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

The TAF Education Fund is a nonprofit charitable organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the False Claims Act (FCA). The TAF Education Fund serves to inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions.

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

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FROM THE EDITOR

Some men see things as they are and say, "Why?"
I dream of things that never were and say "Why not?"
-George Bernard Shaw

When Congress amended the False Claims Act in 1986, it sought to enlist the help of private attorneys in not only uncovering fraud, but also investigating and prosecuting cases. However, in the hopes of protecting FCA defendants from unproven allegations of wrongdoing, Congress reinforced the seal provisions, which has led to the unintended consequences of actually undermining private investigations. Indeed, the FCA seal provision largely prevents attorneys from freely sharing information with the rest of the Relators' Bar, and concerns over the first-to-file bar encourage attorneys to keep their cards close to their vest. But, as a community with shared goals, isn't there a better way to pool resources, to limit risks, and to uncover fraud?

Over the last fifty years, the trend toward law firm consolidation has rapidly increased, producing large, multi-office corporate defense firms, partnering and sharing their financial and legal resources in the defense of their clients. These massive law firms, backed by seemingly unlimited funds and armies of associates, represent most of today's FCA defendants. The common chant echoed from the halls of the defense bar resonates loudly: "divide and conquer" and "get the decline and you'll be fine." Perhaps this is a key factor behind why the Government is slow to make an intervention decision, fearful the relators' counsel will not have the resources to carry a marginal case forward. Indeed, while ad hoc joint ventures have realized some success in a few notable non-intervened cases, the reality is that most have disappeared soon after the declination letter arrived.

A solution might be to join forces as one national *qui tam* law firm. Sure, a million "yeah buts" come to mind, but if the defenders of fraudfeasors can make it work, why can't the Relators' Bar? A firm dedicated to prosecuting cases would diminish the resource limitations driving some of the Bar's best attorneys from the FCA practice. A united front would assure the DOJ that the Bar has the ability to move non-intervened cases forward. One law firm could avoid duplication of investigations, filings, and research expenses. A shared structure would limit the ethical and legal concerns of the attorney-client privilege and the FCA seal provision. In many ways, a national *qui tam* law firm makes legal and financial sense. [The lights slowly brighten and the editor wakes from his dream.] Until that day comes, the Bar continues to share its knowledge and experience through practitioner listserves, legal publications, and educational conferences.

As always, please share your experience with the rest of the Bar. We are currently accepting article ideas for the next issue.

Best wishes,

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Recent False Claims Act & *Qui Tam* Decisions

APRIL 1–JUNE 30, 2005

STATUTORY INTERPRETATIONS

A. Section 3729 Presentment To A Federal Grantee

U.S. ex rel. Farmer v. City of Houston, 2005 WL 1155111 (S.D. Tex. May 5, 2005)

A Texas district court denied the defendants' motion to dismiss a *qui tam* action alleging violations of the False Claims Act. The court ruled that the relator had sufficiently alleged an FCA violation, even though the alleged false claims were submitted to a city government and a nonprofit organization charged with overseeing the allocation of federal HUD funds. The court ruled that the relator qualified for the FCA public disclosure bar's original source exception because the relator's knowledge of the fraud was "gained by [her] own efforts rather than learned second-hand through the efforts of others." The fact that she relied heavily upon public information did not preclude her from having "direct and independent" knowledge of the fraudulent allegations.

After her roof failed during Tropical Storm Allison, Marsha Farmer applied for assistance under the City of Houston's Emergency Home Repair Program, a program funded by the Federal Government through the Department of Housing and Urban Development (HUD) under a grant agreement between the City and the United States. Under the grant agreement, the City authorized and approved a grant allocation for the program, and selected Houston Area Urban League (HAUL), a nonprofit corporation, to implement a portion of the program.

Farmer alleged that, after initially qualifying for the program, HAUL inspected her property and sent her a write-up outlining the repairs to be made and the quantity and type of materials to be used. Farmer noticed several incorrect quantities on the write-up, most notably, that HAUL listed 4,000 square feet of roofing material, when she knew that only 2,000 square feet of roofing material was needed the last time she had the roof replaced.

Farmer then utilized the Texas Public Information Act to investigate other repairs made by HAUL under the Program. She compared them with estimates of roof size, based on the square footage of the repaired houses, which she obtained from the Harris County Appraisal District. Farmer determined that the Program was paying for excessive roofing materials that were never used. She subsequently utilized this method of comparison to determine that the program was paying for excessive charges in other areas as well.

Farmer brought a *qui tam* action against HAUL and the City of Houston for violations of the False Claims Act. As a result of her investigation, the relator alleged that defendants made false claims in Request for Payment forms. The Government elected not to intervene, and the complaint was unsealed. The defendants each filed a motion to dismiss, arguing the complaint should be dismissed under Rule 9(b) and the FCA public disclosure bar.

Complaint Satisfied The Particularity Requirements Of Rule 9(b)

After reviewing the relator's amended complaint, the district court found that the allegations satisfied the particularity requirements of Rule 9(b). The relator detailed numerous specific examples of overcharging, each of which included the date, the project location, and the estimated amount of excessive charges made by HAUL.

FCA Liability Attaches To False Claims Submitted To A Federal Grantee

The court also rejected the defendants' argument that since an RFP is a claim submitted by HAUL to the City, and not a claim submitted by the City to the Federal Government, the relator failed to demonstrate a false claim for payment to the Federal Government. The court also rejected the City's additional argument that because an RFP is made by HAUL, there was no evidence that the City made a false representation.

The court noted that even though an RFP was submitted by HAUL to the City, the City used federal funds to pay an RFP. Thus, according to the court, a request under the program to be paid by the City was a request to be paid by federal funds, and the payment by the City was payment by the Federal Government. To bolster its analysis, the court pointed to the Fifth Circuit's recent holding in *United States ex rel. Riley v. St. Luke's Episcopal Hospital*: "The FCA applies to anyone who knowingly assists in causing the government to pay claims grounded in fraud, without regard to whether that person has direct contractual relations with the government. Thus, a person need not be the one who actually submitted the claim forms in order to be liable. 355 F.3d 370, 378 (5th Cir. 2004) (citations and quotations omitted). Thus, the court ruled that the relator stated an actionable FCA claim.

Allegations Of Fraud Were Previously Disclosed To The Public

In assessing the defendants' argument that the FCA public disclosure bar prevents the relator from bringing the matter at bar, the court quickly agreed that a public disclosure occurred, for the relator learned of the alleged fraud under a Texas Public Information Act (TPIA) request. Equating a TPIA request with a Freedom of Information Act (FOIA) request, the court pointed to the Fifth Circuit holding that a response to a FOIA request "is an administrative report constituting a public disclosure under § 3730(e)(4)(A)." *Reagan*, 384 F.3d at 176. Since TPIA is the state counterpart of the federal FOIA, the court concluded that the TPIA response was a public disclosure under Section 3730(e)(4)(A). Since the relator conceded that Section 3730(e)(4)(A) applied to the matter, the court quickly move to the question of whether she qualified for the Section 3730(e)(4)(B) original source exception.

Relator Is An Original Source Since She Obtained Knowledge Through Her Own Efforts

To qualify for the FCA original source exception exception, the relator must satisfy a two-part test: (1) she must demonstrate that she has direct and independent knowledge of the information on which the allegations are based, and (2) she must demonstrate that she has voluntarily provided the information to the Government before filing her qui tam action. *Reagan,* 384 F.3d at 177. In the case at bar, only the first part of the test was at issue because there was no question that the relator provided the information to the Government before filing her action.

Addressing a common misconception, the court noted that the "direct and independent" standard does not require the relator have direct and independent knowledge of each false claim alleged in her complaint. Instead, the relator "is simply required to possess direct and independent knowledge of the 'information on which the publicly disclosed allegations are based.'" *Id.* (quoting *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.,* 336 F.3d 346, 355 (5th Cir. 2003). According to established case law, the relator's knowledge is direct if it was "gained by [her] own efforts rather than learned second-hand through the efforts of others." *Laird*, 336 F.3d at 355 (citation omitted). Finally, the court observed that the relator's "knowledge is considered 'independent' if it is not derived from the public disclosure." *Reagan*, 384 F.3d at 177.

In the present case, the defendants argued that relator's knowledge was neither direct nor independent because it was based almost entirely on public information. The court countered that although it was heavily based on public information, the relator's knowledge that the defendant engaged in fraud was direct and independent because it was gathered through her own efforts. Through these efforts, the relator determined that the defendants were inflating the quantity of materials needed to repair the houses and receiving payments for these excessive materials. The court further stressed that the relator's own investigation demonstrated a new and undisclosed relationship between the disclosed facts and put HUD "on the trail" of fraud. *See id.* at 179

Moreover, aside from the fact that relator uncovered something new from the public information, the court highlighted that her entire investigation began as a result of her independent knowledge that HAUL overestimated materials to repair her own roof.

Because the court concluded that her knowledge resulted from her own efforts, she was considered an original source of the information underlying her claims. The court therefore claimed jurisdiction over the claims under 31 U.S.C. § 3730(e)(4).

Thus, the court, dismissing the defendants' motion to dismiss, ruled that relator had adequately alleged that the defendants made, and conspired to make, false claims in violation of the FCA, and that she was the original source of the information underlying her claims.

B. Section 3729(a)(3) FCA Conspiracy Provision

U.S. ex rel. Huangyan Import & Export Corporation v. Nature's Farm Products, Inc., 370 F. Supp. 2d 993 (N.D. Cal. May 3, 2005)

See "Statutory Interpretations: Section 3729(a)(7) Reverse False Claims Provision" below at page 7.

U.S. ex rel. Houseman v. Aramark Corporation, 2005 WL 1154508 (M.D. Pa. May 9, 2005)

A Pennsylvania district court denied a motion to dismiss a *qui tam* action alleging a conspiracy to present fraudulent government claims under the federal False Claims Act Section 3729(a)(3). Specifically, the court found that the complaint sufficiently alleged that employees of the defendant colluded with the deputy warden of a county corrections facility to present fraudulent government claims. The court also found that the complaint sufficiently alleged that defendant, acting as an agent of a public body, retaliated against plaintiff during the course of her employment after she reported waste to the appropriate authority, satisfying the *prima facie* elements of an actionable claim under the Pennsylvania Whistleblower Act. However, the court dismissed plaintiff's claim of wrongful discharge under Pennsylvania common law.

C. Section 3729(a)(7) Reverse False Claims Provision

U.S. ex rel. Huangyan Import & Export Corporation v. Nature's Farm Products, Inc., 370 F. Supp. 2d 993 (N.D. Cal. May 3, 2005)

A California district court ruled that there was a present, existing legal duty to pay government extra duties, imposed as antidumping penalty, predating attempt of importer of mushrooms from Chile to falsely claim Canada as country of origin, as required for violation of reverse False Claims Act provision, despite claim that obligation to pay excess duties did not arise until importation attempt, which was contemporaneous with false designation of origin. The court also ruled that Section 3729(a)(3), the FCA provision imposing liability on persons conspiring to defraud the Government by getting false or fraudulent claim allowed or paid, did not apply to alleged conspiracy to avoid payment of excess antidumping duties imposed upon imports from Chile by falsely identifying imported goods as entering United States from Canada. Recognizing the uncertainty of its legal analysis, the court certified the decision for interlocutory appeal pursuant to 28 USC § 1292(b).

Nature's Products, Inc. (NFP) is an importer of, among other things, canned mushrooms. The mushrooms come from Chile, and in late 1998, the International Trade Administration, Department of Commerce (ITA) determined that mushrooms exported from Chile by NFP's Chilean affiliate were being sold at less than fair value. Known as "dumping," ITA imposed an antidumping duty of 148.51 percent on NFP's mushrooms. NFP officers Dennis Choi and Peter Pizzo developed a scheme to circumvent the antidumping duties: They would ship large drums of "brined" (salt-preserved) mushrooms from Chile to Canada; in Canada, with the assistance of defendant Ravine Foods, the mushrooms would be de-brined and packaged in cans for retail sale; these cans—labeled as products of Canada and so designated in paperwork prepared by defendant Aliments Heritage—would be imported from Canada into the United States duty-free pursuant to the North American Free Trade Agreement. Defendant Bank of China, New York Branch (BOCNY) was NFP's commercial bank and was aware of and provided financing for the scheme.

The scheme continued from late 1998 to mid-2000. As each shipment of canned mushrooms was presented at the Canada-United States border, defendants submitted to Customs a Customs Form 7501 that designated the "country of origin" as Canada, and declared that no duty was owed. Along with the false Forms 7501, defendants submitted false certificates of origin prepared by Aliments Heritage that stated that the mushrooms were products of Canada. In total, between December 9, 1998, and June 9, 2000, NFP imported approximately 150 falsely labeled shipments of Chilean mushrooms with a declared value of approximately $4.8 million, thus evading antidumping duties of approximately $7.8 million.

A competitor of NFP, Huangyan Import & Export, uncovered evidence of the scheme during discovery in an unrelated civil lawsuit against NFP. Huangyan filed a *qui tam* suit against the defendants, alleging FCA violations when mushrooms imported from Chile were falsely designated as imported from Canada, in order to avoid antidumping duties. The Government subsequently intervened and settled its claims against all but the NFP defendants. The Government also filed its own complaint.

The complaint stated four claims: (1) a violation of the reverse false claims provision, Section 3729(a)(7), (which arise when a party avoids an obligation to pay the Government, in contrast to claims that seek fraudulently to obtain money or property from the Government); (2) a violation of Section 3729(a)(3), the FCA's provision governing conspiracies to defraud the Government; (3) a claim for common law fraud; and (4) a claim for unjust enrichment. The NFP defendants moved pursuant to FRCP 12(b)(6) to dismiss counts (1) and (2) for failure to state a claim upon which relief can be granted.

The Court Has Subject Matter Jurisdiction Over Case

As an initial matter, the court *sua sponte* raised the question of its subject matter jurisdiction in light of *United States v. Universal Fruits & Vegetables*, 370 F.3d 829 (9th Cir. 2004). In *Universal Fruits & Vegetables*, the Ninth Circuit held that an FCA suit brought by the United States in the first instance to recover antidumping duties is within the exclusive jurisdiction of the Court of International Trade because (1) it is a civil action, (2) it is "commenced by the United States," (3) the case "arises out of an import transaction," and (4) the recovery sought constitutes customs duties. *Id.*

The district court distinguished *Universal Fruits & Vegetables Corp.* from the case at bar. Most importantly for the court, the *Universal Fruits* matter was brought by the United States in the first instance, while the case at bar was originally filed by a relator. According to the court, this distinction makes a difference, because a suit brought by a relator may not be "commenced by the United States"—thus vesting jurisdiction in the present court, not the Court of International Trade. Thus, the court was faced with the issue of whether an FCA suit in which the United States has intervened, filed a complaint and successfully dismissed the *qui tam* relator is a suit "commenced by the United States" within the meaning of 28 USC § 1582 and *Universal Fruits*.

After reading the parties' supplemental briefing on this issue, the court concluded that the United States had the better of the argument on several different levels: "An FCA *qui tam* action in which the relator has been dismissed and the United States has filed a complaint is not 'commenced' by the United States within the meaning of 28 USC § 1582. Accordingly, the court concludes that the Court of International Trade would not have subject matter jurisdiction over this action." Therefore, the court ruled that it had subject matter jurisdiction and proceeded to consider the remaining issues.

Defendant Had Pre-Existing Duty To Pay Anti-Dumping Penalty At The Border

NFP first argued that "a claim under 31 USC § 3729(a)(7) for avoidance of an obligation to pay money to the government[ ] must be based on a *present, existing legal duty to pay the government a fixed sum of money when the alleged false statement is made. . .* The customs duties, including anti-dumping duties, attach at the time goods (such as mushrooms) are trucked over the border from Canada [which] is *at the same time* that the alleged false statements or records, namely Customs Form 7501 and the Certificates of Origin were submitted to the United States Customs Service." In short, the NFP defendants argued that the "obligation" of Section 3729(a)(7) must *preexist* the "false record or statement" of that subsection.

The court saw the issue differently: "On which side of the line is the customs duty allegedly owed by the NFP defendants?" The United States argued that the legal obligation to pay the antidumping duty existed upon the ITA's issuance of its final order respecting NFP's Chilean mushroom imports, and that "customs officials exercise no discretion at all with respect to antidumping duties, but simply apply the 148.51 percent established by the [ITA final order] to determine the duties owed. This argument squarely places the duties at issue in the 'existing debts' category—albeit a subcategory in which payment is contingent upon importation. The latter is a relevant contingency only if the Customs Service has discretion in designating the origin of an import. But there is no suggestion here that the Customs Service had such discretion. Importation is a contingency in the control of the importer; there is no discretion to be found in the hands of some government official."

Thus, the court distilled the emerging case law to a simple dichotomy: "There are obligations that are certain (or nondiscretionary and readily computable) and there are fines and penalties contingent on governmental discretion, and the putative obligation in this case falls in the former category. Accordingly, because the NFP defendants have failed to explain what was contingent or discretionary about the assessment of the antidumping duties alleged in the complaint, their motion to dismiss the first claim is denied."

Section 3729(a)(3) Does Not Reach Conspiracies To Make Reverse False Claims

The court then addressed the defendants' motion to dismiss the FCA conspiracy claim under § 3729(a)(3). Section 3729(a)(3) holds liable persons who "conspire to defraud the Government by getting a false or fraudulent claim allowed or paid." NFP argued a simple syllogism: "By its express terms, § 3729(a)(3) does not reach conspiracies to make reverse false claims. The complaint describes a reverse false claim conspiracy—specifically, a plan to avoid paying customs duties. Ergo § 3729(a)(3) does not reach the conspiracy described in the complaint."

The court found that the requirement that the conspiracy be directed at "getting a false or fraudulent claim allowed or paid" to be unambiguous: "Its plain meaning requires that the conspirators seek to be 'paid' or to have a claim on the treasury 'allowed.' That is not what allegedly happened here; the alleged conspirators in this case wanted to avoid paying money to the United States."

The court expressed its discomfort in the unusual of lack of symmetry, for normal and reverse false claims are equally punishable, but only conspiracies directed at normal claims are punishable. However, the court found the defendants' logic "unassailable." Accordingly, the court concluded that 31 USC § 3729(a)(3) does not reach conspiracies to make reverse false claims. In turn, the court granted the defendants' motion to dismiss the allegations under Section 3729(a)(3).

Lastly, noting that there are reasonable grounds for disagreement on each of the three issues, the court certified the decision for interlocutory review.

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

U.S. ex rel. Farmer v. City of Houston, 2005 WL 1155111 (S.D. Tex. May 5, 2005)

See "Statutory Interpretations: Section 3729 Presentment To A Federal Grantee" above at page 3.

U.S. ex rel. Gilligan v. Medtronic, Inc., 403 F.3d 386 (6th Cir. April 6, 2005)

The Sixth Circuit, reversing a lower court decision, held that prior product liability lawsuits against the defendant-manufacturer precluded the relator's *qui tam* claims under the FCA public disclosure bar. The court of appeals ruled that the Government could have reasonably inferred fraud allegations from various parts of the prior complaints, for the complaints mentioned both a change in design specifications and fraud surrounding the manufacture of leads, and the underlying Medicare fraud claim necessarily relied on the FDA fraud claim.

Louis Gilligan and Gregory Utter were former employees of Medtronic, a medical-device manufacturer, which manufactures four types of heart pacemaker leads which was the subject of the case at bar: Models 4004, 4004M, 4504, and 4504M. In 1988, Medtronic filed an application with the FDA for Premarket Approval of Models 4004 and 4504. The FDA approved the devices in a letter stating "[f]ailure to comply with the conditions of approval invalidates this approval order." The FDA attached the conditions of approval, which included a requirement that the company submit a supplemental Premarket Approval application "[b]efore making any change affecting the safety or effectiveness of the device." The conditions also required Medtronic to submit annual reports identifying changes to the product, regardless of the changes' impact on safety or effectiveness, stating that "[c]ontinued approval of this PMA is contingent upon the submission of post-approval reports . . ."

In 1989, Medtronic changed the coating of two of the leads to a platinum sputter coating. Medtronic filed supplemental applications for Premarket Approval for the subject leads, Models 4004M and 4504M. After the FDA approved the applications, Medtronic altered the design specifications of the two leads, changing the thickness and coverage of the platinum sputter coating. However, Medtronic did not file a new Premarket Approval application or identify the change in the annual postapproval report filed with the FDA.

Thereafter, a large number of the leads manufactured by Medtronic malfunctioned and had to be replaced. On the basis of this malfunction, the relators brought various products liability actions on behalf of individuals who used the malfunctioning leads. In these actions, the attorneys alleged, among other things, "fraud on the FDA" claims. The claims related to Medtronic's alleged misrepresentations to the FDA regarding the safety of the platinum-sputter-coated leads, fraud surrounding the manufacture of the leads, and deviation from design specifications.

Based upon the knowledge they gained through litigation of these product liability actions, the relators later brought an FCA *qui tam* action, alleging that by selling the leads to doctors and hospitals, Medtronic caused the submission of false claims to Medicare. This submission was allegedly a fraud on the Government and therefore, the relators theorized, it formed the basis for an FCA *qui tam* action.

Medtronic moved to dismiss the *qui tam* action on three grounds: (1) lack of subject matter jurisdiction under the FCA public disclosure bar; (2) failure to state a claim upon which relief could be granted; and (3) *res judicata*. The district court denied the motion as to all three claims. Medtronic was then granted a motion for leave to appeal the district court's denial of its motion to dismiss. The defendants appealed to the Sixth Circuit.

Prior Product Liability Suits Precluded *Qui Tam* Action

The Sixth Circuit, reversing the lower court decision, held that prior product liability lawsuits precluded relator's *qui tam* action under the FCA public disclosure bar. The court of appeals ruled that the Government could have reasonably inferred fraud allegations from various parts of prior complaints, for the complaints mentioned both a change in design specifications and fraud surrounding manufacture of leads, and Medicare fraud claim necessarily relied on FDA fraud claim.

In reaching its decision, the court of appeals read the language of Section 3730(e)(4)(A) public disclosure bar and noted that the Act bars jurisdiction where "allegations or transactions" have been publicly disclosed in, among other things, a civil hearing or administrative report. 31 U.S.C. § 3730(e)(4)(A). Evidently, the relators had conceded that they did not qualify for the Section 3730(e)(4)(B) original source exception, so the court quickly reduced the issue to whether the allegations or transactions at issue were publicly disclosed prior to the filing of the relators' complaint. Applying the test outlined in *U.S. ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634, 645 (6th Cir. 2003), the Sixth Circuit determined whether there had been any public disclosure of fraud, and second whether the allegations in the *qui tam* action were "based upon" the previously disclosed fraud. *Id.*

Previous Public Disclosure Was Sufficient to Put The Government On Notice Of Fraud

Reiterating the broad interpretation it adopted in *Dingle v. Bioport Corp.*, 388 F.3d 209, 214–215 (6th Cir. 2004), the Sixth Circuit reasoned that so long as the information alleged is sufficient to put the Government on notice of the likelihood of related fraudulent activity, the prior public disclosure requirement is satisfied. Again, applying its own test from *Dingle*, the court of appeals cited two types of disclosures that are sufficient to put the Government on notice of fraud: First, if information about both a false state of facts and the true state of facts has been disclosed, there has been adequate public disclosure because fraud is implied. *Id.* at 212. Second, if there has been a public allegation of fraud, public disclosure has occurred. *Id.*

Both The False And True State Of Facts Had Been Previously Disclosed To The Public

The Sixth Circuit found that the false state of facts was previously disclosed. Specifically, the court noted that Medtronic had represented to the public that its leads were FDA-approved, and implicitly, that it had complied with FDA regulations and guidelines sufficient to maintain the FDA-approved status of the product.

More importantly, the court of appeals also determined that the true state of facts was previously disclosed. Specifically, the court noted that in several prior products liability cases, including *North v. Medtronic, Inc.*, No. 97-2-16954-2SEA (Wash. Super. Ct. July 7, 1997), the plaintiffs alleged that Medtronic (1) told the FDA that it had cured the problems with the leads by using a platinum sputter coating, (2) engaged in fraudulent conduct in the manufacture of the leads, and (3) deviated from the design specifications.

The relators countered that the allegations raised in the products liability suits were insufficient to constitute prior disclosure of the allegations in the current *qui tam* action, for the prior allegations did not specifically link Medtronic's alteration of the platinum sputter coating with the claims of fraudulent manufacture and deviation from design specifications. However, according to the court, a specific link between pieces of information necessary to create an inference of fraud is not required.

Again, citing its own earlier *Dingle* decision, the Sixth Circuit held that public disclosures contained in different sources, which together provide information that leads to a conclusion of fraud, trigger the public disclosure bar. *See Dingle*, 388 F.3d at 213–14 (finding public disclosure where part of the relevant information came from a journal article and part came from a House of Representatives report). In the case at bar, the information necessary to create the specific inference of fraud was contained in two different parts of a complaint. The court of appeals found no difference between the two cases: "Just as the government could reasonably infer fraud based on separate allegations in a journal article and a House report, the government could also reasonably infer fraud from allegations made in separate parts of a complaint."

Thus, because the true state of facts and the false state of facts underlying the *qui tam* action had been publicly disclosed, the court ruled that the public disclosure bar prevented the lower court from having jurisdiction over the FCA matter.

The Allegation Of Fraud Had Also Been Publicly Disclosed

Alternatively, the court of appeals found that the second type of public disclosure existed in this case—a public allegation of fraud. The relators argued that the prior allegations that Medtronic misrepresented how safe its leads were did not constitute the same fraud on the FDA that they alleged. They further argued that, while the prior cases alleged only fraud on the FDA, this case alleged Medicare fraud.

The court of appeals, however, once again citing its *Dingle* decision, held that a specific allegation of fraud is not necessary: "So long as the disclosed fraud puts the government on notice of the 'possibility of fraud' surrounding the product or transaction, the prior disclosure is sufficient." *Dingle*, 388 F.3d at 214.

In the case at bar, the Sixth Circuit ruled that the allegation of fraud on the FDA in relation to the leads in combination with the allegation of fraudulent manufacture and design deviation was sufficient to put the Government on notice of the "possibility of fraud" surrounding the manufacture and design of the leads. The court of appeals further ruled that the allegations "provided enough information for the government to infer that Medtronic was not manufacturing the leads in line with FDA requirements and were therefore sufficient to put the government on notice of the possibility of fraud."

Even more sweeping, the Sixth Circuit stated that "although the allegations in the prior cases referred to a slightly different type of fraud than the fraud alleged in the current case, such allegations were sufficiently general that they could encompass the fraud alleged in the *qui tam* action." In turn, the court concluded that the prior allegations of fraud on the FDA notified the Government of the possibility of Medicare fraud associated with these Medtronic products.

Qui Tam Claims Were "Based Upon" The Previously Disclosed Fraud

Turning to the next question, the Sixth Circuit quickly determined that the *qui tam* claims were "based upon" the disclosed fraud. Reminding the parties of its earlier holding, the Sixth Circuit held that a complaint is "based upon" the public disclosure where it is "supported by [the public disclosure] and includes any action based even partly upon public disclosures." *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998) (internal quotations omitted).

In a multi-step analysis, the court of appeals offered the following reasoning: "[T]he Medicare fraud claim necessarily relies on the FDA fraud claim. Without FDA fraud rendering the leads unapproved, there could not have been Medicare fraud, because the submission of Medicare claims for implantation of the leads would have been valid. Therefore, the Medicare fraud claim is based on the public disclosure of fraud on the FDA and jurisdiction under the False Claims Act was inappropriate." In turn, holding that the FCA public disclosure bar prevented the lower court from asserting jurisdiction over the matter, the Sixth Circuit reversed the district court decision.

U.S. ex rel. Gear v. Emergency Medical Associates of Illinois, Inc., 2005 WL 991789 (N.D. Ill. April 13, 2005)

An Illinois district court, in dismissing an FCA *qui tam* action under the FCA public disclosure bar, held that the relator could not proceed on behalf of the Gov-

ernment, for the allegations raised in his complaint were publicly disclosed, his case was based upon those public disclosures, and he did not an "original source" of these allegations.

Dr. Brent Gear was fulfilling his residency requirements in emergency medicine by working in the emergency rooms of three Chicago area hospitals: St. Bernard Hospital, Grant Hospital, and Edgewater Hospital. Defendants provided physicians, one of whom was Gear, to these hospitals' emergency rooms.

To clarify the reguations at issue, the court summarized that "Residents" are medical school graduates who gain experience through apprenticeship programs in hospitals. "Attending Physicians" are licensed doctors who have completed their residency programs. Residents' medical services are generally not reimbursable by Medicare, but Medicare does provide some funds to hospitals to offset the costs of residency programs. *See* 42 C.F.R. § 415.208(b)(1). Attending Physicians' services generally are reimbursable by Medicare.

On February 22, 2000, Gear filed a FCA *qui tam* complaint, alleging that the defendants Emergency Medical Associates of Illinois, Inc., and Illinois/Indiana EM-1 Medical Services, S.C. violated the False Claims Act, by fraudulently billing Medicare for the services of medical Residents. Indeed, the core of Gear's allegations was that, in violation of Medicare regulations, the defendants fraudulently billed Medicare for the services of Senior Residents participating in Midwestern's Residency program between the dates of June 1997 and June 2000. More specifically, Gear alleged that he and his fellow Senior Residents who worked as Attending Physicians did not do so outside the scope of their residencies. In fact, Gear alleged that they were encouraged by the defendants to work as Attending Physicians during their residency hours. Gear also alleged that he and other Senior Residents accepted separate salaries from the defendants as both Senior Residents and Attending Physicians. Finally, Gear alleged that the defendants then fraudulently double-billed Medicare for his and other Senior Residents' services as both Residents and Attending Physicians. Gear further alleged that the defendants improperly "upcoded" their claims—that is, billed for more complex (and therefore more expensive) procedures than were actually performed.

After the Government decided not to intervene in the suit, the defendants filed a motion for summary judgment. In their motion, the defendants asserted that Gear's allegations were publicly disclosed a number of times prior to the filing of this suit. The defendants asserted that these allegations were disclosed in, among other things, a 1998 GAO Report, and several media outlets such as medical journals. While Gear acknowledged that these publications mention an alleged widespread Resident/Attending Physician billing scandal at teaching hospitals, he countered that these publications did not directly refer to the defendants, or publicly disclose wrongdoing by these specific defendants.

FCA Public Disclosure Bar Applies

In assessing the relator's complaint, the court first reviewed the FCA public disclosure bar, which provides, in part, "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a . . . Government [General] 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." *Id.* § 3730(e)(4)(A). Thus, reducing the provision to its elements, the court summarized that Section 3730(e)(4)(B) bars a relator's action if the relator's allegations were "publicly disclosed" and the suit was "based upon" that "publicly disclosed" information and the relator was not an "original source" of that "publicly disclosed" information.

The court quickly agreed that the allegations raised in Gear's suit were publicly disclosed. The defendants offered evidence that Gear's allegations were publicly disclosed in (1) a United States GAO report, and (2) various news media sources. In their motion, the defendants included a GAO report which described concerns with potentially "widespread" problems with the inappropriate billing of Medicare for the services of medical Residents, and which reviewed an Inspector General's audit of teaching hospitals' compliance with Medicare billing rules. The defendants also included fifteen examples of media stories detailing allegedly improper billing of Medicare for Residents' services. There was therefore no question as to whether the allegations Gear raised in his suit were publicly disclosed.

While the relator argued that the public disclosures were not specific enough to bar his suit, the court observed that the disclosures exposed in detail the nature of the alleged widespread scheme to defraud Medicare: in teaching hospital settings, with the full knowledge of the hospitals, medical Residents routinely acted as Attending Physicians; Medicare was then allegedly double-billed for the services of both Residents and Attending Physicians; in addition, these hospitals allegedly "upcoded" procedures done by these Residents in order to fraudulently increase the amount billed to Medicare. The court found this to be sufficient.

The court quickly disposed of the "based upon" question, especially after reviewing the only evidence Gear could point to in support of this assertion that he did not base his complaint on the public disclosure—"a self-serving affidavit attached to his Response to Defendants' Motion for Summary Judgment . . . contain[ing] nothing more than the bare contentions that (1) Gear did not base this suit on these public disclosures, and (2) he was never aware of Government investigations into the billing procedures of medical school Residency programs."

Lastly, the court dissected the language of 31 U.S.C. § 3730(e)(4)(B) to verify whether Gear qualified as an original source of the allegations. Most notably and decidingly, Gear failed to voluntarily provide information to the Government prior to filing his complaint, as required to qualify for the original source exception. Indeed, Gear admitted that he "has never claimed to have spoken to the Government about his concerns prior to filing this lawsuit...." The court thus found that Gear was not an "original source" of the allegations.

In turn, the court, in granting the defendants' motion for summary judgment, ruled that the FCA public disclosure bar prevented Gear from representing the Government in the FCA *qui tam* action.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

Shekoyan v. Sibley International, 409 F.3d 414 (D.C. Cir. June 3, 2005)

The D.C. Circuit affirmed a district court decision to grant an employer summary judgment, dismissing the plaintiff's allegations of Title VII, District of Columbia law, and False Claims Act retaliation violations. The court of appeals held that that the employee-relator did not engage in protected activity under the Act, for the employee did not suspect corruption and merely informed his employer of a potential non-compliance problem. The court of appeals also ruled that the district court was entitled to decline to exercise supplemental jurisdiction over the remaining claims under District of Columbia law.

From January 1998 until October 1999, Sibley International, a consulting firm headquartered in Washington, D.C. that "assists foreign governments in implementing accounting reform," employed Vladimir Shekoyan, an Armenian born permanent legal resident of the United States, as a "Training Advisor" on the Georgia Enterprise Accounting Reform (GEAR) project, a U.S. Agency for International Development (USAID) funded project. According to Shehoyan's employment contract, he was employed at Sibley's facilities in Tbilisi, Republic of Georgia. Even though Sibley received a second grant to continue the GEAR project, Shekoyan was terminated as of October 31, 1999—the end date of the original grant.

According to Shekoyan, his working relationship with his supervisor deteriorated as a result of discrimination based on Shekoyan's national origin. He also alleged financial impropriety by the Sibley staff on the GEAR project, including use of the offices and equipment paid for by USAID to run a private audit practice, payment of full-time salaries to individuals who were employed full time by other organizations, use of resources supplied by USAID to develop unrelated business for Sibley, and diversion of project vehicles and staff members for personal tasks.

Shekoyan claimed that he notified his supervisors in Washington about the alleged harassment and misuse of project resources, but he was subsequently fired for insubordination rather than because of any change in staffing requirements, as the defendants maintained.

On October 20, 2000, Shekoyan filed an action in federal district court alleging violations of Title VII, the False Claims Act, and various state laws. Sibley moved to dismiss Shekoyan's Title VII claim on the grounds that Title VII protections do not extend to non-U.S. citizens working abroad and to dismiss his FCA claim under Fed. R. Civ. P. 12(b)(6) for failure to allege facts sufficient to make out a viable Section 3730(h) whistleblower claim. Sibley also moved to dismiss the pendent state law claims for lack of supplemental jurisdiction.

The district court granted Sibley's motion to dismiss the Title VII claim, finding that because "the plaintiff is a permanent resident alien, who was employed extraterritorially, he is outside the scope of the protections of Title VII," and thus it lacked subject matter jurisdiction over the Title VII claim. As for the relator's FCA claim, the lower court dismissed the complaint for failing to meet the particularity requirement of Fed. R. Civ. P. 9(b). The lower court, however, did grant Shekoyan leave to amend his complaint. Lastly, citing *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130 (1966), the district court chose to exercise supplemental jurisdiction and denied Sibley's motion to dismiss those claims, for the relator's state law claims derived from the same "common nucleus of operative fact" as his FCA claim,

The relator subsequently filed his amended complaint, but, following discovery, Sibley moved for summary judgment on Shekoyan's FCA claim. The lower court granted the defendant's motion, and Shehoyan appealed.

Relator Was Not Engaged In "Protected Activity"

The D.C. Circuit, affirming the lower court decision, applied the test it explicitly endorsed in *United States ex rel. Yesudian v. Howard Univ.,* 153 F.3d 731, 736 (D.C. Cir. 1998), which states that to assert an actionable FCA retaliation claim, the employee must show: (1) that he engaged in protected activity ("acts done . . . in furtherance of an action under this section"); and (2) that he experienced discrimination "because of" his protected activity. *Id.* Furthermore, the court stressed that to establish the second element, the employee must demonstrate that the employer had knowledge of the employee's protected activity and that the retaliation was motivated by the protected activity. *Id.*

The relator argued that there was a genuine issue of material fact regarding whether he engaged in "protected activity" under the Act and thus the lower court erroneously granted summary judgment in this matter.

Reviewing the existing Section 3730(h) case law, the court of appeals rejected the relator's argument. First, the court of appeals reminded the parties that the language of the FCA "manifests Congress' intent to protect employees while they are collecting information about a possible fraud, *before* they have put all the pieces of the puzzle together." *Yesudian,* 153 F.3d at 740 (emphasis in original). Thus, according to the court, while the employee "must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action." *United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1269 (9th Cir.1996), it is not necessary for a plaintiff "to 'know' that the investigation . . . could lead to a False Claims Act suit." *Yesudian,* 153 F.3d at 741. Nevertheless, the D.C. Circuit warned that the "[m]ere dissatisfaction with one's treatment on the job is not . . . enough. Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations." *Id.* at 740. In turn, the court stressed that an employee does not engage in protected conduct if he "merely inform[s] a supervisor of the problem." *Zahodnick v. IBM Corp.,* 135 F.3d 911, 914 (4th Cir.1997).

In the case at bar, the D.C. Circuit noted that the relator had reported his concerns to one of his supervisors and had asked whether he should raise them with USAID. The district court found, however, that the basis of his complaints "was because the plaintiff was apparently denied the use of such vehicles and not that the conduct was fraudulent." The court of appeals, in reviewing the lower court decision, considered the relator's own deposition testimony to be particularly significant, in which Shehoyan stated: "I have never concluded that there was corruption. I thought that there are some issues that need to be kind of addressed or corrected or fixed or I don't know, worked out, but I did not conclude that there was a [sic] corruption." Thus, the court of appeals concluded that Shekoyan's own statement manifested that he did no more than "inform[ ] a supervisor of [a] problem," *Zahodnick*, 135 F.3d at 914, and thus did not engage in "protected activity" under the FCA. In turn, the D.C. Circuit affirmed the lower court decision. As for the remaining state law claims, the court ruled that it was rightly within the district court's discretion to dismiss these claims.

U.S. ex rel. Scott v. Metropolitan Health Corporation, 2005 WL 1484507 (W.D. Mich. June 23, 2005)

A former corporate officer with assigned legal compliance responsibilities sued his former employer-hospital, alleging violations of the False Claims Act retaliation provision, Section 3730(h). The district court, in granting the defendant's motion for summary judgment, held that the employee failed to establish the pretextual nature of her termination, for the employee's status as a compliance officer required a heightened notice that the whistleblower intended to further a *qui tam* action, rather than merely intending to warn the corporation of the consequences of its conduct. In the case at bar, the court determined that the relator did not satisfy this heightened notice requirement. The court also decided that supplemental jurisdiction would not be asserted over the remaining state law claims.

Mack v. Augusta-Richmond County, Georgia, 365 F. Supp. 2d 1362 (S.D. Georgia April 18, 2005)

A Georgia district court granted the employer-defendant's motion for summary judgment in an action alleging violation of the FCA whistleblower retaliation provision. The court ruled that there was no distinct possibility of an actionable FCA claim when the plaintiff reported the alleged fraud to a government agency, and, thus, the employer was not liable under Section 3730(h). In particular, the court agreed with the defendant that the plaintiff could not identify a single false record or statement made by the defendant to have the Government pay for a false or fraudulent claim.

Kevin Mack, a former county employee of Augusta-Richmond County, Georgia, was responsible for efficiently managing a HUD-funded project, including ensuring the project fully complied with all government regulations. During the course of his employment, Mack raised concerns with his employer about HUD compliance during the project's re-bid process. Subsequently, Mack contacted HUD officials seeking an opinion about the situation. According to the court, nothing about this contact with HUD "indicate[d] that [Mack] intended to step out of his job responsibilities to report fraud upon the government." Indeed, according to the court, the evidence merely showed that Mack was fullfilling his job responsibilities in ensuring the project complied with HUD regulations. Mack was subsequently fired from his position.

Mack filed an action under the False Claims Act anti-retaliation provision. Under his Section 3730(h) claims, Mack claimed that the act for reporting the alleged fraud to HUD officials constituted "protected activity" under the Act. The defendants, however, argued that at the time of Mack's alleged communications, there was no distinct possibility of an actionable *qui tam* claim, for Mack could not identify any false record or statement made by Augusta to have the Government pay for a false or fraudulent claim. Moreover, the defendants argued that Mack made no efforts in furtherance of reporting or prosecuting an FCA *qui tam* action.

As an initial matter, the district court parroted the rule that in order to seek relief under Section 3730(h), a plaintiff must show that (1) he engaged in protected conduct and (2) that the defendant retaliated against him because of that protected conduct. The defendants argued that Mack did not engage in protected activity.

The court took special note that while Section 3730(h) speaks in terms of offering protection in connection with "an action filed or to be filed," the Eleventh Circuit does not mandate that a plaintiff's conduct be incident to an actual lawsuit filed or to be filed under the False Claims Act. Indeed, so long as the filing of a *qui tam* suit is a "distinct possibility" at the time of a plaintiff's conduct, Section 3730(h) protects the plaintiff. In the case at bar, the court determined that there was no distinct possibility of an FCA *qui tam* action.

Moreover, even assuming the relator had engaged in protected conduct, the court ruled that Mack could not show that his termination was retaliatory. More particularly, Mack could not show that the county was aware that he was investigating or acting in furtherance of a report of fraud, given that it was Mack's job to ensure compliance with HUD guidelines and nothing indicated he intended to step outside his job responsibilities and report fraud to Government. Thus, the court granted the defendants' motion for summary judgment.

Elizondo v. University of Texas at San Antonio, 2005 WL 823353 (W.D. Tex. April 7, 2005)

A Texas district court, granting in part and denying in part the defendants' motion for dismissal in an action alleging violations of the FCA retaliation provision, held that a plaintiff cannot sue a state entity under Section 3730(h), for there is no "clear statement" subjecting States to § 3730(h) liability. Likewise, the court held that because suits against state officials in their official capacity are treated as suits against the State itself, a private individual cannot sue a state official in his official capacity under Section 3730(h). However, the court ruled that a plaintiff's

Section 3730(h) suit could procede against a state official the plaintiff he is suing him in his individual capacity.

The plaintiff worked for the University of Texas at San Antonio (UTSA) from 1986 until his termination on November 11, 2002. At the time of his termination, the plaintiff worked as a Senior Development Specialist at the UTSA Minority Business Development Center (UTSA-MBDC), one of ten centers and programs comprising the UTSA Institute for Economic Development. UTSA-MBDC was created and funded by a federal grant from the Minority Business Development Agency, a subdivision of the U.S. Commerce Department. Indeed, the plaintiff's wages and benefits were paid by these federal funds.

In October 2002, Fletcher Parks, the plaintiff's former supervisor, informed the UTSA-MBDC employees that the program's funds were insufficient to cover operations, salaries, and benefits. The plaintiff asserted that Parks informed him that he had a plan to avoid any budgetary shortfalls by paying employees' (including the plaintiff's) salaries out of the federal grant monies allocated to the Small Business Development Center ("UTSA-SBDC"), for UTSA-SBDC had excess funds. The plaintiff alleged that he objected to Parks's "plan" and informed Parks that he believed such action would be illegal and amounted to fraud against the Government.

According to the plaintiff's complaint, at this time the plaintiff "was taking steps in furtherance of reporting to the appropriate law enforcement officials the Defendants' illegal shifting of federal funds and fraud being perpetrated upon the United States Government." The plaintiff also alleged that he contacted the U.S. Small Business Administration or the U.S. Commerce Department to report the misallocation of federal funds.

Parks repeatedly requested the plaintiff's assent to transfer him to UTSA-SBDC, but each time the plaintiff objected and questioned the legality of Parks's actions. Finally, after the plaintiff again refused Parks's request, Parks handed the plaintiff a letter terminating his employment. The plaintiff also maintained that he subsequently spoke to the president of UTSA about the situation, but to no resolution.

On November 10, 2004, the plaintiff filed a suit raising a claim for retaliatory termination under FCA Section 3730(h), and a claim for violation of his First Amendment free speech rights under 42 U.S.C. § 1983, against both UTSA and Parks. The defendants filed a motion to dismiss, asserting that Eleventh Amendment sovereign immunity bars the FCA action and the applicable statute of limitations bars the § 1983 claim.

Court Must Reach A Statutory Determination Before Assessing 11th Amendment Immunity

As an initial matter, the court noted that it must consider the Eleventh Amendment sovereign immunity issue under Rule 12(b)(1) and the limitations issue under Rule 12(b)(6). However, pointing to the Supreme Court decision *Vermont Agency of Natu-*

ral Resources v. United States ex rel. Stevens, 529 U.S. 765, 779–80, 120 S.Ct. 1858 (2000), the court determined that the statutory determination of whether the State is actually subjected to the suit should be considered prior to the Eleventh Amendment immunity inquiry. In other words, should the statute fail to authorize suit against the State, the suit should be dismissed under Rule 12(b)(6) for failure to state a claim, rather than Rule 12(b)(1). *See United States ex rel. Adrian v. Regents of University of California,* 363 F.3d 398, 401 (5th Cir. 2004) (citing *Stevens,* 529 U.S. at 787–88).

In the landmark *Stevens* decision, the Supreme Court had ruled that the FCA *qui tam* provision, Section 3730(b), does not authorize *qui tam* suits against a State. *Stevens,* 529 U.S. at 787–88. In reaching this ruling, the Court read the phrase "any person" as used in Section 3729 to not include States for purposes of *qui tam* liability. *Id.* at 787. Unfortunately for the sake of judicial ease, the *Stevens* facts did not raise the present question of whether the term "employer" in Section 3730(h) is broad enough to encompass suits against States as employers. One circuit court had previously held that suits against States under § 3730(h) are barred under the Eleventh Amendment, but this decision was announced prior to *Stevens,* which requires courts to determine whether a statute authorizes suits against a State before determining whether such suits are barred under the Eleventh Amendment. *Stevens,* 529 U.S. at 779–80 (overruling an earlier Fifth Circuit decision insofar as it directs inquiry into the Eleventh Amendment issue before the statutory issue).

Act Does Not Explicitly Expose State Entities To FCA Section 3730(h) Liability

To gain insight on how to proceed, the district court followed the analytical roadmap drawn by *Stevens*. In determining whether the term "person" in § 3729 applies to States, the *Stevens* Court looked to the statutory language. First, the Court looked to the understanding of the term "person" when applied to the sovereign. The term "person," according to the Court, has a presumptive interpretation that does not include the sovereign. *Stevens,* 529 U.S. at 780. The term "person" also is without a definitional provision in Section 3729. Another section of the Act, Section 3733(1)(4) contains a definition of "person" as "including any State or political subdivision of a State," but this definition only applies Section 3733 (authorizing the Attorney General to issue civil investigative demands on "any person"), and had no application to § 3730. *Id.* at 783–84 & n. 13.

The provision at issue in the case at bar, Section 3730(h), also includes an ill-defined term. Specifically, the section provides a private citizen with a cause of action for retaliation against his "employer." Similar to Section 3729, Section 3730 does not have a definitional provision.

The district court took special notice of other statutes applicable to "employers" that specifically *include* States as covered entities under that term. Indeed, except for the FMLA (which was originally passed in 1993), each of the statutes cited by the court was amended after enactment to make them applicable to the States. Fair Labor Standards Amendments of 1974, 88 Stat. 61 (amending FLSA); *id.,* 88 Stat. 74

(amending ADEA); Equal Employment Opportunity Act of 1972, § 2(1), 86 Stat. 103 (amending Title VII). Thus, the district court inferred that the term "employer" by itself is not sufficient to permit suit against the States.

Court Ignores Legislative History Because Act's Language Does Not Support Immunity

Even though the legislative history clearly embraces the plaintiff's reading of the Act, the district court determined that the applicable legislative history has no impact on whether Section 3730(h) permits suits against the States. Indeed, the lower court ignored the Senate Report accompanying the FCA Amendments of 1986, which added Section 3730(h). The Report clearly expresses an intention to apply the term "employer" to all private *and* public entities. S. Rep. 99-435, Pub.L. 99-562, *reprinted at* 1986 U.S.C.C.A.N. 5266, 5300 (July 28, 1986) ("[T]he definition of 'employee' and 'employer should be all-inclusive . . . " '[E]mployers' should include public as well as private sector entities."). However, the district court stressed that "evidence of legislative intent does not override the fact that a statute must, through its language, permit suits against States." "If Congress intends to alter the 'usual constitutional balance between States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65, 109 S.Ct. 2304 (1989) (quoting *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142 (1985)).

Examining the language of the Act, the court found no "clear statement" subjecting States to suit under Section 3730(h). Accordingly, the district court held that States are not subject to suit under the statute and the plaintiff has not stated a claim under the FCA against UTSA under which relief could be granted. Thus, the court dismissed the plaintiff's claim against UTSA pursuant Rule 12(b)(6).

State Officials In Their Official Capacities Are Immune From Section 3730(h) Liability

The plaintiff argued that Parks violated FCA Section 3730(h), when he retaliated against him for objecting to Parks's intended budget crisis solution. Parks sought dismissal of the suit. Parks, as a state official, sought dismissal of the suit against him for violating FCA Section 3730(h).

The district court ruled that Parks could hide behind the sovereign immunity shield as a state official acting in his official capacity. "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon,* 373 U.S. 57, 58, 83 S.Ct. 1052 (1963) (*per curiam*). Ruling that the statutory language of Section 3730(h) does not permit suit against States, the district court quickly concluded that the plaintiff's claim against Parks in his official capacity was likewise barred.

State Officials in Their Individual Capacities Are Not Immune From Section 3730(h) Liability

Conversely, the court ruled that the plaintiff's suit under Section 3730(h) against Parks in his individual capacity was not barred. The court observed that though the language of § 3730(h) applies only to suits against "employers," the Fifth Circuit has, at least implicitly, accepted individual liability for government individuals. More specifically, in *Samuel v. Holmes,* the Fifth Circuit held that a school superintendent and five school district board members were not entitled to summary judgment on immunity grounds in a suit against them under § 3730(h). 138 F.3d 173, 178 (5th Cir. 1998). In fact, the Fifth Circuit held that "qualified immunity is categorically denied to government officials under the FCA." *Id.* Thus, at this early stage in the litigation process, the district court ruled that the plaintiff had sufficiently stated a claim against Parks in his individual capacity for retaliation under Section 3730(h).

As for the defendants' reason for dismissing the plaintiff's claim under § 1983, the defendants relied upon immunity and the statute of limitations to support their motion. Specifically, Section 1983 claims for monetary damages are not cognizable against unconsenting States. Accordingly, Plaintiff had not stated a claim under § 1983 for which relief could be granted against UTSA. As to the plaintiff's § 1983 claim against Parks in his official capacity, the court ruled that the plaintiff had set forth a valid claim for injunctive relief, but not monetary relief.

Thus, the district court granted in part and denied in part the defendants' motion to dismiss. "Defendant UTSA is dismissed from this cause of action, as suit against an unconsenting State is not permitted by either the False Claims Act, § 3730(h), or § 1983. Plaintiff's claim for monetary relief under § 3730(h) against Defendant Parks in his official capacity is similarly dismissed. The remaining claims against Parks under § 3730(h) and § 1983 remain pending. Defendants' motion for judgment on the pleadings is granted."

B. Statute of Limitations for FCA Retaliation Claims

<u>*Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*</u>, 125 S.Ct. 2444 (U.S. June 20, 2005)

In a split decision, the United States Supreme Court reversed a Fourth Circuit ruling, which had held that the six-year limitations provision of § 3731(b)(1) applies to § 3730(h) retaliation actions. Finding the language of Section 3731(b)(1) to be a "textual anomaly" and "ambiguous," the majority instead read the provision to apply to all actions brought under Section 3730, except for Section 3730(h) retaliation claims. Without another statute of limitations provision in the Act, the Court directed future Section 3730(h) plaintiffs to the "most closely analogous" state statute of limitations. The dissent, however, championed a strict textual reading, citing the unique circumstances of *qui tam* actions as the possible legislative reasoning behind the Act's unusual language.

Karen Wilson, a former part-time secretary at the Graham County Soil and Water Conservation District, brought this *qui tam* action in January 2001, alleging that her former employer and several of her former coworkers submitted false claims to three federally funded programs. She also alleged that after she reported her concerns to federal authorities, her supervisors and coworkers initiated a pattern of harassment that precipitated her resignation in March 1997.

The defendants moved to dismiss. A North Carolina district court granted the motion in part and denied it in part. *See* 224 F. Supp. 2d 1042, 28 TAF QR 38 (Oct. 2002). The court dismissed some of Wilson's *qui tam* claims for failure to satisfy Fed. R. Civ. P. 9(b), but held that others were sufficiently specific to satisfy the Rule. As for Wilson's retaliation claim, the district court followed *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998), which held that in retaliation claims under § 3730(h), the applicable statute of limitations is taken from the most closely analogous state statute. Because North Carolina's statute of limitations for wrongful discharge bars claims brought more than three years after the date of discharge, the court held that Wilson's regulation claim was time-barred. However, the court noted that there was substantial ground for difference of opinion on this issue, as the Seventh Circuit had ruled in *Neal v. Honeywell*, 33 F.3d 860, 865–66 (7th Cir. 1994) that the six-year limitations period of Section 3731(b)(1) applies to retaliation claims under § 3730(h). Accordingly, the district court certified this issue for interlocutory appeal.

A divided Fourth Circuit panel vacated the district court's order dismissing Wilson's retaliation claim. The court of appeals majority took as its starting point the plain language of § 3731(b): "[a] civil action under section 3730 may not be brought—(1) more than six years after the date on which the violation of section 3729 is committed . . ." The court of appeals observed that § 3730(a), a *qui tam* action under § 3730(b), and a retaliation action under § 3730(h). Therefore, the court reasoned, an action under §3730, which necessarily includes an action under § 3730(h), may be brought no more than six years after the date on which the underlying false claims violations was committed. The defendants appealed the Fourth Circuit decision to the United States Supreme Court and certiorari was granted.

FCA Six-Year Limitations Provision Does Not Apply to Retaliation Claims

Reversing the Fourth Circuit decision in a split decision, the U.S. Supreme Court, in a decision penned by Justice Thomas, held that the False Claims Act's six-year statute of limitations provision does not apply to Section 3730(h) claims. The Court instead held that the "most closely analogous" state limitations period applies to these federal actions. Thomas was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter. Justice Souter refused to fully endorse the majority's opinion. Justice Stevens concurred in the judgment. Justice Ginsburg joined Justice Breyer in a strongly worded dissent.

The Court first examined the Act to determine whether the language expressly supplies a limitations period. If it does not, the Court stressed that it generally "borrows" the most closely analogous state limitations period. Thus, citing prior case law tracing the history of borrowing state limitation periods, the Court reduced the legal question to whether the FCA statute of limitations provision applies by its terms to Section 3730(h) retaliation actions, and if it does not, then the most closely analogous state limitations period applies.

First, in dissecting the statutory language, the Court noted that the language of Section 3731(b)(1) reads "[a] civil action under section 3730 may not be brought . . . more than 6 years after the date on which the violation of section 3729 is committed." The relator, and the Government as *amicus curiae*, argued that this language unambiguously applies to FCA retaliation claims, for Section 3730(h) is "a civil action under section 3730."

The Court, however, viewing the Act as being "more complex than [the relator's] argument supposes," quipped that the "[s]tatutory language has meaning only in context." Read in context, the Court concluded that the FCA limitations provision does not govern Section 3730(h) actions for retaliation.

Weighing the opposing arguments raised by the parties, the Court stated that there was some ambiguity over whether a Section 3730(h) retaliation action is "a civil action under section 3730," as required by the FCA limitations provision. Instead, the Court championed another "reasonable reading" that the provision applies only to actions arising under §§ 3730(a) and (b), not to § 3730(h) retaliation actions. Doubting that Congress could have possibly intended a Section 3730(h) time limit to begin on the date the defendant submitted a false claim for payment, the Court reviewed the rest of Act, without consulting the applicable legislative history.

Most troubling for the Court, the controlling case law maintains that a relator may bring an actionable retaliation complaint without alleging that the defendant submitted a false claim, leaving the limitations period without a starting point. Conversely, the Court concluded that a more "natural" reading of Section 3731(b)(1) would limit its application to Sections 3730(a) and (b). This disparity led the Court to conclude that surely the application to Section 3730(h) was a "textual anomaly."

The relator maintained that the statute does not contain a "textual anomaly," but instead clearly applies the FCA limitations provision to all action under Section 3730, including § 3730(h). In support for their reading, the relator contended that every Section 3730(h) action is premised upon a suspected violation of Section 3729, and thus the time period begins at the moment of the suspected 3729 violation.

The Court countered that relator's argument only works if the Section 3731(b)(1) included the word "suspected" before the phrase "violation of section 3729." As the Court noted, "Section 3731(b)(1) speaks of 'violation[s] of section 3729'—*actual*, not *suspected*, ones."

Thus, the Court concluded that the literal text of the FCA limitations provision is ambiguous. The defendants argued that it should be interpreted to read as if it said a "civil action under section 3730[(a) or (b)]," while the relator asked the Court to read it as if it said "the [suspected or actual] violation of section 3729." Faced with these two options, the Court read the six-year period to govern only §§ 3730(a) and (b) actions, and not § 3730(h) retaliation actions.

Limitations Period Begins When Plaintiff Has A Complete Cause of Action

The majority stated that its reading "is in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues." Echoing earlier Supreme Court decisions, the majority stressed that it has repeatedly recognized the "standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542 (1997) (internal quotation marks omitted); *see also Johnson v. United States*, 544 U.S. __, __, 125 S.Ct. 1571, 1578 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire before the claim arose); Reiter *v. Cooper*, 507 U.S. 258, 267, 113 S.Ct. 1213 (1993) (declining to countenance the "odd result" that a federal cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute").

The Court also brought life to a hypothetical relator who has never existed in the history of the Act. Specifically, the Court sought to protect the employee whose retaliation action is time barred before the retaliation ever accrued—for example, where the employer retaliated against a relator more than six years after the Section 3729 violation.

Thus, based on the Court's unease with the Act's "textual anomaly" and concern for this hypothetical relator, the Supreme Court held that the FCA limitations period does not apply to Section 3730(h) actions. In turn, the Court reversed the Fourth Circuit decision and remanded the case to select North Carolina's "most closely analogous state statute of limitations."

Dissent Argues That Text of Limitations Provision Applies to § 3730(h) Claims

Justice Breyer joined Justice Ginsburg in the dissent, arguing that the Court should not rewrite the language of the False Claims Act. Indeed, while the dissent conceded that it is quite unusual to find a statute of limitations tied not to the time of the plaintiff's injury, but to other related events, Breyer and Ginsburg maintained that Congress had written such a statute here.

The dissent found the text of Section 3731(b)(1) to be reasonably clear. It says that "[a] civil action *under section 3730* may not be brought . . . more than 6 years after the date on which the violation" of the FCA "is committed." (Emphasis added.) Section 3730 specifically lists three kinds of civil actions, including a retaliation action under § 3730(h). Thus, a retaliation action is a "civil action under section 3730," and § 3731(b)(1)'s six-year limitations period applies.

The dissent rejected the argument that there are two equal and reasonable ways to read the limitations provision—on the one hand "suspected or actual," on the other hand "(a) or (b)." The dissent noted that the "statutes of limitations, when referring to starting points, generally refer not to *actual* events, but to *alleged* events. Thus, a plaintiff's tort action is timely if he files it within, say, three years of the *alleged* negligently caused injury; a plaintiff's breach-of-contract action is timely if filed within, say, one year of the *alleged* breach. And a plaintiff who loses such an action because the defendant shows, say, that there was no such injury or no such breach, has not, for that reason, brought the action outside the limitations period. Rather, the suit is still timely even though the violation remains nothing more than 'alleged' after trial. Such a plaintiff has simply lost a timely filed action on the merits." The dissent saw no difference under the FCA.

Mirroring language championed in the joint Taxpayers Against Fraud Education Fund and National Employment Lawyers Association *amici curiae* brief, the dissent maintained that the stronger argument concerned the limitations provision's purpose. "That purpose, after all, includes providing victims of retaliation a reasonable time within which they can file an action to vindicate their rights . . . How can we reconcile that purpose with a reading of the statute that, as a matter of logic, could allow the limitations period to begin to run, perhaps even to terminate, before the forbidden retaliation occurs?"

The answer, according to the dissent, is that Congress could have intended to provide a lengthy limitations period for all related FCA actions, especially given the "reasonable assumption that false claims and retaliation actions are likely to be litigated together." Instead, as the dissent warned, the majority's reading "substitutes for a fairly lengthy—and *uniform*—6-year limitations term, a crazy-quilt of limitations periods stitched together from the laws of 51 jurisdictions which, in some instances, might require a plaintiff to bring a retaliation claim within 90 days, six months, or one year after the retaliation takes place."

C. Seeking Preliminary Injunctive Relief

Bedrossian v. Northwestern Memorial Hospital, 409 F.3d 840 (7th Cir. May 31, 2005)

The Seventh Circuit, in affirming a lower court decision, held that a showing of irreparable harm is required for preliminary injunctive relief under the False Claims Act, because the statutory language of Section 3730(h) supports the position that customary equitable considerations should be made. The court ruled that the plaintiff failed to establish that he would suffer irreparable harm if terminated by the defendant, even if he would lose income, suffer from a damaged reputation, and be unable to find another job.

In 1997, Carlos Bedrossian, M.D, a physician specializing in cytopathology, was hired by Northwestern University as a professor in the Feinberg School of Medicine's Department of Pathology and as director of the cytopathology service within Northwestern Memorial Hospital. In addition, Bedrossian was a colonel in the Medical Corps of the United States Air Force Reserve, which obligated him to spend 13 to 14 weekdays per year lecturing and one weekend per month providing medical services for the Air Force. According to Bedrossian's complaint, while the University was satisfied with this working arrangement, several physicians began to harass him because of his military service. Bedrossian also pointed out that in August 2001, he filed an FCA *qui tam* action against the hospital alleging unlawful billing. After the Government investigated these allegations, the hospital allegedly told Bedrossian that it knew he was the reason for the investigation. In August 2002, the Government declined to intervene in his *qui tam* action. Bedrossian's employment was subsequently terminated.

According to Bedrossian, his termination from the University was based on his employer's contempt for his military service and in retaliation for filing the *qui tam* complaint. On May 21, 2003, Bedrossian brought an action against his former employer Northwestern University alleging that he was terminated in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and Section 3730(h) of the False Claims Act. An Illinois district court denied the plaintiff's request for preliminary relief enjoining the defendant from firing him. The plaintiff appealed the decision to the Seventh Circuit.

Irreparable Harm Is Required For Preliminary Injunctive Relief Under The FCA

The Seventh Circuit, providing a litany of supporting case law, observed that an injunction is an equitable remedy that does not issue as a matter of course, but rather as a remedy that courts may grant at their discretion in the "extraordinary situations" where legal remedies such as monetary damages are inadequate. *See, e.g., Weinberger v. Romero-Barcelo,* 456 U.S. 305, 311–12, 102 S.Ct. 1798 (1982); City *of Harrisonville v. W.S. Dickey Clay Mfg. Co.,* 289 U.S. 334, 337–38, 53 S.Ct. 602 (1933). Indeed, the Supreme Court, in *Romero-Barcelo,* set forth the test for determining whether Congress has limited the court's discretion by enacting a statute eliminating the traditionally required showing of irreparable harm for preliminary injunctive relief: "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Romero-Barcelo,*456 U.S. at 313, 102 S.Ct. 1798 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086 (1946)).

Dissecting the relevant language of USERRA and the FCA, the Seventh Circuit ruled that the two statutes do not clearly mandate injunctive relief for a particular set of circumstances, and thus the court was bound to employ traditional equitable considerations (including irreparable harm) in deciding whether to grant such relief.

In the case of the False Claims Act retaliation provision, the Seventh Circuit ruled that rather than disposing of the irreparable harm requirement, the language actually supports the position that the customary equitable considerations should be made. The court took special note that there is no mention of preliminary relief, and that the statute specifically discusses monetary damages and reinstatement as remedies that can make a plaintiff whole. The court also observed that many other federal statutes that contain provisions to protect from retaliation individuals who expose violations to the Government require proof of irreparable harm for preliminary injunctive relief. *See, e.g.*, 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA).

Furthermore, the Seventh Circuit was particularly troubled that an alternative ruling would lead to imbalance under the FCA, for if Bedrossian prevailed on the merits of his suit, damages would make up what he had presumably lost during unemployment. "On the other hand, Northwestern would not be likely to recoup the losses it might incur were it erroneously forced to employ Bedrossian while this lawsuit is resolved on the merits, including his salary and reduced productivity."

Relator's Alleged Harm Did Not Rise To The Level of "Irreparable Harm"

The Seventh Circuit noted that the Supreme Court had set a high standard for obtaining preliminary injunctions restraining termination of employment. *See Sampson v. Murray,* 415 U.S. 61, 94 S.Ct. 937 (1974). Although it did not "foreclose[ ] relief in the genuinely extraordinary situation," the type of irreparable injury required must really depart from the harms common to most discharged employees. *Id.* at 92 & n. 68, 94 S.Ct. 937. The plaintiff in *Sampson* alleged humiliation, damage to reputation, and loss of income due to her purportedly wrongful termination from federal employment. *Id.* at 92, 94 S.Ct. 937. The Supreme Court held that these injuries did not rise to the level of an extraordinary termination of employment situation, and that they were not "irreparable" to warrant a preliminary injunction. *See id.* Comparing the present case to *Sampson*, the Seventh Circuit ruled that the "irreparable harms" of lost income and damaged reputation alleged by Bedrossian did not meet the level of "irreparable harm." Likewise, the court ruled that the inability to find another job was not irreparable harm. The Seventh Circuit thus agreed with the district court, concluding that Bedrossian failed to show the irreparable harm required for a preliminary injunction against Northwestern. In turn, the Seventh Circuit affirmed the district court's denial of a preliminary injunction prohibiting Northwestern from terminating Bedrossian's employment.

D. Doctrine Of *Res Judicata*

U.S. ex rel. Guadalupe v. The Goodyear Tire & Rubber Co., 2005 WL 1324977 (N.D. Ohio June 3, 2005)

An Ohio district court granted the defendant-employer's motion for summary judgment in an action alleging violations of FCA Sections 3729 and 3730(h). The court ruled that the relator failed to provide any corroborating evidence, such as affidavits, deposition testimony or documents, in support of his argument that the defendant sold defective products to the Federal Government. The court also ruled that the relator's Section 3730(h) claim was barred under the doctrine of *res judicata*, for the plaintiff failed raise his retaliation claim at an earlier full arbitration hearing. Even if the court misapplied the doctrine of *res judicata*, the court maintained that the plaintiff failed to show that he was engaged in "protected activity," as defined by Section 3730(h) case law.

On August 20, 2001, Orlando Guadalupe, a former employee of The Goodyear Tire & Rubber Co., sued Goodyear, alleging the company violated FCA Section 3729, by selling defective tires to the Government. The relator also filed a private action under the FCA retaliation provision, Section 3730(h), alleging the company fired him for contacting the Government regarding his concerns.

To establish that the defendant sold defective tires to the Government, the relator alleged that Goodyear failed to comply with the "detailed" military standards and specifications set forth in its contracts with the Defense Department, and that Goodyear failed to comply with its own specifications for manufacturing tires. The defendant, however, argued that the relator offered no evidence that Goodyear violated any military standards or specifications, that Goodyear violated its own specifications, or that in fact Goodyear sold any defective tires to the Government.

On November 30, 2004, Goodyear filed its summary judgment motion arguing that relator's *qui tam* claims should be dismissed because relator failed to show that Goodyear sold defective tires to the military, and that the relator's retaliatory discharge claim should be barred by *res judicata* and/or dismissed on the merits because the relator had failed to provide adequate evidence of Goodyear's retaliatory motive or that its articulated reasons for firing him are pretextual.

Relator Failed To Provide Corroborating Evidence To Support His *Qui Tam* Allegations

The district court granted the defendants' motion. The court noted that at the end of discovery, the relator had failed provide any corroborating evidence, other than to show that defective tires were passed on to the next department despite his warnings to supervisors and management. The court was particularly troubled at the absence of any corroborating evidence in the form of affidavits, deposition testimony (other than his own), or documents showing that the tires the defendant sold to the Government were defective. Instead, the relator merely submitted a list of "witnesses he will call upon" who "will underscore and substantiate what was occurring on the production line." The court found this to be insufficient, and thus granted the defendants' motion for summary judgment and dismissed the matter with prejudice.

Doctrine of *Res Judicata* Precluded Relator's Section 3730(h) Claim

In assessing the relator's Section 3730(h) FCA retaliation claim, the court noted that a full arbitration hearing had taken place in June 2002, in which relator testified but failed to raise his FCA retaliation allegations. At the conclusion of the hearing, the Arbiter ruled that there was proper cause for relator's discharge and that there was no merit to the claim that defendant was "out to get" him. Applying the doctrine of *res judicata* to the matter at bar, the district court ruled that the relator is precluded from litigating his claim that there was another reason for his termination (i.e., retaliation for his whistleblowing activities). *See Fisher v. Martin Marietta Energy Sys., Inc.*, No. 86-5040, 1987 U.S. App. LEXIS 2711 (6th Cir. Mar. 3, 1987) ("[T]he reason for plaintiff's termination has already been decided. In the context in which that issue was arbitrated, pretext was a relevant consideration, and plaintiff could have raised retaliation as the real cause of her discharge.)

Foreshadowing that it might have wrongly decided the matter, the district court proclaimed that even if *res judicata* did not apply, the relator had failed to show that Goodyear fired him in retaliation for his "protected activity" under the FCA or that Goodyear's reason for firing him, backed by an arbiter, was pretextual. The court again pointed out that the relator failed to provide corroborating evidence, such as deposition testimony from other witnesses. Thus, the district court also granted the defendants' summary judgment motion as it pertained to the relator's Section 3730(h) claims.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Collateral Estoppel

U.S. ex rel. Lanser v. Blackburn, 2005 WL 1497760 (9th Cir. June 14, 2005)

The Ninth Circuit, in an unpublished decision, upheld a lower court dismissal of a *qui tam* action under the principle of collateral estoppel. Craig Lanser had appealed *pro se* the dismissal of his FCA *qui tam* action against his former employers, alleging that they engaged in a scheme to defraud the Small Business Administration by falsifying loan documents and providing unlawful kickbacks.

Pointing to its earlier holding in *Howard v. America Online Inc.*, 208 F.3d 741, 748 (9th Cir. 2000), the Ninth Circuit agreed that collateral estoppel barred the relator's *qui tam* action, for a California state court had previously ruled in the relator's state action, which addressed the same rights and facts as presented in *qui tam* action at bar. The court of appeals, rejecting the relator's argument, ruled that the inclusion of an additional defendant did not alter the application of collateral estoppel, for the plaintiff-relator was a party to the state court action in which the claims concerning fraudulent loans were determined to be untrue and defamatory. Thus, the Ninth Circuit affirmed the lower court decision to dismiss the *qui tam* action.

B. Sovereign Immunity Bar

John Doe v. Jane Doe, 2005 WL 1097322 (10th Cir. May 10, 2005)

John Doe brought an FCA *qui tam* action against the head of a federal agency. An Oklahoma district court dismissed the complaint, ruling that the court lacked jurisdiction to consider the action. Doe appealed the decision to the Tenth Circuit.

The Tenth Circuit, in an unpublished decision affirming the lower court decision, ruled that the district court lacked jurisdiction to consider an FCA action against a federal agency, for Congress made no express waiver of sovereign immunity for that agency. In support of its ruling, the court of appeals pointed to a Supreme Court decision, which held that sovereign immunity protects the Government and its agencies from being sued without their consent. *FDIC v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996 (1994). The Tenth Circuit further observed that "[s]overeign immunity is jurisdictional in nature," *Meyer,* 510 U.S. at 475, and a waiver of sovereign immunity must be explicit. *Lane v. Pena,* 518 U.S. 187, 192, 116 S.Ct. 2092 (1996). Whether sovereign immunity applies is a legal question that the court of appeals reviewed *de novo*. *Shaw v. United States,* 213 F.3d 545, 548 (10th Cir. 2000).

In *Shaw,* the Tenth Circuit had held that the Government does not waived its sovereign immunity against FCA-based collection actions, stating, "[t]here is no express waiver of sovereign immunity in the FCA." *Id.* The Tenth Circuit also pointed to other circuits that have applied sovereign immunity in FCA suits involving agencies and instrumentalities of the Government. *See, e.g., Galvan v. Federal Prison Indus., Inc.,* 199 F.3d 461, 468 (D.C. Cir. 1999). In light of the sovereign immunity bar, the Tenth Circuit ruled that the lower court correctly dismissed the case at bar. While the court conceded that the Government may have waived its immunity if the agency was involved "in the commercial world," the court concluded that the program involved in the instant case was not a "business-type activity with a business-minded purpose," *Federal Housing Admin. v. Burr,* 309 U.S. 242, 263 (1940), as would be required to find a waiver of sovereign immunity. Furthermore, the court of appeals ruled that because sovereign immunity is a legal question, the district court was not required to hold an evidentiary hearing before ruling.

C. Statute of Limitations

United States v. American International, Inc., 2005 WL 1529669 (E.D. Mich. June 20, 2005)

In a Government-intervened FCA action, a Michigan district court denied a defendant's motion for summary judgment, finding instead that the Government's complaint upon intervention was not time barred, for the complaint is viewed as an amendment of the relator's *qui tam* complaint rather than independent complaint by a new party.

On May 24, 2001, co-relators filed their original action, alleging that the defendants submitted false claims to the Government in relation to an airport contract that was awarded in 1994. On July 27, 2004, the Government notified the district court that it intended to intervene and desired to add an additional defendant, Mr. Kelley. The Court then ordered the Government to serve its complaint against Kelley within thirty days of the completion of a pending criminal trial against Kelley and his wife, which ended on September 27, 2004. The Government subsequently complied with this order, serving Kelly on October 27, 2004.

In this motion at bar, Kelley argued that the FCA claims must be dismissed, for they did not satisfy the FCA's six-year statue of limitations. The Government countered that its claims were timely, for the Government was not made aware of Kelley's involvement in the alleged fraudulent scheme until he was indicted with criminal charges. The Government also argued that the statute of limitations stopped running once the co-relators filed their initial complaint on May 24, 2001. Alternatively, the Government maintained that its claims against Kelley should relate back under Fed. R. Civ. P 15 to the initial filing of this *qui tam* action by the co-relators. Furthermore, at oral argument, the Government raised the alternative argument that, if the complaint upon intervention does not relate back, it should be considered as a "fresh" suit being filed against Kelley for bills that continued to be submitted after October 27, 1998.

The district court reduced the legal issue to whether the Government's complaint relates back to the filing of the co-relators' complaint. The relation back requirements are outlined, in relevant part, by Rule 15(c), which disallows the complaint to "relate back" if the party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." The court stressed that this rule is based on the notion that once a lawsuit has been initiated concerning a particular transaction or occurrence, "the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." *Brown v. Shaner*, 172 F.3d 927, 932 (6th Cir. 1999).

However, the court, recognizing the unusual circumstances of this particular Government-intervened *qui tam* action, warned that the application of Rule 15(c) is somewhat challenging, for unlike the typical *qui tam* action where the Government's complaint upon intervention asserts identical claims, the Government chose to include *additional claims* and a *new defendant*.

The Claims in the Government's Complaint Relate Back to the Co-Relators' Complaint

Thankfully for the Government, other courts have previously and consistently ruled that an intervening complaint must be viewed as an amendment of the relator's initial complaint rather than an independent complaint by a new party. *See, e.g., United States ex rel. Cosens v. Yale-New Haven Hosp.*, 233 F. Supp. 2d 319, 325 (D. Conn. 2002); *United States ex rel. Alsaker v. CentraCare Health Sys., Inc.*, No. 99-106, 2002 WL 1285089 at *1 (D. Minn. June 5, 2002). The present court found this approach to be consistent with the nature of a *qui tam* action, for the Government is the real party of interest even though a private party initiated the suit. Thus, the court ruled that Rule 15(c)(2) allows the Government's complaint to "relate back" if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *United States ex rel. Purcell*, 254 F. Supp. 2d 69, 75–76 (D.D.C. 2003).

The district court found that the Government's complaint arose out of the same conduct, transaction and occurrences as those identified in the relators' complaint. Indeed, both complaints dealt with the same multi-million dollar, federally funded contract to renovate the airfield lighting and signage at Detroit Metropolitan Wayne County Airport. Both complaints also alleged that the defendants improperly billed the Government and sought unnecessary extensions in completing the project. And both complaints alleged violations of FCA Sections 3729(a)(1), (a)(2), and (a)(3). Therefore, the court ruled that the Government's complaint properly relates back and must be viewed as an amendment of the relators' initial complaint.

There Is an Issue of Material Fact as to Whether the Statue of Limitations Bars the FCA Claims

The district court proclaimed that although the intervening complaint relates back to the initial complaint, the Government must still demonstrate that it could properly add Kelley as a party. Citing existing case law, the court warned that Kelley's motion must be granted unless the FCA claims satisfy the statute of limitations, for the Government could not make use of the relation back provision to add a *party*. *Purcell*, 254 F. Supp. 2d at 76–77. Accordingly, the district court was then faced with the issue of whether the statute of limitations elapsed before the Government filed its notice of intervention on July 27, 2004.

Kelly, citing Section 3731(b)(2), argued that the statute of limitations had elapsed because the Government should have known of his role in the alleged fraudulent scheme in June 2000 when the Joint Committee of the Michigan Legislature questioned the implementation of the light and signage contract. Raising an alternative argument, Kelley maintained that the six-year limitation outlined in Section 3731(b)(1) bars all claims that occurred before October 27, 1998.

The Government countered that summary judgment should be denied because there were too many factual issues. The Government argued that Kelley had failed to produce sufficient evidence that the investigation by the state legislature uncovered material facts that would have provided adequate notice of his involvement.

Ultimately, the district court found that that granting summary judgment was premature because there were too many unresolved factual issues. The court specifically noted that it had been provided no information regarding the nature and extent of the Joint Committee's investigation. Therefore, the court stressed that it was unclear whether the investigation was the date on which the statute of limitations in Section 3731(b)(2) began to run. The court also pointed out that the complaint alleged a complex conspiracy that led to the submission of countless false claims, each of which was a separate FCA violation. For each violation, a new statute of limitations period began. Until the court is provided with information concerning the date of these transactions and Kelley's involvement, the court explained that a determination on whether any claims are time-barred could not be made.

Thus, the district court denied without prejudice the defendant's motion for summary judgment.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Farmer v. City of Houston, 2005 WL 1155111 (S.D. Tex. May 5, 2005)

See "Statutory Interpretations: Section 3729 Presentment To A Federal Grantee" above at page 3.

United States v. Capital Group Health Services of Florida, Inc., 2005 WL 1364619 (N.D. Fla. June 7, 2005)

In a *qui tam* action alleging that a hospital, a health maintenance organization, and a psychiatrist entered into a scheme for submission of false claims to state and federal governments, a Florida district court dismissed all claims, except for the allegations against the individual psychiatrist-defendant. Applying the language espoused in *Clausen*, the court stressed that Rule 9(b) requires the complaint to detail "some indicia of reliability" to support the allegation of an actual false claim for payment being made to the Government. According to the court, the complaint offered "some indicia of reliability" to support her allegations against the psychiatrist, for she had personal knowledge of his work hours and gave precise figures that on specific dates he submitted claims for more hours than he actually worked. The rest of the allegations failed to satisfy the 9(b) requirements.

Dominica Brodsky filed a *qui tam* suit, which the Government decline to intervene, alleging that the defendants entered a conspiracy under which false claims were submitted to state and federal governments for services allegedly provided to Medicare and Medicaid beneficiaries. The court divided the relator's allegations into four main categories: first, claims by the defendant psychiatrist, Dr. Faisal Munasifi, for psychiatric services that either were not rendered at all ("phantom claims') or that were exaggerated for billing purposes ("upcoded claims"); second, claims by Munasifi that were false because he represented that he had complied with applicable statutes when in fact he violated the "anti-kickback" statute by compensating the defendant health maintenance organization, Capital Group Health Services of Florida, Inc. (CHP), for referring the patients; third, claims for services rendered by psychiatrists employed by the defendant hospital, Tallahassee Memorial Healthcare, Inc. (TMH), for which the compliance representations were false because TMH compensated CHP and Munasifi for referring the patients, thus violating the anti-kickback statute; and fourth, claims by TMH for hospital services for which the compliance representations were false both because TMH compensated CHP and Munasifi, thus violating the anti-kickback statute, and because TMH maintained a "financial relationship" with Munasifi, thus violating the "self-referral" statute.

According to the relator's complaint, she was aware of these false representations because she worked as a mental health counselor at TMH in "the early 1990s," and "later" worked in an office building where Munasifi and the TMH-employed psychiatrists maintained their offices. The relator also identified as a source of some of her information a response by TMH to a discovery request in a different lawsuit.

The defendants moved to dismiss the action for failing to allege the fraud with particularity as required by Rule 9(b). The district court granted the motion but afforded the relator leave to amend the complaint. The relator subsequently filed an amended complaint, but the defendants again moved to dismiss the suit under Rule 9(b).

Rule 9(b) Requires "Some Indicia Of Reliability"

The district court began its analysis by proclaiming that the Eleventh Circuit affirmed the dismissal of a *qui tam* action similar to the case at bar in *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002). In *Clausen*, the Eleventh Circuit held that Rule 9(b) applies to *qui tam* actions and that the complaint there was not sufficiently specific, in part because it "d[id] not identify any specific claims that were submitted to the United States or identify the dates on which those claims were presented to the government" and "relie[d] exclusively on conclusory allegations of fraudulent billing." *Clausen*, 290 F.3d at 1311. The present court also pointed to the Eleventh Circuit admonition: "[I]f Rule 9(b) is to be adhered to, *some indicia of reliability must be given in the complaint* to support the allegation of an actual false claim for payment being made to the Government." *Clausen*, 290 F.3d at 1311 (emphasis added). Through this juridical lens, the district court addressed each of the main four categories of claims at issue in the case at bar.

Claims Against The Defendant Included "Some Indicia Of Reliability"

The court first assessed the "phatom" and "upcoded" claims allegedly submitted by Munasifi. The court, in rejecting the defendant's 9(b) argument, noted that the relator alleged, for example, that Munasifi billed a specific amount ($247.30) for a specific procedure ("[p]rolonged physician services with direct (face-to-face) patient contact in inpatient setting") on a specific date (February 21, 2000), and that he did not in fact perform that procedure as claimed. The court also refuted the defendant's argument that a specific patient's name was needed to satisfy 9(b), stressing that if it was not already known to the defendant, he presumably could determine the patient's identity from his records.

As for the supposed "some indicia of reliability" requirement espoused in *Clausen*, the court determined that the complaint accomplished this, for the complaint stated that the relator had personal knowledge of the length of Munasifi's workday from having worked in the same building with him, and had heard him bragging about not working beyond 5:00 in the afternoon. The complaint also included precise figures, apparently based on available documentation, that on specific dates he submitted claims for more hours than he ever actually worked. The court found this to be sufficient to survive a motion to dismiss.

Alleged "Remumeration" Did Not Violate Anti-Kickback Statute

The court then assessed the allegedly false claims submitted by Munasifi for services rendered to members of the defendant health maintenance organization, CHP. The relator alleged that these claims were accompanied by false representations of compliance with the "anti-kickback" provision, which prohibits paying or soliciting any "remuneration" in exchange for the referral of Medicare or Medicaid patients. *See* 42 U.S.C. § 1320a-7b(b)(1) & (2). In the case at bar, the relator alleged that Munasifi compensated CHP for referring patients to him.

According to the court, the complaint only raised such allegation by accusing Munasifi of compensating CHP by reducing the costs CHP incurred for treatment of its members. Munasifi allegedly did this by hospitalizing fewer patients.

The court, however, determined that this does not qualify as "remuneration" under the anti-kickback provision. To the contrary, the court countered that "a health maintenance organization properly can and indeed should strive to reduce excessive utilization of medical services." Furthermore, the court ruled that the complaint does not allege with particularity any basis for "believing" that Munasifi "remunerated" CHP in the manner at bar.

Relator Failed To State The Basis Of Her Knowledge

The court then turned its attention to the third category of allegedly false claims—claims for services rendered by the psychiatrists employed by TMH. The relator again alleged that these claims were accompanied by false representations of compliance with the governing statutes. First, the relator alleged that TMH compensated CHP for referring these patients, thus violating the anti-kickback provision. Second, the relator alleged that TMH compensated Munasifi for referring patients to the TMH-employed psychiatrists.

However, the court ruled that these allegations failed to satisfy Rule 9(b), for the relator did not state the basis of her knowledge. More specifically, the complaint did not explain how she could know that Munasifi was paid a consulting fee he did not earn or that he charged above-market rent. According to the court, "Ms. Brodsky makes no claim to have seen particular documents or heard conversations supporting these allegations. And although Ms. Brodsky cites discovery responses in a different lawsuit, she makes no allegation that those responses support the assertion that Dr. Munasifi charged for consulting services he did not perform or charged above-market rent." Thus, the court, buying into the *Clausen* language, found the complaint deficient, for "some indicia of reliability must be given in the complaint." *Clausen,* 290 F.3d at 1311. In turn, the district court dismissed these specific claims.

Complaint Adequately Alleged A Violation Of The Self-Referral Statute

Finally, the court examined the allegations that TMH submitted false claims for hospital services. The relator alleged that these claims were false because TMH represented it had complied with the governing statutes, when in fact it had compensated CHP and Munasifi for referring patients, thus violating the anti-kickback statute, and that TMH had maintained a "financial relationship" with Munasifi, in violation of the self-referral statute. The district court ruled that the complaint adequately alleged that TMH compensated Munasifi for referring patients, both by paying consulting fees that were not earned and by paying above-market rent.

The court also found that the complaint adequately alleged a violation of the self-referral statute, under which a physician cannot refer a patient to an entity (including a hospital) with which the physician has a "financial relationship." *See* 42 U.S.C. § 1395nn. Section 1395nn defines a "financial relationship" to include, among other things, above-market consulting fees or rental payments that are either above-market or unsupported by a written lease. *See* 42 U.S.C. § 1395nn(a)(2) (defining "financial relationship" to include a "compensation arrangement" as defined in subsection (h)(1)); 42 U.S.C. § 1395nn(h)(1)(A) (defining "compensation arrangement" to include any arrangement involving "remuneration"); 42 U.S.C. § 1395nn(h)(1)(B) (defining "remuneration" to include "any remuneration, directly or indirectly, in cash or in kind"); 42 U.S.C. § 1395nn(e)(3)(A)(v) (providing exception for fees paid to physicians for services rendered, subject to specified conditions, including that fees not exceed fair market value of services); 42 U.S.C. § 1395nn(e)(1)(A) (providing exception for lease payments, subject to specified conditions, including that lease is in writing and rent is consistent with fair market value). However, the court nevertheless dismissed these claims under Rule 9(b), for the complaint failed to include any specifics about the alleged fraud.

Thus, the only claims that survived the court's dismissal axe were those alleging Munasifi submitted phantom or upcoded claims to the state and federal governments.

U.S. ex rel. Themmes v. Hamilton Enterprises, Inc., 2005 WL 1268784 (E.D. Wis. May 26, 2005)

A Wisconsin district court, dismissing a *qui tam* action for failing to satisfy Rule 9(b), ruled that the fraud outlined in the complaint, which alleged that the defendant sold the Government machines composed of used parts, was not sufficient unless the product was represented to be "new." The court also dismissed the relator's Section 3730(h) claim because the relator did not allege that the relator's actions were performed in furtherance of an FCA action or that the relator was concerned about the defendant defrauding the Government.

Quintron is an unincorporated company owned by Hamilton Enterprises and is in the business of manufacturing diagnostic breath-testing machines called MicroLyzers, which are instruments used by health care providers to detect the level of hydrogen and/or methane in the breath of patients suffering from digestive disturbances. Since at least 1999, Quintron manufactured MicroLyzers with used parts and sold them as "new" to Veterans Administration hospitals (VA hospitals) and to other government agencies and government funded institutions. Quintron also recycled used parts into machines that were held out as "upgraded" with new and improved components, and into machines that were returned for repairs.

From August 13, 2001 to July 14, 2003, Quintron employed Lori Themmes in the position of "Electronics Manager." Alma Thomma was also employed at Quintron through a temporary employment service as an administrative assistant from July 1, 2003 to January 13, 2004.

In February 2003, Themmes confronted Steve Hamilton, Quintron's president, about the company's practice of manufacturing MicroLyzers with used math blocks and selling them as "new," and also about the fact that customers had returned machines for repairs involving the math blocks. Steve Hamilton responded: "We'll use them until we use them up."

In late June 2003, Hamilton ordered Themmes to use up the used thumb-wheel switches currently in storage, but Themmes refused. Instead, Themmes confronted Lyle Hamilton, the founder and CEO of Quintron, about Steve Hamilton's order. Lyle Hamilton agreed that doing so was highly unethical and illegal and said he would talk to Steve Hamilton upon Steve's return to the office.

On or about June 26, 2003, Steve Hamilton gave Themmes a reprimand letter on the pretext that Themmes had complained about her hours of work. Themmes then responded in a written letter dated July 9, 2003 that stated: "I have brought this to everyone's attention in the past, however for the overall sake of the product I am going to say it again. Serious quality issues exist here and need to be addressed." On or about July 14, 2003, Themmes' employment at Quintron was terminated.

Themmes teamed up with Alma Thomma and brought a *qui tam* action alleging that the defendant, Hamilton Enterprises, violated the FCA. In addition, Themmes filed a Section 3730(h) action alleging that she was fired because of her furtherance of an FCA action. When the Government declined to intervene in the *qui tam* suit, the relators proceeded under Section 3730(b)(4)(B). The defendant filed a motion to dismiss, arguing that the false claim cause of action should be dismissed both because it failed to state a claim on which relief could be granted and because it was not pleaded with the particularity required by Rule 9(b). The defendant also sought to dismiss the retaliation claim for failing to state a claim under 3730(h).

Relators Raised An Actionable FCA Claim

The district court ruled that the relators' *qui tam* complaint satisfied Rule 12(b)(6). The relators' action was based on the factual allegation that the defendant "manufactured MycroLyzers with used parts and sold these highly sensitive instruments to Veterans Administration hospitals . . . and other United States agencies and government-funded institutions as 'new.' "

According to the court, the relators pled facts that implied that a contract term might have been violated. In short, the relators alleged that a MicroLyzer was "sold" to a VA hospital as "new." Drawing all reasonable inferences in the relators' favor, the district court concluded that it could be inferred that the alleged "sale" involved an agreement to purchase, followed by delivery and payment. Because the complaint specifies a "new" MicroLyzer, the court found it reasonable to infer that the delivery of a MicroLyzer with used parts might have constituted a breach of the agreement. Pointing to *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959 (1968) ("[T]he Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil."), the district court found that the FCA applies where someone knowingly represents that they are selling the Government one thing, demands and receives payment for it, and then knowingly delivers something else. Such conduct, according to the district court and established case law, fits into the statutory language of "present[ing] . . . a false or fraudulent claim for payment or approval." This was precisely what the relators alleged.

The defendant countered that even if this were true, the allegedly false statements at issue were not material to the Government's decision to buy. While agreeing that "materiality" is an element of an FCA cause of action, the district court found reasonable to infer that the existence of used parts in a new machine would be material to the purchaser. Thus, the court ruled that the relators had stated an actionable FCA cause of action, and the court dismissed defendant's motion to dismiss, to the extent it was based on Rule 12(b)(6).

Complaint Failed To Satisfy Rule 9(b), For It Contained No Allegations That The Defendant Represented The Product As Being "New"

Ignoring the defendant's recommendation to apply the Eleventh Circuit's *Clausen* analysis, the district court refused to look outside of the Seventh Circuit for cases applying Rule 9(b) to FCA actions. The district court instead applied the Rule 9(b) application used by the Seventh Circuit in non-FCA cases. First, the court noted that where the fraud involved is misrepresentation, the plaintiff is required to "state the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Viacom Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777 (7th Cir. 1994); *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992). The court further observed that "the duty to plead the circumstances constituting fraud with particularity [can] not be fulfilled by pleading those circumstances on 'information and belief' unless they [are] facts inaccessible to the plaintiff, in which event he [has] to plead the grounds for his suspicions." *Bankers Trust*, 959 F.2d at 684.

At the outset, the court noted that the allegation that a MicroLyzer was sold to a VA hospital was made "on information and belief." The court again stressed that such allegations are only allowable if the facts involved are inaccessible to the plaintiff, and in the case that they are, the plaintiff is required to plead the grounds for his suspicions. The court ruled that the relators satisfied these requirements, for they were both former employees of Quintron, and as such would not had access to sales records. The relators also indicated that the grounds for their suspicion that the defendant sold a MicroLyzer with used parts to a VA hospital in San Francisco to be that the VA hospital was listed in Quintron's business records as a customer. The combination of the relators' knowledge of the manufacturing process at Quintron, their knowledge of the products Quintron sells, and the VA hospital's being listed as a "customer," was sufficient, according to the court, to allow the simple allegation that the VA hospital was sold a MicroLyzer to be made "on information and belief."

The court then examined the complaint to see if the "circumstances" of the alleged fraud were adequately pled with particularity. The court quickly determined that the factual allegations of the fraud were not sufficiently detailed in the complaint: "It seems that the scenario that the plaintiffs are suggesting occurred is fairly straight forward: the VA hospital ordered a new MicroLyzer from the defendant based on some print material describing the product or communication with the defendant; the VA hospital was sent a machine manufactured with used parts; and the defendant sent a bill which was understood by the VA hospital to be for a 'new' MicroLyzer. But while it might be easy enough for the court to construct such a scenario, Rule 9(b) requires that the complaint contain factual allegations regarding the alleged fraud. The complaint in this case does not contain the required allegations."

The key problem identified by the court was that the relators did not plead any particulars relating to the allegedly fraudulent conduct. As the court highlighted, "manufacturing machines with used parts is not fraudulent. It is only when those machines are represented as 'new' that the question of fraud is potentially implicated. But the plaintiffs have not pleaded any facts whatsoever regarding the allegation that the product was represented to be 'new.'" Thus, the district court, ruling the complaint did not satisfy Rule 9(b), dismissed the relators' *qui tam* action, but gave the relators twenty days to file an amended complaint that fulfilled the particularity requirement.

Relator Was Not Engaged In "Protected Activity"

The district court dismissed the Themmes's Section 3730(h) retaliation action because it failed to allege that Themmes was engaged in conduct protected by the FCA. As the court noted, "An employee need not have actual knowledge of the FCA for her actions to be considered 'protected activity' under § 3730(h)," *Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 479 (7th Cir. 2004), but, "an employee must show that an FCA action is a 'distinct possibility' at the time of the investigation for her actions to be considered 'protected activity.'" *Id.* The district court observed that the Seventh Circuit has adopted the following standard: "the relevant inquiry to determine whether an employee's actions are protected under § 3730(h) is whether: '(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government.'" *Id.* at 480.

In the complaint at bar, the court was unable to find any allegations establishing that Themmes' actions were performed in furtherance of an FCA action, or that Themmes was concerned in any way about fraud on the Government. Again citing *Fanslow*, the court explained that Themmes was not required to have had knowledge of the provision of the False Claims Act, but she must have, in good faith, believed that Quintron was committing fraud against the Government. *Fanslow,* 384 F.3d at 480. The court could find "nothing in the complaint that would lead to the conclusion that Themmes' actions were at all related to, or motivated by, suspected fraud on the government. Simply stated, nothing in the complaint alleges or suggests that Themmes was concerned or even aware that the government was possibly being defrauded at the time she engaged in the conduct for which she was allegedly fired."

In turn, the court dismissed Themmes's Section 3730(h), for failing to establish an essential element of an FCA retaliatory cause of action. Thankfully for Themmes, the court also gave her twenty days to file an amended complaint that adequately pleads all of the elements of a 3730(h) action.

U.S. ex rel. Bannon v. Edgewater Hospital, Inc.**, 2005 WL 991757 (N.D. Ill. April 14, 2005)**

An Illinois district court granted in part and denied in part the defendants' motion to dismiss an FCA *qui tam* action for failing to comply with the particularity requirements of Rule 9(b). While the court agreed that complaint did not plead all of the fact in sufficient detail, the court stressed that Rule 9(b) does not require that averments as to public disclosure be stated with particularity. In other words, the court refused to dismiss the complaint on the ground that lack of public disclosure is not specifically pled.

On February 24, 2004, Anne Bannon filed an amended complaint against various defendants, including Edgewater Hospital, in which she alleged that the defendants violated the FCA and the Illinois Whistleblower Reward and Protection Act, 740 ILCS 175/4(e)(4)(A). The defendants filed a motion to dismiss the complaint for failing to comply with the particularity requirements of Rule 9(b). More specifically, the defendants argued that Bannon had an affirmative duty to allege compliance with the FCA public disclosure bar and that Bannon's claim should be dismissed because she failed to allege that the information was not based on publicly disclosed information or that she was the original source of the information.

The court, however, noting that the defendant was unable to cite any binding authority in support of this heightened pleading requirement, refused to graft yet another requirement to Rule 9(b) jurisprudence. Furthermore, the court noted that Rule 9(b) requires that "all averments of fraud or mistake" be stated with particularity. "While Bannon's underlying claim is of a species of fraud, information indicating the original source of the fraudulent claims is not an averment of fraud or mistake." Thus, the court proclaimed that Rule 9(b) does not require that averments as to public disclosure be stated with particularity.

Unfortunately for the relator, the court did ultimately dismiss her *qui tam* action, ruling that her complaint failed to meet the particularity requirement required for pleading fraud under Rule 9(b). According to the court, Bannon did not state when the misrepresentations were made and who was ultimately responsible for submitting the claims to Medicare and Medicaid. Indeed, Bannon only alleged that the defendants acted with deliberate ignorance and were negligent in managing the operations and billing practices and in submitting bills to Medicare. "Although the complaint alleges in general terms that [the defendants] made false claims under the FCA, it does not associate specific sets of statements with particular agents of [the defendants], specify the content of these statements, or articulate a time or place that the fraudulent claims were made." Therefore, the court ruled that complaint did not meet the Rule 9(b) standard, and court granted the defendants' motion for dismissal.

***International Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 217 v. G.E. Chen Construction*, 2005 WL 1253908 (9th Cir. May 27, 2005)**

After a California district court dismissed a non-intervened *qui tam* action against a corporation and its owner alleging violations of the federal FCA, the California FCA and California law, the defendants sought payment of attorney fees under 31 U.S.C. § 3730(d)(4). The district court, ruling that the *qui tam* action was not "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment," denied the defendants' request. The defendants appealed the decision to the Ninth Circuit.

The Ninth Circuit, in an unpublished decision, affirmed the lower court decision, ruling that the defendants failed to prove the necessary scienter requirement under Section 3730(d)(4). The court of appeals also ruled that the defendants could not rely on the more lenient standard of Section 3730(g), for this provision only applies when the Government brings the action.

***U.S. ex rel. Morrill v. Johns Hopkins University*, 2005 WL 1166083 (4th Cir. May 18, 2005)**

Ann Morrill appealed a Maryland district court's dismissal of her FCA *qui tam* action. The Fourth Circuit, finding no reversible error, affirmed the lower court decision in an unpublished *per curiam* opinion.

Interventions and Suits Filed/Unsealed

APRIL 1–JUNE 30, 2005

***State of Texas v. The Scooter Store*, (W.D. Tex.)**

In May 2005, the DOJ announced that it had filed a civil complaint under the False Claims Act against The Scooter Store. The Complaint alleges that The Scooter Store told potential customers who had called in on its toll-free number that Medicare would pay for expensive power wheelchairs but not less expensive scooters.

State of Missouri v. Dey, Inc.

In May 2005, Missouri Attorney General Jay Nixon announced that his office had filed a civil complaint against Dey, Inc. and Warrick Pharmaceuticals Corporation under the Missouri Health Care Payment Fraud and Abuse Act for fraudulently reporting drug prices.

State of Florida v. David Lawrence Mental Health Center

In May 2005, Florida Attorney General Charlie Crist announced that his office had filed a civil complaint against the David Lawrence Mental Health Center under the Florida False Claims Act. The Government is alleging that case managers at David Lawrence Mental Health Center routinely billed Medicaid up to $40 per hour for activity that was not eligible for reimbursement under the Medicaid program. Case managers submitted claims for "targeted case management" to Medicaid for such things as accompanying a recipient to the beach for the day, attending parties and carnivals, running personal errands for recipients, shopping for and delivering a birthday cake and snack chips, and taking recipients to lunch. The Attorney General is seeking triple damages for the amount falsely submitted to Medicaid, for a total of more than **$1.5 million**, plus $10,000 for each false claim submitted by David Lawrence Mental Health Center.

State of Texas v. Senior RX Support

In May 2005, Texas Attorney General Greg Abbott announced that his office had filed a civil complaint against Senior RX Support for Medicaid fraud. The Government is alleging that the Dallas-based mail-order prescription drug service asked senior citizens to commit fraud in order to qualify for free prescriptions from drug companies in violation of the Texas Deceptive Trade Practices act.

U.S. v. Lihai Medical Clinic

In May 2005, the DOJ announced that it had filed a civil complaint under the False Claims Act against Lihai Medical Clinic and its owner Kingi Langi. The Government is alleging that the medical laboratory submitted some 2,500 false Medicare and Medicaid claims between May 2000 and October 2002 by continuing to submit Medicare and Medicaid claims after being notified that the U.S. Department of Health and Human Services had revoked his certificate, citing non-compliance with federal regulations. The suit seeks to recover $9,000 Langi allegedly received from the Federal Government, plus damages and civil penalties of up to $11,000 for each false claim.

U.S. ex rel. Ramadoss v. Caremark, Inc., **(W.D. Tex.)**

In May 2005, the DOJ announced that it had intervened in a *qui tam* suit against Caremark, Inc. The Government is alleging that Caremark knowingly avoided or decreased its obligation to reimburse Medicaid and other federal health insurance programs in dual coverage situations. Janaki Ramadoss, a former quality assurance representative, filed this *qui tam* suit. Texas, Florida, Tennessee, and Arkansas have also intervened under a variety of state anti-fraud laws.

U.S. v. Cardiac Rehabilitation Center of Cape Cod, Inc., **(D. Mass.)**

In June 2005, the DOJ announced that it had filed a civil complaint under the False Claims Act against Cardiac Rehabilitation of Cape Cod, Inc. and Phillip Chiotellis, M.D. The Government is alleging that Chiotellis, a cardiologist, submitted fraudulently upcoded claims to Medicare in excess of **$1.7 million** by billing cardiac rehabilitations as cardiovascular stress tests. Assistant U.S. Attorney Patricia Connolly is representing the Government.

State of Texas v. Merck & Co.

In June 2005, Texas Attorney General Greg Abbott announced that his office had filed a civil complaint against Merck & Co. for Medicaid fraud. The Government is alleging that Merck was pushing to place the prescription painkiller Vioxx on the state's Medicaid formulary while knowing that it caused a higher risk of heart attack and cardiovascular problems.

Judgments and Settlements

APRIL 1–JUNE 30, 2005

***U.S. ex rel. Woodlee v. SAIC*, (W.D. Tex.)**

In April 2005, the DOJ announced that Science Applications International Corporation had agreed to pay $**2.5 million** to settle allegations of overcharging on an Air Force contract. The Government alleged that SAIC submitted fraudulent cost and pricing data on a contract for environmental cleanup prior to the closure of Kelly Air Force Base. Michael Woodlee, a former manager, filed this *qui tam* suit in 2002. The relator's share was $500,000 or 20 percent. John Clark of Goode, Casseb, Jones, Riklin, Choate & Watson (San Antonio) represented the relator. U.S. Attorney Johnny Sutton managed the case for the Government.

[Editor's Note: In addition to the FCA claim, the complaint alleged violations of the Truth in Negotiations Act (TINA).]

***U.S. v. Dr. Larossav*, (D. Mass.)**

In April 2005, the DOJ announced that Dr. John Larossa had agreed to pay **$447,145** to settle allegations of Medicare fraud. The Government alleged that Dr. Larossa overbilled the Government from 1998 through 2003 by classifying office visits as consultations, billing routine blood draws as critical care blood draws, and submitting claims for direct measurement cholesterol tests that were actually calculated test results. In addition to the settlement, Dr. Larossa has entered into an integrity agreement with HHS to monitor his compliance in the future.

***U.S. v. Dr. Shurlan*, (D. Mass.)**

In April 2005, the DOJ announced that Dr. Vladimir Shurlan had agreed to pay **$89,000** to settle allegations of Medicare fraud. The Government alleged that Dr. Shurlan upcoded his services in order to receive higher reimbursements from Medicare. In addition to the civil settlement, Dr. Shurlan has pled guilty to one criminal count of engaging in a scheme to commit healthcare fraud and has agreed to be excluded from participating in the Medicare program for 10 years. HHS OIG and the FBI investigated the matter.

***U.S. ex rel. Safina Office Products v. Office Max*, (D.D.C.)**

In May 2005, the DOJ announced that OfficeMax, Inc. had agreed to pay **$9.8 million** to settle claims of contract fraud against the General Services Administration (GSA). The Government alleged that OfficeMax sold Government agencies products from countries that do not have reciprocal trade agreements with the U.S., such as China. OfficeMax was required by its contract with the GSA to prevent such items from being offered for sale to U.S. Government agencies. Edward Wilder and Robert Chou Lee, two executives of Safina Office Products filed this *qui tam* action in 2003. The relators' share was $1.47 million, or approximately 15 percent. Vince McKnight of Ashcraft & Gerel (Washington, DC) represented the relators. U.S. Attorney Kenneth L. Wainstein managed this case for the Government.

U.S. ex rel. Relator v. Oracle Corporation**, (D. Mass.)**

In May 2005, the DOJ announced that Oracle Corporation had agreed to pay **$8 million** to settle allegations of computer training fraud. The Government alleged that Oracle overbilled the General Services Administration on a Master Contract for provision of computer training services. The relator, a former vice-president for sales of Oracle University, filed this *qui tam* suit in 2003. The relator's share was $1.58 million, or 20 percent. The law firm Phillips & Cohen represented the relator. GSA OIG, FBI, DCIS, USDA OIG, and the U.S. Postal Inspection Service investigated the matter. Assistant U.S. Attorneys Jeremy Sternberg and Mark Balthazard represented the Government.

U.S. ex rel. Long v. Mayo Foundation**, (D. Minn.)**

In May 2005, the DOJ announced that The Mayo Foundation had agreed to pay **$6.75 million** to settle allegations of research grant fraud. The Government alleged researchers at the Mayo Clinic charged the Government under federal grants for research costs unrelated to the research projects. Former accounting associate Christine Long filed this *qui tam* suit. The relator's share was $1.3 million, or approximately 19 percent. Phil Benson of the Warren-Benson Law Group (San Diego) represented the relator. HHS OIG and NIH investigated the matter. U.S. Attorney Thomas Heffelfinger managed this case for the Government.

University of Miami**, (S.D. Fla)**

In May 2005, it was reported that the University of Miami had agreed to pay **$3.98 million** to settle allegations of Medicare fraud. The Government alleged that the University of Miami submitted claims for a facility fee in connection with primary care services provided to Medicaid recipients at Anne Bates Leach Eye Hospital and Sylvester Comprehensive Cancer Center, even though facility fees were not covered by the Florida Medicaid program.

U.S. ex rel. Gober v. University of Alabama at Birmingham**, (N.D. Ala.)**

In May 2005, the DOJ announced that the University of Alabama Birmingham had agreed to pay **$3.39 million** to settle allegations of Medicare fraud. The Government alleged that the University hospital unlawfully billed federal healthcare programs for services also billed to the sponsors of research trials. Former compliance researcher Thomas Gober and former faculty member Jay Meythaler filed their respective *qui tam* suits in 2004. The relators' share was $395,000 or 12 percent. Stephen Henninger of Henninger, Burge, Vargo & Davis (Birmingham) represented relator Gober. Don McKenna of Hare, Wynn, Newell & Newton (Birmingham) represented relator Meythaler. HHS OIG investigated the matter. Assistant U.S. Attorneys John Bell and Daniel Spiro represented the Government.

***U.S. v. Honeywell*, (S.D. Cal.)**

In May 2005, the DOJ reported that Honeywell Technology Solutions Inc. had agreed to pay **$2.75 million** to settle allegations of fraud on a contract with the U.S. Air Force. The Government alleged that Honeywell falsely stated in its contract proposal that it had a fully compliant cost management system and then charged the costs of developing such a system to the contract when awarded. Assistant U.S. Attorney Shana Mintz represented the Government.

***U.S. ex rel. Allen v. Resurgens Surgery Center*, (N.D. Ga.)**

In May 2005, the DOJ announced that Resurgens Surgery Center had agreed to pay **$2.5 million** to settle allegations of Medicare and Medicaid fraud. The Government alleged that Resurgens, Physician Specialists in Anesthesia, and associated corporate entities had colluded to bill Medicare and Medicaid for millions of dollars in illegal fees. Robert Allen, former medical-practice administrator filed this *qui tam* suit. The relator's share was $1 million, or approximately 28 percent. Marlan Wilbanks of Harmon, Smith, Bridges & Wilbanks, LLP (Atlanta) represented the relator. U.S. Attorney David Nahmais managed this case for the Government.

***U.S. v. Hillcrest Healthcare*, (D. Conn.)**

In May 2005, the DOJ announced that Hillcrest Healthcare had agreed to pay **$750,000** to settle allegations of Medicare Fraud. The Government alleged that Hillcrest fatally neglected patients, while at the same time billing the state for the services it failed to provide. The matter arose out of a joint federal-state investigation into quality of care problems at Connecticut nursing homes. HHS OIG, the Connecticut Medicaid Fraud Control Unit, and the Connecticut Departments of Social Services, Public Health, and Consumer Protection investigated the matter. Assistant U.S. Attorneys Richard Molot and David Sheldon represented the Government.

***U.S. v. Hospital of St. Raphael*, (D. Conn.)**

In May 2005, the DOJ announced that the Hospital of St. Raphael had agreed to pay **$632,000** to settle allegations of Medicare fraud. The Government alleged that St. Raphael unnecessarily admitted Medicare beneficiaries to the hospital for dialysis-related treatments that could have been handled on an outpatient basis. In addition to paying damages, St. Raphael has entered into a Certification of Compliance Agreement with HHS.

***U.S. ex rel. Trombetta v. Tetik*, (N.D. Ill.)**

In May 2005, it was reported that Dr. Robert Tetik had agreed to pay **$700,000** to settle allegations of Medicare and Medicaid fraud. The Government alleged that Dr. Tetik, the owner of EMSCO Billing Services, Inc., had falsely claimed a higher level of services to patients than was actually provided. This suit arises out of consolidated *qui* *tam* cases from 1996 and 1999 filed by former billing supervisors Linda Trombetta and Linda Freeman. In June 2004, EMSCO settled with the Government and the relators for $1.1 million. The relators' share for the new settlement was $129,500, or approximately 19 percent. Steven Cohen of the Cohen Law Group (Chicago) represented relator Trombetta. Norman Hafron of Rosenfeld, Rotenberg, Hafron & Shapiro (Chicago) represented relator Freeman. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorneys Patrick Johnson and Carole Ryczek represented the Government.

[Editor's Note: Although EMSCO and Dr. Tetik have both settled, portions of the lawsuit are still pending against Dr. Tetik's ex-wife Bonnie, who is alleged to have instructed employees to overbill.]

***U.S. ex rel. Edwards v. Kenmore Construction*, (N.D. Ohio)**

In May 2005, the DOJ announced that Kenmore Construction Company had agreed to pay **$622,418** and Choice Construction had agreed to pay **$311,209** to settle allegations of fraud on road construction contracts. The Government alleged the two companies conspired to receive federally funded road construction contracts they were not entitled to receive through fraudulent representation of subcontractor Choice Construction as a Disadvantaged Business Enterprise (DBE), to take advantage of federal laws that require a certain percentage of federally funded road construction contracts to be awarded to DBE's. In addition to the settlement, Kenmore entered into a Corporate Compliance program monitored by the Ohio Department of Transportation. Choice Construction Company is no longer in business. Former employee Darryl Edwards filed this *qui tam* suit. The relator's share has yet to be determined. Department of Transportation OIG investigated the matter. Assistant U.S. Attorneys Alex Rokakis and Kent Penhallurick represented the Government.

***U.S. v. Bayonne Medical Center*, (D.N.J.)**

In May 2005, the DOJ announced that Bayonne Medical Center had agreed to pay **$242,000** to settle claims of Medicare fraud. The Government alleged that the hospital wrongly submitted claims for inpatient stays for patients who received outpatient services. In addition to the settlement, Bayonne has agreed to enter into a corporate compliance program with the Government. HHS OIG investigated the matter. Assistant U.S. Attorney Stuart Minkowitz represented the Government.

***U.S. v. Abington Memorial Hospital*, (E.D. Pa.)**

In May 2005, the DOJ reported that Abington Memorial Hospital had agreed to pay **$4.2 million** to settle allegations of Medicare fraud. The Government alleged that the hospital fraudulently billed Medicare over 17,000 times from 1991 to 1999 for a cholesterol test it was not performing. The complaint notes that Abington did nothing to correct its billing procedures even after the Pennsylvania Department of Public Welfare discovered the false billing in a 1994 audit. The settlement agreement calls for the hospital to hire a new compliance staff in an effort to correct its billing procedures. HHS

OIG Special Agents Patrick Coar and Mark Cavalucci investigated the matter. Assistant U.S. Attorneys Paul Shapiro and Gerald Sullivan represented the Government.

***PricewaterhouseCoopers LLP*, (S.D. Cal.)**

In June 2005, it was reported that PricewaterhouseCoopers had agreed to pay **$41 million** to settle allegations of travel-billing fraud. The Government alleged that the accounting firm over-billed the Government for travel related expenses on federal projects. This *qui tam* suit was filed in 2001.

***U.S. v. Wiggins*, (D. Ky.)**

In June 2005, the DOJ reported that pharmacist Kenneth Earl Wiggins had agreed to pay **$10.5 million** in fines and restitution as part of a plea agreement for illegally selling prescription drugs to the public. Wiggins, who owned 'Kings Drugs' pharmacies in Owensboro, Hartford, and Madisonville, admitted to conspiring with others in 1999 to repackage and sell prescription drug samples to the public and then submit reimbursement claims to Medicaid. Wiggins will forfeit $3.6 million in proceeds from the sale of the drugs and pay $6.7 million to settle claims under the civil False Claims Act.

[Editor's Note: Mr. Wiggins is scheduled for sentencing in September in Owensboro.]

***U.S. ex rel. Rademacher v. Softview Computer Products*, (D.D.C.)**

In June 2005, the DOJ reported that Humanscal Corporation (formerly Softview Computer Products) agreed to pay **$9 million** to resolve allegations of overcharging the General Services Administration. The Government alleged that Humanscale failed to disclose current, accurate, and complete discount and pricing information to GSA contract negotiators and failed to comply with the price reduction clauses for three of its GSA contracts resulting in overcharging the Government. Gerald Rademacher, a former sales manager, filed this *qui tam* suit in June of 2003. The relator's share is $1.58 million, or 18 percent. Paul Scott represented the relator.

***Turner Construction Company*, (D.D.C.)**

In June 2005, the DOJ reported that Turner Construction Company had agreed to pay **$6.6 million** to settle allegations of fraud on federal construction contracts. The Government alleged that Turner had received credits for bonds on dozens of federal contracts without passing the credits along to the federal Government, something it was required to do by the contracts. GSA OIG, Department of Veterans' Affairs OIG, and NCIS investigated the matter.

***U.S. v. Weill Medical College of Cornell University*, (S.D.N.Y.)**

In June 2005, the DOJ reported that Weill Medical College of Cornell University had agreed to pay **$4.4 million** to resolve allegations of fraud on a National Institutes of Health grant intended to support pediatric clinical research. The Government alleged that the college knowingly made false statements to NIH in its administration of the grant and allowed one physician-investigator and the pediatric endocrinology division to take all the grant funds. HHS OIG investigated the matter. Assistant U.S. Attorneys Sheila Gowan and Kathy Marks represented the Government.

Americhoice, (E.D. Pa.)

In June 2005, the DOJ reported that AmeriChoice of Pennsylvania Inc. had agreed to pay **$1.6 million** to settle allegations of Medicare fraud. The Government alleged that from September 1995 to June 1998, AmeriChoice failed to process or pay providers' health claims in a timely fashion, or at all, and inaccurately reported claims processing data to Pennsylvania regulators. HHS OIG, the Postal Inspection Service, the FBI, and the Office of Attorney General Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorney David Hoffman represented the Government.

Community Medical Center, (C.D. Ill.)

In June 2005, the DOJ reported that Community Medical Center of Western Illinois (CMC) agreed to pay **$500,000** to settle allegations of Medicare fraud. The Government alleged that the hospital, on advice from an outside consultant, submitted false claims to Medicare using specific diagnosis codes for gram negative pneumonia, septicemia, and acute renal failure that were not supported by patients' medical records, causing the hospital to receive higher reimbursements from Medicare. As part of the settlement, CMC has entered into a three-year Corporate Integrity Agreement with HHS. In addition, CMC has agreed to spend $150,000 over the next three years to establish a new charity healthcare program. HHS OIG and the Illinois State Police investigated the matter.

U.S. ex rel. Relators v. Fall River Walk-in Emergency Medical Office, (D. Mass.)

In June 2005, the DOJ reported that Fall River Walk-In Emergency Medical Office, P.C. and its owner Tushar Patel, M.D. had agreed to pay **$315,000** to settle allegations of Medicare fraud. The Government alleged that Fall River had overbilled Medicaid and Medicare from 2001 to 2003 by charging for physical therapy services not performed by a physical therapist or physician, improperly billed chiropractic services, and conducted medically unnecessary diagnostic tests. The relators were former employees of Fall River. The relators' share was $75,000 or 23 percent. Suzanne Durrell and Bob Thomas represented the relators. HHS OIG and the Massachusetts Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorney Eugenia Carris represented the Government.

[Editor's note: In addition to the federal settlement, Fall River pleaded guilty to Medicaid fraud and larceny counts and paid $85,000 in restitution.]

LOCAL FCA SETTLEMENTS AND JUDGMENTS

***City of Los Angeles v. Fleishman-Hillard*, (S.D. Cal.)**

In April 2005, the DOJ announced that Fleishman-Hillard had agreed to pay **$5.7 million** to settle allegations of overcharging on public relations contracts for several city agencies. The City filed the lawsuit in July 2004 after an article in the *Los Angeles Times* quoted seven former employees who said workers were encouraged and sometimes even directed to submit falsified timesheets. City Attorney Rocky Delgadillo represented the City of Los Angeles.

[Editor's Note: A criminal investigation is continuing in this matter. One person has been indicted and prosecutors have said they expect at least one additional indictment.]

***U.S. ex rel. Relator v. Kaiser Permanente Hawaii, Inc*, (D. Hi.)**

In May 2005, the DOJ announced that Kaiser Permanente Hawaii, Inc. had agreed to pay **$1.9 million** to settle allegations of overbilling Medicare and Medicaid. The Government alleged that Kaiser overbilled and failed to properly supervise the treatments with the physician's assistant. The relator's share of the $900,000 settlement with the State of Hawaii was $225,000, or 25 percent. The details of the $1 million federal settlement have not been released.

***U.S. ex rel. Hudnall v. ResCare, Inc*, (N.D. Tex)**

In June 2005, Texas Attorney General Greg Abbott announced that the state had settled a Medicaid fraud lawsuit against mental health provider ResCare Inc. under which the company will pay **$2.15 million** to settle allegations of fraudulent billing. The Government alleged that for two years ResCare submitted false billings and back-dated documents to make it appear that employees at a ResCare subsidiary were spending more time rehabilitating patients than they actually were. Jennifer Hudnall, an employee at ResCare's Fort Worth facility, filed this *qui tam* suit in 2001.

***State of New York v. Staten Island University Hospital*, (N.Y.)**

In May 2005, the New York Attorney General's Office reported that Staten Island University Hospital (SIUH) and CHAPS Community Health Services, Inc. (CHAPS) had agreed to pay **$76.5 million** to settle allegations of Medicaid fraud. The Government alleged that SIUH and CHAPS fraudulently billed at 21 different part-time clinics by inflating their hours of operation and regulatory compliance.

Legislative Update

Mayor Bloomberg Signs New York City False Claims Act Into Law

Mayor Bloomberg Signs New York City False Claims Act Into Law

Anthony Cotto

On May 19, 2005, New York City Mayor Michael Bloomberg signed the New York City False Claims Act into law, eight days after its unanimous passage by the City Council. With the passage of the new law, New York City joins 14 states, the District of Columbia, and the City of Chicago as a local government that affords private citizens the right to sue on its behalf. The legislation, authored by New York City Council Member David Yassky, is heavily based on the federal False Claims Act, offering private citizens an incentive to blow the whistle on fraudfeasors by awarding a winning plaintiff up to 30 percent of any civil judgment or settlement. The City will keep the remainder of the recoveries.

The New York law, which went through several revisions following Mayor Bloomberg's March 14 veto of the original bill, now includes language requiring the city to "diligently investigate" all complaints, but allows city officials to decide case by case *after* the investigation whether to actually commence an action and how many resources to devote to it. A person submitting a proposed complaint will be entitled to a response within 180 days indicating whether the city: (1) will open a civil enforcement proceeding (2) authorizes commencement of a case by the person submitting the proposed complaint as a special assistant corporation counsel (3) intends to delay opening a proceeding, or (4) declines to commence a proceeding. If the city declines to commence a proceeding or to designate the person submitting the proposed complaint to commence a proceeding, no proceeding can be brought. In that case, the city corporation counsel must state the reason for turning down the proposed complaint.

Every year New York City is bilked for millions of dollars in false payroll, medical and construction costs. New York City's 2003 contract budget exceeded $9 billion. If statistics compiled for federal false claims are comparable to those submitted at the local level, as much as 10 percent of all claims paid out on government contracts are fraudulent, and the city of New York will have more than $30 million returned to its coffers through the City False Claims Act.

TAFEF Chairman Neil Getnick, Esq. was one of the bill's principal supporters. "The New York City False Claims Act provides a powerful and tested means of fighting fraud in government contracting," said Getnick. Getnick also emphasized the manner in which the new law empowers citizens to help their government fight fraud: "Under this law, private citizens with unique knowledge of fraud on New York City will now be able to retain private counsel, bring suit on behalf of the city, and share a percentage of the recovery. As a result, New York City will now begin to enjoy the benefits that the U.S. government has experienced as a result of the hugely successful federal version of the statute." Mayor Bloomberg echoed Getnick's sentiments: "Citizens must have a means to protect their hard-earned money from these unscrupulous offenders."

Councilman David Yassky, the bill's sponsor, put it best: "The city simply cannot allow itself to be duped so often. Allowing regular citizens to blow the whistle on these despicable swindlers is a powerful weapon in the fight against fraud."

For more information about the New York False Claims Act, including the text and committee report, go to http://www.nyccouncil.info and search for the bill number (Intro. No. 630) and year (2005).

Developments in the Law

**The Clock Strikes Midnight:
State Statutes Now Dictate the Statute of Limitations
Period for Federal Whistleblower Retaliation Actions**

THE CLOCK STRIKES MIDNIGHT:
State Statutes Now Dictate the Statute of Limitations Period for Federal Whistleblower Retaliation Actions

Joseph E. B. White

On June 20, 2005, a split U.S. Supreme Court decision ruled that the federal False Claims Act's explicit six-year limitations provision does not govern the statute of limitations for Section 3730(h) retaliation claims. The Court instead directed whistleblowers to the "most closely analogous state statute" in determining the limitations period for their federal cause of action. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 04-169, slip op. at 1 (U.S. June 20, 2005).

Ignoring the rest of the circuits and instead embracing the lone Ninth Circuit's interpretation of the Act, the majority reasoned that Congress forgot to add a limitations provision for FCA retaliation claims. In a sharply worded dissent, Justice Breyer, in a dissent joined by Justice Ginsburg, questioned the majority's reasoning, expressing concern that the Court was ignoring the unique circumstances faced by *qui tam* relators. Justice Clarence Thomas wrote the opinion for the Court and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter. Justice Souter refused to fully endorse the majority's opinion. Justice Stevens concurred in the judgment.

The specific issue faced by the Court was whether the six-year statute of limitations period established in Section 3731(b) of the False Claims Act applies to retaliation claims brought under Section 3730 of the Act. The Fourth and Seventh Circuits had previously applied the explicit language, whereas the Ninth Circuit bypassed the Act, instead reaching for an "analogous state statute." *Compare Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245 (4th Cir. 2004), and *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), *with United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998).

PROCEDURAL HISTORY

This matter, appealed from a Fourth Circuit decision, took many turns before reaching the Supreme Court. *See* 367 F.3d 245 (2004). The Fourth Circuit had reversed a district court's dismissal of an FCA § 3730(h) retaliation action. The court of appeals held that the six-year limitations provision of § 3731(b)(1) applies to retaliation actions, and thus the district court had erred in applying a three-year limitations period drawn from an analogous state statute.

In this case, Karen Wilson, a former part-time secretary at the Graham County Soil and Water Conservation District, brought this *qui tam* action in January 2001, alleging that her former employer and several of her former coworkers submitted false claims to three federally funded programs. She also alleged that after she reported her concerns to federal authorities, her supervisors and coworkers initiated a pattern of harassment that precipitated her resignation in March 1997.

The defendants moved to dismiss. The district court granted the motion in part and denied it in part. *See* 2002 WL 31104581, 28 TAF QR 38 (Oct. 2002). The court dismissed some of Wilson's *qui tam* claims for failure to satisfy Fed. R. Civ. P. 9(b), but held that others were sufficiently specific to satisfy the Rule. As for Wilson's retaliation claim, the district court followed *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998), which held that in retaliation claims under § 3730(h), the applicable statute of limitations is taken from the most closely analogous state statute. Because North Carolina's statute of limitations for wrongful discharge bars claims brought more than three years after the date of discharge, the court held that Wilson's regulation claim was time-barred. However, the court noted that there was substantial ground for difference of opinion on this issue, as the Seventh Circuit had ruled in *Neal v. Honeywell*, 33 F.3d 860, 865-66 (7th Cir. 1994) that the six-year limitations period of § 3731(b)(1) applies to retaliation claims under § 3730(h). Accordingly, the district court certified this issue for interlocutory appeal.

A divided Fourth Circuit panel vacated the district court's order dismissing Wilson's retaliation claim. The court of appeals majority took as its starting point the plain language of § 3731(b): "[a] civil action under section 3730 may not be brought—(1) more than six years after the date on which the violation of section 3729 is committed . . ." The court of appeals observed that § 3730(a), a *qui tam* action under § 3730(b), and a retaliation action under § 3730(h). Therefore, the court reasoned, an action under §3730, which necessarily includes an action under § 3730(h), may be brought no more than six years after the date on which the underlying false claims violations was committed.

The district court, like the Ninth Circuit in *Lujan*, argued that the reference to a violation of Section 3729 in § 3731(b) shows that Congress did not intend the limitations period to apply to retaliation claims. The Fourth Circuit majority was unpersuaded. The court observed that, if Congress had wished to exclude retaliation claims from the ambit of the limitations provision, it could have provided that "a civil action under Section 3730(a) or (b) may not be brought more than six years after the date on which the violation of Section 3729 is committed." This Congress did not do. Because Congress chose not to modify the language of § 3731(b) in 1986 while adding a third cause of action to § 3730, the court concluded that it intended § 3731(b) to continue to apply to all actions under § 3730, including the newly added cause of action for retaliation.

The court of appeals rejected the defendants' argument that while claims under § 3730(a) or (b) are tied to a violation of § 3729, claims under § 3730(h) are not. Because an action under § 3730 will not lie absent an alleged violation of § 3729, the court concluded that Congress elected to identify a single, readily identifiable point at which to begin the limitations period for all actions under § 3730. Indeed, as the Seventh Circuit had noted, "[I]t is easier to determine the date of a false claim than to pit down the time of retaliatory acts; the claim is a document, but arguments about retaliation depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication." *Neal v. Honeywell*, 33 F.3d at 865.

Examining the legislative history of the 1986 Amendments, the court of appeals noted that Congress rejected an earlier proposal to enact the retaliation provision as a separate section of the FCA, and instead relocated the provision within Subsection (h) of § 3730. This history reinforced the court's conclusion that the limitations period of § 3731(b) applies to actions under § 3730(h).

The court rejected the defendants' arguments that application of the limitations period of § 3731(b) to § 3730(h) claims would lead to absurd results. The defendants argue that if an employee has reported a false claim that the employer submitted several years earlier, the employer might elect to wait out the limitations period before discharging or otherwise retaliating against the employee. Alternatively, the defendants argued that an employee might report a violation so old that the limitations period expires shortly after the violation is reported, leaving the employee unprotected. However, the Fourth Circuit found neither of these scenarios necessarily absurd.

As a threshold matter, the court of appeals observed, statutes of repose have the same effect. Far from being absurd, such provisions simply reflect Congress's decision to opt for simplicity of administration. Moreover, as a practical matter, the court of appeals observed that there is a close temporal relationship between a protected act and the retaliatory conduct based on it, so that there would be few instances in which several years would pass between the violation, the protected conduct, and the retaliatory act. The six-year period provided by § 3731(b) lessens the likelihood that the purportedly absurd consequences would occur, and should generally be sufficient to encompass the protected act and the retaliation, lest the both face challenges for attenuation and staleness.

THE U.S. SUPREME COURT'S REASONING

The majority, rejecting the reasoning advanced by the Fourth Circuit and the dissent, declared that the FCA limitations period is ambiguous, for the running of the limitations clock begins on a violation of Section 3729, not a violation of 3730(h). *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 04-169, slip op. at 5 (U.S. June 20, 2005). Breathing life into a hypothetical that has never graced the pages of a court docket, the Court expressed concern for the relator who is retaliated against six years after a 3729 violation.

Instead of turning to the legislative history to clarify this "ambiguity," the Court blindly concluded that Congress did not intend the six-year limitations provision to apply to Section 3730(h) claims. For support, the Court quickly adopted the "default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham County*, slip op. at 8. Applying that rule without first considering the unique circumstances surrounding an FCA *qui tam* relator, the Court concluded: "[t]herefore, where, as is the case here, there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action (here retaliation) accrues." *Id.* at 9. Perhaps recognizing the ensuing confusion, the court adds a footnote of "analogous state statutes" of limitations that might apply to FCA retaliation claims. In turn, the Court placed this embattled whistleblower first in the long line of confused relators, remanding the case to the court of appeals to determine which state statute offers the "most analogous" provision.

Legal Analysis

Penalty Points, Part One

PENALTY POINTS, Part One

*Lani Anne Remick**

This article is the first part of a three-part series examining the penalty provisions of the False Claims Act. Part One looks at how courts determine the dollar amount of a single penalty within the minimum to maximum statutory range. Part Two will examine how many penalties are awarded in a particular case and the factors bearing on that decision. Part Three will address constitutional issues associated with the imposition of penalties under the Act.

Why should we care about penalties under the False Claims Act? For starters, depending on the facts of the case, penalties may equal or even exceed, by far, the damages available under the Act. In some cases, penalties may be the only amounts recoverable. Accordingly, neither the Government nor a defendant can afford to ignore potential penalties when evaluating a case under the Act—penalties may be the whole ball of wax, or at least a big part of it. For taxpayers and policymakers interested in combating and deterring fraud against the United States Treasury, penalties are a critical component of the package of remedies available under the Act, especially where damages cannot be proved with sufficient certainty.

An award of penalties under the Act may be reduced or even eliminated if its imposition is found to violate the Constitution. Thus, potential constitutional issues can be an important defense or negotiating point for a defendant. Likewise, constitutional implications are an important strategic consideration for the Government in formulating a penalty request (*i.e.*, deciding how many penalties to seek and what amount to request per penalty). For relators, penalties are also of particular interest, because they count as part of the total recovery in determining the relator's share.

The total penalty awarded in a particular case is a function of three main elements: first, the amount of each individual penalty; second, how many penalties are imposed; and third, whether constitutional considerations require reduction or elimination of the total penalty that would otherwise apply. This article, Part One of three parts, will focus on the first element. It will review the Act's penalty provision, as well as other relevant statutory and regulatory provisions. Next, the article will set forth several general principles governing the award of penalties under the Act. Finally, it will discuss and comment on the factors relied upon by courts in determining the dollar amount per penalty in a particular case.

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I. THE FALSE CLAIMS ACT'S PENALTY PROVISION AND OTHER RELEVANT PROVISIONS

When the False Claims Act[1] (the Act) was originally signed into law in 1863, it provided for a penalty of $2,000 in addition to double damages.[2] Despite inflation and an exponential increase in government programs and government spending, the dollar amount of the penalty remained at its Civil War-era level for more than 120 years. In 1986, the Act was significantly amended in order to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government," and to "make the statute a more useful tool against fraud in modern times."[3] In furtherance of these goals, the amendments included an increase from double to treble damages, as well as a long-overdue increase in the penalty amount.[4] Specifically, the Act as amended provided for a minimum penalty of $5,000 and a maximum penalty of $10,000.[5]

Unfortunately for False Claims Act violators, Congress decided not to let another century slide by before the next increase in the Act's penalties. In the 1990s, Congress passed and later amended the Federal Civil Penalties Inflation Adjustment Act of 1990,[6] requiring federal agency heads to make periodic inflationary increases to the dollar amount of civil monetary penalties within their agency's purview, including the False Claims Act.[7] The first such inflationary adjustment was required to be made by October 23, 1996; however, the Department of Justice did not increase the Act's penalties until September 29, 1999.[8] At that time, the minimum and maximum penalties were increased to $5,500 and $11,000, respectively.[9] Although inflationary adjustments are required to be made every four years,[10] no further adjustment has been made to the penalty amounts since 1999, and thus the $5,500–$11,000 range remains applicable at this time.

1. 31 U.S.C. §§ 3729, *et seq.*

2. *See* Rev. Stat. § 3490 ("Any person . . . who shall do or commit any of the acts prohibited . . . shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained . . . .") (codified at 31 U.S.C. § 231); *see also* Pub. L. 97-258, 96 Stat. 877 (1982) (re-codifying the Act at 31 U.S.C. §§ 3729, *et seq.*).

3. S. Rep. No. 99-345, at 1–2 (July 28, 1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

4. *See* S. Rep. at 17, 1986 U.S.C.C.A.N. at 5282 (noting that the penalty amount had remained unchanged since the initial enactment of the Act in 1863).

5. 31 U.S.C. § 3729(a) ("Any person who . . . [commits one of the prohibited acts] is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus [treble damages] . . . .).

6. Pub. L. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (Penalties Inflation Adjustment Act).

7. *See* note following 28 U.S.C. § 2461 (setting out text of the Penalties Inflation Adjustment Act).

8. *See* 64 Fed. Reg. 47099, 47099-100 (August 30, 1999).

9. *Id.* at 47104; 28 C.F.R. § 85.3(a)(9) (2005).

10. *See* Penalties Inflation Adjustment Act at § 4.

II. GENERAL PRINCIPLES GOVERNING THE AWARD OF PENALTIES UNDER THE ACT

A. Penalties are mandatory

As courts have interpreted and applied the Act over the years, certain general principles relevant to the assessment of penalties have emerged. Perhaps most importantly, the courts have been nearly unanimous in holding that the imposition of penalties is mandatory under the Act.[11] Indeed, the language of the statute makes clear that courts have no discretion to determine whether or not to award penalties, stating that "any person" who commits one of the enumerated acts "is liable" for an amount "not less than" the minimum statutory penalty.[12] Moreover, the courts' interpretation is clearly in accord with the legislative intent that, "The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false."[13] The only exceptions to the mandatory imposition of penalties are voluntary self-disclosure[14] (which is outside the scope of this article) and constitutional considerations[15] (which will be discussed in Part Three).

In fact, it appears that only one reported case, *Peterson v. Richardson*,[16] has held that a court has discretion to assess less than one penalty per violation of the Act, at least in the absence of the Government's consent. Even in the *Peterson* case, it is somewhat unclear whether or not the Government consented to the court's reduction in

11. *See, e.g.*, United States v. Killough, 848 F.2d 1523, 1533 (11th Cir. 1988) ("[I]mposition of forfeitures under the Act is not discretionary, but is mandatory for each claim found to be false.") (citations omitted); United States v. Diamond, 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987) ("The Court ... cannot conclude from the statute or its legislative history that the Court has discretion to reduce either the number of claims upon which the forfeiture is sought or the amount of the forfeiture awards."); *see also* United States v. Hughes, 585 F.2d 284, 286 (7th Cir. 1978) (penalty provided under former 31 U.S.C. § 231 was mandatory).

12. 31 U.S.C. § 3729(a). *See also* United States ex rel. Smith v. Gilbert Realty Co., 840 F. Supp. 71, 72 (E.D. Mich. 1993) ("The key words are 'is liable' and 'not less than.' It seems plain that the Act requires a civil penalty each time the violation occurs.").

13. *See* S. Rep. No. 99-345 at 8 (discussing the 1986 amendments). *See also id.* at 17 ("The Committee reaffirms the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments.").

14. A defendant *might* be able to avoid the imposition of penalties by self-disclosing its false claims. Where a defendant makes such a disclosure in accordance with parameters set forth in the Act, "the court *may* assess *not less than* [double damages] . . . ." 31 U.S.C. § 3729(a) (emphasis added). *But see* United States ex rel. Falsetti v. Southern Bell Tel. and Tel. Co., 915 F. Supp. 308, 312 (N.D. Fla. 1996) (stating that "[b]y the omission of reference to the minimum mandatory $5,000 civil penalty, Congress meant that the exception would be a safe-haven for persons who uncover past violations and act promptly to disclose the same to Government investigators," thus suggesting that a qualifying self-disclosure would entirely preclude the imposition of penalties).

15. *See* United States v. Advance Tool Co., 902 F. Supp. 1011, 1018 (W.D. Mo. 1995), *aff'd*, 86 F.3d 1159 (8th Cir. 1996) (table) ("[T]he court rules that it lacks the discretion or inherent power under the FCA to award damages [including civil penalties] below the range set forth therein. However, in that civil penalties are indeed subject to constitutional restraints, this determination does not terminate the Court's inquiry as to the propriety of [the requested penalties] . . . .") (citation omitted).

16. In the case of *United States v. Greenberg*, 237 F. Supp. 439, 445 (S.D.N.Y. 1965), the Government apparently gave its consent for the court to award a number of penalties less than the number of false claims for which defendant had been found liable. Although the case involved 34 false claims, the Government offered three possible rationales for setting the number of penalties at 34, eight, or three, and asked that the court use its discretion in selecting one of the suggested approaches. The court awarded three forfeitures.

the number of penalties.[17] On defendant's appeal, the Fifth Circuit specifically noted that the Government had not filed a cross-appeal and thus could not be heard on the issue of penalties, and also stated that the Government had "tacitly" admitted that the district court had discretion to reduce the penalties.[18]

In any event, the district court in *Peterson*,[19] despite holding that the defendants had submitted 120 false claims, the court awarded only 50 penalties.[20] The court held that where double damages were only $31,606, the minimum $240,000 penalty award ($2,000 x 120) "would be unreasonable and not remotely related to both the actual losses and inexplicable damages incurred by the government."[21] To the extent *Peterson* can be read to suggest that, even in the absence of constitutional concerns, a court has discretion whether or not to award penalties, it has repeatedly been rejected by other courts.[22] Even defense counsel have admitted that arguments based on *Peterson* are "likely to fail in the face of the overwhelming case law to the contrary."[23] Thus, it is firmly established that the Act's penalties are mandatory.

B. Penalties must be awarded even when no damages can be proved

Likewise, it is beyond dispute that penalties must be awarded even where the Government has not proved any damages.[24] In fact, the imposition of penalties is especially appropriate in cases where the Government's injury cannot be quantified with the degree of certainty necessary to support a damage award. As the Supreme Court has recognized, the Government is injured by fraud, even where damages may be "difficult or impossible to ascertain."[25] The Act's penalty provision, like liquidated damages in

17. Peterson v. Weinberger, 370 F. Supp. 1259 (N.D. Tex. 1973), *aff'd*, 508 F.2d 45 (5th Cir. 1975).

18. 508 F.2d at 55.

19. 370 F. Supp. 1267.

20. *Id*.

21. 370 S. Supp. at 1267.

22. *See, e.g., Killough, Diamond,* and *Advance Tool, supra*.

23. Michael Waldman, "Damage Control": A Defendant's Approach to the Damage and Penalty Provisions of the False Claims Act, 21 Pub. Cont. L.J. 131, 158 (Winter 1992); *see also* Gilbert Realty, 840 F. Supp. at 72 ("Defendants admit ... that the *Peterson* case is a lone wolf, and that no other case supports the proposition that the statute provides discretion to award less than the minimum $5,000 in civil penalties per violation."). Had the *Peterson* court relied upon constitutional considerations in reaching its decision, the case might have been correctly decided. *See* United States v. Halper, 490 U.S. 435, 450, 109 S.Ct. 1892, 1902 (1989) (citing *Peterson* for the proposition that, in a constitutional review of penalties imposed under the Act, the district court would properly have discretion to determine "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment"). Interestingly, although the *Peterson* court did not invoke the Double Jeopardy Clause, the Fifth Circuit's opinion does indicate that defendants had previously been prosecuted criminally in connection with the same conduct. *See* 508 F.2d at 47 and nn.. 3 & 4.

24. *See, e.g.*, United States ex rel. Bettis v. Odebrecht Contractors, 393 F.3d 1321, 1326 (D.C. Cir. 2005); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the penalty."); *Advance Tool Co.*, 902 F. Supp. at 1017 ("[C]ivil penalties are recoverable under the FCA even in situations . . . where the United States has failed to show actual damages.").

25. Rex Trailer Co. v. United States, 350 U.S. 148, 153–54, 76 S. Ct. 219, 222 (1956) (where defendant misrepresented its eligibility to participate in veterans' program for purchase of surplus motor vehicles, Government was injured because defendant's conduct "precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation").

other contexts, performs the important function of providing some measure of recovery under these circumstances.[26]

The case of *Ab-Tech Construction, Inc. v. United States*,[27] provides an excellent example of this principle. In *Ab-Tech*, the contractor performed the work required under its contract, but had misrepresented its eligibility to participate in the Small Business Administration's 8(a) program, through which the contract was awarded. The court found that the Government did not suffer any recoverable damages, for it "got essentially what it paid for" in terms of contract performance.[28] Nevertheless, the Government was still injured in that, among other things, the defendant's misrepresentations caused the Government to pay out funds to a recipient it did not intend to benefit.[29]

As the court explained, such injuries are appropriately compensated by an award of penalties, which "are authorized by the False Claims Act to address the broad range of ancillary harms—harms apart from the fraud itself—that the Government may have suffered because of the deception practiced against it."[30] The penalties are intended to compensate the Government for the "costs of corruption."[31] Here, such costs included the added administrative burdens imposed on the Government agencies involved in looking into the contractor's conduct, the costs of the Department of Defense criminal investigation, grand jury investigation and criminal trial, and "most significantly, the societal cost associated with Ab-Tech's abuse of the section 8(a) program."[32] In recognition of the unquantifiable injuries sustained by the Government, the court set the penalty at the maximum $10,000 amount and awarded 22 penalties, for a total of $220,000. The court held that "even if the total amount demanded should exceed the Government's actual out-of-pocket costs, the figure would nevertheless be justified given that the Government is also due compensation for the very real, though largely unquantifiable, injury to the 8(a) program."[33]

Compensating the Government in cases involving such "unquantifiable" injuries is one of the most important functions of penalties under the Act, for in the absence of penalties, the Government would have no remedy at all. Thus, cases such as *Ab-Tech* illustrate why both parts of the "treble damages plus penalties" package of remedies are essential to fulfillment of the Act's purposes.

C. Courts have discretion to set the penalty amount within the statutory range

Although courts lack discretion to decide *whether* to assess a penalty for each violation of the Act, they do have discretion to determine *how much* of a penalty to impose.

26. *Id.*

27. 31 Fed. Cl. 429 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

28. *Id.* at 434.

29. *Id.* at 435.

30. *Id.* at 434–35.

31. *Id.* at 435 (quoting United States v. Halper, 490 U.S. 435, 450, 109 S. Ct. 1892, 1903 (1989)).

32. *Id.*

33. *Id.* at 435.

34. *See Hughes*, 585 F.2d at 286 (former 31 U.S.C. § 231 left the trial court "without discretion to alter the [$2,000] statutory amount").

Prior to 1986, courts were required to award a penalty of $2,000 for each violation of the Act.[34] The 1986 amendments, however, changed the penalty amount from a set sum to a range with a minimum and maximum dollar amount. Neither the amended statute itself nor the accompanying Senate Report provides any guidance as to the factors to be considered in determining where to fix the penalty in a given case. Accordingly, since 1986 courts possess discretion to determine the amount of the penalty within the statutory range.[35] Because discretion lies with the court, in the event of a jury trial, the court, not the jury, determines the number and amount of any penalties to be assessed.[36]

III. FACTORS BEARING ON THE AMOUNT OF PENALTY TO BE AWARDED IN A PARTICULAR CASE

A. Who knows?

In reviewing cases in which penalties were assessed under the Act, it is often impossible to determine what factors guided a court's discretion in determining the penalty amount. Several opinions decided shortly after the 1986 amendments simply announce the penalty amount, with little or no discussion. In the case of *Kelsoe v. Federal Crop Insurance Corporation*,[37] for example, the jury found that defendants had violated the Act by submitting false claims to the Federal Crop Insurance Corporation, and by entering into a conspiracy to submit those claims. The court awarded treble damages of $6,147 and three penalties against one pair of defendants, and treble damages of $63,600 and seven penalties against a second pair of defendants.[38] All of the penalties were set at $7,000, with the court providing no explanation whatsoever as to how it arrived at that amount.[39]

The court in the *Hill* case[40] was only slightly less laconic. That case involved false statements made in applications for federally guaranteed loans. The defendants had previously been criminally convicted for conspiring to file false statements, and the Government moved for summary judgment based on collateral estoppel.[41] In its complaint, the United States requested $30,000 in penalties, $10,000 on each of three counts.[42] In a lengthy summary judgment opinion, the court found the defendants liable under two counts of the complaint, awarding treble damages of $920,129 on

35. *See* United States v. Hill, 676 F. Supp. 1158, 1182 (N.D. Fla. 1987) ("The range in the amount of forfeitures [after the 1986 amendments] apparently reflects congressional intent to allow discretion in assessing forfeitures.").

36. *See* Cook County v. United States ex rel. Chandler, 538 U.S. 119, 132, 123 S. Ct. 1239, 1247 (2003). In fact, in order to avoid prejudicing the jury in their determination of (single) damages, plaintiffs are entitled to exclude from the jury any mention of the imposition of penalties. *See* United States v. Estate of Rogers, 2002 WL 32050124 at * 1 (E.D. Tenn. Jan. 16, 2002) (granting Government's motion *in limine*).

37. 724 F. Supp. 448 (E.D. Tex. 1988).

38. *Id.* at 454.

39. *Id.*

40. 676 F. Supp. 1158, 1182 (N.D. Fla. 1987)

41. 676 F. Supp. at 1161–62.

42. *Id.* at 1161.

one count and $767,416 on the other.[43] The court then held that the two defendants were jointly and severally liable for $10,000 in penalties (presumably awarding the statutory minimum of $5,000 for each of the two conspiracies proved).[44] As for where it came up with this amount, however, the court stated only that it was arrived at "[i]n view of the facts of this case."[45]

One reason for the *Kelsoe* and *Hill* courts' brevity on the topic of penalty amounts might have been that they were decided shortly after the 1986 amendments, when there was a lack of other judicial precedent to rely on. Even as more cases have appeared in this area, however, it remains relatively common for courts to assess penalties without articulating any reason for choosing a certain penalty amount.[46] Because they fail to identify any factors influencing the courts' exercise of discretion, these cases are of limited precedential value and provide little guidance to practitioners, except perhaps in a subsequent case involving very similar facts.

B. Nature of the defendant's conduct

Where courts have revealed their reasoning, the nature of the defendant's conduct giving rise to liability under the Act appears to be the most significant determining factor in arriving at a penalty amount. Conduct that is not unusually egregious may translate to a penalty in the lower part of the range, while more flagrant, clearly intentional violations warrant a penalty at or near the maximum. For example, in the case of *United States ex rel. Ervin and Assocs., Inc. v. Hamilton Securities Group, Inc.*,[47] the court explained that it was awarding the minimum penalty of $5,000 because liability was "predicated on a lesser degree of scienter—namely reckless disregard, rather than 'actual knowledge' or 'deliberate ignorance.' "[48] Similarly, in the case of *Lamb Engineering and Const. Co. v. United States*,[49] the court denied the Government's request for the maximum penalty and instead fixed the penalty at the $5,000 minimum.[50] Although the defendant construction contractor had submitted payment requests which falsely certified that its subcontractors had been paid, the court pointed out that "[t]he billings underlying the certification were not improper" and thus concluded that the facts were "not so egregious as to warrant the maximum."[51]

At the other end of the spectrum, in *UMC Electronics Co. v. United States*,[52] the court awarded the maximum penalty based on the fact that the defendant contractor

43. *Id.* at 1181–82.

44. *Id.* at 1182.

45. *Id.*

46. *See, e.g.*, Daff v. United States, 31 Fed. Cl. 682 (1994), *aff'd*, 78 F.3d 1566 (Fed. Cir. 1996) ($5,000); Pena v. United States Department of Agriculture, 811 F. Supp. 419 (E.D. Ark. 1992) ($5,000); United States v. Macomb Contracting Corp., 763 F. Supp. 272 (M.D. Tenn. 1990) ($10,000).

47. 370 F. Supp. 2d 18 (D.D.C. 2005).

48. *Id.* at 50.

49. 58 Fed. Cl. 106 (2003).

50. *Id.* at 112.

51. *Id.* at 112 n.4.

52. 43 Fed. Cl. 776 (1999), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001).

had knowingly attempted to charge the Government for costs it "knew it had not incurred and probably never will incur."[53] The contractor had included $223,500 worth of bogus costs in an equitable adjustment claim submitted to the Government after completion of the project.[54] Since the case involved only one false claim and the Government had not paid the claim, the Government did not seek treble damages, but only a single penalty.[55] The court found that, under the circumstances, the maximum penalty of $10,000 was warranted, describing it as a "modest amount."[56]

The case of *United States v. Bottini*,[57] likewise involved conduct which the court found to be "most opprobrious."[58] Specifically, the court found that the defendant had made two false applications for workers' compensation, claiming that he was injured on the job when he "did not in fact sustain any injury whatsoever as alleged in the [claim form]."[59] Despite its outrage at the defendant's behavior, the court chose not to award the maximum penalty, apparently finding it to be a mitigating factor that the defendant was married with two sons and "not wealthy."[60] The court split the difference and awarded two penalties of $7,500 each.[61] As *Bottini* illustrates, in addition to the defendant's conduct, courts may also consider the defendant's financial circumstances in determining an appropriate penalty amount.[62]

C. The government's costs of investigation and prosecution

Courts may also consider the Government's costs of detection, investigation and prosecution of the false claims action, and several courts have set the penalty amount at the minimum on the ground that the resulting total penalty would be sufficient to cover such costs. In *United States v. Stocker*,[63] for example, treble damages were $41,892. The court awarded 28 penalties of $5,000 each, for a total penalty of $140,000, holding

53. *Id.* at 821.

54. *Id.*

55. *Id.* at 820.

56. *Id.* at 821. *See also* Hays v. Hoffman, 325 F.3d 982, 993–94 (8th Cir. 2003) (on appeal of case involving false claims by nursing home to Medicaid, court reduced the number of false claims from 200 to 8, but allowed the maximum $10,000 penalty for each, "taking into account the district court's judgment that defendants engaged in serious misconduct"). *But see* United States v. Entin, 750 F. Supp. 512, 519–520 (S.D. Fl.. 1990) (in case involving misstatements made to obtain funds from Small Business Administration and treble damages of nearly $1.5 million, although court found that defendants' conduct was "calculated," "egregious," and "nothing short of an intentional looting of the Federal Treasury," court nevertheless awarded minimum $5,000 penalty with no discussion).

57. 19 F. Supp. 2d 632 (W.D. La. 1997), *aff'd*, 159 F.3d 1357 (5th Cir. 1998).

58. *Id.* at 641.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See also* United States v. Orrego, 2004 WL 1447954 *5 (E.D.N.Y. June 22, 2004) (where defendant prisoner filed false liens against judge, AUSA, and prison warden, court awarded $5,000 penalty based in part on the fact that defendant was "an inmate with limited resources").

63. 798 F. Supp. 531 (E.D. Wis. 1992).

that "this award should easily meet the Government's 'costs, delays and inconveniences occasioned by the fraudulent claims' in this case."[64]

There is no question that the Government's investigative and other costs are an appropriate factor for consideration in determining the penalty amount. As the Supreme Court has recognized, in cases under the Act, the Government's injury includes "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse."[65] In addition, as will be discussed in Part Three of this article, where multiple proceedings raise the possibility of double jeopardy concerns, proof of the Government's investigative and other costs may be relevant to show that the penalty amount is not "punishment," but is meant to be compensatory or remedial.[66] For purposes of the current discussion, however, it is important to note that where there is only one, civil proceeding, double jeopardy is not at issue and penalties should not be limited to the Government's costs. As the Supreme Court acknowledged in *Halper*, "Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive."[67]

Because neither *Stocker* nor *Augustine* involved parallel criminal proceedings, double jeopardy concerns were not implicated. Under these circumstances, although there is no error in *considering* investigative and other costs as one factor in determining penalties, a court should not *limit* penalties to these amounts, and *Stocker* and *Augustine* should not be read to impose such limits.[68]

D. Whether plaintiff has provided reasons in support of a higher penalty

Finally, as a penalty "practice pointer," it is worth noting that, even though a court making a penalty determination is free to rely on anything already in the record from the liability phase, several courts have refused to award more than the minimum penalty unless the Government specifically articulates a reason for doing so.[69] The court in *United States v. Boutte* even went so far as to hold that unless the plaintiff presented

64. *Id.* at 535–36 (quoting United States v. Bornstein, 423 U.S. 303, 315, 93 S.C. 523, 531 (1976)); *see also* United States ex rel. Augustine v. Century Health Svcs., 136 F. Supp. 2d 876, 895 (M.D. Tenn. 2000) ("The court will impose a fine of $5,000 per false claim for a total of $100,000. This sum should sufficiently cover the Government's costs for investigating and prosecuting this action.") (citations omitted).

65. *Halper*, 490 U.S. at 445, 109 S. Ct. at 1900.

66. *See id.*

67. 490 U.S. at 450, 109 S.Ct. at 1903.

68. *See Ab-Tech*, 31 Fed. Cl. at 434–35 (penalty award was justified even if it exceeded Government's actual out-of-pocket costs because Government was also entitled to compensation for unquantifiable injuries caused by defendants fraud, such as "societal costs" and harm to the integrity of the defrauded Government program).

69. *See, e.g.*, Augustine, 136 F. Supp. 2d at 895 ("Although the Government requested the maximum civil penalty of $10,000 be imposed for each false claim, it did not present any basis for its request. The court will impose a fine of $5,000 per false claim ..."); United States v. Fiedler, 756 F. Supp. 688, 694 (E.D.N.Y. 1990) (although United States requested court to set penalties at $10,000, court awarded only $5,000 for each violation, finding that the government "has not presented any reason why the highest fine is appropriate"); cf. United States v. Stella Perez, 839 F. Supp. 92, 98 (D.P.R. 1993), rev'd on other grounds, United States v. Rivera, 55 F.3d 703 (1st Cir. 1995) (court awarded $1.86 million in treble damages (after credits) and $5,000 for each of the 20 false claims, saying only that it saw "no particular reason for awarding the higher amount").

"evidence" in support of a higher amount, the court was "only authorized to assess a $5,000 fine" for each violation.[70]

To the extent *Boutte* suggests that the imposition of any penalty amount above the minimum must be supported by some sort of additional "evidence" other than the evidence supporting liability, it appears to be wrongly decided. First, although the court cited *Fliegler*, that court's explanation for awarding the minimum penalty was that the Government did not provide any "reason" why the maximum fine was appropriate, i.e., an argument in support of the highest fine. The *Fliegler* court did not hold that additional "evidence" was required. Second, as described above, numerous courts have awarded penalties higher than the minimum based on the facts underlying the finding of liability, without requiring the plaintiff to submit additional "evidence." In any event, as these cases illustrate, the relator's counsel or Government trial attorney who seeks the imposition of a penalty greater than the minimum amount would be well advised to articulate specific reasons in support of its request.[71]

E. *Virgin Islands Housing Authority*

The case of *United States ex rel. Virgin Islands Housing Authority v. Coastal General Construction Services Corporation*[72] provides an excellent wrap-up to a discussion of penalty amounts, touching on nearly all of the points raised above.[73] First, unlike many courts, the *Virgin Islands* court provided a complete and cogent explanation of the factors bearing on its assessment of penalties. Likewise, the Government provided a detailed argument justifying its request for the maximum penalty amount, possibly learning from its earlier experiences where the minimum penalty was granted due to lack of support for such a request. The factors cited by the Government touched on both the defendant's conduct and the unquantifiable injuries recognized in cases such as *Ab-Tech*: the defendant's bad faith inflation of costs right before a planned arbitration of the dispute, the public policy goal of deterring fraud against the Government program at issue, and the fact that defendant had made numerous false statements in support of its false claim.

The court correctly noted that it had "broad discretion" in determining the appropriate penalty amount. It then went on to consider the Government's suggested factors, but also added a few factors of its own based on other relevant matters in the record before it. Although noting that the Government had sustained no actual damages, the court properly recognized that the lack of damages did not preclude assessment of a penalty. The court also considered the "ancillary costs" of fraud which have been recognized by the Supreme Court, such as expenses incurred in "detection, inves-

70. United States v. Boutte, 907 F. Supp. 239, 242 (E.D. Tex. 1995), *aff'd*, 108 F.3d 332 (5th Cir. 1997).

71. Of course, merely articulating a basis for a penalty request does not guarantee it will be granted, but at least it will not be denied for lack of trying. *See, e.g.*, Abdelkhalik v. United States, 1996 WL 41234 at * 7 (N.D. Ill. Jan. 30, 1996) (where Government argued that penalty should be $7,500 because food stamp trafficking in which defendant had engaged was the most serious offense under the food stamp regulations, court nevertheless awarded minimum $5,000 penalty because it felt that Government had not presented any "aggravating circumstances").

72. 299 F. Supp. 2d 483 (D.V.I. 2004).

73. *See id.* at 489–90.

tigation, and litigation," but noted that the Government had not presented evidence of such costs. Finally, the court took into consideration that the defendant had already been incarcerated for the same conduct, and that, in connection with defendant's incarceration, the court had waived various fines and costs "due to [defendant's] inability to pay such costs." After "balancing" all of these factors, the court concluded that the minimum penalty was appropriate, and thus awarded $5,000 for each of the ten false claims submitted by the defendant.

In sum, the opinion in *Virgin Islands*, with its careful consideration and weighing of all the relevant factors, illustrates the opposite approach from opinions which simply announce a penalty amount without a word of explanation. If courts making future penalty determinations will align themselves closer to the *Virgin Islands* end of the spectrum, then practitioners and other interested parties will be able to increase their understanding of the factors influencing a court's discretion in determining the dollar amount of penalties imposed under the Act.

Lessons From the Frontlines

The Perfect Storm: How Patience, Perserverance, and Politics Led to the Passage of the Chicago False Claims Act

THE PERFECT STORM:
How Patience, Perserverance, And Politics Led To The Passage Of The Chicago False Claims Act*

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INTRODUCTION

The past year has seen the onset of the next generation of false claims/qui tam legislation—those ordinances attacking fraudulent practices at the local level. First, in November 2004, Chicago's City Council passed the Chicago False Claims Act to become the first major city to pass a false claims law. Then, in May 2005, Mayor Michael Bloomberg signed into law the New York City False Claims Act.

The Chicago False Claims Act is generally patterned after the federal False Claims Act (the "FCA") and its Illinois counterpart, the Whistleblower Reward and Protection Act (the "Illinois FCA"). The Chicago law also has the same intent as the federal and Illinois FCAs: to empower and protect private individuals who take the bold step of coming forward as whistleblowers.

However, because of the political realities that gave rise to its passage, the Chicago legislation differs from the existing federal and state laws in key ways. This includes both the political environment that shaped the legislative process and the shifting political dynamics that occurred during the legislative campaign. Understanding and adjusting to these political realities will help the Relators' Bar both secure effective anti-fraud legislation in other states and municipalities and make sure those laws are effectively used.

THE GENESIS OF THE CHICAGO ORDINANCE

Alderman Joe Moore, the primary sponsor of the Chicago False Claims Act, first conceived of a Chicago whistleblower bill almost two years before the final ordinance was passed. Moore, who has spent nearly fifteen years on the Chicago City Council, is a highly regarded independent, reform-minded Democrat. The rest of the Council is made up of an "insider" Democrat (and one Republican) aligned with Mayor Richard M. Daley and "outsider" independent Democrats who are not part of the Mayor's inner circle.

Years of Democratic Party Machine–run politics has produced the political reality that the Mayor still exerts overwhelming influence on the Council's composition and leadership, and correspondingly, the Council's legislation, even though Chicago is governed under a weak-Mayor/strong-Council construct. As an independent, Moore

* If only the Chicago Cubs could have such good fortune.

+ The author wishes to thank Alderman Joe Moore for his insights for this article, as well as his dedication to getting the Chicago FCA passed. The author also would like to thank BethAnne Yeager for her invaluable support and assistance with this article.

has only limited ability to influence the legislative agenda of a Council that is closely aligned with the Mayor's Office.

In February 2004, Moore introduced an ordinance that contained both an anti-retaliation provision and monetary incentives for blowing the whistle on fraud and abuse of City monies. The Mayor's Office indicated that it was unwilling to support any proposed legislation that allowed for monetary incentives to whistleblowers; instead, offering a "compromise" bill that only contained a whistleblower protection provision. Moore rejected this compromise as too weak. Notwithstanding the persistence of its proponents, without the backing of the Mayor or the Council leadership, Moore's bill was quickly relegated to the bottom of the Council's legislative agenda.

However, in late 2004, several events converged to set up the opportunity to pass a comprehensive False Claims Act: media exposure of a scandal involving private contractors with political connections bilking the City of millions of dollars, an embarrassed Mayor's Office motivated to support reform, the perseverance of Moore and others advocating anti-fraud legislation, and the passing of the Chicago budget for Fiscal Year 2005.

According to a January 2004 *Chicago Sun-Times* report, the City was paying up to $94 an hour for private trucks that often sat idle. Known as the "Hired Trucks scandal," the *Sun Times* reports tied some of the trucking companies to officials in Mayor Daley's administration. A federal investigation ensued, resulting in criminal charges and convictions. Interestingly, at the end of June 2005, another report indicated that one of the Aldermen was related to a trucking firm that received more than a million dollars from the City's Hired Trucks Program.

The Hired Trucks scandal prompted—to say the least—the Mayor's office to show that his administration was serious about uncovering and cleaning up fraud and abuse involving city contracts. One avenue was for Mayor Daley to publicly endorse the idea of a whistleblower statute. However, Moore and other proponents saw the scandal as a unique opportunity to push not only for a strong whistleblower protection ordinance but also a false claims/*qui tam* law.

Their position was strengthened when, in November 2004, as the City Council was preparing to vote on the Mayor's proposed 2005 City Budget, some Council members voiced dissension precipitated by the reports of the waste of city monies. The Mayor's office contacted Moore and agreed to co-sponsor a comprehensive Chicago False Claims Act, which included both whistleblower and *qui tam* provisions. Within days, the ordinance passed unanimously out of the Budget Committee and was on the Council floor for a passing vote the day after that. The law was passed without debate, without any committee hearings or testimony, and with no legislative record.

The passage of the Chicago False Claims Act is a prime example of how legislative efforts must draw from, and even exploit, political circumstances to succeed. In Chicago, this led to the passage of a potentially effective *qui tam* law that will go a long way in exposing and eliminating the seamier side of the way private companies transact business with the City of Chicago.

A PRIMER ON THE CHICAGO FALSE CLAIMS ACT

The Chicago False Claims Act has three components: Two chapters added to the Municipal Code of Chicago (Chapter 1-21, "False Statements," and Chapter 1-22, "False Claims") and an amendment adding a new section on "Whistle blower protection," section 2-152-171, to an entirely different Chapter (Chapter 2-152).

The False Claims part, Chapter 1-22, is the most recognizable to relators' counsel as it closely follows the Illinois' FCA, known as the Whistleblower Reward and Protection Act,[1] which, in turn, closely follows the federal FCA.[2] The definition of "false claim" is the same,[3] as are the definitions of "claim," "knowing" and "knowingly."[4] "Investigation" is the same under both the Illinois and Chicago versions.[5] And, the penalties are the same.[6] However, neither the Chicago nor Illinois laws followed the federal act's reduced penalty for self-disclosure.[7]

Also familiar to relators' counsel are the *qui tam* provisions. A private action may be brought in the name of the City of Chicago, upon the filing the complaint *in camera* and under seal, and serving the city attorney (known as Corporation Counsel) a copy of the complaint and a written disclosure statement.[8] The city initially has sixty days in which to decide to intervene and proceed or decline, and the court may extend that time for "good cause."[9]

The rights of the *qui tam* plaintiff, or the "relator," are also the same, including the percentage of the proceeds recovered, and an award of reasonable expenses, plus attorneys' fees and costs.[10] The prohibition against cases which are based on public disclosures unless the *qui tam* plaintiff is the original source is also the same.[11] Like the federal and state FCA laws, Chicago's ordinance contains a six-year statue of limitations, unless the responsible government official knew or should have known about the conduct, in which case it is a three-year statute of limitations, with a ten-year statute of repose.[12] The preponderance burden of proof also follows the state and federal FCAs.[13]

Conversely, Chicago's False Claims provision diverges from the Illinois and federal FCAs in regard to discovery before a civil action is filed. Under the federal and Illinois law, government investigators' can obtain discovery using CIDs, or civil investigative

1. 740 ILCS 175.

2. 31 U.S.C. §§ 3729–3733

3. *Compare* Municipal Code of Chicago section 1-22-020(1)-(7)4 *with* 740 ILCS 175/3(a)(1)–(7) *and* 31 U.S.C. § 3729(a)(1)-(7).

4. *Compare* Chicago Code 1-22-010 *with* 740 ILCS 175/3(b), (c) *and* 31 U.S.C. § 3729(b), (c).

5. *Compare* Chicago Code 1-22-010 *with* 740 ILCS 175/2(d).

6. *Compare* Chicago Code 1-22-020 *with* 740 ILCS 175/3(a) *and* 31 U.S.C. § 3729(a)).

7. 31 U.S.C. § 3729(a).

8. *See* Chicago Code 1-22-030(b)(1), (2); *see also* 740 ILCS 175/4(b); 31 U.S.C. § 3730(b).

9. *See* Chicago Code 1-22-030(b)(2)–(4); *see also* 740 ILCS 175/4(b)(2)-(4); 31 U.S.C. § 3730(b)(2)–(4).

10. *See* Chicago Code 1-22-030(d), (e); *see also* 740 ILCS 175/4(c), (d); 31 U.S.C. § 3730(c), (d).

11. *See* Chicago Code 1-22-030(f); *see also* 740 ILCS 175/4(e); 31 U.S.C. § 3730(e).

12. *See* Chicago Code 1-22-040(a); *see also* 740 ILCS 175/5(a); 31 U.S.C. § 3731(a).

13. *See* Chicago Code 1-22-040; *see also* 740 ILCS 175/5; 31 U.S.C. § 3731.

demands.[14] In Chicago, in comparison, the Corporation Counsel's discovery procedure is via subpoenas.[15] Furthermore, the return on a CID is twenty days.[16] If the putative defendant fails to respond, the prosecutor files a petition for an order from the court for enforcement of the CID.[17] Under the Chicago legislation, the Corporation Counsel sets the date of return, not less than ten days after the service of the subpoena; however, the putative defendant must move to modify or set aside the subpoena by the date of return or within twenty days after service if the date of return is more than twenty days out.[18] And, even though the corporation counsel may petition the court for an order of the enforcement of the subpoena,[19] a subpoena, unlike a CID, is self-enforcing. In other words, the failure to respond to a subpoena automatically results in an order holding the respondent in contempt of court. How this will actually work given that the proceedings are to be under seal is a question. Likely, the Corporation Counsel will have to initiate an enforcement action for an order to show cause.

The False Claims chapter also diverges from the Illinois and federal FCAs over what the prosecutor can do with the material obtained through pre-filing discovery. Under the federal and Illinois statutes, only an investigator or other officer or employee from the Department of Justice under the federal statute or the Illinois Attorney General or Department of State Police under the State statute may examine the information obtained.[20] In contrast, the Chicago Corporation Counsel has broader authority and may share the material with those the counsel "determined necessary . . . subject to the conditions imposed by him or her for effective enforcement of the laws of this city."[21] It will be interesting to see if the Corporation Counsel exercises this power, which appears to include sharing discovery with the *qui tam* plaintiff and/or *qui tam* counsel.

Of particular interest to relators and their counsel is Chicago's whistleblower protection provision, which, although part of the Chicago False Claims Act, is a separate provision from the False Claims chapter. The anti-retaliation ordinance,[22] provides that:

> No person shall take any retaliatory action against an employee because the employee does any of the following: (1) Discloses or threatens to disclose to a supervisor or to a public body an activity, policy, or practice of any officer, employee, or city contractor that the employee reasonably believes evidences: (i) an unlawful use of funds, unlawful use of authority, or other unlawful conduct that poses a substantial and specific danger to public health or safety by any officer, employee

14. 740 ILCS 175/5; 31 U.S.C. § 3733.

15. Chicago Code 1-22-050.

16. 740 ILCS 175/6(a)(2)(E); 31 U.S.C. § 3733(a)(2)(E).

17. 740 ILCS 175/6(a)(2)(E); 31 U.S.C. § 3733(a)(2)(E).

18. Chicago Code 1-22-050(a)(2)(C), (F).

19. *See id.* at 1-22-050(j)(1)

20. 740 ILCS 175/6(i)(2)(C); 31 U.S.C. § 3733(i)(2)(C).

21. Chicago Code 1-22-050(i)(2).

22. Chicago Code 2-152-171

> or city contractor; or (ii) any other violation of a law, rule, or regulation by any officer, employee, or city contractor; or
>
> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any activity, policy, or practice described in subsection (b)(1).[23]

Thus, the Chicago whistleblower provision specifies the protected activity that must precipitate the retaliation, in contrast with the federal and Illinois acts which prohibit retaliation "because of lawful acts done by the employee…in furtherance of an action under this action."[24] Similarly, Chicago defines the retaliatory conduct—"reprimand, discharge, suspension, demotion, or denial of promotion or transfer."[25] The federal and Illinois legislation broadens the potentially retaliatory conduct to add "any other manner [of discrimination] in the terms and conditions of employment by his or her employer."[26] Practically, this may be a distinction without a difference if the courts follow the interpretation of the Illinois and federal *qui tam* whistleblower provisions that have adopted the Title VII standard for retaliation, that there must be a tangible adverse employment action.

Chicago also limits the recovery for the whistleblower to injunctive relief, reinstatement with full benefits and seniority, and two times back pay.[27] Under Illinois and federal law, the whistleblower "shall be entitled to all relief to make the employee whole," adding to Chicago's list "interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including [the ever-important] litigation costs and reasonable attorneys' fees."[28]

The fact that *qui tam* relators cannot recover costs and attorneys' fees in Chicago significantly weakens the whistleblower protection. Also, where there are *qui tam* cases that include retaliation allegations, there will be challenges to attorneys' fees and costs to split them between those recoverable under the false claims causes of action and those not under the retaliation claim. This could have been avoided had the Chicago whistleblower protection provision more closely followed the Illinois and federal false claims models as the False Claims chapter did.

The whistleblower provision also does not set forth a statute of limitations, and because it is an entirely separate provision from the False Claims Chapter, it might be very well interpreted to follow the recent Supreme Court decision which held that claims under 3730(h) are governed by the analogous state statute of limitations.[29]

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23. *Id.* at (b).

24. 740 ILCS 175/4(g); 31 U.S.C. § 3730(h).

25. Municipal Code of Chicago Section 2-152-171(a)(2).

26. 740 ILCS 175/4(g); 31 U.S.C. § 3730(h).

27. Chicago Code 2-152-171(c).

28. 740 ILCS 175/4(g); 31 U.S.C. § 3730(h).

29. *See* Graham County Soil and Water Conservation Dist. v. United States *ex rel.* Wilson, No. 04-169, slip op. at 1 (U.S. June 20, 2005).

The final difference between the Chicago False Claims Act and the federal and state FCAs is Chapter 1-21. This Chapter gives exclusive power to the Chicago Corporation Counsel to prosecute any person who knowingly makes false statements of material fact to the City, and any person who aids and abets the making of those false statements.[30] The civil penalties are not less than $500 and not more than $1000, as well as up to three times the amount of damages the City sustains, plus the City's litigation and collection costs and attorney's fees. There is no private right of action. Only the Corporation Counsel can prosecute, by instituting an action with the department of administrative hearings.[31]

Even though there is overlap with the False Claim Chapter provision covering false statements,[32] Chapter 1-21 is broader. Indeed, it reaches false statements that are not necessarily tied to fraudulent claims for payment, covering false statements "of material fact made in connection with an application, report, affidavit, oath, or attestation, including a statement of material fact made in connection with a bid, proposal, contract or economic disclosure statement or affidavit." In addition, those persons who aid and abet in these statements are also subject to prosecution.

It is apparent that Chapter 1-21 was enacted to target corruption involving false statements that may not rise to the level of a false claim because they are not made in connection with the payment or receipt of money but rather are statements made in connection with making an application or a contract. Such statements were an aspect of the Hired Trucks scandal, and some involved were eventually charged with perjury.

NOW THAT THERE IS A LAW, HOW DO WE MAKE SURE IT IS EFFECTIVE

The effectiveness of the Chicago False Claims Acts will, of course, depend upon how it is implemented by the Corporation Counsel's Office and interpreted by the courts.

One open question remains whether it will be applied to conduct which occurred prior to passage. There is no express language in the Chicago FCA other than the standard, "This ordinance shall be in full force and effect from and after its passage and publication." Nor, as just noted, is there any clear indication from the City Council because there is no legislative history leading to the passage of the law.

Under federal law, in the absence of such clear intent, there is a presumption against retroactive legislation. Since the Chicago FCA follows the federal FCA, a court may very well look to the Supreme Court's decision, *Hughes Aircraft Co. v. United States ex rel. Schumer*,[33] which precluded retroactive application of the jurisdictional bar provision in the 1986 amendments to the federal FCA because it affected the parties' substantive, rather than procedural rights.

30. Chicago Code 1-21-1010 and 1-21-020.

31. Chicago Code 1-21-030.

32. Chicago Code 1-22-020(2)

33. 520 U.S. 939, 117 S. Ct. 1871 (1997).

Similarly, the Chicago FCA, although it addresses unlawful conduct—fraud—the increased penalties in the FCA substantively changes the defendant's rights. Just as the Supreme Court held that the 1991 amendments to the Civil Rights Act which added compensatory and punitive damages would not apply retroactively,[34] in the absence of legislative intent, Illinois courts may limit the reach of the Chicago FCA to conduct occurring after the date of the Act. The net effect will be to carve out all such fraud against the City occurring before November 2005, which would include false payments made in the Hired Trucks scandal. Of course, given the absence of legislative history, there is no indication that the City Council intended to have federal or Illinois case law apply to the Chicago ordinance—although the close patterning of the laws is a persuasive sign that case law interpreting the federal law should be followed for the Chicago FCA.

The Chicago FCA will face other challenges to its effective implementation. A significant potential obstacle is the lack of any express implementation process written into the law.

The Chicago ordinance is silent as to how a filed *qui tam* case gets processed and investigated by the Chicago Corporation Counsel Office. This leaves open the possibility that cases could languish in the Corporation Counsel's office, just as some state and federal cases do under the sixty-day-plus-repeated-extensions mechanism built into the federal and Illinois laws.

Another potential problem area is the lack of any public reporting requirement, such as the type included in the New York City law.[35] New York's built-in monitoring would have worked well in Chicago as a check on languishing cases, much as Senator Grassley's current inquiry into the current administration's declination of false claims cases. Without a reporting requirement, there is no oversight, no check and balance on the impact of political influences on the Corporation Counsel, and no easy way to assess the effectiveness of the Chicago False Claims Act in rooting out fraud.

How can Chicago best address these implementation problems? One solution is for the City Council to amend the Chicago FCA. However, if those ordinances are amended, they will be open to further, possibly unfavorable, amendments.

Another option would be an executive order. The Mayor can set policy for the city via executive order. Yet, subsequent administrations can change such policy by issuing new executive orders.

Perhaps the quickest and easiest path would be an internal policy issued by the Corporation Counsel. Under this scenario, it will be up to the relators' bar and the proponents of the ordinance to encourage the Corporation Counsel's office to dedicate one or more attorneys to false claims cases so that they can quickly become at ease with the legislative scheme, as currently exists in the more effective U.S. Attorneys' offices. Of course, the political reality in Chicago is that whatever process is adopted, and whatever form it takes, it will have to be done with the imprimatur of the Mayor's Office.

34. *See Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994).

35. *See* New York City False Claims Act, Int. No. 630-2005 Section 7-808.

CONCLUSION

The new Chicago False Claims Act has great potential to be an effective and powerful anti-fraud tool, but only if it is used. The Relators Bar should heed the advice that precinct captains used to give to voters in Chicago—use it early and often.

In the Spotlight

Applying the False Claims Act to Commercial IT Procurements

Editor's Note: While this article is at times critical of the False Claims Act, it does an excellent job of highlighting the utility of the Act in uncovering false claims in the growing IT procurement approval process.

APPLYING THE FALSE CLAIMS ACT TO COMMERCIAL IT PROCUREMENTS[A1]

Michael J. Davidson[a1]

I. INTRODUCTION

For the past decade, the federal acquisition system has been the subject of significant reform initiatives. Most notable among these reforms have been the Federal Acquisition Streamlining Act (FASA) of 1994[1] and the Clinger-Cohen Act of 1996.[2] Many of these initiatives have eliminated or reduced several of the systemic safeguards against procurement fraud. For commercial item procurements in particular, acquisition reform has eliminated or reduced the transparency of full and open competition, certifications concerning the eligibility and responsibility of contractors and their principals, and provisions of such prophylactic laws as the Anti-Kickback Act[3] and the prohibited employment statute,[4] among others. Coupled with the reduction of systemic protections has been the gradual reduction of governmental resources devoted to combating procurement fraud.[5]

Standing like a rock in the tide of modern acquisition reform has been the False Claims Act (FCA), a Civil War–era defense procurement fraud statute that Congress significantly strengthened in 1986, and that has steadily evolved into the Government's primary weapon to confront fraud against the United States in almost any form. With its large pool of potential *qui tam* relators (or whistleblowers), the FCA enjoys a ready-made investigative resource that partially compensates for the loss of governmental resources. Largely unscathed by acquisition reform, the FCA poses a significant business risk to the large body of commercial information technology (IT) vendors now entering the federal marketplace.

A1. This article originally appeared in the Fall 2004 issue of the *Public Contract Law Journal. See* Michael J. Davidson, *Applying the False Claims Act to Commercial IT Procurement*, 34 Pub. Cont. L.J. 25 (Fall 2004). TAFEF has received permission to republish this article.

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1. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

2. Pub. L. No. 104-106, 110 Stat. 679 (1996).

3. 41 U.S.C. § 57(d) (2000).

4. 10 U.S.C. § 2408 (2000).

5. *See, e.g.*, Richard J. Bednar, *The Fourteenth Major Frank B. Creekmore Lecture*, 175 MIL. L. REV. 286, 291 (2003) ("[A]lmost all of our investigative resources at the federal level are now being devoted not to procurement fraud, but to chasing the terrorists—to the anti-terrorist campaign"); *id.* at 296 (noting that the once-robust Army Procurement Fraud Division was being "squeezed down to a branch again because of the impetus to move people to the war fighters and to size down the 'overhead' and the number of lawyers devoted to these activities"); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 629 (2001) ("over the last decade, as a by-product of aggressive reform of the federal procurement process, oversight of government spending—both internal and external—has plummeted"). Between 1990 and 1999, "'accounting and budget' personnel within the [federal] acquisition workforce" decreased by 63 percent; staffing for the Defense Contract Audit Agency decreased by 44 percent, and "the number of 'quality assurance, inspection, and grading' personnel" decreased by 57 percent. *Id.* at 671 n.146.

This article will examine the competing philosophies behind, and the application of, both the FCA and acquisition reform laws and regulations affecting commercial item procurements. Further, the article will examine the potential application of the FCA to commercial IT procurements.

II. TWO COMPETING PHILOSOPHIES?

A. The False Claims Act

Originally enacted during the Civil War in response to rampant fraud being committed by defense contractors, the False Claims Act,[6] is now being used effectively by the United States and *qui tam* relators to combat a wide range of frauds against the United States. The FCA has been used to address allegations of fraud against the United States not only in defense procurement, but also in health care,[7] banking,[8] the postal service,[9] natural resources,[10] realty services,[11] and the Federal Food Stamp Program,[12] among others.

Generally, the FCA imposes civil liability on those who knowingly present, cause to be presented, or conspire to present a false or fraudulent claim to the United States; or on those who knowingly make or use false statements to get a false or fraudulent claim paid.[13] The Government need only prove its case by a preponderance of the evidence.[14] Further, the United States must show only that the defendant acted knowingly, defined by the FCA as either actual knowledge or the lesser forms of scienter: acting in deliberate ignorance or in reckless disregard of the truth, or falsifying certain information.[15] No specific intent to defraud is required.[16] However, mere negligence, inadvertence, or mistake will not support FCA liability.[17] A defendant found liable under the FCA is subject to both treble damages and penalties.[18]

6. False Claims Amendments Act of 1986, 31 U.S.C. §§ 3729–3733 (2000) ("The False Clams Act was adopted . . . in order to combat rampant fraud in Civil War defense contracts.").

7. Jerry Seper, *Justice Recovers $1 Billion in Frauds*, WASH. TIMES, Dec. 19, 2002, at A4 ("Health care fraud accounted for the majority of recoveries, totaling more than $890 million.").

8. *See, e.g.*, United States v. First Nat'l Bank of Cicero, 957 F.2d 1362 (7th Cir. 1992); United States *ex rel.* S. Prawer v. Fleet Bank of Maine, 63 F. Supp. 2d 59 (D. Me. 1998).

9. *See, e.g.*, United States *ex rel.* Holmes v. Consumer Ins. Group, 318 F.3d 1199 (10th Cir. 2003) (company allegedly committed fraud in order to pay bulk mailing rates rather than the more expensive per pound rate).

10. United States *ex rel.* Johnson v. Shell Oil Co., 34 F. Supp. 2d 429, 432 (E.D. Tex. 1998) (FCA case against oil companies "in connection with reporting the value of oil produced on federal and Indian leases and paying royalties for the oil produced").

11. United States v. Bald Eagle Realty, 1 F. Supp. 2d 1311, 1316 (D. Utah 1998); *see also* United States v. De Witt, 265 F.2d 393 (5th Cir. 1959).

12. Brooks v. United States, 64 F.3d 251 (7th Cir. 1995).

13. 31 U.S.C. § 3729(a)(1)–(3) (2000); *see also* United States v. Medica-Rents, Inc., 285 F. Supp. 2d 742, 768–69 (N.D. Tex. 2003). Other less common bases for an FCA violation are contained at 31 U.S.C. § 3729(a)(4)–(7).

14. 31 U.S.C. § 3731(c) (2003); *see also Brooks*, 64 F.3d at 255.

15. 31 U.S.C. § 3729(b) (2000).

16. *Id.* ("no proof of specific intent to defraud is required").

17. United States v. United Techs. Corp., 51 F. Supp. 2d 167, 199 (D. Conn. 1999) ("actions were negligent, inadvertent or a mistake, and, therefore, not actionable under the FCA").

18. 31 U.S.C. § 3729(a) (2000).

The purpose of the FCA is "to combat and deter fraud" and to make the United States "completely whole" for the results of such fraud.[19] Congress intended that the FCA be applied broadly. For example, Congress extended the definition of a "person" so that the FCA's coverage would have a broad application.[20] Also, Congress defined a claim expansively to include "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, of if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."[21] Further, courts have acknowledged the FCA's broad reach. In *United States v. Neifert-White Co.*,[22] the Supreme Court held that the FCA "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money."[23]

B. Commercial Item Procurements

As with the FCA, Congress also intended to give a broad application to the relaxed laws and regulations that govern commercial item procurements; and Congress has clearly expressed its preference for commercial item procurements.[24] Further, the definition of a commercial item is expansive, applying not only to goods, as the term implies, but to services as well.[25] As long as the item "is of a type customarily used by the general public or by non-governmental entities," the agencies are to treat it as a commercial item, even though it is not actually being sold commercially, and despite the fact that the United States may be the item's first purchaser.[26] The definition also includes certain items that have evolved technologically from commercial items, "modified" commercial items, and privately developed nondevelopmental items that have been sold competitively to state and local Governments.[27] As an illustration of the breadth of the commercial item definition, the Air Force procured its Atlas and Delta space launch

19. United States *ex rel.* Roby v. Boeing Co., 302 F.3d 637, 645–46 (6th Cir. 2002).

20. S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

21. 31 U.S.C. § 3729(c) (2000).

22. 390 U.S. 228 (1968).

23. *Id.* at 233; *see also* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999) ("The phrase 'false or fraudulent claim' in the [FCA] should be construed broadly."); United States v. Inc. Vill. of Island Park, 888 F. Supp. 419, 439 (E.D.N.Y. 1995) ("The provisions of the False Claims Act are to be read broadly and 'reach[ ] beyond claims which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.'") (citation omitted).

24. 10 U.S.C. § 2377 (2000); *see also* FAR 12.000 ("implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act"); FAR 12.101.

25. *See* 41 U.S.C. § 403(12) (2000); FAR 2.101; JOHN CIBINIC & RALPH C. NASH, FORMATION OF GOVERNMENT CONTRACTS 971 (1998) (commercial items include "both commercial supplies and commercial services").

26. FAR 2.101 (emphasis added); CIBINIC & NASH, *supra* note 25, at 972. The item also must have been "sold, leased or licensed to the general public" or offered for such. FAR 2.101.

27. FAR *2.101*.

vehicles, with attendant launch services, as commercial items.[28] The determination as to "whether a product or service is a commercial item is largely within the discretion of the contracting agency" and the General Accounting Office (GAO) will not disturb that decision "unless it is shown to be unreasonable."[29]

Commercial item procurements have increased exponentially in the wake of the acquisition reform movement. Between fiscal year (FY) 1997 and FY 2001, "government wide use of part 12 procedures increased by 148 percent."[30] Additionally, the use of another method for purchasing commercial items, the General Service Administration's (GSA's) Multiple Award Schedules, has tripled during the same time period.[31] Purchases of information technology were major contributors to the popularity of GSA's schedules contracts.[32]

Congress had a completely different focus with respect to commercial item procurements than it did with the FCA. Unlike with the FCA, the emphasis of commercial item procurements is on efficiency, responsiveness, and cost savings,[33] with a concomitant de-emphasis on protecting the integrity of the procurement system.

As part of the reform effort to encourage commercial item procurements, numerous systemic safeguards have been waived. Generally, commercial items need not be subjected to government inspection and testing prior to acceptance; instead, the Government "shall rely on contractor's existing quality assurance systems as a substitute."[34] Further, unless a contract modification converts a commercial item into a noncommer-

28. Gregory H. McClure, *The Application of the Prompt Payment Act to Commercial Item Acquisitions: Contractors Are Not Entitled to Interest on Late Commercial Interim Payments*, 29 PUB. CONT. L.J. 269, 271 (2000). Additionally, the Air Force treated its "Evolved Expendable Launch Vehicle Program [as] a FAR Part 12 commercial procurement." *Id.*

29. Aalco Forwarding, Inc., Comp. Gen. B-277241.8, B-227241.9, Oct. 21, 1997, 97-2 CPD ¶ 110; *see also* Coherent, Inc., Comp. Gen. B-270998, May 7, 1996, 96-1 CPD ¶ 214.

30. GENERAL ACCOUNTING OFFICE, *FEDERAL PROCUREMENT: SPENDING AND WORKFORCE TRENDS, REPORT TO THE COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, AND THE COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE, GAO-03-443 18 (2003)* [hereinafter GAO-03-443], *available at* http://www.gao.gov/new.items/d03443.pdf.

31. *Id.* at 3.

32. *Id.* ("The growth was driven largely by purchases of information technology and professional, administrative, and management support services.").

33. *See* 41 U.S.C. § 253(g)(1)(B) (2000) (authorizing simplified acquisition procedures (SAP) for property and services not exceeding $5 million "[i]n order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors"); 41 U.S.C. § 427(a)(2) (2000); GENERAL ACCOUNTING OFFICE, *CONTRACT MANAGEMENT: BENEFITS OF SIMPLIFIED ACQUISITION TEST PROCEDURES NOT CLEARLY DEMONSTRATED, REPORT TO CONGRESSIONAL COMMITTEES, GAO-01-517 2 (2001)* [hereinafter GAO-01-517] (Congress authorized simplified acquisition procedures for commercial item procurements not exceeding $5 million, "maximizing efficiency and economy and minimizing burden and administrative costs for both the government and industry"); *cf.* Stephen M. Daniels, *Why We Should Be Concerned About the Movement Toward Procurement Reform*, ARMY LAW., Mar. 1997, at 4–5 (the traditional guiding principles of the federal procurement system "have been relegated to secondary importance" and "we now care far more about different values—speed and ease of conducting procurements . . . The ongoing reform is geared to increasing efficiency, speed, and freedom for contracting officials"); GAO-03-443, *supra* note 30, at 17 ("Many procurement reform advocates have recommended agencies purchase commercial items to save money and reduce acquisition time . . .").

34. FAR 12.208 ("unless customary market practices for the commercial item being acquired include in-process inspection," any such "in-process inspections by the Government shall be conducted in a manner consistent with commercial practice"). The Government may inspect, and reject, any item tendered for acceptance. FAR 12.402(a), 52.212-4(a).

cial one, a contracting officer (CO) may not "require submission of cost or pricing data to support any action," to include contracts, subcontracts, or contract modifications.[35]

The applicability of several laws has been either waived or modified for contractors[36] and subcontractors.[37] For example, the requirement that prime contracts contain a provision obligating the contractor to institute procedures to prevent and detect violations of the Anti-Kickback Act[38] does not apply to contracts for commercial items.[39] The Government's right to audit the contractor's books and records for purposes of determining whether an Anti-Kickback Act violation has occurred, similarly, does not apply.[40] Further, the applicability of the Truth In Negotiations Act has been sharply curbed for commercial item acquisitions.[41] Department of Defense contracts also are affected. Usually, a defense contractor may not employ persons who were convicted of fraud-related felonies in certain positions of responsibility.[42] This provision, however, does not apply to commercial items.[43]

For procurements below the SAP threshold of $100,000, the requirement that a commercial item contractor must certify that it or its principals are not presently suspended, debarred, or otherwise ineligible for award; that within the preceding three years they have not had a fraud-related criminal conviction or civil judgment; or that they are not currently under indictment or civilly charged for fraud-related conduct is waived.[44] This is a significant omission because the most effective way to enforce such

35. FAR 15.403-1(b)(3), (c)(3). However, "to support a determination of price reasonableness or cost realism," the CO may still require some other form of information. FAR 15.403-1(b); *see also* FAR 15.403-3(a)(1) (CO still "responsible for obtaining information that is adequate for evaluating the reasonableness of the price or determining cost realism"). FAR 15.403-3 admonishes the CO not to "obtain more information than is necessary" and to attempt first to obtain the requisite information from sources other than the contractor. FAR 15.403-3(a)(1). The relaxation of this requirement has not been without problems. After reviewing 145 contract actions awarded in FY1998 and FY1999, the Department of Defense Inspector General's Office found that COs neglected to obtain requisite data in 32 percent of the actions and that "price analysis documentation did not support price reasonableness in eighty-six percent (124) of the actions reviewed." Major John Siemietkowski et al., Commercial Item Buys Still Lacking, in Contract and Fiscal Law Developments of 2001—The Year in Review, 2002 ARMY LAW. 1, 129 (2002).

36. FAR 12.503 ("The following laws are not applicable to Executive agency contracts for the acquisition of commercial items . . .").

37. FAR 12.504 ("The following are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components at any tier . . .").

38. 41 U.S.C. §§ 51–58 (2000).

39. 41 U.S.C. § 57(d) (2001); FAR 12.503(b)(2). This provision was designed to encourage contractors to detect and eliminate kickbacks by instituting such devices as educational programs, company ethics policies, applicant screening procedures, and reporting procedures. H. REP. NO. 99- 964, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5976.

40. 41 U.S.C. § 58 (2001) ("This section does not apply with respect to a prime contract for the acquisition of commercial items"); FAR 12.503(b)(2).

41. FAR 12.503(c)(2).

42. 10 U.S.C. § 2408 (2001); DFARS 252.203-7001. A defense contractor or subcontractor who knowingly violates this employment restriction is subject to a criminal fine of not more than $500,000. 10 U.S.C. § 2408(b).

43. DFARS 212.503(a)(viii); 10 U.S.C. § 2408(b)(4)(B).

44. FAR 12.301(b)(2), 52.212-3(h).

administrative action is through a certification; the falsification of such certification is subject to criminal prosecution[45] and FCA liability[46] and may serve as the basis for invalidating future contract awards.[47]

Absent the certification, the CO is limited to identifying debarred, suspended, or otherwise ineligible entities or individuals through the GSA's List of Parties Excluded from Federal Procurement and Nonprocurement Programs.[48] However the GSA list does not include those individuals convicted, under indictment, or found civilly liable but not yet reported to a federal agency debarring authority. Further, absent such a certification, a CO would have difficulty determining that an otherwise ineligible entity has changed its name or replaced one ineligible principal with another while retaining the former in a position of authority under a different title (e.g., as a consultant).

Significantly, as part of a test program, the Federal Government dictated that the CO "shall" use SAP for all commercial item acquisitions above the simplified acquisition threshold ($100,000) but not exceeding $5 million, "to the maximum extent practicable."[49] Congress initially authorized the test program as part of the Clinger-Cohen Act of 1996, with an original expiration date of January 1, 2000,[50] but the program has been extended through its present expiration date of January 1, 2006.[51] Many federal procurement officials favor making this test program a permanent part of the acquisition process.[52]

Simplified acquisition procedures "relieve contracting officers from most of the procedures required for sealed bidding and conventional negotiations."[53] In particular, SAP procurements do not require full competition; rather, they require only "compe-

45. *See, e.g.*, United States v. Puente, 982 F.2d 156 (5th Cir. 1993) (conviction for providing a false statement to the United States in violation of 18 U.S.C. § 1001; bid contained a false certification that contractor had never been convicted of a felony).

46. *Cf.* Press Release, United States Attorney's Office (E.D. Mo.), United States Resolves Lawsuit against Poplar Bluff Contracting Company for Violations of the False Claims Act (Mar. 10, 2003) (FCA allegations included defendant's submission of a false statement indicating "his lack of a prior criminal record"), *at* http://www.usdoj.gov/usao/moe/press%20releases/archived%20press%20releases/2003%20press%20release/march/kajacs.html.

47. *See* Southwestern Bell Tel. Co., Comp. Gen. B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 (sustaining protest; if offeror intentionally provided a false certification that principals had not been indicted within the prior three years, which "materially influenced the agency's consideration of its proposal, [the] proposal should be disqualified and a contract award based upon the proposal canceled") (citing Universal Techs. Inc.; Spacecraft, Inc., B-248808, B-244808.2, B-2448808.4, B-248808.5, Sept. 28, 1992, 92-2 CPD ¶ 212, at 13).

48. *See generally* FAR part 9.

49. FAR 12.203 ("For acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding $5,000,000 ($10,000,000 for acquisitions entered into under the authority of 12.102(f)(1)), including options, contracting activities shall employ the simplified procedures authorized by Subpart 13.5 to the maximum extent practicable."); *see also* FAR 13.500(b) ("For the period of this test, contracting activities must employ the simplified procedures authorized by the test to the maximum extent practicable.").

50. Pub. L. No. 104-106, § 4202, 110 Stat. 679 (1996) (codified at 10 U.S.C. § 2304 note); GAO-01-517, *supra* note 33, at 2; Major Kathryn R. Sommerkamp et al., *Contract Law Developments of 1996—The Year in Review*, 1997 ARMY LAW. 3, 44 (1997). Because of unreliable data, the GAO was unable to determine the test program's benefit to federal agencies. GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: NO RELIABLE DATA TO MEASURE BENEFITS OF THE SIMPLIFIED ACQUISITION TEST PROGRAM, GAO-03-1068 7 (2003) [hereinafter GAO-03- 1068].

51. FAR 13.500(d).

52. GAO-03-1068, *supra* note 50, at 6.

53. CIBINIC & NASH, *supra* note 25, at 987.

tition to the maximum extent practicable."[54] Using these simplified procedures, the CO may "solicit quotations orally,"[55] may limit solicited quotations or offers to as few as three sources in the local trade area,[56] and may even reduce solicitations to a single source "if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available."[57] These "streamlined procedures . . . increase efficiency [but] at the expense of public notice and, as a result, competition and oversight."[58]

As one legal commentator, with procurement fraud experience as both a military and private sector attorney, critically noted: "Another thing we have done, we have raised the authority to use the simplified acquisition procedure for commercial items to five million dollars. Come on. That is just asking for abuse. We are contracting out more and more all the time, which means that we are removing responsibility and the accountability to outside of the government organizational apparatus and into the commercial sector."[59]

The uncertain meaning of certain phrases in the FAR holds the potential for an even more extensive waiver of certain prophylactic antifraud provisions. FAR 13.500, which implements the test program, permits the CO to use any simplified acquisition procedure in part 13, "subject to any specific dollar limitation applicable to the particular procedure."[60] Clearly FAR subpart 13.1—Procedures qualifies for use under the test program, but FAR 13.005 and 13.006, which list a number of laws that are inapplicable to simplified acquisition procurements, are listed outside of the procedure subpart. A literal reading of the FAR then would require application of these various laws to procurements above the simplified acquisition threshold of $100,000 even under the test program.

If, under a less literal reading of the FAR, sections 13.005 and 13.006 were to qualify as a "procedure," then these same laws would be inapplicable to the test program procurements, including portions of the Anti-Kickback Act of 1986.[61] Arguably this expansive reading of the FAR would be consistent with the policy of FAR part 13 to reduce "unnecessary burdens" on contractors.[62]

However, FAR 13.003 also encourages the use of simplified procedures for acquisitions of commercial items not exceeding $5 million using "any appropriate combination of procedures" in other parts of the FAR, including FAR part 12.[63] If the law waiving provisions of FAR 13.005 constitutes a "procedure" for purposes of the test

54. FAR 13.104.

55. FAR 13.106-1(c).

56. FAR 13.104(b); *cf.* FAR 5.202(a)(13)(i).

57. FAR 13.106-1(b); *see also* Schooner, *supra* note 5, at 662.

58 Schooner, *supra* note 5, at 662.

59. Bednar, *supra* note 5, at 291–92. Bednar previously served as the Army debarring official and now is employed with Crowell & Moring LLP. *Id.* at 287 n.2, 293.

60. FAR 13.500(a).

61. FAR 13.005(a)(1).

62. FAR 13.002(d).

63. FAR 13.003(g)(2).

program, then arguably clauses waiving the application of various laws[64] and certification requirements[65] also apply to test program procurements.

C. Historical Tension

The apparent inconsistency between the purpose and application of the FCA to federal procurements and the apparent sacrifice of governmental fraud safeguards as part of the commercial item procurement initiative is nothing new to federal contracting. Historically, an apparent disconnect has existed between procurement fraud and federal procurement laws, regulations, policies, and institutional culture.[66]

Numerous examples serve to illustrate the disjunctive relationship between the two legal regimens. A claim for purposes of the FCA is defined differently, and more broadly, than a claim envisioned by the Contract Disputes Act (CDA).[67] The Government's preference for resolving contract disputes at the CO's level[68] may conflict with the fraud investigator or Department of Justice attorney's desire that an FCA lawsuit not be undermined by the actions of the CO. Further, contract clauses[69] or procurement officials' actions[70] have conflicted with the ability of the Government to pursue an FCA case, with the FCA usually, but not always,[71] prevailing in court decisions.

64. *See, e.g.*, FAR 12.503, 12.504.

65. *See, e.g.*, FAR 52.212–3(h) ("Certification Regarding Debarment, Suspension or Ineligibility for Award").

66. For a discussion of the competing, and conflicting, roles and responsibilities of COs, procurement fraud investigators, and Justice attorneys during a procurement fraud investigation, *see generally* Michael Davidson, Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations, 2002 ARMY LAW. 21 (Sept. 2002).

67. *Compare* 31 U.S.C. § 3729 (2000) (FCA claim definition), *with* FAR 33.201 (CDA claim definition).

68. FAR 33.204 ("The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level.").

69. *See, e.g.*, United States *ex rel.* Roby v. Boeing Co., 302 F.3d 637, 643 (6th Cir. 2002) (the High Value Items Clause, "which limits contractor liability for high-value items in fairly broad terms," did not preclude the United States from *see*king FCA damages); *cf.* United States v. United States Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) ("It is well settled, of course, that the law will not sustain a covenant of immunity which protects against fraud, contravenes public policy, is prejudicial to the public welfare, is contrary to good morals, or relieves one of a duty imposed by law for the public benefit.").

70. *See, e.g.*, United States v. Nat'l Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956) (CO, who learned generators were nonconforming after having received them, could not waive FCA liability through contract modification; "Congress [never] intended that contracting officers should have the power to vitiate the False Claims Statute"); United States *ex rel.* Mayman v. Martin Marietta Corp., 894 F. Supp. 218, 223 (D. Md. 1995) (CO may not authorize contractor conduct that violates federal regulations; rejecting estoppel defense to FCA suit); United States v. Inc. Vill. of Island Park, 888 F. Supp. 419, 442 (E.D.N.Y. 1995) (not a defense that the Government paid the claims after learning of their falsity when Government contractually obligated to pay).

71. United States *ex rel.* Durcholtz v. FKW, Inc., 189 F.3d 542, 545 n.2 (7th Cir. 1999) (contractor did not knowingly submit false claims when agency officials directed conduct, even though officials "may have stretched the contracting regulations to or beyond their limits"); United States v. Bankers Insur. Co., 245 F.3d 315, 323–25 (4th Cir. 2001) (arbitration provision enforceable to stay FCA lawsuit); *United States Cartridge Co.*, 198 F.2d at 464 (WWII–related liability-limiting contract provision held enforceable because "this was not a conventional Government contract made under normal conditions; it was an unusual arrangement made to meet a crisis").

As a further illustration of the tension between the contracting and procurement fraud communities, both the FAR—including FAR part 12—and the Multiple Award Schedule empower procurement officials to require replacement or repair of nonconforming supplies.[72] Permitting the contractor to replace defective supplies can undermine a related FCA case by (1) permitting the contractor to retrieve critical evidence (i.e., the defective items); (2) resolving the matter before or without the participation or even knowledge of fraud investigators; and (3) reducing jury appeal in any subsequent trial.[73]

III. APPLICATION OF THE FCA

Nothing in FARA, FASA, or other commercial item acquisition reform initiatives indicates that Congress intended the FCA to be limited in its application. Accordingly, to a large extent, the FCA should apply to commercial item procurements generally, and IT procurements in particular, to the same extent as any other procurement or federal program. This is particularly true in garden-variety cases, which pose few, if any, novel legal issues for the FCA merely because they arise in the commercial IT context. Although the waiver of various laws, regulations, and certifications reduces the risk of exposure for commercial contractors because various potential theories of FCA liability will be removed, the rapidly expanding pool of federal IT contractors, and other changes in the manner in which certain IT procurements are made, may generate new bases for liability. Depending upon the particular factual scenario, the FCA can be applied to commercial IT contractors with varying levels of clarity.

A. Expanded Pool of Potential Defendants

1. General

The acquisition reform movement has greatly expanded a class of potential FCA defendants: the commercial IT contractors. In a recent article in Procurement Lawyer, one legal commentator observed that the recent acquisition reforms, particularly "significant reforms in the way in which the Government purchases commercial items," have "opened the flood gates to new entrants in the marketplace."[74] Additionally, as a result of the 2002 E-Government Act,[75] which permits state and local Governments

72. FAR 52.246-2(f), 52.212-4(b); Solicitation, Federal Supply Schedule for General Purpose Commercial Information Technology Equipment, Software and Services (Refresh No. 12, posted Sept. 15, 2003) ¶ C.1(a) [hereinafter Schedule 70 Solicitation], *available at* http://www.eps.gov/spg/GSA/FSS/FCI/FCIS%2DJB% 2D980001B/Attachments.html.

73 *See* Davidson, *supra* note 66, at 34

74. Christopher R. Yukins, *Ethics in Procurement: New Challenges After a Decade of Reform*, 38 PROCUREMENT LAW. 3, 4 (2003).

75. Pub. L. No. 107-347, 116 Stat. 2899 (2002).

to use the federal supply schedule, "more than 1,000 more IT companies want to sign GSA contracts in order to get onto the federal supply schedules."[76]

To some extent, this influx of relatively new and unsophisticated federal contractors should cause an increase in the number of potential FCA cases, not because this new breed of federal contractor is inherently unethical or more prone to illegal conduct, but rather because many of these additions to the world of federal contracting are unsophisticated, uneducated, and inexperienced with the complex laws and regulations that govern federal procurements.[77] As the author of the Procurement Lawyer article elaborated:

> By lowering the overall regulatory burden on federal contractors, especially information technology contractors, the Federal Government successfully convinced hundreds, if not thousands, of companies that had never before participated in federal procurement to enter the federal market. As a result, there are now enormous numbers of contractor employees who have little or no experience with the unique statutory and regulatory requirements of federal contracting.[78]

Despite the relaxed nature of commercial item procurements, a number of FAR clauses still apply to contractors. Furthermore, the legal "maxim that '[m]en must turn square corners when they deal with the Government"' remains fully applicable to FCA cases.[79] Thus, contractors are not excused from the terms of a contract merely because "the contract terms appear onerous from an ex post perspective, or [because] the contract's purpose could be effectuated in some other way" or even when "the item supplied under contract is as good as the one contracted for."[80] Two such applicable clauses, the violation of which may subject the commercial item contractor to FCA liability, are the Price Reduction and Price Adjustment Clauses.

2. Price Reduction/Adjustment Clauses

When negotiating a GSA Multiple Award Schedule contract, the United States will seek prices and discounts from the prospective vendor that are as favorable as those

76. Karen Robb, *Vendors Flock to GSA Schedules in Bid to Win State, Local Customers*, FED. TIMES, Sept. 29, 2003, at 9, *available at* http:// federaltimes.com/index.php?s=2250654. In addition to the Federal Government, several states have enacted their own versions of the False Claims Act. John T. Boese, State False Claims Laws Pose New Challenge for Contractors, ANDRES GOV'T CONTRACT LITIG. REPORTER 16 (Mar. 28, 2003) ("Earlier this year, Virginia became the twelfth state to enact a *qui tam* false claims law modeled on the Federal False Claims Act."). In addition to the District of Columbia, the remaining states include California, Florida, Louisiana, Texas, Tennessee, Nevada, Hawaii, Delaware, and Massachusetts. *Id.*

77. Yukins, *supra* note 74, at 4 ("enormous numbers of new participants are pouring into the federal procurement market—new participants who simply do not understand their ethical and legal obligations"); *see* Robb, *supra* note 76, at 9 ("'A lot of small companies that never dealt in the federal market before want to join up so they can have access to the state and local market'").

78. Yukins, *supra* note 74, at 4.

79. United States *ex rel.* Compton v. Midwest Specialties, Inc., 142 F.3d 296, 302 n.4 (6th Cir. 1998) (citation omitted); *see also* Varljen v. Cleveland Gear Co., 250 F.3d 426, 430 (6th Cir. 2001).

80. *Compton*, 142 F.3d at 302 n.4.

provided to the vendor's most favored commercial customer.[81] To achieve this goal, the current GSA schedule solicitation for information technology (IT) procurements ("Schedule 70") contains both a Price Adjustment Clause and a Price Reduction Clause.[82] Information technology contractors on the GSA schedule who do not fully appreciate their obligations under these clauses, or who do not take adequate steps to ensure compliance, risk significant exposure to FCA liability. Indeed, FCA cases have been brought against companies for failing to adhere to these or similar clauses.[83]

With its offer, the prospective contractor must disclose information concerning its prior commercial discounts.[84] Such "discounts" are defined broadly to mean "a reduction in catalog prices (published or unpublished) [and] include, but are not limited to, rebates, quality discounts, purchase option credits, and any other terms or conditions (other than concessions) which reduce the amount of money a customer ultimately pays for goods or services ordered or received."[85]

The Price Adjustment Clause provides a mechanism to penalize a contractor for not accurately disclosing information required by the solicitation or by contract, including discounts occurring between the time of the original submission and the conclusion of price negotiations.[86] A violation of the clause may result in a price reduction in favor of the United States, liability for overpayments (including interest), and termination for default,[87] in addition to potential FCA liability.

In contrast to the Price Adjustment Clause, which looks at pre-award discounts, the Price Reduction Clause focuses on post-award discounts. Under the clause, the GSA and the contractor negotiate the customer base used to determine the most-favored-customer price.[88] Throughout the term of the contract, the vendor/contractor's prices to the Government must maintain a constant relationship (usually expressed as a percentage discount) to that customer base, or "basis of award." Thus, after contract award, any discount or price reduction afforded to anyone in that customer base

81. GENERAL ACCOUNTING OFFICE, *CONTRACT MANAGEMENT, RESTRUCTURING GSA: FEDERAL SUPPLY SERVICE AND FEDERAL TECHNOLOGY SERVICE, TESTIMONY, GAO-04-132T 2 (2003)* [hereinafter GAO-04-132T], *available at* http://www.gao.gov ("FSS negotiates master contracts with vendors, seeking discounts off commercial list prices that are at least as favorable as the discounts offered to their most favored customers.").

82. Schedule 70 Solicitation, *supra* note 72, ¶ C.28 (GSAR 552.238-75), Full Text of Clauses Incorporated by Reference, at 54 (GSAR 552.215-72). The GSA Schedule 70 has proven extremely popular with both vendors and federal agencies. There are "[o]ver 4,400 awarded contractors ... currently on Schedule 70." GSA Schedule 70 (Aug. 23, 2003). Further, federal "agencies made 55 percent of their fiscal 2002 computer hardware purchases, about $3.4 billion, via GSA Schedule 70." Michael Hardy, GSA Sked Hits New High with PC Buys, FED. COMPUTER WK., Sept. 1, 2003, at 12.

83. Press Release, U.S. Department of Justice, Gateway Computer Pays $9 Million to Settle Claims of Overcharging United States (Oct. 31, 2000), *available at* http://www.usdoj.gov/opa/pr/2000/October/636civ.htm; *see* United States *ex rel*. Brown v. Merant, Inc., 2002 WL 487160 (E.D. Pa. Mar. 29, 2002) (relator alleged defendant failed to disclose commercial discounts to GSA prior to award; court granted summary judgment to defendant); *cf*. Contractor Pays $2.6M to Settle Charges It Didn't Offer VA Commercial Discount, 70 FED. CONT. REP. 369 (Oct. 12, 1998) (settlement of FCA action alleging, in part, that defendant "failed to pass on to the government discounts given to commercial customers").

84. Schedule 70 Solicitation, *supra* note 72, § E.5 (citing GSAR 552.212- 70).

85. *Id*. § E.5(a).

86. GSAR 552.215-72(a) (cited in Schedule 70 Solicitation, *supra* note 72, Clauses Incorporated by Reference, at 54).

87. GSAR 552.215-72.

88. GSAR 552.238-75(a).

constitutes a price reduction, which must be reported to the CO.[89] The CO will then modify the contract to reflect any applicable price reduction to government prices, so that the relationship between government and commercial prices is maintained. [90]

The problem for the vendor/contractor is that it may not have an adequate system in place to timely learn of, and report, discounts offered through its sales staff. Acts[91] and knowledge[92] of a company's agents, when acting within the scope of their employment, may be attributed to the company. Further, even if deemed unaware of a particular discount when determining whether the false statement was knowingly made, the FCA defendant may still be found liable on the theory that it acted recklessly because it should have known that its sales staff regularly offered discounts to commercial customers.

In theory, every invoice sent to the United States for payment after an undisclosed price reduction for a commercial customer within the specified customer base can constitute a false claim. Similarly, the failure to disclose required discount information prior to award may result in FCA liability for every invoice or other claim under that contract.[93] A contractor found to have violated the FCA is subject to treble damages in addition to a penalty of between $5,500 and $11,000 for each false claim.[94] The Government need not prove any actual loss or damages in order to obtain the civil penalties.[95] However, the number of forfeiture penalties charged to the defendant may reflect the number of acts of misconduct causing the false claims rather than the actual number of false claims made,[96] unless the defendant "knowingly causes a specific number of claims to be filed," in which case it will be "liable for an equal number of forfeitures."[97]

89. GSAR 552.238-75(a), (b); *see* GSAR 552.216-70(a) (price reductions required for contracts awarded based on commercial catalog prices).

90. GSAR 552.238-75(g).

91. *See, e.g.*, United States v. O'Connell, 890 F.2d 563, 569 (1st Cir. 1989) ("We hold that a corporation should be held liable under the False Claims Act for the fraud of an agent who acts with apparent authority even if the corporation received no benefit from the agent's fraud.").

92. *See, e.g.*, Grand Union Co. v. United States, 696 F.2d 888, 891 (11th Cir. 1983) (FCA case); United States v. United States Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (FCA case). But *cf.* United States v. United Techs. Corp., 51 F. Supp. 2d 167, 199 (D. Conn. 1999) (FCA case; facts of case did not warrant application of collective corporate knowledge doctrine).

93. Ron R. Hutchinson, *The Government's Audit and Investigative Power over Commercial Item Contracts and Subcontracts*, 27 PUB. CONT. L.J. 263, 287 (1998).

94. 31 U.S.C. § 3129(a); 28 C.F.R. § 85.3(a) (2001); *see* United States v. Zan Mach. Co., 803 F. Supp. 620, 624 (E.D.N.Y. 1992) (FCA "provides for a . . . forfeiture for each false claim submitted by a defendant"). At least one court has imposed a limit on the amount an FCA defendant can be penalized based on a finding that such penalty amount violates the Excessive Fines Clause of the Eighth Amendment. *See, e.g.*, United States v. Advance Tool Co., 902 F. Supp. 1011, 1018 (W.D. Mo. 1995), *aff'd*, 86 F.3d 1159 (8th Cir. 1996).

95. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the penalty."); United States v. Bald Eagle Realty, 1 F. Supp. 2d 1311, 1316 (D. Utah 1998); *Advance Tool*, 902 F. Supp. at 1017.

96. United States v. Bornstein, 423 U.S. 303, 312–13 (1975) (subcontractor who sent three invoiced shipments of non-conforming goods, which caused thirty-five false claims, only held liable for three forfeitures).

97. United States v. Ehrlich, 643 F.2d 634, 638 (9th Cir. 1981); *see also* United States v. Inc. Vill. of Island Park, 888 F. Supp. 419, 441 (E.D.N.Y. 1995).

For IT contractors new to federal contracting, or who are considering entering into the federal market, this potential FCA liability constitutes a significant business risk. For those contractors electing to participate in the federal marketplace, this risk must be addressed by either electing not to offer discounts to commercial customers in the specified customer base or by expending resources necessary to ensure timely reporting to the CO of all discounts. A prudent vendor will seek to negotiate as narrow a customer base as possible to reduce the potential for violations of the Price Reduction Clause and, ultimately, the FCA.

B. Section 508

Originally enacted in 1986, section 508 of the Rehabilitation Act of 1973[98] was significantly enhanced in 1998.[99] Initially without teeth, section 508 was "largely ignored by both the Government and industry" until Congress added an enforcement section that provided for agency-level administrative complaints and for civil relief in federal district court.[100] Currently, absent an "undue burden" or other enumerated exception, "[w]hen developing, procuring, maintaining, or using electronic and information technology" (EIT), federal agencies must ensure that the technology permits federal employees with disabilities, and those members of the public with disabilities who seek information or services from the Federal Government, access to information or data comparable to that obtained by their counterparts without disabilities.[101]

The FAR defines EIT broadly to include "information technology," as well as telephones, copiers, information kiosks, and interconnected systems that create, convert, or duplicate data.[102] The acquisition of EIT is governed by FAR subpart 39.2, which requires that "acquisition of EIT supplies and services ... meet the applicable accessibility standards at 36 CFR part 1194," i.e., the standards for accessibility.[103] Further, federal agencies must consider accessibility standards during acquisition planning,[104] perform market research to determine if EIT is available "that meets all or part of the accessibility standards" when requiring supplies or services,[105] and "prepare requirements documents for [EIT] that comply with the applicable accessibility standards."[106]

In satisfaction of their market research obligations, federal procurement officials may turn to Voluntary Product Accessibility Templates (VPAT) checklists for accessibility, which were created by an industry group, the Information Technology Industry

98. 29 U.S.C. § 794d (2000).

99. Michael F. Mason & Vanessa T. Hoang, *Government Procurement of Electronic and Information Technology: An Examination of the Final FAR Section 508 Rule*, 43 GOV'T CONTRACTOR, July 11, 2001, at 3.

100. *Id.*; *see* 29 U.S.C.A. § 794d(f) (West 1999 and 2003 Supp.).

101. 29 U.S.C.A. § 794(d)(a)(1).

102. FAR 2.101.

103. FAR 39.203(a).

104. FAR 7.103

105. FAR 10(a)(3)(vii).

106. FAR 11.002(f).

Council.[107] Vendors who elect to use this approach will complete a VPAT, post it on a website, and generally link that compliance "report card" to the Government's Buy Accessible website.[108] Procuring activities use the results of their market research to determine which contractors will be included in a competition.[109] For an indefinite-quantity contract award (e.g., FSS), the FAR seems to suggest that COs may rely on contractor self-reports of compliance, including information posted on the vendor's website.[110] However, it is unclear how agencies are to verify a vendor's reported level of compliance with the accessibility standards, for purposes of market research or source selection.[111] The FAR provides no guidance.[112]

A vendor could suffer significant FCA liability if it included false information on its Web-based VPAT, or submitted a false VPAT or similar information in response to an RFQ or RFI.[113] If the Government uses the vendor-supplied false accessibility information to award the contract, task order, or delivery order, the entire contract or order may be tainted by fraud. Under the "fraud-in-the-inducement" line of cases, when a contract is obtained "through false statements or fraudulent conduct," FCA liability may attach to every claim submitted for payment, even if the claim itself is not false.[114] The fact that the contract was obtained through fraud is enough to trigger liability.[115]

The VPAT is made up of a summary table, followed by more detailed tables, addressing the section 508 standards.[116] Within each table are three columns: (1) a listing or description of the section 508 criteria; (2) a description of features from the

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107. The VPAT is "a simple Internet-based tool to assist Federal contracting and procurement officials in fulfilling their new market research requirements." *INFORMATION TECHNOLOGY INDUSTRY COUNCIL, VOLUNTARY PRODUCT ACCESSIBILITY TEMPLATE, BEST PRACTICES FOR ELECTRONIC & INFORMATION TECHNOLOGY VENDORS* [hereinafter ITIC], *available at* http:// www.itic.org/policy/508/Sec508.html (last visited June 19, 2004); *see* Mason & Hoang, *supra* note 99 ("the template . . . is gaining wide acceptance as a reasonable means of assisting agencies in satisfying their section 508 market research obligations").

108. ITIC, *supra* note 107, at 1. In CourtSmart Digital Systems, Inc., Comp. Gen. B-292995, 2004 WL 816361, at *1 (Feb. 13, 2004), the agency issued a Request for Quotations that required vendors to complete and submit a VPAT with their quotations.

109. GENERAL SERVICES ADMINISTRATION, WHITE PAPER: ACQUISITION SOURCES AND ALTERNATIVES 11 (1998) ("After market research, the activity identifies schedule contractors to be included in the competition"), *available at* http:// www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/acquisition_sources_R2GX2-u_0Z5RDZ-i34K-pR.html (last visited June 19, 2004). Only three schedule contractors need be identified for the competition. *Id*. at 12; FAR 8.404(b)(2).

110. FAR 39.203(b)(2).

111. Sheila C. Stark, *The FAR Rule on EIT Accessibility Under Section 508--Nine Months Later*, 44 GOV'T CONTRACTOR 4 (Apr. 17, 2002) ("How agencies verify that information for market research or source selection purposes is completely unclear").

112. *Id.*; *see* FAR subpart 39.2.

113. The ITIC webpage, which hosts the VPAT, admonishes: "it's the vendor's responsibility to maintain the integrity of the data on the VPAT." ITIC, *supra* note 107, at 2.

114. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787–88 (4th Cir. 1999) (citations omitted); *see also* S. REP. NO. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 ("Likewise, each and every claim submitted under a contract . . . which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation constitutes a false claim.").

115. *Westinghouse Savannah River Co.*, 176 F.3d at 788.

116. ITIC, *supra* note 107, at 2.

vendor's product that support those criteria; and (3) any vendor-supplied remarks and explanations.[117] The third column allows the vendor to provide any remarks or explanations that it deems appropriate.[118] For FCA purposes, the "remarks and explanations" column provides a potential safe harbor to vendors who use it to qualify any assertions they have made about the ability of their product to satisfy section 508 accessibility criteria.

It has been argued that litigation serves as a form of external oversight over the procurement process.[119] If true, at least with respect to bid protests, this external oversight has been almost nonexistent in ensuring that contractor representations concerning section 508 compliance are truthful. At least one academic has attributed the current near dearth of bid protests to concerns by competing contractors that they too are equally noncompliant.[120] However, it seems likely that *qui tam* litigation will eventually partially fill this external oversight void as disgruntled employees of IT companies bring FCA cases alleging vendor misrepresentations to the United States.

C. Lack of Privity with the Government and "Knowingly" False Claims

The mere fact that an IT company sells its product to the Federal Government through a reseller or other intermediary does not immunize that company from the reach of the FCA. To illustrate, assume company A sells computer software or various computer components to company B, a reseller that sells desktop and laptop computers in the commercial market. Included in B's customer base are one or more federal agencies. Company B then incorporates A's software or computer component into the final end product, which is sold to the United States. The software or computer component proves defective.

Under such a scenario, it is still possible for the United States to bring an FCA case against company A although the company never sold its product directly to the Federal Government. First, it is clear that privity of contract with the United States is not required for liability under the FCA.[121] FCA actions have been brought against subcontractors[122] as well as against other entities without a direct relationship to the Federal Government, such as municipal corporations and officials participating in a HUD subsidized mortgage program.[123]

117. *Id.*; *see* Information Technology Industry Council, Voluntary Product Accessibility Template, *available at* http://www.itic.org/policy/508/vpat.html.

118. ITIC, *supra* note 107, at 2.

119. Schooner, *supra* note 5, at 629 ("Historically, the government has externalized much of its procurement oversight by relying upon litigation initiated by contractors and potential contractors to police the buying process."). The author is aware of only a single bid protest based on section 508 noncompliance. In CourtSmart Digital Systems, Comp. Gen. B-292995, 2004 WL 816361 (Feb. 13, 2004), the GAO sustained a protest, in part, because the agency issued an order to a vendor under an FSS contract when the awardee's quotation was not section 508 compliant and therefore not technically acceptable.

120. Interview with Professor Christopher Yukins, The George Washington University Law School, in Washington, D.C. (Nov. 6, 2003).

121. United States *ex rel.* Marchus v. Hess, 317 U.S. 537, 544–45 (1943); Pickens v. Kanawha River Towing, 916 F. Supp. 702, 707 (S.D. Ohio 1996).

122. *See, e.g.*, Varljen v. Cleveland Gear Co., 250 F.3d 426, 426 (6th Cir. 2001); Pickens, 916 F. Supp. at 704 (subcontractors "provided helper boat services" on a lock and dam construction project).

123. United States v. Inc. Vill. of Island Park, 888 F. Supp. 419, 419 (E.D.N.Y. 1995).

Further, to trigger FCA liability, the defendant need not actually make a claim upon the United States. Indirect false claims are cognizable under the FCA.[124] It is sufficient that the defendant causes another to make such a claim,[125] and it is no defense that the actual submitter of the false claim is "totally innocent."[126] Indeed, FCA cases have been pursued against IT contractors under this causation theory of liability.[127]

The critical inquiry in this type of case is often whether the vendor (company A) knowingly caused the false claim to be made. However, to prove that the defendant acted knowingly, the United States need not prove actual knowledge. In 1986 Congress lowered the FCA's scienter requirement to include not only actual knowledge, but also reckless disregard and deliberate indifference,[128] in order to include within the FCA's scope "what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted."[129]

An interesting issue presents itself in the IT procurement context with respect to the government knowledge defense, which may serve as a defense to the FCA's scienter element.[130] The basic premise of the defense is that the defendant did not knowingly present a false claim because it thought the Government knew what the defendant was doing at the time the claim was presented. Although the law in this area has yet to solidify, and a full discussion of the defense is beyond the scope of this article, generally to establish the defense the defendant must prove that it disclosed the facts that form the basis of the FCA lawsuit to relevant government officials before submitting, or causing to submit, the allegedly false statement or claim.[131]

Because technology is constantly evolving and, as such, is to a large extent imperfect, what effect would widespread knowledge within the IT industry of these imperfections have on an FCA case, when neither the vendor nor the reseller specifically

124. S. REP. NO. 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 ("a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States").

125. 31 U.S.C. § 3729(a); *see also* United States v. Bornstein, 423 U.S. 303, 309 (1975) (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"); *Pickens*, 916 F. Supp. at 706 ("The False Claims Act creates a cause of action against a subcontractor who causes a general contractor to submit a false claim to the United States."); *Island Park*, 888 F. Supp. at 439 (FCA liability extends to "one who engages in a fraudulent course of conduct that causes the government to pay a claim for money").

126. *Island Park*, 888 F. Supp. at 440.

127. *See, e.g.*, Press Release, U.S. Department of Justice, *Toshiba Pays U.S. Million to Settle Defective Computer Case* (Oct. 13, 2003) (FCA settlement of suit in connection with "a defect in the floppy disk controllers (FDC) contained in Toshiba's laptops . . ."), *available at* http:// www.usdoj.gov/opa/pr/2000/October/602civ.htm (last visited June 19, 2004). The Government's theory was that Toshiba caused false claims to be presented to the United States. Interview with Professor Christopher Yukins, The George Washington University Law School, in Washington, D.C. (Sept. 9, 2003) (Professor Yukins represented Toshiba in this case).

128 United States v. United Techs. Corp., 51 F. Supp. 2d 167 (D. Conn. 1999) (the 1986 amendments to the FCA "lowered the state of mind necessary to sustain a finding of liability").

129. S. REP. NO. 99-345, at 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286; *see also* United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149, 1153 (W.D. Mo. 2000).

130. *See, e.g.*, United States *ex rel.* Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 289 (4th Cir. 2002) (government knowledge "can negate the scienter required for an FCA violation").

131. *See* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

brought these imperfections to the knowledge of relevant procurement officials? Some cases have seemed to charge the United States with knowledge of a defendant's conduct when such conduct was extensively known within the agency without specifically focusing on the knowledge of relevant procurement officials.[132] However, even those cases noted that the Government was aware of the alleged misconduct as a result of a robust flow of information between the contractor and the agency.[133]

Language in at least one case may offer some support to an FCA defendant under circumstances when the Government knows that particular software is flawed but directs a contractor to provide that specific software as part of a computer or other IT procurement. In United States ex rel. Durcholz v. FKW, Inc.,[134] an unsuccessful bidder for a dredging subcontract brought a *qui tam* lawsuit against the general contractor (FKW) and the agency's contracting specialist.[135] The agency wanted to quickly remove sediment from sedimentation ponds and, to accelerate the bid process, used a Unit Price Book (UPB), which provided for a line item for excavation but not for dredging.[136] Regardless, agency officials told FKW to dredge the ponds and to price the work using the excavation line item.[137] FKW then solicited subcontractor bids, informed potential bidders of the agency's desire that dredging be performed but that excavation bids be submitted, and then discussed the resultant bids with an agency official.[138] Eventually, Durcholtz brought suit alleging that FKW violated the FCA by using the "UPB excavation line-items in (1) its proposal for and (2) subsequent invoices from the dredging contract."[139]

Focusing on the scienter or mens rea element of the FCA, the court noted that "[t]he Government's prior knowledge of an allegedly false claim can vitiate an FCA action" and that "[i]f 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."[140] Even though the agency's procurement officials "may have stretched the contracting regulations to or beyond their limits,"[141]

132. Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 534 (10th Cir. 2000) ("[T]here may still be occasions when the government's knowledge of or cooperation with a contractor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA.") (citing United States *ex rel.* Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 327 (9th Cir. 1995); United States *ex rel.* Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992)).

133. *Shaw*, 213 F.3d at 534 (rejecting defense, noting that the *qui tam* relator had disclosed failings to the Government, not the defendants); *Butler*, 71 F.3d at 327 ("completely cooperated and shared all information . . ."); *Wang*, 975 F.2d at 1421 ("FMC was open with the government about [all the deficiencies].").

134. 189 F.3d 542 (7th Cir. 1999).

135. *Id.* at 543.

136. *Id.* at 544.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 545.

141. *Id.* at 545 n.2

the court refused to hold the contractor liable when it followed the agency's directions.[142] "The Government knew what it wanted, and it got what it paid for."[143]

The government-knowledge defense first presumes that the Government actually possesses knowledge of what the defendant is doing and that such knowledge be possessed by certain procurement officials or, at a minimum, widely known within the cognizant activity within that agency. Even under the liberal analysis of Durcholtz, the Government must know what it is getting; that is, an imperfect software system. Further, for its scienter or mens rea to be affected by the Government's knowledge, the vendor must be acting on its own knowledge that the Government possesses such information. A vendor who merely assumes, because software deficiencies are widely known within the software industry or even the general commercial market, that agency procurement officials would know that as well proceeds at its peril and may be found to have acted with reckless disregard or deliberate indifference.

IV. CONCLUSION

Congress has clearly indicated its preference for commercial item procurements and has elected to remove or modify many of the systemic antifraud safeguards in order to encourage commercial contractor participation in the federal marketplace. To a very large extent, Congress has achieved its goals. We have seen a dramatic increase in the volume of commercial item procurements and a significant portion of this success has involved IT procurements. Following in this groundswell of acquisition reform is the enormous body of new entrants to the federal marketplace, the commercial IT vendors.

Despite the relaxation of many of the systemic safeguards against procurement fraud, the formidable Civil False Claims Act remains largely unscathed by the last decade of acquisition reform. Although the legal landscape has been altered slightly as some of the theories for an FCA lawsuit have been reduced or eliminated as a result of the curtailment of certain certifications or modification of various laws and regulations, new contracting vehicles and the large influx of unsophisticated commercial vendors into the federal marketplace provide a fertile environment for potential FCA litigation. Because the FCA still poses a significant business risk to such new entrants with its broad scope, infinite pool of potential qui tam relators, and severe penalties, commercial contractors would be wise to be familiar with the Government's most frequently employed weapon against procurement fraud.

142. To the extent the case goes beyond an interpretive holding that not all violations of agency regulations result in FCA violations and is interpreted to stand for the proposition that an FCA defendant can escape liability when authorized by government officials to submit false claims, the case holding would be of questionable validity. United States *ex rel.* Mayman v. Martin Marietta Corp., 894 F. Supp. 218, 223 (D. Md. 1995) ("a government officer cannot authorize a contractor to violate federal regulations"); United States v. Nat'l Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956) ("[w]e do not believe that the Congress ever intended that contracting officers should have the power to vitiate the False Claims statute"); *cf.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991). Although the contractor may not possess a specific intent to defraud (unless engaged in a conspiracy with a government official to do so), the claim itself remains false and the FCA's scienter standard is the knowing presentation of a false claim, not a specific intent to defraud. *See Mayman*, 894 F. Supp. at 223; *cf. Hagood*, 929 F.2d at 1421.

143. United States *ex rel.* Durcholz v. FKW, Inc., 189 F.3d 542, 545 (7th Cir. 1999).

Upcoming Legal Battles

Holding Medicare Contractors Accountable for Fraud: Correctly Reading the Medicare Act's Immunity Provision

HOLDING MEDICARE CONTRACTORS ACCOUNTABLE FOR FRAUD:
Correctly Reading the Medicare Act's Immunity Provision

Joseph E. B. White

The federal False Claims Act has become the U.S. Government's primary weapon in fighting fraud against the American tax dollar. The Act has proven particularly effective in targeting Medicare fraud. Alarmingly, even Medicare contractors, the Government's appointed guardians of federal healthcare funds, have defrauded the Government of millions of healthcare dollars.

While the Federal Government, through the assistance of *qui tam* relators, has steadily recovered millions of stolen funds from these dishonest contractors, a 1998 Eleventh Circuit decision has offered a level of protection to fraudfeasing Medicare fund "protectors." Specifically, in *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), the court of appeals read a full immunity provision into the Medicare Act, thus allowing fraudfeasing entities to dip into the Medicare coffers with impunity.

Thankfully for the federal fisc, no other defendant outside of the Eleventh Circuit has received protection under the *Body* "amendment," until a 2004 Utah district court decision adopted this misinterpretation of the Medicare Act. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 334 F. Supp. 2d 1278 (D. Utah 2004).

The relators have appealed this lower court decision to the Tenth Circuit Court of Appeals. Taxpayers Against Fraud Education Fund, concerned the *Body* interpretation would infect another area of the country, filed an *amicus curiae* brief championing an accurate reading of the Medicare Act. The Tenth Circuit is now faced with the issue of whether the FCA applies to Medicare contractor-defendants accused of defrauding the Medicare system. The lower court decision gravely undermines the efficacy of the False Claims Act in policing fraud on the Federal Government, because it exempts from FCA liability Medicare contractors who knowingly make or certify fraudulent claim records, allowing healthcare providers to fraudulently or falsely receive millions of dollars in reimbursement funds from the Federal Government. In response, TAFEF raised the following argument with the court of appeals.

SUMMARY OF THE ARGUMENT

The False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, imposes civil liability on any person who "knowingly makes . . . a false record . . . to get a false . . . claim paid or approved by the Government." *Id.* § 3729(a)(2). The Medicare Act, 42 U.S.C. § 1395u(e), provides Medicare contractor employees immunity for false payments certified or made "in the absence of gross negligence or intent to defraud the United States." 42 U.S.C. § 1395u(e)(1) and (2). Likewise, the Medicare Act extends the same level of immunity to the Medicare contractor. *Id.* § 1395u(e)(3). Indeed, as the legislative history explains, Congress intended to limit Medicare contractors to "the *same* immunity from liability . . . as would be provided their certifying and disbursing officers." H.R. Conf. Rep. No. 89-682 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2231 (emphasis added).

The district court held that fraudulent claim records knowingly made or certified by a Medicare contractor, which allows a healthcare provider to get a false or fraudulent claim paid or approved by the Government, are nevertheless excluded from the scope of the False Claims Act because the Medicare Act includes a supposed full immunity provision that permits fraudfeasing contractors to escape liability with impunity. This reading of the Medicare statute is inconsistent with its plain language, irreconcilable with applicable legislative history, and at odds with accepted False Claims Act prosecution policy and practice.

The district court decision, by failing to recognize that contractor immunity only applies to payments certified or made "in the absence of gross negligence or intent to defraud" the Government, significantly restricts the reach of the False Claims Act in a manner that Congress did not intend, weakening False Claims Act protection with respect to the Medicare system, leaving hundreds of billions of dollars in federal funds in jeopardy. The decision is legally unsustainable, and should be reversed.

The lower court's ruling selectively reads the language of 42 U.S.C. § 1395u(e)(1)-(3), which explicitly limits carrier immunity to "payments referred to in paragraph (1) or (2)." *Id.* § 1395u(e)(3). The district court decision overly restricts the plain meaning of paragraphs (1) and (2), which, by their very terms, limits immunized "payments" to those certified or made "in the absence of gross negligence or intent to defraud the United States." *Id.* § 1395u(e)(1) and (2). Thus, the Medicare Act includes no "full immunity" bypass to False Claims Act liability.

The district court's ruling is particularly flawed with respect to the Medicare system, a federally funded program, which, by its very nature, depends upon Medicare contractors making honest claim records for subsequent submission to the Federal Government. By adopting a blanket rule that pierces the FCA shield protecting Medicare, the district court jeopardizes the federal fisc, the very entity Congress sought to protect.

Additionally, the relevant legislative history shows beyond question that the result reached by the district court is contrary to the intent of Congress. In the accompanying Conference Report, Congress, in clarifying the existing scope of liability, unequivocally stressed that the Medicare Act's immunity veil only pardons a carrier to the same extent as its individual employees. Congress, when recently amending the Medicare Act, again stressed the continued False Claims Act liability of fraudfeasing Medicare contractors. Thus, the lower court's ruling not only ignores the plain meaning of the Medicare Act, but also disregards the relevant legislative history.

Furthermore, in support of its strained statutory reading, the district court announces that it is adopting the Eleventh Circuit's interpretation in *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998). However, despite this lone circuit court highlighting this supposed free pass for fraudfeasing Medicare contractors, no other defendant outside of the Eleventh Circuit has successfully argued the "full immunity" defense to FCA liability. In fact, in the nearly seven years since the *Body* decision, at least four Medicare contractors have inked False Claims Act settlements with the Department of Justice, returning over $264 million to the public treasury. Thus, the Eleventh Circuit and the lower court stand alone, while the United States Congress, the Department of Justice, and even fraudfeasing Medicare contractors have failed to read blanket immunity into the Act.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT FALSE CLAIM RECORDS MADE OR CERTIFIED BY A MEDICARE CONTRACTOR, WHICH ALLOWS A HEALTHCARE PROVIDER TO GET A FALSE OR FRAUDULENT CLAIM PAID OR APPROVED BY THE GOVERNMENT, ARE NEVERTHELESS EXCLUDED FROM THE SCOPE OF THE FALSE CLAIMS ACT BECAUSE A SUPPOSED GRANT OF FULL IMMUNITY PERMITS THE CONTRACTOR TO ESCAPE LIABILITY WITH INPUNITY.

A. The District Court's Ruling Ignores the Plain Language of the Medicare Act.

In 31 U.S.C. § 3729(a)(2), the False Claims Act imposes civil liability and treble damages upon any person who "knowingly makes . . . a false record . . . to get a false . . . claim paid or approved by the Government." *Id.* The Medicare Act provides in relevant part:

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

42 U.S.C. § 1395u(e) (emphasis added). As the lower court correctly deduced, the Medicare statute extends immunity to Medicare carriers for "payments referred to in paragraph (1) or (2)." *Id.* § 1395u(e)(3). The lower court held that under this provision of the Medicare Act, a fraudulent claim record made by a Medicare carrier to get a false

claim paid or approved by the Government does not fall within the scope of the False Claims Act, even if the record was made with the intent to defraud the United States.

By its terms, Section 1395u(e)(3) immunity does not extend to "any payments" made or certified by a Medicare carrier, but instead only to those payments "referred to in paragraph (1) or (2)." The lower court, borrowing an Eleventh Circuit interpretation that has yet to be adopted by any other circuit, interpreted the language in Section 1395u(e)(3) to extend "full immunity" to Medicare contractors simply because "[a] clause limited immunity to payments not involving gross negligence or fraud is conspicuously absent" from paragraph (3). *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098, 1111 (11th Cir. 1998). However, as the United States Supreme Court warned, "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). By striking the reference to paragraphs (1) and (2), the district court rewrites paragraph (3) to read: "No such carrier shall be liable to the United States for any payments." Perhaps the U.S. Supreme Court said it best in *United States v. Naftalin*: "The short answer is that Congress did not write the statute that way." 441 U.S. 768, 773 (1979).

In addition to selectively reading the language of Section 1395u(e)(3), the district court also ignores the explicit qualification of "payments" defined in Sections 1395u(e)(1) and (2). Most importantly for this case, these sections explicitly limit "payments" to those certified or made "in the absence of gross negligence or intent to defraud the United States." *Id.* § 1395u(e)(1) and (2). Thus, Congress, in limiting carrier liability to these particularly defined payments, explicitly clarified that fraudfeasing contractors cannot escape liability by simply arguing that they are not legally accountable for their fraudulent actions. The lower court's cursory interpretation is therefore legally unsustainable.

B. The District Court's Ruling Is Inconsistent With the Relevant Legislative History.

Whatever one may think of the arguments that can be made from the actual text, no one can say the Medicare Act unambiguously grants "full immunity" to Medicare carriers under Section 1395u(e)(3). Accordingly, the lower court's strained interpretation at least demands a review of the legislative history. *See Blum v. Stevenson*, 465 U.S. 886, 896 (1984). Once the legislative history is consulted, any residual uncertainty about whether to read a full immunity bypass into the statute disappears. Indeed, the Conference Report accompanying the Medicare Act states that Section 1395u(e)(3) is intended to limit Medicare contractors to "the *same* immunity from liability for incorrect payments as would be provided their certifying and disbursing officers." H.R. Conf. Rep. No. 89-682 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2231 (emphasis added). Because certifying and disbursing officers are immune from liability only when they act "in the absence of gross negligence or intent to defraud the United States," 42 U.S.C. §1395u(e)(1) and (2), the characterization of Section 1395u(e)(3) in the accompanying legislative history insists that the contractor's immunity be similarly limited. By contrast, the reading adopted by the lower court required it to ignore this legislative history. Because Section 1395u(e)(3) may plausibly be interpreted in a manner consistent with the applicable legislative history, the district court should not have adopted its strained interpretation that blindly disregards the underlying congressional intent.

Furthermore, when Congress recently amended the Medicare Act, the accompanying legislative history reiterated the intent underlying the original statute: "[T]he False Claims Act *continues, as in the past*, to remain available as a remedy for fraud against Medicare by certifying officers, disbursing officers, *and Medicare administrative contractors alike*..." 149 Cong. Rec. S15644 (emphasis added). Conversely, neither the Defendant nor the lower court could point to a single legislative utterance championing unlimited carrier immunity. Thus, in addition to misinterpreting the Medicare Act, the district court's analysis directly conflicts with the relevant legislative history, blatantly casting a jaundice eye upon the intent of Congress.

C. The District Court's Ruling Impermissively Legislates an Exception to the False Claims Act.

Congress "endorse[d]" the Supreme Court's interpretation that the federal False Claims Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. 99-345, 99th Cong., 2d Sess., at 19, reprinted in 1986 U.S.C.C.A.N. 5266, 5284 (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)). The district court's ruling, on the other hand, impermissively legislates a Medicare contractor "full immunity" limitation that appears nowhere in the relevant statutory language, weakening the False Claims Act shield that Congress erected around the Medicare system.

In other words, reading "full immunity" into Section 1395u(e)(3) trumps the explicit language and purpose of the False Claims Act, repealing by implication Congress's intention to "reach all types of fraud." However, such a reading is inconsistent with the "cardinal principle of statutory construction that repeals by implication are not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (internal quotation marks and citation omitted). As the United States Supreme Court has stressed, "[j]udges are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265-66 (1992) (citations omitted). For nearly four decades, the judicial system has honored the congressional intent behind both the False Claims Act and the Medicare Act, holding Medicare contractors liable "for all types of fraud, without qualification." Thus, the two Acts are not only "capable of co-existence," but have succeeded in protecting the Medicare system from fraudfeasing Medicare contractors.

D. The District Court's Ruling Conflicts With Accepted False Claims Act Prosecution Policy and Practice.

The district court, reaching for a statutory interpretation that has only been accepted by one circuit, relied on *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), and ruled that Medicare contractors are fully immunized for all fraudulent activity under Section 1395u(e). Perhaps viewing this reading of the Act as being inconsistent with its plain language and irreconcilable with its applicable legislative history, fraudfeasing carriers have, time and time again, refused to reach out for this supposed ironclad plank of immunity. Instead, since the *Body* decision first discovered this alleged passageway around FCA immunity, at least another four Medicare contractors have signed FCA settlement agreements with the Department of Justice, recovering over $264 million in ill-received federal funds.[1]

Thus, unlike the lower court, the United States Congress, the United States Department of Justice, and fraudfeasing Medicare contractors have refused the invitation to read "full immunity" into the Act. If the district court had properly read Act, the lower court would have ruled that the type of fraud alleged in this case could form the basis for an FCA claim, when the Medicare contractor makes or certifies a fraudulent claim record with "gross negligence or intent to defraud the United States." Perhaps this is why Medicare contractor fraud cases involving millions of federal dollars have been successfully settled under the federal False Claims Act, but no other court outside of the Eleventh Circuit has reached the same conclusion as this Utah district court. With an annual budget of over $325 billion in federal funds, the Medicare system—and the U.S. taxpayer—deserve an accurate reading of the Medicare Act. For the foregoing reasons, the judgment of the district court should be reversed.

1. *See, e.g., United States ex rel. Doe v. Pennsylvania Blue Shield*, 54 F. Supp.2d 410 (M.D. Pa. 1999) (Pennsylvania Blue Shield, the Part B carrier for Pennsylvania, Delaware, New Jersey and the District of Columbia, and its parent, Highmark, Inc., paid $38.5 million to settle four False Claims Act suits); *United States ex rel. Dodson v. Blue Shield of Calif.*, No. C94-3626 EEL, (N.D. Cal. 1998) (The United States recovered $12 million in settlement of a *qui tam* case alleging that the Part B carrier for Northern California mischarged costs under its carrier contract and misrepresented its performance to HCFA); *United States ex rel. Knoob v. Health Care Service Corporation*, No. 95-4071 (S.D. Ill. 1998) (United States recovered $140 million in settlement of a suit alleging that the Part B carrier for Illinois and Michigan had shredded claims, deleted claims from its computer system, paid all claims under $50, shut off its beneficiary and provider telephone lines, and intentionally misrepresented its performance to HCFA). In yet another example, a Medicare contractor, Anthem Blue Cross & Blue Shield (formerly Blue Cross & Blue Shield of Connecticut), in order to improve its ratings under the Contractor Performance Evaluation Program, intentionally overpaid tens of millions of dollars to hospitals, falsifying cost reports. The United States reached a $74 million settlement with Anthem in December 1999.

The Big Picture

U.S. False Claims Act:
Deputizing the Public to Combat Fraud

U.S. FALSE CLAIMS ACT:
Deputizing the Public to Combat Fraud*

Joseph E. B. White

Historically, private prosecutors, through private action statutes, or "qui tam" statutes, have played a pivotal role in enforcing public regulations. However, with the emergence of professional police forces and the misuse of early *qui tam* statutes, governments have steadily recalled prosecutorial authority from the general public. In stark contrast, the U.S. False Claims Act, one of the few remaining *qui tam* statutes, continues to actively incentivize private citizens to ferret out fraudulent activity, empowering the citizenry with a level of prosecutorial authority, and freeing limited public enforcement resources to target other forms of criminal activity. The growing success of the Act reveals an efficient, cost-effective public-private enforcement model that balances the theoretical and historical concerns raised by the public choice theory and previous *qui tam* legislation.

Today, the U.S. legal system largely disregards the potential benefits of private citizens in regulatory enforcement, and yet private whistleblowers continue to play the dominant role in combating fraud against the U.S. Government. Several theoretical traditions identify laypersons as being an important counterbalance to the potential ills of excessive governmental authority. The public choice theory, in particular, argues that extreme centralization of governmental authority jeopardizes the overall good of society. This article examines the U.S. False Claims Act (FCA), a functioning *qui tam* statute, to examine what modern private law enforcement might look like in operation—what rights private prosecutors receive and what citizen involvement means to modern fraud prosecution efforts. I argue that effective fraud prosecution cannot be realized without the assistance of the private citizenry and that the U.S. False Claims Act model may help the criminal justice system respond to some of the limits of traditional public enforcement mechanisms.

Legislative consideration and sociolegal scholarship rarely addresses the feasibility of private law enforcement. The topic received extensive discussion in the 1860s and in the 1940s, but must less in the meantime, even as concerns over rising crime rates and limited public resources garnered heightened concern. While most criminal justice experts were looking for answers within the public law enforcement arena, an effective dual private-public enforcement mechanism emerged and thrived in the U.S. Government's fight to end fraud against the Federal Government. Indeed, since 1986, the U.S. False Claims Act's amended *qui tam* provisions have revolutionized fraud detection and prosecution. "Qui tam," which comes from the Latin phrase, "qui tam pro domino rege quam pro se ipso in hac parte sequitur," translates into "who pursues this action on our Lord the King's behalf as well as his own." According to one of its main advocates, Taxpayers Against Fraud Education Fund, several states have

*Taxpayers Against Fraud Education Fund has initiated an effort to increase the level of academic interest in the role of *qui tam* relators and the federal False Claims Act. This paper was presented at the 2005 National Law & Society Association Meeting in Las Vegas, an academic conference which drew legal academics from all fifty states and over thirty countries.

explored similar *qui tam* mechanisms, including fourteen U.S. states that have enacted their own version of the U.S. False Claims Act (Taxpayers Against Fraud Education Fund 2005). Nor is the interest limited to the United States. Just this last year, the Australian legislature considered a slight variation on the U.S. False Claims Act. With its measured success in legal practice, the U.S. False Claims Act *qui tam* enforcement model deserves the attention of sociolegal scholars to see whether it merits expansion into other areas of regulatory enforcement.

This paper highlights the U.S. False Claims Act model as an effective dual-plaintiff mechanism to combating fraud. Part I examines some of the historical abuses and misuses of earlier *qui tam* statutes. Part II, documenting the pendulum swing to the other end of the spectrum, explores the theoretical limitations of concentrating prosecutorial authority in the hands of the government. Part III highlights the compromise struck by the *qui tam* provisions of the U.S. False Claims Act, and argues that this modern-day statute answers the historical questions raised by earlier *qui tam* statutes, all while providing a measured solution to the theoretical concerns of excessive governmental authority. The article concludes that because the U.S. False Claims Act approach has successfully addressed the historical, theoretical, and actual concerns of present-day fraud enforcement, the dual-plaintiff design offers a possible approach to other areas of regulatory enforcement.

I. THE HISTORICAL DECLINE OF *QUI TAM* LEGISLATION

Earlier governments turned to *qui tam* provisions out of necessity. In thirteenth century England and in colonial America, with the absence of established professional police forces, the governments primarily relied upon private citizens to enforce public laws. The enormity of the jurisdictional regions, the anonymity of the typical rural existence, and the scarcity of recognized prosecuting authorities all underscored the need for private, or *qui tam*, actions. Serving as a viable alternative to public law enforcement, *qui tam* suits were quite common, etched into English law until 1951 and the American lexicon through much of the nineteenth century (History of *Qui Tam* 1972: 83–91).

However, the evolving social and legal climate eventually decreased the need for *qui tam* suits, slowly replacing private citizens with professional law enforcement. Perhaps most importantly, the mass migration of people to the cities concentrated the populace within set, manageable geographical boundaries, permitting law enforcement to better monitor criminal activity. Furthermore, the demographic shift from rural to urban settings exacerbated the anonymity of the general public, undermining an individual private citizen's ability to investigate and locate criminal actors for a possible *qui tam* action. Lastly, according to David Friedman, the English government began to recognize that "the right to run courts and collect fines was a valuable property right" (Friedman 1996: 107). Likewise, in 1800 America, elected prosecutors and governmental officials decided that there was no longer a need for private prosecutors (Langbein 1974: 445).

While demographical statistics and political ambitions certainly formed the undercurrent ripping *qui tam* statutes from the law books, serious misuse and abuse of these early provisions hastened their ultimate demise (Beck 2000: 579). Without adequate government oversight, private prosecutors brought actions under unpopular or obsolete laws, including "Sunday laws," which disallowed a litany of common activities on Sunday (Beck 2000: 591–93). *Qui tam* actions were also commonly filed in distant, inconvenient venues, forcing defendants to settle, rather than expend the necessary time and money to battle in court (History of *Qui Tam* 1972: 91).

Perhaps more disturbing, several early *qui tam* actions involved collusion between defendants and private prosecutors, in which the parties would settle for deflated amounts, preventing the government from subsequently prosecuting the wrongdoer. The English Parliament eventually responded to this defense tactic by passing legislation that removed the preclusive effect of these private suits, but by this point, the momentum toward repealing all *qui tam* suits had already begun (21 Jam. I ch. 4 (Eng.) (1623)). The proverbial "straw that broke the camel's back" was the revelation that many private prosecutors were extorting money through agreements not to prosecute (Beck 2000: 574). Soon after, q*ui tam* statutes disappeared from the English and American legal landscape, centralizing enforcement power in the hands of the government.

II. THE THEORETICAL CONCERN OF CONSOLIDATED PUBLIC LAW ENFORCEMENT

In theory and in practice, excessive consolidation of law enforcement authority undermines the goals of fraud detection and prosecution. Most prominently, the public choice theory encourages increased involvement of private citizens and the decentralization of prosecutorial discretion. This sociolegal theory is based on the assumption that "politicians, bureaucrats, and other decision-makers in public life are rationally self-interested," thereby "maximiz[ing] their personal power and wealth even when these selfish ends conflict with public-spirited goals" (Colombatto & Macey 1996: 929). Thus, the public choice theory suggests that an effective regulatory enforcement mechanism must adequately address this characteristic of governmental decisionmakers.

More to the point, the public choice theory, which has earned credibility in recent years in sociolegal literature, refers to the belief that "well-organized groups, seeking to advance their members' self-interest at someone else's cost, tend to win out in the public policy market" (Farina & Rachlinski 2002: 268). Indeed, in the arena of corporate crime legislation and prosecution, the proprietary and monetary interests of competing groups "may be affected, positively or negatively, by actions of the government" (Kahn 1990: 288). The public choice theory "understands legislative outcomes to result from the supply and demand for political outcomes" (Kahn 1990: 288), in which "other individuals, with conflicting interests, are willing to pay for opposite results" (Kahn 1990: 288).

Of course, a central premise of the public choice theory is that government officials are influenced, whether consciously or subconsciously, by the fiscal or physical presence of interest groups (Kahn 1990: 288–89). According to Peter Kahn, the effective price of influence depends largely upon the size of the interest group:

> The smaller the group, the more likely it is that an individual group member will prefer to bear the cost of the action rather than risk its not occurring . . . . The larger the group, the less likely it is that the individual will be willing to pay for the group's consumption, and the greater is the individual's incentive to try to pass the cost to other group members. Larger groups will therefore encounter more difficulty organizing and securing the desired good . . . for its members . . . . Larger groups, particularly those as large as the "general public," . . . may be entirely unable to make effective bribe offers to legislators (Kahn 1990: 290).

In turn, under the public choice theory, the victim typically appears to be the general public, "who [has] been legislatively robbed by a well-organized minority" (Hovenkamp 1990: 87). Moreover, if the target is the government's corporate crime enforcement mechanism, the general public and the public treasury are also financially jeopardized. As a result, national governments with concentrated prosecutory authority may be subject to even more pressure and influence from determined corporate interests, potentially encouraging inappropriate use or misuse of limited resources.

The practical realities of the public choice theory have been well documented, particularly in the ongoing battle to combat fraud against the U.S. Government (Sax 1971; Stewart 1975). Especially revealing, a seminal 1981 U.S. General Accounting Office (GAO) report concluded that the centralization of enforcement authority in the U.S. Department of Justice led to relatively few criminal or civil fraud cases. The GAO report cited the U.S. Government's failure to initiate adequate fraud litigation and the insufficiency of its prosecutorial resources, thereby allowing perpetrators of fraud to keep their ill-gained profits. Likewise, under a public choice theory, Professor Jerry Mashaw expressed concern over the current concentrated structure of the U.S. Government, proposing a need for broader delegation of governmental decisionmaking authority (Mashaw 1997: 118).

Therefore, the theoretical and actual potential for abuse and defects in a concentrated regulatory mechanism require secondary avenues for enforcement. If regulations are not adequately enforced, the justice system suffers, as does the society as a whole. In order for the public to be confident that their interests are being protected in an environment dominated by interests groups, private citizens must be allowed to function as a secondary avenue for enforcement.

III. THE COMPROMISE OFFERED BY THE U.S. FALSE CLAIMS ACT

While most of the early *qui tam* statutes have been erased from the books, the *qui tam* provisions of the U.S. False Claims Act (31 U.S.C. 3729 *et seq.*) remain etched into the law, recently earning the distinction as the U.S. Government's primary tool in combating fraud against the public treasury. The longevity and efficacy of the Act not only reflects the drafters' keen recognition of the historical misuses and abuses of earlier *qui tam* statutes, but also balances the disruptive tendencies raised by the public choice theory with the need for an effective fraud detection and deterrence mechanism.

With the advent of the Internet and the globalization of modern-day criminal schemes, the U.S. Government needs law enforcement capabilities that respond rapidly and effectively to the dynamic underworld of complex corporate fraud. Recognizing the resource and informational limits of traditional public law enforcement personnel, the United States, in 1986, reinvigorated the *qui tam* provisions of the U.S. False Claims Act, encouraging private citizens to join the fight against those seeking to steal from government coffers.

By deputizing private attorney generals, the U.S. Government not only supplemented limited public resources, but also tapped into the key resource of inside information about fraudulent activity, oftentimes setting the Government onto the correct trail of fraud. Indeed, the *qui tam* whistleblower, or "relator," regularly guides the U.S. Government through the complex maze of corporate fraud, charting the disjointed pieces of corporate malfeasance, ultimately directing prosecutors to the key masterminds, knowledgeable witnesses, and "smoking gun" evidence. As the U.S. Government has increasingly relied upon False Claims Act relators, corporate fraud has become more complex and subversive, furthering the reliance on these deputized private prosecutors. By outlining the precise inner workings of the U.S. False Claims Act, this section details an institutional model that successfully integrates private citizens into law enforcement efforts, all while honoring the concerns highlighted by history and the public choice theory.

A. The Basic Mechanics of the U.S. False Claims Act

The basic mechanics of the U.S. False Claims Act center around a dual-plaintiff design, structured to maximize the relative benefits and incentives of the two parties, the U.S. Government and the private prosecutor. The unique relationship also offers a level of government oversight and defendant protection that was largely absent from earlier *qui tam* legislation, thus preventing some of the historical abuses that led to the decline of private citizen actions.

Enacted into law in 1863 (Act of March 2, 1863, ch. 67, 12 Stat. 696–98), the U.S. False Claims Act was originally passed to protect the Union Army from government contractors who had billed the military for defective or nonexistent supplies, including sick horses, malfunctioning guns, and shoddily manufactured uniforms. Today, in addition to defense contractors, the Act is also used to prosecute other types of contractor malfeasance, such as fraudfeasing health care providers, dishonest research grantees, and price-gouging pharmaceutical manufacturers.

The FCA has always included a *qui tam* provision, in which the Government assigns its right to sue to the relator; however, prior to 1986, several amendments to the Act undermined FCA *qui tam* actions. In turn, few successful private actions were brought during this time period (Boese 2001: § 1.03). In 1986, after several high-publicly pricing scandals at the U.S. Defense Department, including stories about $900 hammers, the U.S. Congress strengthened the FCA *qui tam* provisions by increasing the minimum monetary reward for successful cases, by lowering the mens rea requirement, by lengthening the statute of limitations period, and by constructing an anti-retaliation provision to protect FCA whistleblowers (Boese 2001: § 1.04).

The exact procedure for bringing an FCA *qui tam* action is also quite unique. The relator first files a *qui tam* complaint under seal with a federal district court and does not serve the complaint on the defendant. In addition, the relator submits a copy of the complaint to the Department of Justice along with a "written disclosure of substantially all material evidence and information the person possesses" (31 U.S.C. § § 3730(b)(2)-(3)). Then, while the case remains under seal, the Department of Justice assesses the relator's case and determines whether it will intervene in the matter (Boese 2001: § 4.05). If the Government decides to intervene, the Department of Justice takes "primary responsibility" for the suit, but the relator retains a stake in the action, including the right to object and be heard on a motion to limit the relator's role, or to dismiss or settle the case (31 U.S.C. § 3730(c)(2)). Conversely, if the government declines to intervene, the relator has the right to proceed with the action (31 U.S.C. § 3730(c)(3)). Either way, the relator is guaranteed at least fifteen percent of any judgment or settlement and could receive up to thirty percent in a non-intervened case. The only time the relator could receive less than the fifteen percent minimum is when the relator was complicit in the FCA violations or the action was based on publicly disclosed information (31 U.S.C. §§ 3730(d)(1), (3)). In other words, under most circumstances, both the public and the private prosecutors maintain a vested interest in the detection and prosecution of False Claims Act violations.

B. The U.S. False Claims Act Alleviates Public Choice Theory Concerns

The shared interests of the U.S. Government and the FCA *qui tam* relator dissipate some of disruptive concerns raised by the public choice theory. In particular, Jerry Mashaw, in his book *Greed, Chaos and Governance*, stressed the limited resources of government agencies, the concern that government agencies could become "captured" by the industries they monitor, and the overall societal benefits of decentralizing governmental authority (Mashaw 1997: 46). The U.S. False Claims Act recognizes and addresses each of these concerns.

First, and perhaps most importantly, FCA *qui tam* relators regularly supplement public resources by supplying governmental agencies with the necessary inside information to ferret out fraud. The Act explicitly seeks to elicit inside information through its penalties provisions, which, combined with the minimum percentage allocated for successful relators, provide a hefty incentive for potential relators. These valuable insiders, familiar with the fraudulent landscape behind the corporate veil, are able to guide governmental investigators, saving limited investigative resources and time (Bucy 2002). Additionally, knowledgeable relators spare innocent corporate bystanders the prying ire of a broad government investigation.

The U.S. False Claims Act also supplements governmental regulatory efforts by welcoming skilled *qui tam* attorneys into the fight against fraudfeasing entities. The specialized legal skills of the Relators' Bar are particularly needed in the detection and reconstruction of the complex, buried economic schemes that unlawfully drain the public fisc. Given the large dollar amount of the typical FCA settlement, the presence of court-awarded attorneys fees, and the commonality of traditional contingency fee agreements, the monetary incentives lure some of the country's leading attorneys to the FCA practice. Furthermore, the complex legal issues raised under the U.S. False Claims Act typically deter inexperienced counsel, especially given the high front-end costs of *qui tam* investigations and the uncertainty of FCA settlements.

Second, FCA *qui tam* actions counterbalance government agencies that have been potentially "captured" by the industry they were tasked to monitor. Specifically, the FCA's dual-plaintiff design encourages coordination between private and public regulators, thus alleviating concerns over "industry capture." Indeed, as mentioned, the relator retains the right to continue with the suit, even when the Government refuses to take action. Furthermore, the dual nature of FCA prosecutions allows the two parties to discuss overarching regulatory policy concerns, all while limiting duplicative prosecution and investigation efforts.

Third, as championed by the public choice theory, the U.S. False Claims Act returns power and participation to the citizenry, greatly decentralizing prosecutory authority. Cognizant of the social, emotional, and financial disincentives to blowing the whistle on fraud, the Act incentivizes whistleblowers to come forward so as to publicly highlight the fraudulent activity for the U.S. legal system (Bucy 2002). Without the FCA reward structure, the prevalence of *qui tam* actions would surely decrease, freeing fraudfeasors to scheme another day.

C. The U.S. False Claims Act Avoids Historical Pitfalls of Previous *Qui Tam* Statutes

In addition to answering the questions raised by the public choice theory, the drafters of the U.S. False Claims Act painstakingly avoided the historical pitfalls that buried previous *qui tam* statutes. In particular, the FCA establishes a quality-control mechanism to weed out frivolous or wasteful *qui tam* claims, and includes enhanced confidentiality protections for those accused of FCA violations.

Unlike early *qui tam* statutes, the FCA *qui tam* provisions demand governmental oversight. The dual-plaintiff structure partners public and private prosecutors, encouraging the two parties to enter a continued dialog about the case. Besides requiring the relator to disclose key facts about the case they are filing, the Act also grants the Government access to subsequent court documents, even if the Government declines to intervene in the matter.

Additionally, if the relator insists on proceeding with a frivolous claim, the FCA authorizes the Government to move for dismissal of the action. Furthermore, even if the Government does not seek or obtain dismissal of the frivolous suit, the defendant has a cause of action under the FCA to sue the relator for bringing inappropriate litigation.

Lastly, in an attempt to protect the defendants' reputation from mere allegations of wrongdoing, the FCA includes a seal provision, which keeps the relator's complaint out of the public eye while the Government determines whether to intervene. Further, the seal also protects the government and the accused from wasting unnecessary resources in responding to a frivolous private action. As the U.S. Congress explained, "sealing the initial private false claims complaint protects both the Government and the defendant's interests by giving the Government an adequate opportunity to fully evaluate the private enforcement suit" (S. Rep. No. 99-345, 1986 U.S.C.C.A.N. 5266, 5289-90). This respect for competing public and private interests not only honors the historical and theoretical roots of *qui tam* actions, but also contributes to the practical realities of present-day fraud prosecutions.

D. The Success of U.S. False Claims Act *Qui Tam* Prosecutions

The U.S. False Claims Act *qui tam* provisions have not only merely avoided the historical drawbacks of previous private citizen actions, but have actually emerged as the primary weapon in combating fraud against the U.S. Government. Notably, prior to the 1986 Amendments, when Congress greatly strengthened the FCA *qui tam* provisions, the Department of Justice only received about six *qui tam* cases per year (France 1990: 47). Since that time, over 4,700 *qui tam* cases have been filed and the government has recovered in excess of $14 billion in fraudulently obtained funds (Taxpayers Against Fraud Education Fund 2005). Moreover, in the last fiscal year, 79.8 percent of all FCA cases began as *qui tam* actions, compared to only 8.8 percent in 1987 (Taxpayers Against Fraud Education Fund 2005). Indeed, the Government's reliance on private prosecutors has potentially contributed to a decreased non-*qui tam* caseload, from a high of 361 new cases in 1987 to only 105 cases in 2004, all while increasing the overall caseload from 393 to 520 new FCA cases (Taxpayers Against Fraud Education Fund 2005). Even more telling, the total yearly FCA recovery in 1987 was under $90 million; the average return over the last five years has soared to $1.48 *billion* (Taxpayers Against Fraud Education Fund). Lastly, according to a recent study, the U.S. Government's investment in health care *qui tam* cases has returned $13 to the government's coffers for every $1 invested (Meyer 2005). In short, private prosecutors have become an effective, cost-efficient means to recover stolen funds.

IV. CONCLUSION

In conclusion, modern-day corporate fraud prosecution needs the assistance of private prosecutors. Harkening back to resource imbalance of early English and American governments, the enormity, anonymity, and complexity of today's economic schemes have greatly disadvantaged traditional public law enforcement efforts.

The success of U.S. False Claims Act has quietly become the most important weapon in combating fraud against the U.S. Government. The Act operates as an effective government regulatory mechanism that actually incorporates laypersons in a vital decision-making capacity—the role of an Assistant U.S. Attorney. Not merely serving as a legitimacy function in the American legal system, the empowerment of False Claims Act whistleblowers has actually produced tangible and deterrent-producing effects, recovering over $14 billion in fraudulent funds since 1986. Even though corporate fallout is regularly documented in the nation's newspapers, television documentaries, and scholarly analysis, the catalytical presence of the U.S. False Claims Act has largely remained in the shadows of the American legal machinery, inconspicuously demanding legitimacy and accountability from all who do business with the U.S. Government. This paper illuminates the inner workings of the Act, highlighting the unprecedented partnership between the justice system and the private citizenry in regulating government expenditures. As this regulatory model shows, the lay public and the Government can partner in strengthening the American legal system.

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