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

Since the 1986 False Claims Act Amendments, nearly $18,000,000,000 in stolen funds have been returned to the U.S. Treasury. Emerging state False Claims Acts have offered yet another level of protection for state budgets across the country. Two of the nation's largest cities have enacted similar legislation to protect their monetary walls. The success of the *qui tam* mechanism has been nothing short of remarkable.

But the true success of the '86 Amendments is not found through statistical analysis or in Justice Department press releases or even in casebooks. The true mark of success is found in boardrooms across America. The '86 Amendments have forced an awakening in the corporate community. For some many years, the federal government was seen as an easy target for fraudsters. Now, with whistleblowers standing guard, fraudsters have scampered to the remaining states without FCAs, begging the legislators to leave their state coffers unguarded.

The good news is that the federal False Claims Act is not a theoretical principle of fraud deterrence. Instead, it has a proven track record of effectively and efficiently targeting those who seek to steal the American tax dollar. Opponents lob baseless derogatory comments in the hope of tarnishing its record, but legislators continue to recognize the true impact of the False Claims Act. Happy twentieth birthday, '86 FCA Amendments!

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Recent False Claims Act & *Qui Tam* Decisions

APRIL 1–JUNE 30, 2006

A. FCA Liability for Violating Conditions of Participation

U.S. ex rel. Conner v. Salina Regional Health Center, Inc., 2006 WL 1232859 (D. Kan. May 8, 2006)

A Kansas district court dismissed an FCA *qui tam* action, even though the defendant-hospital allegedly violated a number of Medicare's conditions of participation. The court found that because the alleged violations fell under the government's grounds for "Permissive Exclusion," as opposed to "Mandatory Exclusion," the Medicare payments were not expressly conditioned on the hospital complying with these particular requirements. Moreover, the court determined that there was not an Anti-kickback statute violation in the case, for the State law explicitly permitted the contested hospital-physician agreement.

Brian Conner, M.D., an ophthalmologist who formerly maintained medical staff privileges with Salina Regional Health Center, brought an FCA *qui tam* action against the health center, alleging that each time the defendant filed an annual Medicare cost report and certified that its services were in compliance with the laws and regulations governing healthcare services, the defendant presented false claims to the government. According to Conner, the defendant provided medical services that failed to meet the governing standards of care and solicited kickbacks from Conner, thus making reimbursement claims for those services false.

After the government declined to intervene in the matter, the defendant filed a FRCP 12(b)(6) motion to dismiss, arguing that Conner failed to state an actionable FCA claim.

Payment Was Not Expressly Conditioned on Perfect Compliance With Regulations at Issue

The defendant claimed that, even if it falsely certified that it was in compliance with these particular statutes and regulations, the government did not rely on the certification in determining whether it had properly reimbursed the defendant for healthcare services. According to the defendant, reliance was lacking because the statutes and regulations at issue did not expressly require compliance as a prerequisite to receiving government payment. The relator, however, countered that the cost reports that included the certification were required by law, and final Medicare payments were expressly conditioned upon a truthful annual cost report certification.

The court reduced the case law to one question: Was the payment expressly conditioned on certification of compliance with statutes and regulations? After analyzing the various statutes and regulations at issue in this case, the court determined that payment was not expressly conditioned on the defendant's certification. Specifically, the court determined that the following statutes and regulations do not expressly require perfect compliance with the "conditions of participation" as a prerequisite to receiving government payments: 42 C.F.R. §§ 482.1 *et seq.*; 42 U.S.C. § 1395dd; 42 U.S.C. § 2000d; 42 U.S.C. § 1320a-7(b)(6)(B); and 42 U.S.C. § 1320a-7(b)(7).

As for alleged violations of 42 U.S.C. § 1320a-7b(b) and 42 U.S.C. § 1320a-7b(a)(3), the court noted these statutes were listed under "Permissive Exclusion" list, providing that "the Secretary **may** exclude the following individuals and cease participation in any federal health care program. . . ." (emphasis added). Given this level of discretion, the court stated that these statutes did not expressly condition payment upon certification.

The court warned that "[i]f plaintiff's argument is accepted, the FCA would allow courts to take away all money a hospital received from Medicare even though the agencies charged with the enforcement of Medicare statutes and regulations would not have done so."

No Anti-Kickback Violation Where State Law Allows The Agreement

The court then turned its attention to whether Conner had stated an actionable FCA claim based on the Medicare Anti-kickback statute, 42 U.S.C. § 1320a-7b. Conner claimed that in order to continue to receive privileges with defendant, including the right to receive patient referrals from the hospital's emergency room, he was required to provide his own operating room staff. Conner claimed that this qualified as a "kickback," because it provided a benefit to the hospital, yet the hospital continued to receive full Medicare reimbursement. According to Conner, he was forced to financially induce the hospital to furnish him with privileges and Medicare referrals.

The court found that these allegations also failed to state a claim, for "Conner merely allege[d] a dispute between two healthcare providers about valid and legal ways to provide surgical support, which does not affect Medicare payments." Notably, the court sidestepped whether the compulsory nature of the relationship amounted to an Anti-kickback violation. Instead, the court pointed out that Kansas law does not prohibit Conner from using his own surgical scrub personnel if he so chooses. *See* K.A.R. §§ 28-34-5a and 28-34-17b. According to the court, "Conner cannot state a claim for violation of the anti-kickback statute when defendant proposed an agreement which was allowed and contemplated by law." In turn, the court dismissed Conner's Anti-kickback allegations.

B. FCA Liability in Multi-Stage Application Processes

U.S. ex rel. O'Connell v. Chapman University, 2006 WL 1562231 (C.D. Cal. May 23, 2006)

A California district court ruled that an actionable FCA claim existed, where a defendant allegedly submitted false documents to a non-governmental accrediting body, which granted the defendant the right to submit claims for payment to the federal government. The court refused to deviate from the existing case law, even though the conditions of eligibility were dictated by a non-government organization and not by a statutory or regulatory requirement.

Katherine O'Connell and Carlee Durfor, former employees of Chapman University, brought an FCA *qui tam* action alleging that the university violated the FCA by supplying knowingly false certifications of compliance to an accrediting organization, the Western Association of Schools and Colleges (WASC), so as to qualify for hundreds of millions of dollars in federal and state funding. Moreover, the relators maintained that the certifications pertained to fundamental conditions of payment of government funds.

After the government declined to intervene, the university filed a motion to dismiss, arguing that none of the certifications identified by the relators constituted false claims for payment or false certification of compliance with a condition of payment. In addition, the university argued that the federal and state funding does not depend on complete compliance with WASC guidelines, but rather depends only on the university being WASC-accredited. In short, the university maintained that the relators' claims fail because the state licensing application documents do not involve the payment of government money.

Court Applies Seventh Circuit's *Main* Decision

In rejecting the defendant's argument, the court applied the analytical framework provided by an analogous Seventh Circuit decision, *United States ex rel Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005). *Main* dealt with a certification to refrain from paying recruiters incentive compensation, a prerequisite for eligibility in federal student loan and grants programs. In *Main*, the court began its analysis by noting that many federal subsidies under the Higher Education Act require multiple layers of paperwork. "First the college or university submits an application to establish the institution's eligibility." If this application, called "phase one," is granted, the institution and its students submit additional applications for specific grants, loans, and scholarships. These applications are called "phase two." The *Main* court observed that both "a statute, 20 U.S.C. § 1094, and a regulation, 34 C.F.R. § 668.14(b)(22)(i), condition institutional eligibility on a commitment to refrain from paying recruiters contingent fees for enrolling students."

The *Main* court, faced with a similar defense argument, held that "phase-two applications would not have been granted had the truth been told earlier, for all disbursements depended on the phase-one finding that the University was an eligible institution." The court further held that an actionable FCA claim was raised, where the "University use[d] its phase-one application (and the resulting certification of eligibility) when it makes (or causes a student to make or use) a phase-two application for payment."

In the case at bar, the court considered "phase one" to be the documents that the university submitted for WASC accreditation. "Phase-two" was the subsequent requests for specific state and federal loans and grants, which depended on the university's WASC accreditation. Therefore, the relators argued that but for the alleged false statements contained in phase-one, the university would not have been granted certain loans and grants. Agreeing with the *Main* decision, the court held that no more was required to state a claim under the FCA.

Perhaps recognizing the persuasive appeal of the *Main* holding, Chapman attempted to distinguish *Main* on the grounds that in the instant case, unlike in *Main*, there was no statutory or regulatory requirement that conditioned eligibility on the alleged infraction. The court, however, was unable to see why this distinction made any difference. The government conditioned payment on the university complying with something, and it did not matter if that something was found in a regulation or an accreditation guideline.

Thus, the court found that the relators had raised an actionable claim.

A. Section 3729(a)(1) & (A)(2) Presentment "Requirement"

U.S. ex rel. Rafizadeh v. Continental Common, Inc., 2006 WL 980676 (E.D. La. April 11, 2006)

A Louisiana district court dismissed an FCA *qui tam* action, which had alleged that a defendant submitted false claims to a State agency, causing the agency to submit a false budget to the federal government. Ignoring the "cause[d] to be presented" language of the Act, the court claimed that because the relator presented the false claims to the State, and not to the federal government, FCA liability did not attach under FCA Sections 3729(a)(1) or (a)(2).

Schumann Rafizadeh brought an FCA *qui tam* action under Sections 3729(a)(1) and (a)(2) against Continental Common, Inc, alleging that the company knowingly submitted false and inflated claims for rental invoices to the State of Louisiana Departments of Social Services (DSS), Specially, the defendants allegedly overstated the amount of usable square feet included in the DSS leases and, in addition, charged the government in excess of the then-going market rates for the existing and non-existing square footage stated in the lease. This, in turn, caused the State to present inflated claims for payment to federal government, in accordance with the federal government's commitments to fund the agency's budget.

The defendant, pointing to the holdings of *United States ex rel. Totten v. Bombardier*, 380 F.3d 488 (D.C. Cir. 2004), encouraged the court to dismiss the action, for the relator failed to allege that the claim was submitted to the federal government.

No Federal FCA Liability Where the False Claim Is Presented to a State Government

The relator maintained that a false claim was ultimately submitted to the federal government, for the false and inflated invoices were incorporated "into the budget presented to the United States for funding . . ." and that the United States funded a portion of the agency's budget.

The court, however, ignoring the "caused to be presented" language of Section 3729(a), considered the presentation to be too tenuous to constitute presentment of the inflated invoices to the United States. With blinders on, the court plainly stated that the allegedly inflated invoices were presented to the State of Louisiana, not the federal government, so FCA liability could not attach.

Accordingly, the court granted the defendant's motion to dismiss.

B. Section 3729(a)(4) Possession Requirement

U.S. ex rel. Vargas v. Lackmann Food Services, Inc., 2006 WL 1460381 (M.D. Fla. May 23, 2006)

A Florida district court held that an FCA relator had raised an actionable Section 3729(a)(4) claim, where the relator alleged that the defendant-food service company supplied the government with less food than the amount for which the defendant had received a receipt for payment. The court found that all of the elements were present, even the requirement that the defendant "possess[ ] . . . property or money used, or to be used, by the government," for the defendant split the resulting profits from sales with the government.

Beginning in April 2000, Carolyn Vargas worked as a culinary worker for Lackmann Food Services, Inc., which had a contract with the federal government to prepare and serve food at a NASA facility. Under the terms of the contract, Lackmann was obligated to seek approval for and receive at specified times on a semi-annual basis approximately fifty percent of the net revenue accrued from sales of food.

In late 2001, Vargas complained to management that the company was regularly serving out-dated fish and other food to NASA employees. In response to Vargas's repeated complaints, her supervisors told her that the chef's job was to save money. Moreover, Vargas alleged that when the health inspector visited, she was instructed to lie to the inspector by telling him that Lackmann dumped all leftovers every day.

On February 15, 2006, Vargas filed an FCA *qui tam* action against Lackmann under Section 3729(a)(1) and (a)(4), claiming that from late 2001 until October 2003, Lackmann knowingly presented or caused to be presented false claims for payment for the sale and serving of substandard food to officers and employees of the United States, members of the Armed Forces, contractor employees, and Government invitees. Vargas further alleged that at least one of the three entrees served by Lackmann each day, which averaged 500 servings per week, was spoiled, contaminated, or unfit for human consumption. In turn, Vargas argued that Lackmann's conduct was the equivalent of submitting approximately 500 claims each week for 100 weeks, amounting to an estimated 50,000 instances in which Lackmann made false claims in applying for payments for substandard food.

After the government refused to intervene in the matter, Lackmann filed a motion to dismiss, on the grounds that the relator failed to allege that the government either paid for or reimbursed any of the customers for food purchased or that the defendants intended to extract money from the government in connection with these individual point-of-sale transactions.

Relator Raised an Actionable 3729(a)(1) Claim

The court opened the analysis by explaining what is *not* an actionable Section 3729(a)(1) claim. Citing *United States ex rel. Totten v. Bombadier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004), the court explained that the relator would not have raised an actionable claim if she had alleged that the employees bought the defective food with funds from their government paychecks. The court then proceeded to accept the relator's argument based on the fact that no court has explicitly rejected the relator's theory of liability.

The defendants, however, argued that *Totten* requires the relator to show that funds were paid directly by the government. Moreover, the defendants maintained that the concession agreement between the parties clearly demonstrated that the government did not provide any funds directly to defendants and that defendants never made a demand on the government for payment because the government based its transmission of the funds in the separate account on a performance evaluation.

The relator, however, pointing out that the individual patrons were government employees, countered that the defendants submitted false claims for payment to government employees at each point of sale. At the motion to dismiss stage, the court viewed this as being sufficient to allow the case to proceed.

Relator Raised an Actionable 3729(a)(4) Claim

As for the relator's Section 3729(a)(4) claim, the defendants argued that the relator did not raise an actionable claim, for there were no specific allegations that the defendants were "in possession or control of property or money used by the Government" or that defendants received a "certificate" of any kind.

In *United States ex. rel Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 681 (10th Cir. 1998), the Tenth Circuit found that the "essential elements" of a claim under Section 3729(a)(4) include "(1) possession, custody, or control of property or money used, or to be used, by the government, (2) delivery of less property than the amount for which the person receives a certificate or receipt, (3) with intent to defraud or willfully to conceal the property."

Parceling out the three *Aakhus* elements, Vargas alleged that Lackmann possessed the government's money in the form of sale proceeds prior to depositing the money in a government account, that Lackmann delivered substandard food, and that Lackmann had an intent to defraud government at that time.

Lackmann, however, argued that Vargas failed to allege that Lackmann even received a certificate or receipt. The court, pinning this oversight on an "inartfully drafted" complaint, ruled that it could be inferred that Lackmann received a certificate or receipt because it was a "contractor."

Thus, finding all of the elements adequately pled in the complaint, the court denied the defendant's motion to dismiss.

C. Section 3729(b) *Mens Rea* Requirement

United States v. Chen, 2006 WL 1554546 (D. Nev. May 30, 2006)

A Nevada district court, permitting an FCA action to proceed against an individual physician, ruled that a reasonable jury could find that the defendant had submitted false claims to the government. Moreover, the court stressed that health care providers have a duty to familiarize themselves with the Medicaid billing requirements.

The United States brought an FCA action against Dr. Eugene Chen, alleging that from January 1999 to June 2004, Chen submitted false claims for reimbursement to Medicare contractors. The federal government brought the action after discovering that Chen was regularly upcoding his bills to obtain the highest level of Medicare reimbursement.

Chen filed a motion for summary judgment arguing that his claims for payments were not false. Additionally, Chen argued, that even if the billings were false, Medicare approved his billing practice and he reasonably believed that he billed appropriately.

A Reasonable Jury Could Find That the Defendant Submit False Claims

Chen claimed that he never submitted a false Medicare claim, for he always fulfilled the requirements for billing under the relevant CPT Code. In particular, Chen maintained that he could bill for the procedure and an additional "consultation" modifier because he did more during his consultation than the normal requirements for the base CPT code. In response, the government argued that Chen's level of service did not meet the Medicare definition of a "consultation" as presented in Medicare manuals, bulletins, and newsletters. The government argued that the service Chen provided lacked several required elements to qualify as a consultation: 1) the referring physician did not request the consultation; 2) the patient's record did not document the consultation request; 3) the referring physician was not seeking Chen's "advice or opinion;" and 4) physicians did not intend to use the results in management of their patient's condition. Additionally, the government alleged a pattern of double billing, first billing for the procedure and then billing under a separate code for an "initial inpatient consultation." The government argued billing for both of these codes double bills the Medicare program because both codes include the elements of a consultation.

While conceding that the Medicare regulations were "unquestionably technical and complex," the court agreed with the government's interpretation and ruled that there was no ambiguity when it came to the requirements for billing initial consultations. The court also found that a reasonable jury could find that Chen double billed for his services.

Providers Have a Duty to Familiarize Themselves With Medicare Billing Requirements

Arguing in the alternative, Chen maintained that even if his billings were false, he did not knowingly falsely bill because the Medicare billing requirements are confusing. Chen asserted that he made "reasonable interpretations" of Medicare billing codes and that he reasonably believed his billing practices were correct. As evidence of his lack of knowledge, Chen noted that Medicare reviewed his billings three times and each time Medicare paid for the questioned consultations. Chen argued that this led him to believe that his billing practices were correct. Further, he argued that he relied on these audits and continued his billing practices based on explicit instructions from the Medicare hearing officer.

The government responded that under Medicare, participants have a duty to familiarize themselves with the legal requirements for payment. Additionally, the government contended that Chen actually knew his billings were false because he understood the significance of billing with modifiers. Chen had billed with other modifiers and had switched to the -25 modifier when Medicare rejected payment for the consultation. Furthermore, the government argued that Chen used different diagnosis codes for the procedure and the consultation because he knew that using different diagnosis codes would portray the consultation as "separately identifiable." The government argued that Chen deliberately remained ignorant of Medicare rules. Indeed, the government maintained that Chen possessed the appropriate billing information, but he chose to ignore Medicare's billing requirements.

The court, reaching into the legislative history behind the 1986 FCA Amendments, noted that Congress amended the FCA to include acting in "deliberate ignorance of the truth or falsity" specifically to address "the problem of the 'ostrich-like' refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know." *UMC Elecs. Co. v. United States,* 43 Fed. Cl. 776, 793 (Ct. Cl. 1999) (quoting S.Rep. No. 99-345 at 21 (1986), *reprinted in* U.S.C.C.A.N. 5266, 5286). The reckless disregard standard addresses the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered. *Crane Helicopter Servs., Inc. v. United States,* 45 Fed. Cl. 410, 433 (Fed. Cl. 1999) ("[T]he statute covers not just those who set out to defraud the government, but also those who ignore the obvious warning signs.").

Moreover, the court observed that the U.S. Supreme Court has found that participants in the Medicare program have a "duty to familiarize [themselves] with the legal requirements for cost reimbursement." *Heckler v. Cmty Health Servs.,* 467 U.S. 51, 64 (1984). "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law," therefore Medicare holds health providers "to the most demanding standards in [their] quest for public funds." *Id.* at 63.

With this understanding of the law, the court had no trouble in ruling that a reasonable juror could find that Chen had actual knowledge of the falsity of his billings or that Chen acted in reckless disregard of available information when he falsely billed Medicare for consultations. Furthermore, the court ruled that a reasonable jury could find that Chen's use of modifiers and diagnosis codes demonstrated that Chen knew his billings were false.

Thus, because the government had raised genuine issues of material fact that Chen violated the FCA, the court denied Chen's motion for summary judgment.

D. Section 3729(c) Claim for Government Funds

U.S. ex rel. Shank v. Lewis Enterprises, Inc., 2006 WL 1207005 (S.D. Ill. May 3, 2006)

An Illinois district court found that an actionable FCA action existed where a defendant submitted false claims for payment to a fund created by Congress and consisting of federal, state, and private funds.

Michael Shank brought an FCA *qui tam* against his former employer Lewis Enterprises, alleging, among other things, that the audiology firm was fraudulently billing benefit plans serving retired minors. In particular, Shank alleged that the defendant's actions were bilking the tripartite benefit scheme Congress established under the Coal Act, in which the federal government, state governments, and private entities fund a benefit plan for retired coal miners.

After the government refused to intervene in the matter, the defendant filed a motion to dismiss, arguing that federal funds were stolen in the alleged scheme.

Actionable FCA "Claim" When Money Is Supplied By A Fund That Includes Federal, State, and Private Money

The courts were faced with the issue of whether false claims and statements submitted to benefit plans established and maintained pursuant to the Coal Act are actionable under the FCA. The court started by reciting the statutory definition of "claim," which "includes any request or demand . . . for money . . . which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money . . . which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for *any portion of the money* . . . which is requested or demanded." 31 U.S.C. § 3279(c) (emphasis added).

Though the defendant did not deny that the federal government provided part of the funds, they claimed that certain restrictions imposed by the government kept the federal funds from being used to pay for hearing aids and related services. The court ruled that this was not dispositive, particularly since the management of the fund was not in the hands of the federal government. In short, because the federal government provided "a portion of the money" in the benefit plan, the court ruled that the defendant potentially stole federal funds. Accordingly, the court denied the defendant's motion to dismiss.

E. Section 3730(c)(5) Alternate Remedies

United States v. Lustmann, 2006 WL 1207145 (S.D. Ill. May 4, 2006)

An Illinois district court refused to allow two relators to intervene in a settled criminal matter for the purposes of obtaining a percentage of the supposed Section 3730(c)(5) alternate remedy. Unlike some of the decisions that have permitted such an intervention, this action differed in that a stay order was still in place and that the government had intervened in the FCA *qui tam* action prior to the criminal settlement. In other words, the court stressed that the government could not have possibility obtained an *alternate* remedy, for the *qui tam* action was still ongoing.

On June 17, 2002, Angela Johnson and Jessica Maurizio, two former employees of a day care center owned by Deborah Lustmann, filed a *qui tam* action under the federal and Illinois FCAs against the day care center and Lustmann for submitting false claims for child care and meals. After several extensions of the seal, the federal government intervened in the *qui tam* action, while the State of Illinois declined intervention. On the motion of the federal government, the court stayed the action based on a pending criminal action.

On December 2, 2005, Lustmann pled guilty to the charge of mail fraud and agreed to a stipulation of facts stating that she knowingly submit false reports to the government to obtain funds for the day care center. On March 13, 2006, she was sentenced to a one-year term of probation and ordered to pay a $500 fine, a $100 special assessment, and $25,000 in restitution payable to the United States Department of Agriculture. Before she was sentenced, she had paid the entire agreed restitution.

The relators filed a motion to intervene in the criminal case, arguing that the monetary part of the criminal settlement constituted an alternate remedy within the meaning of 31 U.S.C. § 3730(c)(5) and 740 ILCS 175/4(c)(5).

Criminal Settlement Was Not An "Alternate Remedy" To An Ongoing Intervened FCA *Qui Tam* Action

Faced with the issue of whether the government's prosecution of Lustmann constituted an "alternate remedy," the court first pointed out that the stay order was still in place in the *qui tam* action. In other words, the *qui tam* action was ongoing, even after the criminal judgment was entered.

The relators responded by highlighting *United States ex. rel. Barajas v. Northrop Corporation*, 258 F.3d 1004 (9th Cir. 2001), in which the Ninth Circuit held that an administrative proceeding held by the Air Force to suspend or disbar a contractor from entering into contracts with the Department of Defense constituted an "alternate remedy" to an FCA *qui tam* action.

The court distinguished *Barajas* in that the *Barajas* relator had not intervened in the criminal prosecution of Northrop Corporation; rather, he had filed a second civil action.

The relators also cited *United States v. Bisig*, 2005 WL 3532554 (S.D. Ind. Dec. 21, 2005), to show that intervention in a criminal case is authorized. In that case, the district court held that when the United States declines to intervene in a *qui tam* action but seeks recovery of a defendant's assets through criminal forfeiture, the United States has engaged in an "alternate remedy" for purposes of § 3730(c)(5).

Once again the court distinguished the case, pointing out that, unlike in the *Bisig* case, the federal government had intervened in the action and it was still ongoing. Moreover, the court stressed that, unlike *Bisig*, there is no pending forfeiture proceeding, for Lustmann's restitution had already been disbursed. "Simply put, there is nothing in which Relators can participate." Accordingly, the court denied the relators' motion to intervene.

Ubl v. United States, 2006 WL 1050650 (E.D. Va. April 18, 2006)

A Virginia district court, in refusing to grant the relator a share of a supposed Section 3730(c)(5) alternate remedy, highlighted that the relator only has the "same rights in such proceeding as such person would have had if the action had continued" under the FCA. Here, because the government supposedly received no "proceeds" resulting from the relator's allegations, the court ruled that there was no share available to the relator.

Thomas Ubl, previously filed two separate FCA *qui tam* actions against Savin Corporation, alleging that the company was discounting its products sold to commercial customers and not informing the General Services Administration (GSA) about these discounts during negotiations of Multiple Award Schedule (MAS) contracts for the provision of copying services and supplies to federal agencies. After investigating Ubl's allegations, the government declined to intervene. However, in both instances, the government informed Ubl that it had found no basis for an FCA action and declined to intervene in the case. And, in both instances, the relator sought and received the government's consent to dismiss the complaint. On February 15, 2000, the court entered an order dismissing the complaint without prejudice.

According to Ubl, the government continued to investigate Savin and other MAS photocopier supplies/leasing contractors after declining to intervene in his *qui tam* actions. On January 31, 2006, Ubl discovered that, in fact, the GSA Office of Inspector General had conducted an audit of the Savin MAS contract following the filing of his complaint, which resulted in a July 1998 report recommending a renegotiation of the maintenance pricing terms of the government's contract with Savin. The report estimated that the renegotiation would save the government approximately $4.2 million over the life of the contract extension.

Ubl subsequently filed a FRCP 60(b)(6) motion, seeking relief from the court's order dismissing his FCA *qui tam* actions. Specifically, Ubl, seeking a share of the estimated savings under the FCA alternate remedy provision, argued that the government realized "proceeds" from his FCA claims.

No Alternate Remedy Where the Government Did Not Recover "Proceeds"

Ubl relied on the Ninth Circuit's pronouncement in *Barajas* to support his broad interpretation of the FCA alternate remedy provision, Section 3730(c)(5): "The language of § 3730(c)(5) places no restrictions on the alternate remedies the government might pursue. It specifies broadly that the government may pursue 'any alternative remedy available to [it]' (emphasis added). The term 'any' is generally used to indicate lack of restrictions or limitations on the term modified." *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1010–1011 (9th Cir. 2001).

The court, however, stressed a different part of the provision: "the statute only grants Relator the right to share in 'the proceeds of the action or settlement,' 31 U.S.C. § 3730(d)(2), or the proceeds of the "alternative remedy,' 31 U.S.C. § 3730(c)(5)." The court further preached that "[n]o matter how broadly the Court interprets the phrase 'any alternative remedy,' there must still be proceeds resulting from Relator's *qui tam* claims or from an investigation and alternative remedy resulting from Relator's *qui tam* claims. Unless the Government has received proceeds to remedy a claim of liability, Relator has no right of compensation."

According to the court, the funds in which Ubl sought to share simply were not proceeds of his *qui tam* claims. Instead, the $4.2 million figure merely represented the potential savings to the government if the GSA contracting officer chose to follow the recommendations contained within the audit report. Moreover, the court considered this recommendation to be completely unrelated to Ubl's allegation, for the GSA "routinely conducts audits of preaward audits of high-dollar contracts."

Thus, the court denied Ubl's motion for relief.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Haight v. Catholic Healthcare West, 445 F.3d 1147 (9th Cir. April 19, 2006)

The Ninth Circuit reversed and remanded an Arizona district court's dismissal of an FCA *qui tam* action, in which a relator used a Freedom of Information Act (FOIA) request to obtain a copy of the defendant's NIH grant application. The court of appeals held that a response to a FOIA request is not necessarily a "public disclosure" under the FCA public disclosure bar, unless the document is from a source enumerated in Section 3730(e)(4)(A).

Dr. Patricia Haight, an experimental psychologist and the Southwest Regional Director of In Defense of Animals, brought an FCA *qui tam* action against Catholic Healthcare West and Dr. Michael Berens, alleging that the defendants submitted a fraudulent grant application to the National Institutes of Health (NIH), allowing them to obtain a $700,000 NIH grant.

Haight extensively researched the NIH-funded study conducted by Dr. Berens, in which he used beagle dogs to research glioma, a form of malignant brain tumor. Specifically, Haight, concerned about the efficacy of the study, toured the facility where the dogs were housed, interviewed numerous individuals, and obtained copies of the original grant application. Through her research, Haight discovered that Berens's grant application included false information, including an exaggerated success rate.

Most importantly for the case at bar, Haight located a copy of Berens's grant application by submitting a FOIA request to the government. In response to her FOIA request, the government informed her that she could obtain a copy directly from Berens's research lab. So, she personally walked down to the lab and obtained copies of the grant application and continuation forms. Later, but before she filed her *qui tam* complaint, several news articles were published on Berens's controversial animal experiments.

After the government declined to intervene, the defendants filed a motion to dismiss, arguing that Haight's *qui tam* action was barred by the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4). Haight, however, countered that she qualified for the Section 3730(e)(4)(B) original source exception, for she had obtained the necessary knowledge by independent investigation.

The district court, in dismissing the suit, held that that a response to a FOIA request is a public disclosure via an enumerated source and that Haight did not qualify for the original source exception. Accordingly, the court ruled that Haight's suit was barred under FCA public disclosure bar. Haight appealed the decision to the Ninth Circuit.

FOIA Response Is Not A *Per Se* Public Disclosure

Before diving into the issue of whether or not Haight qualified for the original source exception, the court of appeals first assessed whether there was even a public disclosure. The public disclosure bar reads:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [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.

31 U.S.C. 3730(e)(4)(A).

Further dissecting the provision, the court explained that the determination of whether the allegations underlying a fraud claim have been publicly disclosed requires two inquiries. First, to constitute a public disclosure, the fraud must have been disclosed in one or more of the sources specified under the statute: 1) a criminal, civil, or administrative hearing; 2) a congressional, administrative, or [General] Accounting Office report, hearing, audit or investigation; or 3) the news media. Second, if there has been such a disclosure, the content of that disclosure must consist of the "allegations or transactions" giving rise to the relators' claim.

The Ninth Circuit concluded that the district court was incorrect in holding that a response to the FOIA request was *per se* a public disclosure via an enumerated source within the meaning of the FCA public disclosure bar.

The defendants, arguing that *all* documents obtained via FOIA request are public disclosures for the purposes of the jurisdictional statute, cited *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3d Cir. 1999), in which then-Circuit Court Judge Samuel Alito concluded that a response to a FOIA request is a publicly disclosed "administrative report" or "administrative investigation" so as to invoke the jurisdictional bar. The Ninth Circuit disagreed: "[A] response to a FOIA request is not necessarily a report or investigation, although it can be, if it is from one of the sources enumerated in the statute. Since the document obtained via FOIA request here was not from one of the sources enumerated in the statute, the FOIA response does not trigger the jurisdictional bar."

The court further explained that the *Mistick* interpretation of "report" and "investigation" stretches the meaning of those terms too broadly. Mirroring the arguments raised in the *Mistick* dissent, the Ninth Circuit stressed that the FOIA only requires that federal agencies search their records for those that are responsive to the request. In essence, a FOIA request is a "mechanism for duplicating records that are in the possession of the federal government and that are not otherwise excludable from members of the public." *Mistick*, 186 F.3d at 393 (Becker, C.J., dissenting). In contrast, the court viewed "reports" and "investigations" as generally involving independent work product.

The Ninth Circuit found additional support for its interpretation in the underlying legislative history: "By limiting the enumerated sources to that narrow list, [ ] Congress [ ] sought to capitalize on the independent efforts of prospective *qui tam* relators who call information to the attention of the government."

Unfortunately buried in a footnote, the court of appeals further underscored the concerns of the *Mistick* holding:

> [H]olding that a FOIA response is necessarily a 'report' or 'investigation' would deter individuals who suspect fraud from investigating it. FOIA requests are one of the simplest vehicles by which interested citizens can uncover possible fraud against the government. If information obtained pursuant to FOIA requests could never form the basis of a *qui tam* action, prospective relators would have to invest substantially more energy into uncovering the suspected fraud through other means.

(This concern had special resonance with the court, for the FOIA response in this case consisted only of alerting Haight to the location of the documents relating to the Dr. Berens' research: "Far from putting any work product into those documents, in this instance the FOIA response did not even involve duplication. Responding to Haight's FOIA request did not position the government to detect or respond to the alleged fraud.")

Thus, even though Haight's allegations relied on information obtained in the grant application, the Ninth Circuit ruled that she was not barred under the FCA public disclosure bar, for the grant application was not publicly disclosed via an enumerated Section 3730(e)(4)(A) source.

U.S. ex rel. Maxwell v. Kerr-McGee Chemical Worldwide, LLC, 2006 WL 1660538 (D. Colo. June 9, 2006)

A Colorado district court refused to dismiss an FCA *qui tam* action, where a former government auditor brought the suit based on information he obtained while conducting a governmental investigation. The court held that a government employee who obtains information about fraud in the scope of his or her employment and who is required to report that fraud is still a "person" for purposes of the FCA *qui tam* provisions.

Bobby Maxwell, a former senior auditor with the U.S. Department of Interior's Royalty Management Program of the Minerals Management Service (MMS), brought an FCA *qui tam* action against Kerr-McGee Oil & Gas, alleging that in July 1997, the company became subject to a contract with Texon L.P., in which it agreed to exclusively sell all crude oil it produced from federal land to Texon. Kerr-McGee allegedly agreed to the sale of the oil at far below fair market price in exchange for Texon bearing its marketing expenses. Maxwell maintained that Kerr-McGee reported the sales value of the oil for royalty purposes and paid the royalties accordingly, without "grossing up" the actual sales proceeds to reflect the fair market value of the oil and the value of the marketing services provided by Texon.

After Maxwell discovered the scheme while conducting an MMS investigation, he authored an official government letter demanding that Kerr-McGee pay the government $10 million for the unpaid royalties. After Kerr-McGee refused to pay, Maxwell resigned from the government and filed an FCA *qui tam* action against the company.

When the government declined to intervene, Kerr-McGee filed a motion for summary judgment, arguing that Maxwell could not "serve as a relator because he [wa]s a former government auditor who supervised the very same audit of Kerr-McGee that serves as the basis of his . . . case." Kerr-McGee also argued that the FCA public disclosure bar precluded the suit, for the case "[wa]s premised upon public disclosures and Maxwell, as a government auditor charged to audit Kerr-McGee, [could] not be an 'original source' under the FCA."

Government Employees Are Allowed To Be FCA Relators

As an initial matter, the court first considered whether Maxwell could even bring the action under the FCA. The Tenth Circuit's opinion in *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003) suggested to the court that Maxwell was not barred from acting as an FCA relator. Indeed, *Holmes* specifically rejected the notion that the FCA bars certain people—in other words, government employees—from inclusion in its term "person" when describing who may bring a *qui tam* action.

Holmes also recognized that public policy concerns might support a different outcome, but noted that "nothing in the FCA expressly precludes federal employees from filing *qui tam* suits." *Id.* at 1212. Thus, the present court, following the binding precedent, rejected Kerr-McGee's argument that Maxwell could not serve as a relator in a *qui tam* suit. In turn, the court held that a government employee who obtains information about fraud in the scope of his or her employment and who is required to report that fraud is still a "person" for FCA purposes under 31 U.S.C. § 3730(b)(1).

Federal Conflict-of-Interest Laws Do Not Prevent Government Employee-Relators

As a side note, the court highlighted the *dicta* from *Holmes*, which "noted the possibility that federal conflict-of-interest laws might be implicated by a government employee filing a *qui tam* action based upon information obtained in the course of his or her employment. In particular, the possibility was mentioned that such an employee might have to forfeit all or part of the recovery obtained. . . ." 318 F.3d at 1214 n. 11. However, the present court emphasized that such an alleged conflict does not affect his status as a "person" under the FCA nor does it deprive the court of jurisdiction; it merely reduces the relator's possible recovery in the case.

Court Took A Pass On Controversial Public Disclosure Issues

The court then turned its attention to whether the FCA public disclosure bar precluded the suit. The defendant maintained that the first public disclosure was an email exchange between a State of Louisiana employee and an MMS agent, in which the state employee requested a copy of the Kerr-McGee/Texon contract for the period from August 1995 through December 2001, and stated that "[w]e analyzed the prices being paid by Texon to Kerr and found them to be FAR below gravity adjusted market indices." The MMS agent's subsequent response revealed that MMS had "done a lot of work at Kerr and found numerous problems which will result in a significant underpayment."

According to the Tenth Circuit, "public disclosure occurs when the allegations or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to members of the public who are otherwise strangers to the fraud." *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996) (citing *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520–21 (10th Cir. 1996)). In *MK-Ferguson,* the court of appeals held that a Department of Energy report and audit sent to the State of Oregon without any restrictions on its dissemination qualified as a public disclosure. The court found that "Oregon was not a party to the questioned contracts and projects. Oregon was thus a stranger to the fraud like any other member of the public."

The defendants argued that the same scenario existed in the case at bar, in that the MMS official disclosed information to the state employee, "clearly indicating the direction and findings of its audit." Moreover, the State of Louisiana was not a party to the questioned contracts, and the State and the state employee were both strangers to the fraud.

Maxwell, however, countered that the email exchange was not a public disclosure because the state employee was also considered an MMS agent, for he sometimes by contract conducted audits for the MMS at its direction and the State was reimbursed for his salary by MMS. Maxwell, borrowing language from the Tenth Circuit's *Ramseyer* decision, also argued that the state employee had "essentially completed his investigation" of the Kerr-McGee/Texon contract and had reached the conclusion that it was underpaying its royalties. *See also Ramseyer,* 90 F.3d at 1521 ("public disclosure occurs only when the allegations or fraudulent transactions are affirmatively provided to others *not previously informed thereof*") (emphasis added). In short, Maxwell maintained that the MMS agent could not have been revealing alleged wrongdoing, for the state employee already knew this information through his own investigation, regardless of whether he could be considered a federal agent.

Interestingly, after going through the trouble of laying out the competing arguments over whether a public disclosure had even occurred, the court then jumped to the original source analysis, determining that this issue was ultimately dispositive in the matter at bar. Thus, for the sake of the Section 3730(3)(4)(B) analysis, the court presumed without deciding that a public disclosure had occurred during the email exchange.

Relator Qualified for Original Source Exception

The court noted that for Maxwell to qualify for the Section 3730(e)(4)(B) original source exception, he must have "direct and independent knowledge of the information on which the allegations [were] based and ha[ve] voluntarily provided the information to the Government before filing the action." *MK-Ferguson*, 99 F.3d at 1547; 31 U.S.C. § 3730(e)(4)(B). "Direct and independent knowledge" is defined by the Tenth Circuit as knowledge that is "marked by the absence of an intervening agency" and "unmediated by anything but the relator's own labor." *MK-Ferguson*, 99 F.3d at 1547.

The defendants argued that Maxwell could not qualify as an original source because his information was "derivative of the facts uncovered by the field auditors." The defendants further argued that he could not have "voluntarily" provided the information to the government because it was his job and duty as an auditor to uncover the fraud

Maxwell, however, maintained that he "was directly involved in the hands-on investigation" and that he "established and designed the audit, made specific document requests and was the first to analyze the Kerr-McGee documents." The defendants countered that Maxwell was often not on site, had other auditors doing the actual auditing work, and thus he could not have "direct and independent knowledge."

The court, pointing to the language of the exception provision, rejected the defendants' narrow view of the law: "Although the additional people who conducted work along with and under the guidance of Mr. Maxwell might also qualify as original sources, that does not appear to disqualify Mr. Maxwell." *See* 31 U.S.C. § 3730(e)(4)(A) (describing "*an* original source") (emphasis added). Considering the evidence as a whole, the court found that Maxwell had presented sufficient evidence to show that he was actively involved in the audit and in drawing the conclusions. Thus, the court ruled that Maxwell had the requisite direct and independent knowledge.

Relator Voluntarily Provided Information to Government Prior to Filing FCA Suit

The court then turned its attention to the more controversial issue of whether he voluntarily provided the information to the government prior to filing his suit. The defendants argued that he could not have voluntarily provided any information to the government where it was also his duty to do so as part of his job. Maxwell contended that he met the voluntary disclosure requirement through his prefiling disclosure to the government in his role as a private person, not as a federal employee.

Once again, the court turned to the Tenth Circuit's *Holmes* decision, which specifically contemplated such a dual role, noting that "even though [Ms. Holmes] may have been acting 'as the government,' *i.e.*, in her official capacity, when she obtained the information that now forms the basis of her *qui tam* complaint, it is apparent that she is acting as a 'person,' *i.e.*, in her individual capacity, in filing and pursuing this *qui tam* action." *Holmes*, 318 F.3d at 1210. The present court extended such logic to Maxwell's prefiling disclosure as well, which was not part of his job duties but rather part of his requirement as a citizen in filing a *qui tam* suit. Thus, the court found that Maxwell had voluntarily provided the information to the government, thus qualifying for the original source exception to the FCA public disclosure bar.

U.S. ex rel. Nelson v. Biolink Partners, 2006 WL 861338 (D. Neb. April 4, 2006)

A Nebraska district court, refusing to dismiss an FCA *qui tam* action under the FCA public disclosure bar, ruled that the fact the relator reviewed government documents to confirm his suspicions of fraud does not defeat the relator's status as an original source.

Michael Nelson, the owner, inventor, and holder of a patent on a device that analyzes human blood, discovered that Biolink Partners had allegedly received federal grant funds from various federal government agencies, including the NIH, based on false claims or fraudulent information. Specifically, Nelson maintained that Biolink had submitted some Nelson's drawings, plans, schematics, and other documents to the government, claiming that such intellectual property was its own, and had falsely represented that Nelson's employees were working for Biolink, thereby obtaining grant funds.

To confirm his suspicions, Nelson reviewed various government documents, including Biolink's NIH grant application. Nelson subsequently filed an FCA *qui tam* action against Biolink. After the NIH determined that the false statements were not "material" to its decision to grant the awards, the government declined to intervene in the action. Biolink filed a motion for summary judgment.

Allegations Were Publicly Disclosed

For purposes of its motion for summary judgment, Biolink did not deny that it made false claims or provided fraudulent information on its grant applications. It asserted, however, that Nelson was not the original source of the allegations of fraud, and that the court, therefore, lacked jurisdiction to hear the case under the FCA public disclosure bar, Section 3730(e)(4)(A). Specifically, Biolink maintained that the allegations of fraud were publicly disclosed before Nelson filed his action and that Nelson's knowledge of the alleged fraud came from documents supplied by the NIH.

Without much of a fight, Nelson conceded that a public disclosure to place, instead spending most of his argument on whether he had sufficient knowledge of certain facts to qualify for the original source exception.

Relator Had Requisite "Direct And Independent Knowledge"

The court, in turn, reduced the relevant question to whether Nelson had "direct and independent knowledge of the information on which his allegations are based," as required by in 31 U.S.C. § 3730(e)(4)(B).

"'Independent knowledge' has been consistently defined as knowledge that is not dependent on public disclosure." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir.1991). "'Direct' knowledge under the Act has been defined as knowledge 'marked by absence of an intervening agency.'" *United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645, 656 (D.C. Cir. 1994).

Biolink focused the court's attention on statements made during Nelson's deposition to the effect that Nelson obtained knowledge of the alleged fraud from his review of NIH documents, and that he did not have firsthand knowledge of what Biolink did or did not do. Nelson maintained, however, that he did have firsthand knowledge that *he* was the owner and inventor of the device; that *he* held a patent on the machine, its software and its working processes; that *he* had prepared certain drawings, plans, schematics, and other documents regarding the invention; and that *his* company employed certain employees. The court, agreeing with Nelson, considered Nelson's knowledge of such facts to be "direct" and "independent."

Review Of Government Documents Does Not Preclude Someone With "Direct And Independent Knowledge"

Moreover, the court stressed that the fact that Nelson reviewed NIH documents did not preclude him from being an "original source." "[T]o qualify as an original source, a relator does not have to have personal knowledge of all elements of a cause of action." *Allina Health* Sys., 276 F.3d at 1050, citing *Springfield Term. Ry. Co. v. Quinn,* 14 F.3d 645, 656–57 (D.C.Cir.1994). "If the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand." *Id.*

The court found that Nelson met this burden, thus qualifying for the original source exception. Accordingly, the court denied the defendant's summary judgment motion.

B. Courts of Limited Jurisdiction

United States v. Universal Fruits and Vegetables Corp., 2006 WL 1459755 (CIT May 25, 2006)

The Court of International Trade, pointing to its limited jurisdiction, refused to hear an FCA action, alleging that a company violated the reverse FCA provision by fraudulently avoiding antidumping duties. The court stressed that its power was limited to the recovery of "custom duties," and the FCA only permits the government to recover for "damages and civil penalties."

The government brought a Section 3729(a)(7) reverse FCA action against produce importer Universal Fruit and Vegetables Corporation, alleging that the importer had fraudulently avoided antidumping duties. After the case was transferred to the Court of International Trade, the court was faced with the threshold issue of whether it even had jurisdiction to decide the matter.

The court stressed that its jurisdiction was statutorily limited to "civil action[s] which arise out of an import transaction and which is commenced by the United States (1) to recover a civil penalty under section 592, 593A, 641(b)(6), 614(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or (3) to recover customs duties."

The court quickly determined that the only statutory provision upon which the court could possibly claim jurisdiction over this matter was if the suit sought "to recover customs duties." 28 U.S.C. § 1582(3). However, the court was particularly troubled by the FCA treble damages provision: "Rather than recovery of actual duties owed, the FCA provides for three times the amount of damages the government sustains, or if construed favoring Plaintiff's prayer, then three times what would have been the duties owed plus civil penalties. However, the customs duties that were owed are not recoverable under the language of the FCA."

In turn, the court ruled that it could not rule on the matter, for the "damages and civil penalties" language placed the FCA action outside of its limited jurisdiction.

C. Supplemental Jurisdiction for Personal Claims

U.S. ex rel. Carey v. Brock, 2006 WL 1195887 (E.D. Tenn. May 2, 2006)

A Tennessee district court permitted an FCA relator to include her personal injury claims against the FCA defendant, for the language of the FCA does not expressly disallow pendent state law claims in an FCA *qui tam* action. The court also stressed that a remand or dismissal of the state law claims would waste judicial resources and would needlessly result in additional delay.

In March 2003, Kelli Carey began teaching an x-ray class while employed by Tazewell Medical Clinic, Inc. as registered technologist. After a wage dispute arose between Carey and the clinic, Carey left her employment and asked for the release of her license.

Subsequent to her departure, Carey was advised that the clinic did not have an x-ray tech, registered technologist, or anyone licensed by the State to shoot x-rays. Carey also learned that her license remained mounted on the clinic's wall; the clinic was using her licensure for x-ray purposes; and further, the clinic was allowing employees to wear her radioactivity badge. In addition, Carey was advised that the clinic was receiving payments from Medicaid and Medicare for these x-rays.

In March 2004, she filed a complaint in federal court, raising claims under the FCA and asserting individual personal injuries in connection with use of her radiation badge by the clinic.

In response, the defendants filed a motion to dismiss her personal claims, stating that the real party in interest in a *qui tam* action is the United States and that a relator is not permitted to attach her own personal claims in a lawsuit where she is not a party.

Court Exercised Supplemental Jurisdiction Over State Law Claims

Carey argued that the court could assert pendent jurisdiction over the state law claim. For support, she offered *United States ex rel Roby v. Boeing Company,* 100 F. Supp. 2d 619 (S.D.Ohio 2000). In *Roby*, the court dealt with a *qui tam* action against a government contractor and its supplier who allegedly manufactured and sold defective transmission gears for an Army helicopter. The action also involved common law contract claims. In that matter, the defendant argued that if the underlying FCA claim were dismissed on summary judgment, then the breach of contract claim would be dismissed for want of jurisdiction. The relator countered that when a court has original jurisdiction in regard to one claim, a court may exercise supplemental jurisdiction over state law claims: "Plaintiffs argue[d] that, to the extent this Court may have the occasion to exercise [its] discretion, it should continue to assert jurisdiction over the contract claim, because to do otherwise would waste the judicial resources that this Court has already expended." The relators' arguments prevailed, and the common law contract claim remained in the suit.

The court was persuaded by the *Roby* decision: "A remand/dismissal would waste judicial resources and result in additional delay. Since Congress has not unmistakably and clearly expressed in the language of the statute an intention to disallow pendent state law claims of an individual relator in this type of *qui tam* suit, this Court hereby exercises its discretion to retain the relator's personal injury claims in accordance with general pendent jurisdiction principles." Accordingly, the court denied the defendants' motion to dismiss the plaintiff's personal action.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

U.S. ex rel. Harris v. EPS, Inc., 2006 WL 1348173 (D. Vt. May 16, 2006)

In action brought under the FCA anti-retaliation provision, a Vermont district court refused to grant the defendant-employer's request to enforce a mandatory arbitration clause in an employee handbook. Of particular note, the handbook included a disclaimer, indicating that the employer did not intend to be bound by the policies in the handbook. As for the plaintiff's action against her supervisor, the court, agreeing with a majority of the courts, ruled that the term "employer" in the Section 3730(h) does not include supervisors. Thus, the relator could not bring an actionable FCA retaliation suit against her supervisors in their individual capacities.

When Robert Harris began working at EPS, Inc., he was presented with an "employee handbook," which explicitly stated that the handbook was not "employment contract and [wa]s not intended to create contractual obligations of any kind." It also stated that "[a]ll employees must sign an Employee Acknowledgment Form indicating their receipt of this employment Handbook; . . . and their agreement that all legal grievances against the company must be submitted to compulsory arbitration." According to EPS, Harris signed the "Acknowledgement Form."

In early 2004, EPS had a contract with the State of Michigan to provide compliance review for the State's Department of Housing and Urban Development (HUD) Section 236 subsidy program. In January 2004, Harris, responsible for coordinating EPS's services under the contract, learned that certain EPS employees were signing and submitting to HUD worksheets which stated that verifications had been performed when in fact they had not. Harris subsequently informed his supervisors.

As time went by and his supervisors took no action, Harris began to believe that his allegations were not being taken seriously. Then, on March 19, 2004, he emailed his supervisors about another problem with an employee who was falsely stating that certain supporting documentation was on file. On March 24, Harris asked to be relieved of his responsibility over the Section 236 area, because he felt that his concerns were not being addressed. That same day, EPS terminated Harris, alleging that he had been insubordinate to a supervisor, that he had raised his voice, and that he had asked to be fired. Shortly thereafter, Harris filed complaints with HUD about EPS's failure to conduct its verification duties properly.

In May 2004, Harris brought FCA anti-retaliation actions against his former supervisors and his former employer EPS, Inc., alleging that he was terminated in retaliation for discovering and complaining about fraudulent conduct at the company. The defendants, pointing to a mandatory arbitration clause in the employee handbook, filed a motion to dismiss or to stay on the ground that the dispute must be submitted to arbitration. The supervisors raised the additional argument that they could not be sued in their individual capacities under FCA Section 3730(h).

Parties Did Not Agree to Arbitrate

The first step in determining whether a dispute must be sent to arbitration is to decide "whether the parties agreed to arbitrate[.]" *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004). Harris argued that EPS could not establish that the parties agreed to arbitrate. His argument proceeded in two parts: (1) the acknowledgment form, which contained the purported arbitration clause, was part of the handbook; and (2) nothing in the form or any other part of the handbook should be considered to form a binding agreement in light of the disclaimers stating that the handbook did not form a contract or create contractual obligations.

The court, accepting Harris's logic, found ample authority for the notion that where an employer uses disclaimers indicating that it does not intend to be bound by the policies in an employee handbook, the employer cannot enforce a policy of mandatory arbitration, even if the employee has signed an acknowledgment form. *See, e.g., Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131–32 (7th Cir. 1997) (holding that arbitration clause in employee manual was not enforceable where the manual included a disclaimer stating that it was not a contract and that the employer could modify or terminate its terms at any time).

Accordingly, the court held that the form did not constitute a binding agreement to arbitrate. In turn, the court denied the defendants motion on the ground that they had not demonstrated that they were entitled to arbitration as a matter of law.

No FCA Retaliation Suit Against Supervisors in Their Individual Capacities

The court, without much discussion, held that the supervisors could not be liable under Section 3730(h), for they were not considered "employers," as defined under the Act. However, while the court granted the defendants' motion to dismiss, the court refused to grant their request to assess attorneys' fees and expenses against Harris. The court noted that the claim could not be considered "frivolous," for there was no binding Second Circuit precedent that spoke directly to this issue.

Ernsting v. Ave Maria College, 2006 WL 1284626 (E.D. Mich. May 10, 2006)

McNally v. Ave Maria College, 2006 WL 1284647 (E.D. Mich. May 10, 2006)

In a pair of related cases, a Michigan district court ruled that the plaintiffs' Section 3730(h) retaliation claims were barred by the principle of *res judicata* because the allegations arose out of the same facts and circumstances that were alleged in an earlier dismissed state court cause of action.

McKenna v. Senior Life Management, Inc., 2006 WL 1194857 (S.D.N.Y. May 2, 2006)

A New York district court, looking for the statute that is "most closely analogous" to the federal FCA whistleblower provision, refused to apply the two-year statute of limitations period of the State Whistleblower law, for the protections afforded under the New York act are not as protective as the federal FCA anti-retaliation provision. Instead, the court chose to apply the three-year limitations period available under the State's personal injury statute.

Mary McKenna brought an FCA anti-retaliation action against her former employer Senior Life Management, Inc., alleging that she was terminated for reporting possible FCA violations to the federal government. The defendant filed a motion to dismiss the Section 3730(h) action, on the ground that it was barred by the applicable statute of limitations—which, it argued, was found in New York's Whistleblower Statute, Labor Law § 740. McKenna countered that the one-year limitations period found in Labor Law § 740 does not apply to her claim. Instead, McKenna encouraged the court to apply the three-year limitations period allowed under the New York State Human Rights Law, Exec. L. § 296, which provides a cause of action against an employer who retaliates against an employee for asserting her rights under the New York State Human Rights Law.

The court observed that McKenna was terminated on September 2002 and that she filed her action two years later in October 2004. The court also noted that the statute of limitations for a Section 3730(h) claim is actually found in the state statute "most closely analogous" to that federal law. *Graham County Soil & Water v. Wilson*, 545 U.S. 409 (2005). Thus, the court was faced with the issue of whether the statute most closely analogous to § 3730 is Labor Law § 740 or the New York State Human Rights Law, Exec. L. § 296.

The Defendant argued that the United States Supreme Court ruled in *Graham County* that Labor Law § 740 was the New York statute most closely analogous to § 3730(h). In reality, all the Court did was note that Labor Law § 740 was one of a number of "likely analogous state statutes of limitations." *Id.* at 2451. This conclusion was reinforced by the Supreme Court's own follow-up statement: "We stress that these are only the likely candidates for analogous state statutes of limitations; it may well not be an exhaustive or authoritative list of the possibilities." *Id.* at 2451, n.3.

So, the court rejected the defendant's assertion that the Supreme Court "rule[d]" that Labor Law § 740 was the New York statute most closely analogous to the False Claims Act.

Indeed, upon closer examination, the court explained that "it is well settled as a matter of New York law that Labor Law § 740, while denominated a whistle-blower statute, would afford relator absolutely no relief."

The court also rejected the McKenna's proposed statute, for New York's Human Rights Law, N.Y. Exec. L. § 296, does not protect an employee against all whistleblowing conduct—only whistleblowing related to employment discrimination.

With no comparable State statute on the books, the court decided to borrow the three-year statute of limitations for personal injury claims found in C.P.L.R. § 214(5). Indeed, this is a statute the Second Circuit has borrowed from repeatedly to set the limitations period for actions brought under federal statutes where Congress crafted no statute of limitations, including 42 U.S.C. § § 1981 and 1983 and Title IX. *Curto v. Edmundson,* 392 F.3d 502 (2d Cir. 2004), *Okure v. Owens,* 816 F.2d 45, 48–9 (2d Cir. 1987).

Thus, the court determined that McKenna's Section 3730(h) claim was not time barred, for it was filed before the three-year window closed.

***U.S. ex rel. Sweeney v. Manorcare Health Services, Inc.*, 2006 WL 1042015 (W.D. Wash. April 15, 2006)**

Allowing an FCA retaliation action to proceed, a Washington district court ruled that a reasonable jury could find that the fact that the employer interviewed possible replacements *before* terminating the plaintiff created an inference that the stated reasons for firing her were merely pretextual.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Claims Are Not "False"

State of Nevada ex rel. Steinke v. Merck & Company, Inc., 2006 WL 1506901 (D. Nev. May 31, 2006)

A Nevada district court held that a relator had alleged a claim under the Nevada False Claims Act, where the relator alleged that a drug manufacturer failed to include certain discounted and free products in the "Best Price" reports it submitted to the federal government pursuant to the Medicaid rebate statute.

Dean Steinke brought a *qui tam* action against Merck & Company, alleging that the drug manufacturer violated the Nevada False Claims Act, N.R.S. § 357.010 *et seq.*, by failing to include certain discounted and free Zocor and Vioxx products in "Best Price" reports to the federal government pursuant to Medicaid rebate statute, 42 U.S.C. § 1396r-8. Specifically, the relator alleged that Merck failed to include discounts under the Simvastatin Acute Care Value Enhancement (SAVE) program for Zocor, which provided discounts of up to 92 percent from the catalog price for Zocor if a hospital maintained a 70 percent market share or established Zocor as the exclusive statin drug on its formulary. In addition, the relator alleged that Merck failed to include a 92 percent discount for Vioxx under the Vioxx Incentive Program (VIP) if a hospital committed to maintain an 80 percent market share. Lastly, the relator alleged that Merck gave away free goods to "effectively lower" the price that Merck charged providers for these pharmaceuticals.

After the State of Nevada intervened, the defendant filed a motion to dismiss, raising four arguments: (1) Plaintiffs have misread the relevant portion of the Rebate Statute and Rebate Agreement, (2) Merck's Best Price reports are not "knowingly" false as a matter of law, (3) the claims are barred under the doctrine of conflict preemption, and (4) Plaintiffs have not satisfied particularity requirements of Rule 9(b).

"Best Price" Must Include Cash Discounts and Free Goods That Are Contingent On Any Purchase Requirement

Congress defined "best price" as "the lowest price available from the manufacturer during the rebate period to any wholesaler, retailer, provider, health maintenance organization, nonprofit entity, or governmental entity within the United States, excluding [certain governmental entitles not applicable to this case.]" 42 U.S.C. § 1396r-8(c)(1)(C)(i). Congress also expressly provided some "special rules" to be used in the calculation of "best price":

> The term best price-
>
> (I) shall be inclusive of cash discounts, free goods that are contingent on any purchase requirement, volume discounts, and rebates (other than rebates under this section);
>
> . . . and
>
> (III) shall not take into account prices that are merely nominal in amount.

42 USCS § 1396r-8(c)(1)(C)(ii).

Merck urged the court to adopt a reading of the best price statute as to exclude any prices less than 10 percent of the Average Manufacturer's Price (AMP). In support of this interpretation, Merck cited to the Rebate Agreement, which defined "nominal price" as "any price less than 10 percent of the AMP in the same quarter for which the AMP is computed."

Nevada, however, maintained that such a reading would render part (I) of the special exceptions section superfluous, as any free good would be, by definition, less than 10 percent of the AMP. Nevada maintained that the proper interpretation of "best price" is to include cash discounts, free goods that are contingent on any purchase requirement, volume discounts, and rebates if the price of those goods is less than 10 percent of the AMP and those prices are tied to a purchase agreement.

While the defendants reached for a host of extraneous support, the court highlighted the underlying congressional record, which explicitly addresses what prices should be excluded under the "best price" statute: "The exclusion of 'prices that are merely nominal' was intended to exclude those prices that 'manufacturers offer to special purchasers, such as the sale of birth control pills for a penny a pack to Planned Parenthood.'" 136 Cong. Rec. S 12954, *S12962 (1990). Moreover, the legislative history clearly states that the Rebate Statute was intended to ensure that Medicaid "receive[d] the best discounts in the market. . . ." *Id.* at * S12954.

Lastly, the court pointed to a letter from the CMS Administrator stating that "[u]nder the plain terms of the Medicaid statute, free goods 'that are contingent on any purchase requirement' must be included in the calculation of the best price."

In turn, the court concluded that the phrase "prices that are merely nominal in amount" is "all prices that are less than 10 percent of the AMP, but without other qualifications." In the present action, because Merck did not include prices tied to its SAVE and VIP incentive programs in its calculation of best price, the court determined that the SAVE and VIP discount and marketing plans required additional valuable consideration and conditions precedent that were more than a "merely nominal price." Therefore, the court found that these prices were not without qualification.

"Reasonable Interpretation" Does Not Automatically Defeat FCA "Falsity" Element

The court then considered Merck's argument that it could not have acted knowingly for purposes of the FCA because it complied with the express terms of the Rebate Agreement. Furthermore, Merck maintained that even if the reports were false, it was based on both an honest mistake and a reasonable interpretation and thus could not be "knowingly false," as required by the FCA.

The court responded by noting that, under the controlling case law, a reasonable interpretation does not render a statement "not false," but rather the good faith nature of the action "forecloses the possibility that the scienter requirement is met." *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999).

On the basis of the pleadings, the court could not conclude as a matter of law that Nevada failed to allege an actionable FCA claim. Notably, Nevada alleged that by omitting the prices of free and discounted drugs given to hospitals, Merck *did not act reasonably* in failing to comply with the terms of the Rebate Agreement.

No Conflict Preemption Concerns With Best Price Statute

The court, in quickly rejecting the defendant's conflict preemption argument, found that the "United States considers the Best Prices statute to be one of cooperative federalism and does not seek the right to exclusive rebate enforcement power." Therefore, the court concluded that there was no "unique federal interest" to be upset by allowing states to pursue claims under the Best Price statute.

Complaint Satisfied Rule 9(b)

Lastly, the court found that the complaint adequately satisfied the particularity requirements of FRCP 9(b). Here Nevada pled that it had been defrauded by Merck's best price reports, which failed to take into account free or discounted pharmaceuticals given to hospitals as part of an incentive program. The court required nothing further from the State.

Thus, the court, in a landmark decision for rebate fraud, denied the defendant's motion to dismiss.

B. Government Sustained No "Damages"

U.S. ex rel. Romano v. New York Presbyterian Hospital, 2006 WL 897208 (S.D.N.Y. April 6, 2006)

A New York district court held that an FCA *qui tam* action could proceed against a hospital, even though the government had recovered all of its alleged damages in an earlier settlement with a different defendant. Dissecting the language of the Section 3729(a), the court highlighted that the entitlement to FCA penalties follows from the making of a false claim, not its amount. In other words, one who presents a false claim becomes liable for the civil penalty, regardless of the amount of the false claim.

Denise Romano, a former Columbia University billing compliance associate, brought an FCA *qui tam* action against the university and New York Presbyterian Hospital, alleging that the defendants billed the Medicaid program for services provided by certified nurse midwives as if the services were actually performed by physicians. After the government reached a settlement with the university, the hospital moved for summary judgment, on the grounds that all of the FCA "damages" were satisfied in the settlement. The relator, however, maintained that even if there were no "damages" left to pay, the hospital could still be liable for civil penalties under the FCA penalties provision.

FCA Defendant Liable For Civil Penalties Even When There Are No "Damages"

Thus, the court was faced with the issue of whether the FCA requires the defendant to pay statutory civil penalties even if the federal government suffered no damages. To determine the issue, the court logically turned to the language of the statute: The False Claims Act provides that any person who violates 31 U.S.C. § § 3729(a)(1)-(7) is liable for "a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a).

The defendant argued that "damages" is an element of an FCA action, so if there are no damages to pay, the court must dismiss the suit. The court disagreed.

Instead, the court highlighted the principle in *Young-Montenay, Inc. v. United States,* 15 F.3d 1040 (Fed. Cir. 1994), where a contractor fraudulently accelerated the payment by the government of $49,000 so that the contractor obtained that portion of the total amount (to which he was ultimately entitled) before the proper progress payment. The court held that because of early payment, the government suffered damages during the overpayment period, and thus was entitled to damages of three times the $49,000 premature payment. Likewise, the court declared that it was immaterial whether the government ultimately entirely recouped its damages by its settlement with Columbia University.

In turn, the court stressed that the entitlement to a penalty follows from the making of a false claim, not its amount: "One who presents a false claim becomes liable for the civil penalty (regardless of the amount of the false claim), and so does one who conspires with the false claimant." Accordingly, the court denied the defendant's motion.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Berglund v. Boeing Company, Inc., 2006 WL 1805965 (D. Or. June 22, 2006)

An Oregon district court refused to dismiss an FCA *qui tam* action under Rule 9(b), in which the relator alleged that the defendant supplied the government with defective aircraft that failed to comply with explicit contractual provisions. The court, in rejecting the argument that FCA violations are not present if the defendant substantially complies with a contract, stated that an FCA violation could be present, "even if the supplied product is as good as the specified product." The court, focusing on whether the complaint fairly informed the defendant of the alleged conduct, also refused to find fault with the relator for failing to provide the court with the defendant's actual contracts and claims for payment.

Cliff Berglund filed an FCA *qui tam* action against his former employer Boeing Company, alleging that the company submitted false claims to the government by delivering contractually nonconforming aircraft parts to agencies of the United States. After the government declined to intervene, Boeing filed a motion to dismiss, on the grounds of the particularity requirements of FRCP 9(b).

Complaint Satisfied Rule 9(b)

In denying the defendant's FRCP 9(b) motion to dismiss, the court determined that the relator had sufficiently pled an FCA claim. Berglund's claim was grounded in allegations that Boeing disregarded manufacturing requirements that resulted in the production of nonconforming parts. These nonconforming parts were then certified as meeting specifications and sold to the federal government. Examining these allegations against the Rule 9(b) requirement for particularity, the court ruled that the threshold requirement was met, for the complaint alleged specific facts regarding the fraudulent activity, including the time, date, place, and content of the alleged fraudulent representations, how and why the representations were false or misleading, and in some cases, identified the person engaged in the fraud.

Boeing, however, countered that Rule 9(b) was not satisfied, for while the relator alleged failures to follow internal Boeing procedures in connection with its commercial aviation line, the relator never addressed what Boeing's quality system determined regarding those parts. In other words, the allegations fell short of the Rule 9(b) standard because it was unknown whether Boeing's quality system ultimately determined the parts to be acceptable and, if so, whether Boeing's engineers and quality assurance personnel acted fraudulently in doing so. Thus, according to Boeing, the complaint did not specify "what" alleged conduct Boeing must defend or "how" that conduct was supposedly fraudulent.

Boeing also complained that the relator failed to identify even a single claim for payment or to provide facts from which Boeing could determine "when" or "where" any such claims were submitted, "who" was involved, or any other facts relating to the purported fraud on the government. Lastly, Boeing maintained that even if a certification were made that the aircraft were "conforming," the certification would be true unless Boeing committed fraud in its disposition of the parts under its quality system, which was supposedly not alleged by the relator.

FCA Violation Where Government Did Not Receive What It Bargained For

According to Berglund, the aircraft were defective because they contained "many flight-critical parts that were manufactured in violation of contractually required specifications." After examining the laundry list of alleged contract violations, the court found that the allegations were sufficient to inform Boeing of the fraudulent activity relied upon by Berglund for his FCA claims.

In turn, the court rejected the defendant's defense that the alleged noncompliance nevertheless resulted in products that met "type design." As the Sixth Circuit had stated: "[T]he failure to comply with government contract specifications can result in an FCA 'injury' to the government, even if the supplied product is as good as the specified product." *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 430 (6th Cir. 2000) (citing *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir. 1998)); *see also United State ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1525 (9th Cir. 1995) (lack of determination of actual harm from violation did not preclude FCA claim).

Rather than question the underlying terms of the contract, the court narrowed its analysis to whether Boeing had adequate notice of the FCA claim against it, as required by Rule 9(b). In this instance, the court determined that it did. The complaint identified, among other things, the circumstances of Boeing's continued use of unauthorized coolant, and identified Boeing executives involved in the decision. It identified the tests that were failed, and the dates of the process specifications. The complaint also set forth allegations of manufacturing procedure deviations and quality malfeasance that support the FCA violations alleged in connection with the violations of the machining specifications. Furthermore, the complaint identified the defective parts and planes and detailed the alleged failures of those nonconforming parts.

Relator Not Required To Have Actual Contract To Satisfy Rule 9(b)

In addition, Boeing challenged the complaint for failing to identify the content of Boeing's allegedly false certifications. Boeing maintained that the relator did not identify, among other things, the specific government contracts at issue; the pertinent contractual requirements; the certifications made by Boeing to the government; why the certifications may have been fraudulent; and, what claims for payment were made by Boeing.

The court soundly rejected this distorted reading of the Rule 9(b) particularity requirements. In the court's view, the fact that Berglund did not have in his possession, at this stage of the proceedings, the actual contracts and claims for payment for the identified parts and planes did not violate Rule 9(b). Rather, the court focused its Rule 9(b) analysis on whether the complaint fairly informed Boeing of the alleged conduct. Here, the court determined that it was clear that the false certification relied upon by the relator was Boeing's claim to the government, at the time of sale, that the specified parts and planes were manufactured in accordance with the requirements of the contract.

Moreover, based on the relator's representation to the court that he could amend the complaint to include Boeing's General Certification, the court found that the relator's allegations were sufficient to satisfy Rule 9(b). Thus, the court denied the defendant's motion to dismiss.

U.S. ex rel. Fowler v. Caremark Rx, Inc., 2006 WL 1519567 (N.D. Ill. May 30, 2006)

An Illinois district court dismissed a federal FCA *qui tam* action under FRCP 9(b), for while the complaint alleged that the defendant made misrepresentations to the government "through regular billing invoices and states, reports, and otherwise," the complaint did not identify a false claim for payment that was actually submitted to the government. The court also dismissed the relators' state FCA actions, for the relators failed to comply with the procedural requirements of the various state *qui tam* statutes.

Four former Caremark employees brought federal and state FCA *qui tam* actions against Caremark Rx, Inc., alleging that the company violated the FCA by falsely representing to the federal and state government, through regular billing invoices and statements, reports, and otherwise, that it was entitled to compensation pursuant to the terms of its contractual agreements.

Under its government contracts, Caremark supplied prescription drugs to members of various federal and state health insurance plans. These contracts subjected Caremark to penalties for failing to meet performance targets, including delivering drugs to plan members within a specified number of days after receiving their orders.

According to the relators, Caremark regularly evaded these penalties by implementing policies and procedures designed to conceal its failure to meet processing deadlines. For example, when its Florida facility was inundated with orders, it would divert unfilled orders to its Arizona, Illinois, or Texas facility. However, to conceal the delay resulting from the inter-facility delivery, the employees in the other three facilities would treat the diverted orders as if they were new orders received directly from plan members. As employees at these facilities, the relators supposedly obtained first-hand knowledge of these policies and procedures.

After the government declined to intervene in the action, the defendant filed a motion to dismiss the federal actions under FRCP 9(b) and the state actions for failing to satisfy the procedural requirements of the various state *qui tam* statutes.

Complaint Failed To Satisfy Rule 9(b)

In weighing the defendant's Rule 9(b) argument, the court highlighted *United States ex. rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). In *Clausen*, the Eleventh Circuit interpreted FRCP 9(b) to require a relator to identify "*an actual false claim* for payment being made to the government."

Applying the *Clausen* FRCP 9(b) requirement to the facts, the court noted that while the relators alleged that the defendants made misrepresentations to the government "through regular billing invoices and statements, reports, and otherwise," the complaint failed to identify a particular claim that was actually submitted to the government.

In the alternative, the relators argued that Rule 9(b) should be relaxed in the case at bar, for the defendant had exclusive control over information about the alleged schemes. The court, while agreeing that Rule 9(b) may be relaxed where plaintiffs lack access to all requisite facts, refused to relax the rule for the relators. The court maintained that the information was not in defendant's exclusive control, for the company had submitted the allegedly false claims to the federal government. In turn, the court, holding steadfast to a heightened pleading requirement, determined that the complaint failed to satisfy Rule 9(b).

State Law Claims Dismissed For Failing To Comply With Procedural Requirements

In addition, the defendant argued that the relators' state FCA claims should be dismissed, on the grounds that the relators failed to comply with the *qui tam* provisions of the state FCAs. Similar to the FCA, the false claims acts of Tennessee, Texas, the District of Columbia, Louisiana, and Michigan permit *qui tam* actions only if: (1) they are brought in the name of the state government; (2) the complaints are filed under seal and provided to the state government; and (3) the complaints may not be served until the state government decides whether to intervene. Tenn.Code Ann. § 71-5-183(b) (2005); Texas Hum. Res.Code Ann. § 36.101–102 (2006); D.C. Code § 2-308.15(b) (2006); La.Rev.Stat. Ann. § 46:439.2(A) (2006); Mich. Comp. Laws Ann. § 400.610a (2006); *see also* 31 U.S.C. § 3730(b). The defendant encouraged the court to dismiss the relators' complaint for failing to comply with these statutory requirements.

The relators, however, argued that because these pre-conditions are designed for the state governments' benefit, the defendant lacks standing to assert a defense based on the pre-conditions. The court, while at least recognizing that the laws do not mandate "letter-perfect compliance," decided to dismiss the complaint, for the relators failed to comply "with every pre-condition required by state false claims acts."

Thus, the court granted the defendant's motion to dismiss.

B. Rule 41(B) Failure to Prosecute

Sealed Appellant v. Sealed Appellee, 452 F.3d 415 (5th Cir. June 12, 2006)

In reviewing an FCA *qui tam* action, the Fifth Circuit converted a Texas district court's dismissal without prejudice to a dismissal with prejudice for claims that were barred by the FCA statute of limitations provision. Applying Rule 41(b), the court of appeals found that there was "a clear record of delay . . . [and] lesser sanctions would not [have] serve[d] the best interests of justice." The dissent, however, warned that dismissal with prejudice should only be ordered in extreme circumstances, and there was no evidence that the court even considered lesser sanctions.

In May 2000, Appellant brought an FCA *qui tam* action against Appellee. In August 2002, the government declined to intervene. However, after the government filed its notice of declination with the court, Appellant never served the complaint or any other documentation on Appellee. Nor did he take any other action in the case, such as filing motions or pleadings, seeking discovery, or notifying Appellee of the pending claims, during the two years that the case remained unsealed and pending.

Finally, in July 2004, Appellee filed a motion to dismiss, pointing to the particularity requirements of FRCP 9(b) and the service requirements of FRCP 41(b).

In August 2004, the court dismissed the complaint under FRCP 41(b) for failure to prosecute. Despite Appellee's request that the dismissal be with prejudice, the court "decline[d] to dismiss the case with prejudice and, in its discretion, dismisse[d] it instead *without* prejudice."

The decision was appealed to the Fifth Circuit.

Claims That Were Not Time-Barred Were Dismissed Without Prejudice

As an initial matter, the court affirmed the decision to dismiss without prejudice those claims that were not barred by the FCA statute of limitations period. Thus Appellant could refile these claims, because the statute of limitations had not yet run.

As for the time-barred claims, however, the court of appeals treated the dismissal without prejudice as a dismissal with prejudice. After this conversion, the court then reached out for Rule 41(b), holding that Rule 41(b) dismissals with prejudice should be affirmed only on a showing of "a clear record of delay or contumacious conduct by the plaintiff . . . , and where lesser sanctions would not serve the best interests of justice."

Time-Barred Claims Were Dismissed With Prejudice

Applying this test to the matter at bar, the court found that there was actual prejudice to the defendant. For support, the court highlighted *Veazey v. Young's Yacht Sale & Serv.*, 644 F.2d 475 (5th Cir. 1981), which had explained that the failure to serve process within the statute of limitations period is extremely prejudicial because it affects all the defendant's preparations. Moreover, if the statute had run, a potential defendant that has not been served is entitled to expect that it will no longer have to defend the claim.

The Fifth Circuit was additionally troubled by the lapse of time: "Appellant has not missed the 120-day deadline by only a day or a week or two, but by almost 600 days. Therefore, the delay is not a 'simple inadvertence.'"

Appellant countered that his attorney did not inform him about the delay. The court offered Appellant little pity, and instead recited the well-established case law that a party is bound by the acts of his attorney. *See, e.g., Link v. Wabash R.R.*, 370 U.S. 626 (1962). In addition, given the lapse of inactivity, the court expressed that "[o]ne does not have to be legally sophisticated to understand that if he is the only plaintiff in the case and does not hear from his attorney for almost two years, his case is not being diligently prosecuted." Borrowing from an earlier decision, the court of appeals stated, "We believe that there comes a point at which the deficiency in counsel's performance puts the plaintiff on notice that, unless a new lawyer is obtained, the very continuation of the lawsuit is threatened." *Callip v. Harris County Child Welfare Dep't*, 757 F.2d 1513, 1522 (5th Cir. 1985) (affirming dismissal with prejudice).

Thus, the court, determining that Appellant was to blame for the delay, "affirmed" the lower court's decision to dismiss these claims with prejudice

Dissent Argued for Remand

Judge Garza, however, in a strongly worded dissent, chastised the majority for converting the lower court decision into a dismissal with prejudice, as it pertained to the claims that were barred by the FCA the statute of limitations: "It is well-established that a dismissal with prejudice is 'an extreme sanction that deprives a litigant of the opportunity to pursue his claim.' *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 247 (5th Cir. 1980). In this case, the district court did not consider or employ lesser sanctions."

Judge Garza, arguing for a remand, stressed that the lower court should, at the very least, be given the chance to consider lesser sanctions. Garza viewed the majority's decision as unnecessarily usurping the power of the lower court and impermissively levying a sanction that was not even on the lower court's radar screen. For this reason, Judge Garza dissented in part.

C. Rule 45 Compelling Discovery From a Party

U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc., 2006 WL 1515914 (D.D.C. June 2, 2006)

A District of Columbia district court refused to grant a defendant's motion to compel the United States to respond to a subpoena in a non-intervened FCA *qui tam* action. Dissecting the language of FRCP 45, the court ruled that the government was not a "person" within the meaning of the rule, for the government was not a real party in interest when, as in this case, the government had elected not to intervene.

The D.C. District Court recently considered two discovery disputes in an ongoing *qui tam* battle, alleging that the Diabetes Treatment Centers of America, Inc. (DTCA) violated the FCA by submitting claims to Medicare, even though the health care company was allegedly violating various conditions of participation. One dispute centered on whether the relator improperly objected to DCTA's interrogatories. The second, and perhaps more legally important, dispute pertained to whether a defendant can compel the government to respond to a discovery request in a non-intervened *qui tam* action.

The discovery request at issue was a subpoena that the defendant served on the U.S. Department of Health and Human Services (HHS), calling for documents and testimony relating to HHS' policy and practice of considering whether to pay a claim. HHS refused to comply with the subpoena on grounds of relevance, undue burden, waiver, and failure to comply with procedural requirements. DTCA filed a motion to compel.

The district court denied the defendant's motion, for the defendant failed to provide a valid basis on which to compel the federal agency to comply with the subpoena. The most applicable Federal Rule of Civil Procedure is Rule 45. However, the court agreed with the government's interpretation that the United States is not a "person" within the meaning of that rule. *See United States ex. rel. Taylor v. Gabelli*, 233 F.R.D. 174, 175–76 (D.D.C. 2005) (holding that the presumption that Rule 45 does not apply to the federal government can only be overcome by affirmative evidence); *Lerner v. District of Columbia*, 2005 WL 2375175, at *4 (D.D.C. 2005) (holding that the same conclusion is compelled by this Circuit's reasoning in an analogous case). Similarly, the court ruled that the government cannot be compelled to comply with the subpoena as a party to the action, because it is not a real party in interest when, as in this case, it has elected not to intervene. *See Gabelli*, 233 F.R.D. at 174–75 (finding no basis for "the proposition that the federal government is a real party in interest to a *qui tam* action when it elects *not* to intervene").

The court then considered the other possible basis for compelling discovery—the agency's own regulations governing such matters. Citing the existing case law, the court noted that any dispute that the agency's response to the subpoena was not in conformity with its own regulations must be brought under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq. See Yousuf v. Samantar*, 2005 WL 1523385, at *4

n. 10 (D.D.C. 2005) (noting that a district court cannot review an agency's compliance with its regulations until the agency has issued a final decision and an action is filed under the APA challenging that decision) In the case at bar, the court noted that HHS had not yet issued a final decision.

In turn, the court denied DTCA's motion to compel. The court further explained that HHS must be given an opportunity to respond in conformance with its own regulations, and if DTCA is dissatisfied with the response or lack of response, the proper vehicle for any challenge to the agency's action is the APA.

***U.S. ex rel. Fry v. Guidant Corporation*, 2006 WL 1102397 (M.D. Tenn. April 25, 2006)**

Interpreting the FCA first-to-file bar to prevent a relator from adding a co-relator after the complaint has been filed, a Tennessee district court refused to grant a relator's motion for leave to add a co-plaintiff. Interestingly, the court stressed that the outcome would have been different if the second relator was "related to the original relator," as defined under the FRCP for intervention, Rule 24(b)(2).

***U.S. ex rel. Shank v. Lewis Enterprises, Inc.*, 2006 WL 1064072 (S.D. Ill. April 21, 2006)**

An Illinois district court refused to grant an FCA defendant's request to stay an FCA *qui tam* action because of a pending criminal indictment. The court explained that a stay was not possible given the prematurity of the 5th Amendment concerns and the indefinite nature of a stay based on a *pending* indictment.

***U.S. ex rel. Wynne v. Blue Cross Blue Shield of Kansas, Inc.*, 2006 WL 1064108 (D. Kansas April 21, 2006)**

A Kansas district court, in dismissing an FCA *qui tam* action without prejudice, ruled that the particularity requirements of FRCP 9(b) were not met, for the complaint did not identify a particular false claim that was actually submitted to the federal government.

***U.S. ex rel. White v. The Apollo Group, Inc.*, 2006 WL 1042881 (W.D. Tex. April 17, 2006)**

Applying the FRCP Rule 11 sanctions standard, a Texas district court awarded an FCA defendant its attorneys' fees and expenses against a *pro se* FCA relator. The court considered the relator to be a "vexatious litigant," particularly based on the fact that the relator brought the exact same FCA action against the defendant, even after the court dismissed the first suit with prejudice.

***U.S. ex rel. Mergent Services v. Flaherty*, 2006 WL 880044 (S.D.N.Y. April 6, 2006)**

Joining the chorus of courts refusing to allow *pro se* FCA actions, a New York district court dismissed a *pro se* relator's suit without prejudice, allowing him an opportunity to reappear with counsel.

U.S. ex rel. Nudelman v. International Rehabilitation Associates, Inc., 2006 WL 925035 (E.D. Pa. April 4, 2006)

A Pennsylvania district court granted the federal and state governments' motion to approve a $3.15 million FCA settlement over the objections of the relator. The court found the settlement to be reasonable in light of all the attendant risks of litigation and in light of the court's calculation that the amount of damages sustained was slightly in excess of $6 million.

Interventions & Suits Filed/Unsealed

APRIL 1–JUNE 30, 2006

Compiled by Marlowe Doman

Isakson v. Custer Battles (E.D. VA)

Two relators have commenced a *qui tam* suit against former acting Navy Secretary Hansford T. Johnson, former acting Navy Undersecretary Douglas Combs, and Custer Battles LLC officials including founders Scott Custer and Mike Battles. Also named were six companies connected to the contracting firm, including Windmill International Ltd., a worldwide contractor run by Combs and Johnson, and a Romanian company, Danubia Global, which purchased Custer Battles in 2005.

The lawsuit contends Custer and Battles, both Army veterans with Washington political connections, tried to get around a suspension order by plotting with Johnson and Combs "to set up sham companies (thereby) concealing their ownership and control of those entities." The contracting firm, Custer Battles LLC, was suspended two years ago by the military for submitting millions of dollars in fake invoices.

The relators are Gary Isakson, a former Custer Battles associate, and Rory Mayberry, a medic who said he was fired last year from a Custer Battles shell company after pointing out fraud. Isakson won a $10 million False Claims Act verdict against Custer Battles in March 2006.

According to the new lawsuit filed in Virginia, the shell companies committed other illegal acts, including selling weapons on the Iraqi black market, creating a dangerous possibility that "insurgents could buy them and use them to attack U.S. soldiers." The relators are represented by Alan Grayson and Victor Kubli of Grayson & Kubli, P.C. (McLean, VA).

[Note: Custer Battles also is under federal criminal investigation for accusations of fraud and two alleged incidents in which its security guards opened fire on Iraqi civilians and soldiers.]

U.S. v. Methodist Hospitals (N.D. IN)

The U.S. Attorney's office commenced a lawsuit in 2004 against Methodist Hospitals in Gary, Indiana and 12 physicians for allegedly engaging in Medicare fraud between 1995 and 2004. The suit claims retired hospital president John Bethjemann, Corporate Compliance Manager John Diehl, and 12 others generated $51 million in improper bills to Medicare. The suit accuses Bethjemann and Diehl of demanding kickbacks from physicians with exclusive hospital contracts in order to continue patient referrals. The suit says hospitals and physicians then submitted false claims for medical services.

The suit names Broadway Radiology Services, Northwest Indiana Radiology, and Advanced Imaging Center of Schererville as being part of the kickback scheme.

The U.S. attorney's office filed the lawsuit on behalf of relator Dr. Richard Lichtenberg. It was originally under seal to prevent public disclosure, but was recently made public. The relator's attorneys are Mark Schwartz of Schwartz & Associates, P.C. (Wilmette, IL) and Robert Shelist of the Law Offices of Robert J. Shelist (Chicago).

Assistant U.S. Attorney Joseph Reid is handling the case for the government.

U.S. ex rel. Ven-A-Care v. Abbott Laboratories Inc. (S.D. FL)

In May 2006, the Justice Department joined a whistleblower lawsuit against Abbott Laboratories Inc. and Hospira Inc., alleging that the companies conspired to inflate Medicare and Medicaid reimbursements on some drugs from 1991 to 2001. The Justice Department said Medicare and Medicaid had reimbursed hospitals and doctors more than $175 million for the Abbott drugs in question.

In a civil complaint filed in federal court in Florida, the Justice Department alleged that Abbott, a drug maker based in Abbott Park, Ill., reported prices for its drugs to price publishers, such as the Drug Topics Red Book, that were as much as 1,000 percent higher than the prices the company charged hospitals and doctors. The drugs were sold by Abbott's Hospital Products Division, which Abbott spun off two years ago as Hospira, which is based in Lake Forest, Ill. The allegedly inflated prices listed by the Red Book and other price publishers enabled doctors and hospitals to reap big profits by filing Medicare and Medicaid reimbursement claims that were much higher than what they had actually paid, according to the government's complaint. Abbott marketed these so-called spreads as an inducement to buy its drugs—which were injectable and intravenous medications—thereby increasing its own sales and profits, according to the complaint.

The federal probe began after a Florida home-infusion company, Ven-A-Care of the Florida Keys Inc., filed a whistleblower lawsuit against Abbott. The relators are represented by James Breen of The Breen Law Firm (Georgia).

This investigation was conducted by the U.S. Department of Justice, the U.S. Attorney's Office for the Southern District of Florida, and the Office of Inspector General of the Department of Health and Human Services.

U.S. ex rel. Ondis v. City of Woonsocket (D. MA)

A $40 million lawsuit was filed on behalf of the United States government and Gordon F.B. Ondis, whose company, HEDCO, owns affordable housing units in Woonsocket. The lawsuit alleges the city defrauded the Department of Housing and Urban Development when it pursued millions in federal dollars to create low-income, affordable housing for individuals and families, but then implemented and administered a policy that actively discourages the development of affordable subsidized housing.

The false claims lawsuit against the city was filed under seal more than a year ago. After reviewing the complaint, the government decided against intervening, which set the stage a few weeks ago for Ondis to continue with the lawsuit on his own.

The relator's case is being handled by Leon Blais of Blais & Parent, L.L.P. (Boston), and AUSA Patricia Connelly handled the case for the government.

Judgments & Settlements

APRIL 1–JUNE 30, 2006

Compiled by Marlowe Doman

U.S. ex rel. Relators v. CGI-AMS, Inc. (S.D. OH)

In July 2006, CGI-AMS Inc., formerly American Management Systems (AMS), agreed to pay **$1.53 million** to settle an FCA *qui tam* lawsuit. In 1997, AMS was hired by the former Ohio Department of Human Services to install a computer system that would help county caseworkers statewide spend less time on data-entry tasks. The federally funded continued through June 2002, when four Ohio state employees, Randall Smith, Michel Wilcox, Alice DeWeese and Ronald Wilinski, exposed AMS's questionable billing practices. Specifically, the four relators maintained that AMS billed the State for unrelated work and billed top dollar for work performed by unqualified employees.

The relators will receive $232,000, or 15 percent of the settlement. The firms that represented the relators were Volkema Thomas (Cincinnati), Helmer, Martins, Rice & Popham (Cincinnati), and the Nolan Law Firm (Fort Lauderdale, FL).

[Note: The computer system installed by AMS never lived up to its original billing, as it is used by only 42 of Ohio's 88 counties. Today, CGI-AMS is involved in several computer projects for the department, although on a much smaller scale.]

U.S. ex rel. Relators v. General Electric Co. (W.D. KY)

In July 2006, General Electric Co. (GE) and two of its subcontractors agreed to pay the United States **$11.5 million** to settle an FCA *qui tam* lawsuit alleging that GE sold defective blades for engines in U.S. military airplanes and helicopters. The lawsuit alleged quality-control problems over a period of years involving the manufacture of several types of engine blades at GE's Aircraft Engines division facility in Madisonville, KY. These alleged problems included nonconformance in casting and in non-destructive testing. Two subcontractors, Howmet Corp., a subsidiary of Alcoa, and Precision Castparts Corp. manufactured unfinished castings for the blades, which GE then finished at the Madisonville facility. Both subcontractors were also named as defendants.

Several employees of GE's Madisonville facility filed the *qui tam* lawsuit. The relators will receive $2,357,500, or 20 percent, of the settlement. The relators were represented by Priddy, Cutler, Miller & Meade (Louisville), Volkema Thomas (Cincinnati), and Helmer, Martins, Rice & Popham (Cincinnati).

The Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the U.S. Navy Criminal Investigative Service, the U.S. Air Force Office of Special Investigation and the U.S. Department of Transportation, Office of the Inspector General investigated the case. The Defense Contract Audit Agency provided audit support. The Justice Department's Civil Division and the Office of the U.S. Attorney for the Western District of Kentucky negotiated the settlement.

[Note: GE faces a separate lawsuit filed by a former Madisonville plant supervisor, Richard Gardner. He is seeking $50 million, claiming he was fired after testifying before the federal grand jury that investigated the allegations.]

U.S. ex rel. Orbeck v. Marion County Medical Center (D. SC)

In July 2006, Marion County Medical Center reached a settlement for $3.75 million with the government over accusations of false claims submitted to the Medicare, Medicaid, and Tricare programs. The allegations involved the high salaries of two doctors and claims for hospital services provided by Marion that were referred, ordered or arranged for by the same physicians whose salaries were paid by Marion. Also, the Center was accused of submitting claims for services that the documentation did not prove actually happened.

Dr. Kenneth Orbeck, a family practitioner and a former employee of the center, was the relator in the case. Dr. Orbeck will receive $610,083, or 16 percent, of the settlement. He was represented by attorney Ernest Nauful from Ernest J. Nauful, Jr., P.C. (Columbia, S.C.).

U.S. ex rel. Relators v. Medtronic, Inc. (W.D TN)

In July 2006, Medtronic, Inc. agreed to pay $40 million to the United States based upon allegations about certain sales and marketing practices in the spinal business. Also, Medtronic and the Office of the Inspector General/Health and Human Services have entered into a corporate integrity agreement.

The two *qui tam* suits filed in this case allege that the Medtronic Sofamor Danek division (MSD) paid kickbacks to doctors to induce them to use MSD's spinal products. The government has alleged that, between 1998 and 2003, Medtronic paid kickbacks in a number of forms, including sham consulting agreements, sham royalty agreements and lavish trips to desirable locations.

The first lawsuit remains under seal and the whistle-blower involved has not been identified. The second, however, was filed by Jacqueline Kay Poteet, a former senior manager of travel services for the company. The government is seeking to dismiss Poteet's case, in order to deprive her of a share of the settlement. The relators' attorney Andrew Carr of Bateman Gibson (Memphis) said he would object to the proposed settlement.

The Justice Department's Civil Division, the United States Attorneys' Office in Memphis, the Federal Bureau of Investigation, the Office of Inspector General of the Department of Health and Human Services, the U.S. Postal Service and the Tennessee Bureau of Investigation handled this case.

[Note: Poteet filed a motion in the Western District of Tennessee alleging that "this case has not been adequately investigated" by the U.S. government, and that the $40 million amount is "woefully inadequate."]

U.S. ex rel. Relator v. Burleson (N.D. AL)

In July 2006, Gerald M. Burleson, his wife Frances R. Burleson, and their businesses (Haleyville Medical Supplies, Inc., City Pharmacy of Haleyville, Inc., Care Medical of

Jasper, Inc., Care Pharmacy, Inc., and Winfield Medical Supply, Inc.) agreed to pay the United States **$3.14 million** to settle civil healthcare fraud claims.

The healthcare fraud investigation arose out of a *qui tam* lawsuit, alleging that Burlesons paid kickbacks to individuals who improperly referred patients to the Burlesons for durable medical equipment and respiratory medications. Although the Burlesons attempted to camouflage the kickbacks as payments to "employees" for services rendered, the "employees" provided minimal to no services. The relator also alleged that Max Burleson defrauded Medicare by dispensing a "compounded" medication rather than the medication in fact prescribed by the patient's physician.

The U.S. Food and Drug Administration Office of Criminal Investigations, Department of Health and Human Services Office of Inspector General, the Federal Bureau of Investigation and the Defense Criminal Investigative Service, investigated this case. Assistant United States Attorney Lloyd C. Peeples was the lead attorney in the civil investigation. Information about the relator and the relator's share has not yet been released to the public.

[Note: In a related criminal action, Max Burleson plead guilty to criminal healthcare fraud and drug misbranding charges arising out of the allegations in the qui tam suit and was sentenced to serve 18 months in prison.]

U.S. ex rel. Russell v. Odyssey HealthCare, Inc.

In July 2006, Odyssey HealthCare, Inc. agreed to pay the United States **$12.9 million** to settle allegations that the company submitted false claims to Medicare. The Dallas-based national hospice provider allegedly billed Medicare for services provided to patients who were not terminally ill and therefore were ineligible for the Medicare hospice benefit. The settlement, which covered a period from 2001 to 2005, resolved charges originally brought against Odyssey HealthCare by a former regional vice president, JoAnne Russell. As part of the settlement, Russell will receive $2,326,500, or 18 percent of the settlement. The relator's attorney was Nola Hitchcock Cross from Cross Law Firm, S.C. (Milwaukee, WI).

This settlement was the result of a collaborative investigation involving the Department of Justice's Civil Division, the U.S. Attorney's Office for the Eastern District of Wisconsin, the U.S. Attorney's Office for the Southern District of Texas, and the Department of Health and Human Services' Office of the Inspector General.

U.S. v. Tenet Healthcare Corp.

In June 2006, Tenet Healthcare announced a global settlement with the Department of Justice that included **$900 million** and the divestiture of nine hospitals. The monetary sum included $725 million to be paid incrementally and $175 million in payments that Tenet will not request from Medicare. The DOJ alleged that Tenet cheated Medicare through improper "up-coding," abuse of the outlier system, and giving kickbacks to doctors. The fraud was investigated by the Department of Health and Human Services' Office of Inspector General and its Office of Investigations in

Santa Ana, CA, Office of General Counsel and Centers for Medicare and Medicaid Services; the Federal Bureau of Investigation; and Medicare Contractors Mutual of Omaha Inc. and IntegriGuard LLC.

While DOJ has acknowledged that some of the allegations originated from *qui tam* suits, DOJ has not yet announced which suits were settled in this "global settlement."

U.S. v. Indiana (S.D. IN)

In June 2006, the state of Indiana agreed to pay approximately **$8.3 million** to the U.S. government, due to fraudulent E-rate claims by the State's Intelenet Commission. The E-Rate program provides funding for needy schools and libraries to connect to and use the Internet. Among the charges were claims of inflated prices, falsified invoices and non-competitive bid practices. The charges also included ignoring an E-Rate requirement that schools and libraries make co-payments for expenses charged to the E-Rate program. The resolution announced resulted from an ongoing federal investigation of fraud and anti-competitive conduct in the E-Rate program in Indiana.

The U.S. Department of Justice's Civil Division, the U.S. Attorney's Office for the Southern District of Indiana, and the FCC Office of the Inspector General conducted the investigation jointly.

United States ex rel. JA Russo Associates, Inc. v. AT&T Corporation (C.D. CA)

In June 2006, AT&T Communications–East, Inc., a subsidiary of AT&T Corp., agreed to pay the United States **$2.9 million** to settle claims that it defrauded the General Services Administration (GSA) from 1998 to 2001. The settlement resolves allegations that the company defrauded the United States by knowingly passing through to government customers, in violation of the terms of AT&T's contract with GSA, certain costs and fees known as Presubscribed Interexchange Carrier Charges. These charges are fees that long distance companies pay to local telephone companies to recover part of the costs of providing facilities that link each telephone customer to the telephone network.

The allegations arose from a *qui tam* lawsuit filed by relator John Russo, whose share of the settlement was undisclosed. The attorneys for the relator were Don Warren and Phillip Benson from Warren Benson Law Group (San Diego).

U.S. ex rel. Drescher v. Highmark, Inc. (E.D. PA)

In June 2006, Highmark Inc. settled allegations with the government that it underpaid health benefits owed to older employees who also qualify for Medicare. The Pittsburgh-based insurer has agreed to pay over **$2 million** in the settlement. Highmark also agreed to set up a program to count the number of Medicare patients in its plans more accurately. An independent group will watch over the program's policies and procedures for three years. The issue revolves around employees or their spouses who qualify for Medicare but also are covered by a company's group health plan. Authorities said Highmark didn't fully cover its portion of expenses for these workers, shifting more of the burden to Medicare.

The U.S. Attorney's Office in Philadelphia sued Highmark in 2003 after former employee Elizabeth Drescher filed a *qui tam* lawsuit six years ago. She will receive over $818,600, or 41 percent from the more than $2 million settlement. The relator's attorney was Mitch Kreindler of Kreindler & Associates, P.C. (Malvern, PA). The Assistant U.S. Attorneys who handled the government's intervention were Virginia Gibson, Margaret Hutchinson and David Wiseman.

U.S. ex rel. Greendyke v. CNOS (D. SD)

In June 2006, a South Dakota health clinic and an artificial joint manufacturer have agreed to pay **$345,000** to the Medicare Trust Fund to settle a federal kickback case. Stryker Corporation and its affiliates made payments from 2000 to 2003 to The Center for Neurosciences, Orthopedics & Spine, or CNOS, in order to induce CNOS and Siouxland Surgery Center to buy orthopedic surgical products from Stryker. CNOS physicians own a controlling interest in Siouxland Surgery Center. Stryker paid $240,000 of the settlement, with CNOS and Siouxland Surgery Center paying the remaining $105,000.

The action was filed on behalf of the federal government by relator Spencer Greendyke, M.D., a former physician and board member of CNOS. The relator's share of the settlement was not yet disclosed. The relator's attorneys were Brett Lovrien, Shawn Nichols, and Steven Sanford from Cadwell Sandord Deibert & Garry L.L.P. (Sioux Falls, SD). Assistant U.S. Attorney John Holm handled the case for the government.

U.S. ex rel. Monahan v. St. Barnabas (D. NJ)

In June 2006, the government announced a settlement for **$265 million** against Saint Barnabas Hospitals of West Orange, New Jersey. Additionally, Saint Barnabas Hospitals has entered into a comprehensive Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. This action alleged that the Saint Barnabas Hospitals fraudulently increased charges to Medicare patients in order to obtain enhanced reimbursement from Medicare.

The settlement resulted from a *qui tam* lawsuit filed in November 2002 by relator James Monahan and his attorney Marc Raspanti in the District of New Jersey. Other whistleblower lawsuits were filed in the Eastern District of Pennsylvania that same month by two other relators.

The settlement with Saint Barnabas was the result of a coordinated effort among the Department of Justice Civil Division; the United States Attorney's Office for the District of New Jersey; the United States Attorney's Office for the Eastern District of Pennsylvania; the Department of Health and Human Services' Office of Inspector General and Office of Counsel to the Inspector General; the Centers for Medicare and Medicaid Services; the Federal Bureau of Investigation; and the U.S. Postal Inspection Service.

U.S. v. Honeywell International Inc. (D. NJ)

In June 2006, Honeywell International Inc. agreed to pay the United States Government **$2.6 million** to resolve allegations that Honeywell did not properly test electrostatic protective metallic sheets which had been qualified by the Department of the Navy for use in packaging over 186,000 sensitive parts used by the Department of Defense (DoD) and the National Aeronautic and Space Administration (NASA).

Caltex Plastics, of Vernon, CA, was a purchaser of Honeywell sheets, which it would make into bags and other products. During the course of a prior lawsuit between the two companies, Caltex and its vice president, Jim Higgs, determined that Honeywell was selling goods to the military that had not gone through proper testing. As a result of the settlement, the relators will receive $393,750, of 15 percent. The attorney for the relators was Robert G. Klein from Klein Trial Lawyers in Los Angeles, CA.

The Justice Department's Civil Division along with the United States Attorney's Office for the District of New Jersey conducted the litigation and settlement of the case. The DoD's Defense Criminal Investigative Service Office of the Defense Inspector General, NASA's Office of Inspector General, and the Department of the Air Force Office of Special Investigation investigated the case.

U.S. ex rel. Quinnelly v. Piedmont Hospital (N.D. GA)

In June 2006, Piedmont Hospital in Atlanta agreed to pay **$3 million** to resolve a *qui tam* lawsuit that alleged the hospital submitted claims to federal health-care programs for services that were not eligible for reimbursement and failed to properly execute contractual agreements with the physicians performing professional services. The hospital also signed a Corporate Integrity Agreement that requires Piedmont to adhere to certain policies and procedures to ensure compliance with statutes and regulations that govern the use of federal health-care funds.

The *qui tam* lawsuit was filed by relator Patricia J. Quinnelly, who was a vascular technologist in Piedmont's F. Levering Neely Vascular Laboratory from 2001 through 2004. Ms. Quinnelly will receive $354,390, or 12 percent, as the relator's share. In addition, Piedmont Hospital will pay all attorney's fees, expert fees and costs incurred by Ms. Quinnelly's counsel over the last three years in prosecuting this action. The relator's attorneys were Marlan B. Wilbanks of Harmon, Smith, Bridges & Wilbanks, L.L.P. (Atlanta, GA), and Marc S. Raspanti of Miller, Alfano & Raspanti, PC (Philadelphia, PA).

U.S. Attorney David E. Nahamias, Assistant United States Attorneys Amy Berne and Mina Rhee, as well as Department of Justice Investigator Donna Davis led the federal investigation.

U.S. v. Mesivta Sanz of Hudson County (D. NJ)

In June 2006, Mesivta Sanz of Hudson County, a nonprofit corporation that runs a private school in Union City paid the federal government **$469,000** to settle allegations that it had wrongly charged the National School Lunch Program for meals it never served. According to the settlement agreement, between 2001 and 2006, Mesivta Sanz allegedly submitted false information and statements to the U.S. Department of Agriculture, which wrongfully reported that school breakfasts and lunches were served on various days on which no classes were in session, namely weekend and religious holy days.

Assistant U. S. Attorney Rudolph A. Filko, Deputy Chief of the Civil Division, handled the case. Others involved in the investigation included Special Agents from the United States Department of Agriculture, Office of Inspector General under the direction of Special Agent-in-Charge for Investigations Brian L. Haaser and auditors from the U.S. Attorney's Office Affirmative Civil Enforcement Unit.

U.S. ex rel. Smith v. Lincare, Inc. (D. MA)

In June 2006, Lincare, Inc., a national home oxygen equipment supplier, agreed to pay **$526,000** to resolve federal civil claims that three of the company's central Massachusetts facilities overbilled Medicare. Also, Lincare has entered into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General in order that, among other things, its compliance with the Medicare billing guidelines can be monitored.

Lincare overbilled Medicare for home oxygen equipment furnished by three of its facilities located in Marlborough, Dudley and Cherry Valley, Massachusetts.

A former sales representative for Lincare, Susan Smith, blew the whistle on the home oxygen supplier. Smith will receive $96,680, or 18 percent, of Lincare's payment. Lincare also agreed to pay her attorney $16,890.

This matter was investigated by the Inspector General's Office of the Department of Health and Human Services and the Employee Benefits Security Administration. The matter was handled by Assistant U.S. Attorney Karen L. Goodwin in U.S. Attorney Michael Sullivan's Springfield Office.

U.S. ex rel. Fowler v. Tetra Tech Inc. (N.D. AL)

In June 2006, Tetra Tech Inc., Engineering Management Concepts (EMC), has agreed to pay **$95,000** to settle allegations that a company now owned by Tetra Tech, improperly billed the U.S. Missile Defense Agency from 2000 to 2003. The U.S. Attorney's Office of the Northern District of Alabama said the company did not appropriately divide time between the Missile Defense Agency and work performed for NASA and that some Engineering Management Concepts employees did not keep proper time records.

The suit was filed as a *qui tam* complaint brought by James Fowler and Doug Tyler, two former EMC employees. The company also agreed to payment of attorney's fees for the two former EMC employees. The attorneys for the relators were James Moncus, Donald McKenna, and Scott Powell from Hare, Wynn, Newell & Newton LLP (Birmingham, AL). Assistant U.S. Attorneys Alice Martin and Lloyd Peeples handled the government's intervention case.

U.S. ex rel. Taylor v. Gabelli (S.D. NY)

In June 2006, Wall Street investor Mario Gabelli and companies affiliated with him agreed to pay **$130 million** to settle allegations that he used sham companies to buy cellphone licenses under a federal program for small and minority-owned businesses. The suit accused Gabelli of defrauding the U.S. government by hiding his firm's control of small firms that received bidding discounts for wireless licenses won at spectrum auctions during the 1990s. By making this claim, Gabelli and his partners appeared to qualify for $90 million in federal discounts as well as $70 million in financing breaks on federal loans. After winning the lucrative radio licenses at discount, Gabelli and partners sold the licenses, netting $206 million in profit, most of which went to Gabelli.

The *qui tam* lawsuit was initially filed by relator Russell C. Taylor III who worked at a law firm involved with the spectrum bidding process. The relator's share was $32.2 million, or 25 percent, which will be split between the Washington, DC firms of Phillips & Cohen LLP and Williams & Connolly LLP. Assistant U.S. Attorneys David Kennedy, Sheila Gowan, and Wendy Waszmer handled this case for the government.

U.S. v. United Technologies Corp. (S.D. OH)

In June 2006, United Technologies Corp., whose subsidiaries include Sikorsky and Pratt & Whitney, has entered into a **$283 million** settlement of government contract accounting matters with the U.S. Department of Defense, because Pratt violated the False Claims Act during the "Fighter Engine Competition" between Pratt and General Electric from 1985 to 1990. The longstanding accounting disagreement had centered on the allocation of overhead costs between commercial and government programs. The Justice Department claimed that the government overpaid for Pratt engines under contracts awarded by the Air Force because Pratt inflated its estimated costs for some purchased parts and withheld data that would have revealed the overstatements.

U.S. ex rel. Jenlink v. Farmers Bancorporation (W.D. OK)

In June 2006, relator farmers Ronald Jenlink and Greg Boruff settled a *qui tam* suit against Farmers Bancorporation, of Cherokee, OK. The bank—which operates under the name Farmers Exchange Bank and is headquartered in Cherokee with branches in Tonkawa, Helena, and Wakita—was ordered to pay **$2.127 million**. As a result of the settlement, the relators will receive $340,320, or 16 percent. The defendant was an agricultural lender accused of abusing the provisions of a federal farm loan program. The relators accused the banks of improperly charging excessive interest rates and fees on federally guaranteed FSA agricultural loans.

Lawyers Michael C. Bigheart, Larry D. Lahman, and Roger L. Ediger of the firm Mitchell & DeClerck (Enid, OK) successfully represented the relators. The Office of the United States Attorney for the Western District of Oklahoma and the Civil Division of the Justice Department jointly handled the civil investigation and settlement.

U.S. v. Harlem Hospital (S.D.N.Y.)

In May 2006, Harlem Hospital agreed to pay **$2.3 million** to settle civil charges that it double-billed Medicare. Harlem Hospital, which is part of the city's Health and Hospitals Corp., was allegedly notified by its medical claims processor, Empire Medical Services, in July 1997 that it was consistently double billing Medicare, but did not stop the practice. The complaint details specific hospital memos and other documentation that discuss the double-billing problem. Assistant U.S. Attorney Heidi Wendel handled the case for the government.

U.S. v. Lincare Holdings

In May 2006, Florida-based Lincare Holdings, which makes home oxygen and other respiratory equipment, on Monday reached a **$10 million** settlement with the Office of Inspector General (OIG) of the US Department of Health & Human Services (HHS) over allegations that the company paid kickbacks to doctors. The government's allegations stated that between 1993 and 2000, Lincare illegally paid doctors to refer patients to the company. Doctors allegedly received sports tickets, gift certificates, fishing trips and golf outings, as well as office and medical equipment. The HHS-OIG also accused Lincare of giving doctors kickbacks through payments hidden as consulting fees. Lincare also said it already has resolved other investigations by the HHS-OIG and the Department of Justice related to inappropriate Medicare payments and other issues.

To date this amount was the largest administrative recovery by the HHS-OIG.

U.S. ex rel. Pelley v. Phoenix Fabricators (S.D. IN)

In May 2006, the government announced a settlement with Phoenix Fabricators and Erectors, Inc., a manufacturer and erector of elevated water storage tanks headquartered in Avon, Indiana. The settlement will be a payment of **$1.75 million** to the U.S. government. In addition to the cash payment, Phoenix agreed to issue warranty extensions to all of the potentially affected tanks.

The relators' complaint alleged that Phoenix used welds to construct water tanks that did not comply with contract specifications relating to structural integrity. The relators further stated that Phoenix conspired with an engineering firm to generate false testing records to show that the tanks it manufactured met the contract specifications. Thus, the tanks purchased with government funds may not have been as structurally sound as they should have been.

The relators who filed the *qui tam* lawsuit were Scott D. Pelley and Christopher J. Braun. The relators' attorneys were John Ketcham of Plews Shadley Racher & Braun (Indianapolis) and William O. Harrington of the Law Office of William O. Harrington P.C. (Danville, IN). Assistant U.S. Attorney Erin Lewis was one of the government lawyers that handled the case. The case was investigated by the U.S. Department of Agriculture, Rural Development Association, the U.S. Department of Housing and Urban Development and the U.S. Department of Commerce.

U.S. v. Chiotellis (D. MA)

In May 2006, Philip N. Chiotellis, M.D, a Hyannis doctor, agreed to pay **$1.9 million** to resolve claims by the government that he submitted fraudulent billings to the Medicare program. By the terms of the agreement, Dr. Chiotellis entered into an Integrity Agreement with the Department of Health and Human Services, Office of Inspector General in order that, among other things, his compliance with the Medicare billing guidelines can be monitored. Based on its investigation, the United States alleged that Dr. Chiotellis had over billed Medicare from 1995 through 2001 for thousands of cardiac rehabilitation services that were performed, but billed to the Medicare program as cardiovascular stress tests. Reimbursement rates for cardiovascular stress tests are significantly higher than rates for cardiac rehabilitation services.

Assistant U.S. Attorney Patricia M. Connolly in the U.S. Attorney's Office of the District of Massachusetts. The matter was investigated by the Department of Health and Human Services, Office of Inspector General.

U.S. v. Tenet Healthcare (S.D. CA)

In May 2006, Tenet Healthcare agreed to pay **$21 million** and to sell off its Alvarado Hospital Medical Center in San Diego to settle government charges over alleged kickbacks to doctors. At issue was whether the Dallas-based company's 311-bed Alvarado hospital and its former chief executive, Barry Weinbaum, violated criminal anti-kickback laws by funneling more than $10 million to physicians to increase admissions. Prosecutors argued that Alvarado's relocation deals went beyond the bounds of legal relocation payments. They said the agreements conveyed more than $10 million in bribes to established physician groups to entice them to admit patients to the hospital.

[Note: Tenet, Alvarado and a former hospital administrator have been tried twice on related criminal charges. Both trials ended in mistrials after jurors were unable to agree. The U.S. Attorney's Office in San Diego has agreed not to pursue any more criminal charges.]

U.S. v. Group II Medical Supports, LLC (S.D. WV)

In May 2006, Group II Medical Supports, LLC (Group II), a Beckley-area durable medical equipment supplier, along with owners and officers, Tracy Webber, Hugh Keatley and Gregory DeValdes, agreed to pay the United States a total of **$1,575,000** in order to resolve false claims liability associated with improper billings to Medicare and Medicaid. This agreement was a partial settlement of the Southern District of West Virginia's largest health care fraud matter to date. In addition to a cash payment of $1,000,000, Group II and Hugh Keatley, its current owner, have agreed to forego the filing of additional Medicare claims that they value at more than $660,000. Former owner Tracy Webber has also agreed to pay $525,000 and former officer, Gregory DeValdes, has agreed to pay $50,000. Group II, Keatley, and Webber are also permanently excluded from future participation in the Medicare and Medicaid programs. DeValdes, former Vice President of Sales, is excluded for a minimum of five years.

Group II routinely supplied high cost inflatable mattresses developed to treat the most advance and serious forms of pressure ulcers or bed sores, to Medicare and Medicaid patients who did not have the required ulcers and otherwise did not qualify. To facilitate this scheme, Group II, its owners, and its field representatives misrepresented individual patient condition and diagnoses and created false documents that were used to support Medicare and Medicaid claims for payment.

The investigation was conducted jointly by the United States Department of Health and Human Services, Office of the Inspector General, the Office of United States Attorney for the Southern District of West Virginia, and the Commercial Litigation Branch of the United States Department of Justice.

[Note: In addition to these civil and administrative actions, Group II has pleaded guilty and been convicted of making false statements to Medicare and Medicaid. On March 30, 2006, Chief United States District Judge David A. Faber ordered Group II to pay more than $8.4 million in restitution to Medicare and Medicaid.]

U.S. v. York County (E.D. PA)

In April 2006, York County agreed to pay **$18.5 million** to the federal government to end a dispute that it allegedly overcharged for housing immigration detainees. The county will make quarterly payments of $688,832 for six years. Officials plan to make these payments with a rate increase that will be negotiated with the federal government for housing the detainees. The federal government alleged that it should have paid $38-a-day per detainee—not $60—between October 1999 and March 2003, based on the prison's operating costs and its representation of the daily population at the prison.

The government's investigation was conducted by the Department of Justice Office of the Inspector General. The OIG's Fraud Detection Office and Philadelphia Regional Audit Office collaborated in developing the evidence that formed the basis for the government's claims.

U.S. ex rel. Curley v. Clark Atlanta University (N.D. GA)

In April 2006, Clark Atlanta University agreed to pay **$5 million** to settle a *qui tam* suit that alleged the university misused federal funds. The agreement includes more than a $1 million to be paid to the professor who reported the college. The university also entered into an agreement to ensure that it properly manages federal funds in the future. The school was accused of violating the terms of its initial agreement with the United States Department of Energy between 1990 and 2002. The lawsuit alleged that while acting as manager of a consortium of 17 universities, Clark Atlanta received about $24 million from the Department of Energy that was supposed to be used to train a new minority workforce in environmental scientists. The university did not use the funds for those purposes.

The *qui tam* suit was filed by Dr. August Curley, who was hired by Clark Atlanta as Program Manager for the Consortium in 1995. Dr. Curley will receive 1.1 million, or

22 percent of the settlement. The relator was represented by attorneys Clifford Hardwick of Clifford H. Hardwick & Associates (Roswell, GA), and Tyrone Bridges and Marlan Wilbanks of Harmon, Smith, Bridges & Wilbanks, L.L.P. (Atlanta, GA).

U.S. ex rel Gilligan-O'Brien v. West Bend Mutual Insurance (W.D. WI)

In April 2006, West Bend Mutual Insurance agreed to pay **$92,500** on behalf of Rock Valley Community Programs to settle a false claims act violation. After a four-day trial, jurors found that Rock Valley and its chief executive officer, Irwin McHugh, had submitted false claims for payment to the Federal Bureau of Prisons.

Relator Nancy Gilligan-O'Brien was hired by Rock Valley in 1990 and became its outpatient and clinical services director. She administered the Treatment Alternative Program, which offers day and outpatient substance abuse treatment to state criminal offenders. In 2000, Rock Valley began providing drug abuse treatment services to federal offenders after it stated to the Bureau of Prisons that it would comply with state requirements. In 2003, Gilligan-O'Brien repeatedly told McHugh that Rock Valley wasn't properly certified for the federal program. She refused to sign certain documents because she said they falsely stated she had supervised employees.

Gilligan-O'Brien's share was $27,750, or 30 percent. Gilligan-O'Brien was represented by attorney Julie A. Lewis of Nowlan & Mouat LLP (Janesville, WI).

[Note: Rock Valley's insurer, West Bend Mutual Insurance also agreed to pay Gilligan-O'Brien $407,500 to settle her claim for having been fired for informing the government about her employer's billing practices.]

U.S. v. AEPTEC Microsystems (D. MD)

In April 2006, AEPTEC Microsystems agreed to pay the government **$1.6 million** to settle claims that the company overcharged the Navy on four contracts for shipboard automation technology. The agreement resolves charges that AEPTEC, which does business as 3e Technologies, submitted false claims for work performed by shifting labor hours from fixed-fee contracts for commercial services to Navy cost-plus contracts. Three of the contracts were for the installation of shipboard wireless sensors to collect data about wear and tear on equipment aboard ships. A fourth contact was for developing a wireless system to monitor shipboard food inventories.

Assistant U.S. Attorney Jamie M. Bennett and the Office of the Defense Criminal Investigative Service handled the investigation and settlement.

U.S. v. Moore Farms (N.D. TX)

In April 2006, William Jesse Moore and Bobby Elbridge Moore of Crowell agreed to pay a **$900,000** settlement to the government. The government had filed a civil lawsuit against Moore Farms under the False Claims Act, alleging that Moore Farms filed false insurance claims for the 1998 growing season.

The government's case was handled by Assistant U.S. Attorneys Donna K. Webb, Shane Read, and Matthew Zandi. This settlement is the result of joint civil and criminal investigations by the United States Attorneys Office, the U.S. Department of Agriculture, Office of Inspector General; the U.S. Department of Agriculture, Risk Management Agency; and the U.S. Department of Agriculture Farm Service Agency in Vernon, Texas into crop insurance fraud in Wilbarger and Foard counties.

[Note: The United States convicted Wendell Mints in February 2004 on 25 counts of an indictment that charged him with defrauding the government of nearly $500,000 by operating an elaborate scheme in which he "worked the system" to falsify crop insurance loss documents and collected insurance money for thousands of acres of cotton and wheat sorghum fields he did not plant. Mints was also ordered to pay restitution. Moore Farms was one of Wendell Mints Insurance Agency's larger clients.]

STATE JUDGMENTS & SETTLEMENTS

Baxter International Inc. (Texas)

In June 2006, Baxter International Inc., the world's biggest maker of blood-disease treatments, agreed to pay **$8.5 million** to settle a suit alleging it falsely reported the prices of drugs to the Texas Medicaid system. The Texas attorney general sued Deerfield-based Baxter, North Chicago-based Abbott Laboratories and B. Braun Medical Inc. in 2004, claiming the companies misreported prices of intravenous fluids and injectable medications, leading Texas Medicaid to reimburse pharmacies at above-market rates.

The settlement brings to $64 million the amount Texas has collected from Medicaid billing disputes since bringing its first case in 2000, including a $27 million settlement with Schering-Plough Corp. in May 2004.

TAP Pharmaceutical Products Inc. (Massachusetts)

TAP Pharmaceutical Products Inc. agreed to pay the state **$798,000** to settle charges it defrauded Medicare patients by artificially inflating the price for its cancer drug Lupron. The Wisconsin Attorney General's office alleged that TAP illegally influenced doctors to prescribe Lupron by using free samples, rebates, discounts, bribes, lavish trips, and other inducements. The latest settlement money, which will be distributed to 48 state organizations engaged in the care and treatment of cancer or the promotion of improved health care for Wisconsin citizens, comes out of a nationwide class action filed in federal court in Massachusetts. The $798,000 settlement with TAP represents was only one part of one claim for one drug produced by one of the defendants in that suit.

Dey Inc. (Missouri)

In April 2006, the pharmaceutical company Dey Inc. agreed to pay **$2.93 million** to settle allegations it engaged in a pricing scheme that resulted in the Medicaid program paying too much for certain generic prescription drugs. Under the settlement terms, Dey Inc. will pay $2.73 million to the Medicaid Fraud Reimbursement Fund and $200,000 to the Merchandising Practices Revolving Fund, which is used to fund consumer protection litigation and education.

Attorney General Jay Nixon's lawsuit, filed in May 2005, said Dey Inc. did not accurately report the prices of drugs sold to pharmacies participating in the Medicaid program. The prices reported to pharmaceutical trade publications, referred to as the average wholesale price (AWP) or the wholesale acquisition cost (WAC), often were substantially higher than the prices paid by the providers for the drugs, which were primarily generic brand inhalants used by patients with respiratory conditions. The

AWP and the WAC are two of the bases used by the Missouri Medicaid program to determine the reimbursement paid to the providers when they submit claims to Medicaid. If a pharmacy knew it would receive a greater reimbursement from Medicaid if it dispensed a generic prescription drug sold by Dey Inc., it would be more likely to dispense that drug, the lawsuit alleged. As a result, Nixon said, Dey Inc. was able to artificially increase its market share through a scheme that cost Missouri taxpayers.

In Their Own Words

The Whistleblower's Experience:
The High Cost of Integrity

The Whistleblower's Experience: The High Cost of Integrity[1*]

James Moorman
President & C.E.O
Taxpayers Against Fraud & Taxpayers Against Fraud Education Fund

Jack described me as the president of Taxpayers Against Fraud and said a few words about TAF, but what he didn't say was that TAF receives numerous calls from potential relators seeking information about the FCA. They want to know how the act works, whether they have a claim, do they need a lawyer and how do they find one and pay for one, is their employer going to find out if they file suit, what happens after they file, how long will it take, what are they likely to get when it's all over, and things like that. My colleagues at TAF and I have many such conversations and, as a result, we've become familiar with the problems relators face.

I assume that most of you in the audience represent or work for defendants or potential defendants or for government and that only a small percentage of you represent relators. For that reason, I'm guessing that most of you haven't given much thought to the difficulties relators face and what it says about relators as a group that they persevere in the face of their difficulties. However, I believe it's important for all lawyers in the FCA field, whomever they represent, to understand relators' problems. Relators are, without question, key players in this arena, and if you are a professional in this field and don't "get" the relators situation, then you don't fully understand what you are dealing with. For that reason, I thought it would be appropriate to walk you through some of the problems relators face.

I start by noting that the problems relators face are daunting and the path of relators is difficult and filled with traps.

Woody Allen has noted that in every life, we all come to a fork in the road.

One fork leads to despair and utter hopelessness. The other fork, leads to total extinction.

Woody suggests that we pray for the wisdom to choose carefully.

I mention Woody's black humor because he describes the choice relators often face.

Am I exaggerating?

Let's look at the numbers.

Every year about 400 federal *qui tam* cases are filed, but only 80 or 90 or so are successfully resolved. According to the Department of Justice's statistics, starting with the 1986 amendments to the FCA through the end of fiscal year 2005, 5,129 *qui tam* suits were filed, but only 990 were successfully resolved.

You can do the math. The bottom line is that only about 20 percent of *qui tam* cases succeed.

Eighty or ninety successful cases a year. That's not a lot, especially when one considers the amount of money that is spent by the federal government on goods and services every year.

1. * These remarks were delivered on June 15, 2006, at the Sixth American Bar Association National Institute on the False Claims Act and have been edited slightly for publication.

Now we know the number of successful cases isn't so low because fraud is rare. No, fraud is not rare. It's because it's so very hard for relators to win a False Claims Act case.

As we look at why that is, I invite you to sit in the chair of a potential relator and ponder the choices from that perspective.

Assume you are 32 years old, you are bright and that you have done well in school.

Let's say you have an MBA and your mother is proud of you.

After your first year of employment you received the maximum raise and a glowing review from your boss.

You've been promoted and included in a new division that has a huge federal contract. You are a project leader and you have five employees working for you on part of this huge federal project.

Life is grand.

A year or so passes and then, one day, you discover that your division's bills for your team's work are significantly inflated. Hours, pay rates, number of employees—all inflated. It appears the bills are forty percent beyond what they should be. You gingerly poke around and come to the conclusion that similar misbilling characterizes the entire project and you estimate that at least $60 million of fraud is involved.

You're shocked. So what are your options? You immediately consider:

OPTION ONE: GO ALONG WITH IT

Many people do this. It's the old *'go along to get along'* option.

In the real world, most people follow the herd, even when they don't like where the herd is taking them.

In almost every company that gets nailed under the FCA, you find a culture of going along to get along.

But it comes with a cost, especially if you value your self-respect.

So let's assume that you have some character and that you, for your own self-respect, just can't be a part of a fraud. You're not going to go along to get along.

You quickly figure out that the easiest thing for you to do is:

OPTION TWO: LEAVE.

Many people take this option. They simply leave. They keep their own counsel, button their lip, update their resume, and find another job as quickly as possible.

This is often what someone does when they have a spouse, a mortgage, and a couple of kids in school.

But this option also comes with costs: the disruption of leaving and also the self-knowledge that you did nothing but run away.

So let's further assume you're one of those people with a lot of character and that you want the fraud to stop and you won't feel right about yourself unless you have done your bit to stop it. You figure out that you can take:

OPTION THREE: REPORT THE FRAUD

Some will call a government tip line in order to report the fraud, but generally nothing comes of that. The odds that the government will launch an investigation with regard to any one tip is very, very low.

A second way to report is to go to your superior, or to your firm's compliance officer. What frequently happens next in such situations, especially if, as appears here, a big business-plan fraud is involved, is that the reporting employee is, one way or another, out of his or her job.

Those that receive the information of fraud may express concern. Others may join in to hear all about the problem with apparent concern as well.

But sooner or later, the whistleblower is reorganized out of their job. If they're lucky, they're given a severance package.

Perhaps that happened to you, or perhaps you were alert enough to notice that these things happened to others at your company, so you didn't report the fraud.

Let's pause here a second and observe that for anyone offended by fraud, options 1, 2, and 3 all come up short.

So, if we assume you are one of those people who are determined to see that the right thing is done, that you are overflowing with character, you look for more alternatives and you search around and find:

OPTION FOUR: THE FALSE CLAIMS ACT

You study the FCA as best you can. Unlike options 1, 2, or 3, this option appears to be effective. You're excited. You seek to find out more. Perhaps you call TAF to see how it works. Perhaps you even talk to *moi*.

I or someone else confirms for you that the FCA is an effective option, but we also alert you to some of the difficulties you'll face:

- If it's me you talk to, I tell you that if you haven't already lost it, you are correct in believing you might well lose your job.
- I tell you most cases don't succeed.
- I tell you it could take quite a while—years.
- I tell you about isolation—that you can't talk about your case except to your legal team.
- Oh yes, I tell you you'll need a lawyer and that you'll be working with this lawyer for however long it takes.
- I tell you this could be quite stressful for you and your family.

But your case seems like a very good case to me and I tell you, based on what you have told me, that you're in the ball park, and you, being one of the dauntless ones, weigh the risks as acceptable and proceed to become a relator.

So what can go wrong? Well to begin with, let's suppose:

1. You get an inexperienced lawyer. There are exceptions, but lawyers representing relators always seem to muck up their first FCA case. If you're lucky, yours will associate an experienced lawyer to help steer the case. If you're unlucky, he'll just proceed and then, sometime, years later, you'll find yourself in the legal equivalent of a glider wreck.

There are many ways an inexperienced lawyer can disserve his relator. For example, he can fail to understand what must be done to comply with Rule 9(b). That's common. I've heard of many stranger things, such as a lawyer who didn't serve the government, another that named himself as relator, rather than his client, and one that dismissed his case at an AUSA's suggestion so the government could investigate, and on and on. These things seem incredible, but they happen and when they do, they ruin a relator's case.

2. At the end of the day, the case recovers very little of the money that was stolen. This could happen for several reasons. The company simply can't afford to pay or goes bankrupt. Or the extent of the fraud turns out to be much smaller than you thought. Or, DoJ, for "litigation risk" reasons, settles really cheap. Thus, you spend seven years of your life, lose your employability in your chosen field, are reduced to flipping burgers, and you walk away with, say, $30,000

3. You were not the first to file. For example, suppose you find out—two years after filing your case and after spending much time and money—that you were not the first to file. Whoops!

That $60 million claim you thought you had? It's someone else's. If you have an astute attorney, he may salvage something. But don't count on it.

4. A public disclosure becomes an issue and you are found not to be an original source. This is a complicated subject with many wrinkles and no doubt the subject of a panel at this Institute. I won't go into it, but it can emerge as an issue long after you filed. If it does, too bad.

5. The government leaves the case under seal for years. And what is worse, the government may not communicate much with your attorney.

Time marches on, but your case does not march with it. All your good work has gone into limbo. Perhaps your case has actually being investigated. Or, perhaps your case file has simply gathered dust in some investigators office.

What do you do? Wait or go to the judge? Neither option is appealing. I talked to a lawyer last month who told me he has had a case under seal for eleven years. Nothing is harder on a relator than this situation. It is like slow death.

6. The government declines your case. After three years, you get a call from your lawyer. Your case has been declined.

The government may have discovered, for one of a number of reasons, that your case has a major defect. So, after three years, you learn you might as well drop the matter. Not good, but at least, the waiting is over.

Sometimes a federal agency is embarrassed by the fraud and would just as soon bury it. If a False Claims Act case goes forward, everyone from Congress on down is going to read about how stupid this agency was. DoJ can't do much if the client agency won't cooperate, but Justice won't tell you that. It'll be one of those "You may have a good case, we just don't have the resources to pursue it" things. You are left wondering if this is perhaps a signal that DoJ really wants you to proceed. Your dilemmas multiply.

7. The government declines, says you may have a good case, you pursue the case, but the defendant fights hard. The question is, can you see the case through without the government?

In truth, a big hospital, or defense contractor, or oil company engaged in massive fraud against the federal government has all the resources it needs to defend the fraud through protracted litigation.

In contrast, most of the relators' firms are small outfits with just one, two or three lawyers juggling a full caseload. They don't have the resources to proceed alone. However, they can recruit other lawyers to help out if they can persuade them that your case is worth the extended fight.

You are represented by one of those solo practitioners. Your lawyer makes the effort but, for whatever reason, can't attract the additional help necessary to pursue the case. And so, it's over.

8. The Government changes its mind, but . . . Let's say your lawyer does persuade a larger firm to join the effort and you proceed. Then after years of struggle, you get GOOD news: You've developed good evidence, your lawyer has been great, and the government, after initially declining, has decided to join the case.

Then, after a while, you get the BAD news: The government insists on settling the case for only $1 million.

One million? What's wrong with that? One million is not an uncommon FCA settlement.

Putting aside the big problem that the taxpayers are big losers if the government settles for only a tiny fraction of what's been stolen, it means you, as the relator, don't get enough to compensate you for what you have been through. Assume you get the average relator's award, 16 percent. That works out to be $160,000.

You will have to split this with your lawyer and the IRS. That means your take home share of the settlement is going to net out at about $80,000. That would be a nice amount in another context, but not here.

After seven years of litigation over what you know is $60 million in fraud, the fraudster got away with $59 million and you got $80,000.

You toasted your career, you lost your home and your wife and family, and the $80,000 is not even enough to pay your back alimony and child support.

But it could be worse.

9. The government says you can only have 5 percent. Let's say the Government joins the case, but at the end of the day, DoJ takes the position, for any of a number of reasons, that you are only entitled to a reward for 5 percent of the $1,000,000 settlement, or $50,000, which nets you only $25,000.

Can you do anything about it? It's problematic. The choices are difficult and often the answer is to swallow hard and take the crumbs.

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These are just some of the ways that things go wrong for relators and why being a relator is not easy.

And yet, despite everything, relators are bringing back over a billion dollars a year to the United States, and lesser, but significant amounts to the states.

Since the FCA Amendments of 1986, the U.S. Government has recovered more than $16 billion.

In the healthcare arena alone, $15 is returned for every dollar the government invests in FCA cases.

The False Claims Act has been successful enough that 15 states have passed similar laws, and more are being added every year.

It really is amazing to see what the government accomplishes with relator-initiated cases. It is a difficult process, but it works.

Despite how much has been accomplished with so few cases and how hard it has been to achieve what has been accomplished, I have been surprised of late to hear complaints from critics about relators' awards. "My God," say the apologists for fraudsters, "these whistleblowers are nothing but bounty hunters. They are all greedy. Their awards are 'Out of Control.'"

The critics' solution? To cap relators' awards at some low number.

But, will there be a cap on the amount of money a company can filch from the U.S. Government and the taxpayers?

I don't think so.

The effect of any cap on relators' awards would be to make what is now very difficult, very uninviting. The critics are no doubt aware of this.

Qui tam cases would dry up and the fraudsters would be much relieved.

Does this make any sense?

We know fraud hasn't gone away. Indeed, we're all aware of a number of large problem areas.

Billions have disappeared in Iraq.

Billions are lost to the Medicaid and Medicare programs.

Billions seem to have sunk into the swamps around New Orleans.

We also know that the FCA retrieves money taken from the government by fraud.

And I should also mention that we know that the False Claims Act cases are not just about money.

They're also about the victims of defective bulletproof vests—the victims of dishonest medical research and the victims of ineffective drugs—the victims of crashes of Chinook helicopters with defective rotor gears—schools cheated out of their computer equipment—abused nursing home residents.

The FCA has not been able to end our fraud problems, but so much has been done under that act, and at such great odds.

And there is no doubt that the current reward incentives have been the key to encouraging relators to come forward with the regularity they do today. Because of how difficult it is to succeed as a relator, without the current award structure, it would be senseless to bring *qui tam* cases. Potential relators would soon figure that out

Those who would criticize relators and undermine their incentives are really just carrying the water of those that want everyone to go along to get along. The critics have a moral obligation to explain why that would be a good thing. But we never hear such an explanation from the critics. No, what we hear is only the denigration of the righteous, those who act to stop fraud.

Lessons From the Frontlines

District Profiles:
Eastern District of Pennsylvania

DISTRICT PROFILES:
Eastern District of Pennsylvania

Mark A. Kleinman

This will be the first in a series of articles profiling the civil fraud enforcement programs in various U.S. Attorney's Offices. With ninety-four offices, it would take until 2028 to cover all of them, we'll begin by focusing on some of the busiest offices.

We begin in Philadelphia, where so many of the groundbreaking theories in health-care fraud have originated. The Eastern District of Pennsylvania did the first PATH case, brought the first nursing home quality of care cases, and is currently heading for trial in the largest PBM case currently being prosecuted. TAF spoke with Virginia Gibson, Chief of the Civil Division and herself an experienced False Claims Act litigator.

TAF: ***Tell us how you staff False Claims Act cases.***

Gibson: We are blessed with a number of talented lawyers. We have twenty-two lawyers in the Civil Division and nearly all of them work on False Claims Act cases. We have some tremendously skilled attorneys and there are ample opportunities for all our lawyers to benefit from that. In 2004 and 2005, our lawyers spent about 45 percent of their time (ten full-time equivalent positions) on FCA prosecutions. This year it has been significantly higher despite our somewhat reduced staff.

In our office Peg Hutchinson, Jim Sheehan, or I are involved in every intake, as is either one of our own in-house investigators or an agent from the affected agency. I'll discuss the case with Jim, Peg and Cathy Votaw of our Criminal Division and make the initial staffing decisions based on what we learn during the intake. The four of us remain available and involved whenever we're needed for strategic and dispositive decisions in the case.

TAF: ***What's your preferred approach to prefiling contact?***

Gibson: Our office has always had a very healthy relationship with the relator's bar. We like communication early as it helps improve the cases that are filed. Also, given the increasing litigation over public disclosure and first-to-file issues, it is important that we keep our doors open so relators can contact us before filing. We keep careful records about all prefiling contacts in case they are needed later.

TAF: ***Your track record in health care cases is so strong that some of us hesitate to bring cases to you outside of the health care arena. How specialized is the office, really?***

Gibson: We have a number of cases outside of health care, and welcome them. All of our experienced AUSAs cut their teeth on defense fraud cases in the late eighties and early nineties. One of the characteristics of the AUSAs is that they like a challenge. We don't want to neglect emerging areas of fraud, and we're certainly mindful of the increasing number of whistleblowers coming from the defense industry.

TAF: ***What are your current priorities for future developments in the office?***

Gibson: We try to anticipate where the most expensive new frauds are, and we support research and training so that we know what to look for and how best to prove it. A good example would be the shifting focus in our pharmaceutical cases from kickbacks to PBMs, to scientific research issues to pricing issues, and Part D fraud.

We're looking closely at formulary development. It is also important to ensure that beneficiaries have the Part D benefit available, so we are also looking at transparency in the enrollment process, including cherry picking.

Outside of pharmaceutical issues, we're increasingly looking at quality of patient care in acute care hospitals, and not just institutional settings.

Finally, we keep our eye on the buildup in military spending, and the fraud potential there.

TAF: ***What are your economic criteria? Is there some number of single damages that is an absolute threshold for you?***

Gibson: We certainly have a ballpark idea of what is needed to make a case cost-effective, but relators should know that there is no hard and fast number. Sometimes the principle is more important than the dollar amount. We are interested in recovering money for the affected program, such as Medicare, and for the Treasury, but we are also very interested in stopping harm, in low dollar but high impact fraud cases, such as the credentialing and quality of care cases. The criteria can change depending upon the degree to which our client investigative agencies support a case.

Although David Hoffman has left the office, a number of AUSAs remain interested in and committed to protecting people in skilled nursing homes, boarding homes, hospitals, residential treatment facilities and similar institutions. We'll continue to put time and effort into those cases because they are so important. Two of our senior health care fraud attorneys are working on these cases with one of the newer AUSAs and with our partners at OIG and the state Department of Aging. Our commitment to this area is undiminished.

We're also very interested in human subjects research fraud cases, where you have human participants who may be endangered on the front end, and the ultimate consumers of drugs and devices who are potential victims further down the line. Overall, we hope we can get at that conduct through some penalties and establishing monitors, and that we can have both an educational and deterrent effect.

TAF: ***You mentioned monitoring. Some offices prefer to do their own direct monitoring, and some prefer to leave it to OIG. What's your preference?***

Gibson: We work hand in hand with our client agencies and essentially work it out between us. We often like to retain specialists with clinical expertise who are not sitting in the offices reviewing data, but who actually go on-site, interact with people, and see things firsthand.

TAF: ***Tell me about your approach to some of the settlement issues you've faced.***

Gibson: Every one has a different style. We try to involve the relators as much as possible and regularly advise them of our assessment of the adequacy of the evidence and any potential legal challenges we see.

So far, there have been many few relators' challenges to the fairness, adequacy, or reasonableness of settlements, and we work diligently to keep it that way. Main Justice is trying hard to maintain uniformity in the principles driving settlements and relator's share, and they are increasingly interested in being involved in these disputes.

We try to identify potential procedural issues and seek permission to notify relators of public disclosure or first to file problems as we become aware of them.

Where first to file issues arise, of course, our preference is that relators cooperate with one another rather than litigating with one another, or with us. We like to spend our resources on investigation and the substantive issues.

TAF: ***Any observations on improving relator's practice?***

Gibson: Relators have to be more sophisticated than they were ten years ago. The area has become much more technically demanding, and so many things matter more than they once did. The Rule 9(B) challenges are demanding a much greater degree of specificity than I think a lot of relators have been used to, and we hear those challenges more and more frequently by relators who file later in time. Also, with the recent ruling in *King Pharmaceuticals* that the states have to be served in federal court, knowledge of the various state statutes and their procedural provisions are critical. We ask relators to play a positive role in coordination with the states they name as co-plaintiffs.

We'd also like to see more relator's counsel come to court with us when we seek extensions as our judges are much more interested in holding status conferences during the seal period than they were in the past. You have a right to be at these hearings, except when we are discussing the actual investigative matters with the judges. We've had instances where relator's counsel doesn't come with and it doesn't always sit well with the judges. Some of the judges are more amenable to seal extensions if relator's counsel are present. Also, the relators' early presence may serve you well in later, more substantive proceedings.

Finally, open communication is important. We try to be very open about the progress of our investigations and tell you as much as we can without waiving our privileges. If you have questions or concerns about the process, *ask* us—don't assume things. That can go a long way toward keeping misunderstandings from turning into conflicts.

In sum, we are able to do the important work of stopping fraud, recovering taxpayer funds, and deterring future misconduct in large part because of the motivation, courage, information, and dedication of relators and their counsel. We have the privilege of seeing firsthand the difference one person of integrity can make. We thank you for that opportunity and look forward to future challenges and cooperative efforts.

Legal Analysis

Chilling News:
The Department of Justice's Determination to
Unseal All Declined *Qui Tams*
Regardless of Whether Pursued by Relators

Chilling News:

The Department of Justice's Determination to Unseal All Declined *Qui Tams* Regardless of Whether Pursued by Relators

Shelley R. Slade

A common question posed by those considering a *qui tam* action is this: if the government ultimately is not interested in pursuing my case, and declines to intervene, will my identity as a whistle blower become public? Clients ask this question for obvious reasons: they are concerned about retaliation by the targets of their lawsuits and being "blacklisted" within their industry. Most companies shy away from employing individuals who have blown the whistle on an illegal practice. Such individuals are stereotyped as "troublemakers."

In many cases, the answer to this question is a material factor for a person considering a *qui tam* case. They ordinarily don't mind assuming the risk of retaliation if the government is interested in the merits of their case; in such a situation, the potential benefits of coming clean, being vindicated, and receiving a monetary award outweigh the possible costs of being "outed" as a government informant. On the other hand, they ordinarily do mind losing their anonymity in a situation in which they see no upside to blowing the whistle. When the government declines to intervene this is often the situation, as few relators have the resources and will to litigate a declined case on their own.

Until fairly recently, *qui tam* attorneys could counsel potential clients that there was a decent chance that their anonymity would be preserved if they quickly dismissed their lawsuit following any Department of Justice (DOJ) notice of declination. Until a few months ago, the Assistant U.S. Attorney (AUSA) handling a case would simply notice the government's declination and agree to the voluntary dismissal without requesting unsealing, or, at worst, make a perfunctory request for unsealing without citing cases or making arguments. In most cases, the courts maintained the cases under seal regardless of whether the AUSA had requested unsealing.

The landscape is now significantly different. For the last several months, Main Justice has been making a concerted effort to remove the seal on declined *qui tams* even when relators have agreed to voluntary dismissal prior to any service of the complaint on the defendant. Main Justice is insisting that AUSAs file motions to unseal despite their personal or institutional disagreements with the approach. In some instances, Main Justice has even directed AUSAs to move for unsealing many months after the case was dismissed and closed by the clerk of the court.

This new practice does not necessarily reflect a change in Main DOJ's policy. For a number of years, Main DOJ attorneys have been taking the position that declined dismissed *qui tams* should come out from under seal. What is new, however, is the aggressive efforts by Main DOJ to persuade AUSAs around the country to comply with Main DOJ's policy, and the efforts to locate and move for unsealing of closed cases still under seal.

Why the sudden change in practice? It's unclear, although Main DOJ attorneys have cited several reasons for this practice in legal briefs and presentations at conferences, including the following:

1. Unsealing declined, voluntarily dismissed *qui tams* will deter frivolous and marginal cases by imposing on relators the costs associated with publication of such allegations, such as possible motions by defendants for sanctions under Fed. R. Civ. P. 11.

2. Unsealing declined, voluntarily dismissed *qui tams* will facilitate the Department of Justice's reporting to Congress concerning declined cases, and

3. Unsealing is consistent with the presumption in favor of public access to judicial records.

Regrettably, none of these rationales support DOJ's policy, as explained below.

1. DETERRING FRIVOLOUS AND MARGINAL *QUI TAMS* BY IMPOSING COSTS ON RELATOR.

DOJ maintains that publication of the allegations in declined cases serves as a useful check on frivolous or unsubstantiated pleading, which is in the interest of judicial economy. DOJ has taken the position that the unsealing of a *qui tam* complaint ensures that it will be available for examination by both the defendants and the general public, and subjected to scrutiny under Fed. R. Civ. P. 11.

DOJ's new practice not only will chill meritorious cases along with the marginal, however, it also encourages defendants to engage in the very retaliation that Congress prohibited in the False Claims Act (FCA). DOJ, in effect, is "throwing out the baby with the bath water." Moreover, DOJ's practice will have the unintended and undesirable consequence of actually increasing the odds that relators who have brought marginal cases will pursue those cases following the government's declination.

A. DOJ's Policy Deters Meritorious Cases

As *qui tam* relators are counseled by their attorneys, even a relator with a meritorious case needs to be concerned about the consequences of DOJ declination. There is a significant risk of declination even in meritorious cases. DOJ declines to intervene in approximately 80 percent of *qui tam* cases, and often declines cases due solely to a lack of investigatory resources. Indeed, the Office of Inspector General of the U.S. Department of Health & Human Services (HHS-OIG) reportedly no longer assigns investigators to Medicaid fraud cases, leaving any investigation of such matters to the states' meager resources. Other oft-cited reasons for declination include the state of the evidence (have the key documents been destroyed?), the difficulty or expense of proving the allegations (would an audit be even more expensive than the alleged damages?), the small dollar value of the case, or the novelty of the legal theory.

Accordingly, DOJ's policy is likely to chill *qui tam* filings by *anyone* with a significant fear of retaliation, regardless of the merits of their case. And, ironically, the individuals with the most to lose from retaliation often are the very ones with the most valuable information for the government, *i.e.*, corporate insiders with key evidence and coveted, high-paying jobs.

B. DOJ's Policy Encourages Unlawful Retaliation

In addition to chilling valuable cases, DOJ's policy will lead directly to illegal retaliation against relators by their employers. Thus, by taking affirmative steps to publicize allegations in which it has declined to intervene, DOJ sets the stage for employers to retaliate against whistle blowers in the terms of their employment. DOJ's declination undoubtedly will be used by employers as a basis for arguing that the dismissal or demotion of the employee is due to vexatious, merit less accusations of the relator, rather than a legitimate FCA action, and that the FCA does not protect against retaliation for merit less allegations. Although such an argument would be misplaced as the FCA does not require an FCA action to have merit for the anti-retaliation provision to come into play (and as declinations often are based on factors besides merit), relators would nonetheless be penalized as they would have to incur the costs and risks of litigation to remedy the unlawful retaliation.

Indeed, DOJ's reference to Rule 11 motions could be interpreted as a signal by DOJ to defendants that DOJ might support such retaliation in a declined case. This is particularly the case since DOJ's reference to Rule 11 is non-sensical on its face. Since it was amended in the early 1990s, Rule 11 has permitted a party to withdraw an offensive pleading in lieu of being faced with a motion for sanctions. If a relator voluntarily dismisses his case prior to service of the complaint, no Rule 11 motion will lie as the relator already has voluntarily withdrawn his pleading.

C. DOJ's Policy Increases the Odds that Relators Will Pursue Marginal Cases

Ironically, DOJ's policy will lead to the very result DOJ says it is trying to avoid: burdening the courts with marginal cases. Thus, in the past, when *qui tam* relators weighed the respective benefits of pursuing or dismissing a declined *qui tam*, a key perceived benefit for them on the "dismissal side" of the scale was the likely preservation of their anonymity. More recently however, and particularly in certain judicial districts, counsel have had to warn their clients that there was a good chance that DOJ would move for unsealing *even if* they voluntarily dismissed their case prior to service of the complaint. This advice from time to time has operated as a "tipping point" in relators' deliberations, causing them to wish to pursue their declined cases since their identity would be disclosed regardless. While the cases pursued following declination often are meritorious, the "tipping point" factor will apply to the marginal cases as well. And, regrettably, this problem will not only burden the courts, it also will adversely affect DOJ and relators in future *qui tam* cases as it is the bad facts of declined *qui tams* that traditionally have made the worst case law.

2. FACILITATE REPORTING TO CONGRESS

This rationale also is insufficient to justify the policy. DOJ can always report on the number and dismissal dates of these cases without breaching seals. Moreover, lifting the seals on declined *qui tams* would not reveal the bases for DOJ declination as DOJ rarely, if ever, gives its reasons in its court filings.

3. COMPLY WITH PRESUMPTION IN FAVOR OF OPEN JUDICIAL PROCEEDINGS

When a *qui tam* case is dismissed before a complaint is even served, without any judicial rulings on contested claims or motions, the cases creating a presumption in favor of public access to judicial proceedings simply do not apply. The presumption in favor of open judicial proceedings applies to cases in active litigation and is intended to allow the public to understand the basis for judicial decision-making on contested claims and motions. "[T]he presumption of access is based on the need for the public monitoring of federal courts." *U.S. v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995); accord, *Leucadia, Inc. v. Applied Extension Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993); *In re Continental Ill. Sec. Litig.*,732 F.2d 1302, 1308 (7th Cir. 1984). The presumption aims "to promote knowledge of and attention to the performance of the courts." *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866, 898 (E.D. Pa. 1981). Accordingly, as stated by the esteemed Judge Wisdom, "If the purpose of the common law right of access is to check judicial abuses . . .[citations omitted] . . . then that right should only extend to materials upon which a judicial decision is based." *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 n. 7 (7th Cir. 1980).

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With the presumption in favor of open judicial proceedings inapplicable, what standard should guide the courts in ruling on government motions to unseal? First and foremost, in deciding whether to continue the seal on a case, a court has broad discretion and may be reversed only for abuse of discretion. *Tomaskovitch v. AT&T Wireless*, 62 Fed. Appx. 632, 633 (6th Cir. 2003); *In re Boston Herald, Inc.*, 321 F.3d 174 (1st Cir. 2003). As stated by the U.S. Supreme Court, "the decision as to [public] access [to judicial records] is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978).

Relators should assist courts in exercising this discretion wisely by explaining how publicity about a declined case could cause irreversible damage to the reputations and business interests of the relator and the defendant, and would not further any discernible public interest. Relators should note that Congress enacted the 1986 Amendments to the FCA to address Congress' concern that fears of retaliation, stigmatization and blacklisting were chilling the willingness of private citizens to come forward; relators should point out that the government's affirmative effort to unseal declined cases regardless of whether the relators elect to pursue them facilitates the very retaliation that Congress prohibits in the FCA.

Relators also should remind courts that unsealing unfairly impacts defendants and their employees, whose reputations may be harmed notwithstanding the fact that the government has declined to intervene. As acknowledged by the Court of Appeals for the Fifth Circuit,"[T]he mere filing of a civil action against other private parties may cause damage to their good names and reputations and may also result in economic harm." *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979). Whereas the dismissal of a declined *qui tam* complaint prior to unsealing can protect the reputational interests of the named Defendants, the subsequent unsealing of the case would simply serve to damage those interests.

Finally, relators should clarify for the courts that nothing in the FCA requires unsealing in these circumstances. The only express reference in the statute to unsealing is in connection with service of the complaint: "[t]he defendant shall not be required to respond to any complaint filed under [the *qui tam* provision] until 20 days after the complaint is unsealed and served upon the defendant." 31 U.S.C. § 3730(b)(3). In the FCA, Congress simply has not addressed the question of whether a court should unseal a declined *qui tam* that was dismissed before service of the complaint.

It is important that relator's counsel work zealously to fight DOJ's efforts to unseal these cases. Each time the government prevails in an individual case, it creates another public, judicial opinion it can cite, leading to an increasingly one-sided public depiction of the law, since the opinions going the other way necessarily remain under seal. Regrettably, if unsealing declined, dismissed *qui tams* becomes the judicial norm, it will be to the significant detriment of the taxpayers, as DOJ will have facilitated unlawful retaliation against those with the nerve to blow the whistle, and chilled reporting by others who view retaliation and blacklisting, rather than redressing fraud, as the more likely results of their coming forward.

Spotlight

States, Statutes, and Fraud:
An Empirical Study of Emerging State False Claims Acts

States, Statutes, and Fraud:
An Empirical Study of Emerging State False Claims Acts+*

By James F. Barger, Jr.,[a] *Pamela H. Bucy,*[b] *Melinda M. Eubanks,*[c] *and Marc S. Raspanti*[d]

INTRODUCTION

As Zachery Bentley sat in his Key West, Florida, office reviewing the financial books of his pharmacy, he could hardly have imagined he would discover a pricing discrepancy that would lead to lawsuits yielding over half a billion dollars in recoveries.[1] Bentley's modest company, Ven-a-Care, Inc., provided in-home intravenous drug treatments to AIDS patients in his Key West community.[2] Bentley never intended to be a whistle-blowing crusader but could not ignore the pricing discrepancy he discovered in 1990.[3] At that time, high drug costs were exhausting many of his clients' insurance benefits.[4] Bentley saw first hand the anguish the high costs created for his clients who could no longer afford the medicine they needed. Again and again, Bentley and his two partners opted to continue treating AIDS patients whose insurance benefits were depleted.[5] As he sat in his office reviewing the pricing discrepancies, Bentley realized that many of his clients had been cheated by the false "spreads" pharmaceutical companies were using to market their products to drug suppliers.[6] The pharmaceutical companies were reporting higher than actual prices for their drugs, thereby guaranteeing themselves windfall profits through inflated Medicare reimbursements.[7]

+ Taxpayers Against Fraud Education Fund has received permission to reprint this article that originally appeared in the *Tulane Law Review*. *See* 80 Tul. L. Rev. 465 (Dec. 2005).

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1. David Batstone, *Shaking Up the Drug Industry*, 32 Sojourners Magazine 1, 19 (2003) [hereinafter Batstone, *Shaking Up*]; Subcommittee on Health, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, Prepared testimony of Mr. Zachery Bentley (September 21, 2001) *available at* http://energy commerce.house.gov/107/hearings/09212001Hearings371/Bentley616print.htm [hereinafter *Bentley Testimony*].

2. Batstone, *Shaking Up*, *supra* note 5 at 19 (2003).

3. *Id*.

4. *Id*.

5. *Id*.

6. *See generally* State v. Warrick Pharmaceuticals Corp., GV002327, Seventh Amended Petition (District Court of Travis County, Texas, April 20, 2004) [hereinafter *Warrick Petition*].

7. Batstone, *Shaking Up*, *supra* note 5 at 19 (2003); *see generally Warrick Petition*, *supra* note 10.

Bentley was stunned when a Medicare reimbursement check passed across his desk for the infusion cancer drug, Leucovorin.[8] The Medicare reimbursement was 1,000 percent more than his company paid for the drug.[9] According to Bentley, "The ten-fold profit on this drug, being paid for by Medicare (80 percent) and the beneficiary (20 percent), was so excessive that the beneficiary's co-payment actually exceeded the cost of the drug to Ven-a-Care."[10]

Angered, Bentley and his partners refused to participate in the scheme when first approached.[11] A year later, when another drug company pitched a similar arrangement to them, they decided to blow the whistle on the fraudulent practice.[12] But before doing so, they wanted to be sure they were right.[13] They dug deeper, and discovered that the pricing scheme was a widespread and systemic problem.[14] According to Bentley, "It became apparent to us that many drug manufacturers reported truthful prices, while others falsely inflated their price reports so that their targeted customers—oncologists, urologists, home care companies, [dialysis] providers, [durable medical equipment] companies, and others—would be induced by the resulting windfall profits to order their drugs."[15]

Bentley and his partners reported the scheme to federal officials and eventually presented their findings to a United States Congressional subcommittee.[16] In Ven-a-Care's name, they also brought suit as a "*qui tam* relator"[17] under the federal civil False Claims Act (FCA).[18] Ultimately, the United States Department of Justice joined Ven-a-Care's FCA lawsuit. Together, they obtained a judgment netting the federal treasury close to $500,000,000 and earned $65 million for their role in bringing and assisting in the lawsuit.[19]

The Ven-a-Care story is one of tremendous success for the federal government but one of failure for all but a handful of state governments. Because drug companies also utilized their pricing discrepancy scheme to defraud the states through their Medicaid programs, the states, like the federal government, were potential plaintiffs. Most states, however, had no meaningful statutory power with which to proceed against the putative defendants. Those states which did not possess a potent statute similar to the federal False Claims Act could not commence lawsuits against the pharmaceutical

8. *Bentley Testimony, supra* note 5.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.*; *see also* House Committee Medicaid Prescription Drug Reimbursement, *available at* http://inside.cspan.archives.org:8080/cspan/cspan.csp?command=dprogram4record=135754373.

17. See text and accompanying notes 34–38 *infra*.

18..31 U.S.C. § 3729 et seq.; *Bentley Testimony, supra* note 5.

19. Corporate Crime Reporter, *The Top 100 False Claims Act Settlements* (December 30, 2003) *at* http://www.corporatecrimereporter.com/fraudrep.pdf. The suit brought against Fresinius Medical care of North America ranks as the fifth largest settlement ever under the federal False Claims Act. *Id*.

companies themselves.[20] Only a handful of states with *qui tam* provisions similar to the one found in the Federal False Claims Act were poised to reap large rewards.[21]

There is no question that the federal False Claims Act (FCA), with its "*qui tam*" provisions is a powerful regulatory tool. Only recently have states begun passing statutes that to some degree or another are modeled after it. As they do so, questions arise: Is the FCA model effective, or overreaching? What impact will passage of multiple state FCA statutes have on an already complex regulatory world? What can we learn about detecting and deterring fraud from these experiences?

This article reviews the experience of those states that have passed civil False Claims Acts. As part of this review, we have conducted what is to date the only comprehensive survey of states that have false claims acts with *qui tam* provisions.[22] Part

20. Office of Attorney General, Press Release, *Attorney General Reaps $27 Million Medicaid Fraud Settlement With Major Drug Maker* (Monday, May 3, 2004) [hereinafter *Texas Press Release*]

21. Texas was one of the fortunate few to be able to sue the pharmaceutical companies for the losses it suffered because of their pricing scheme. *See* Robert Bryce, *Texas Goes After Big Pharma*, Texas Observer (March 4, 2005)[hereinafter *Big Pharma*], Using Texas' Medicaid Fraud Prevention Act, Tex. Hum Res. Code § 36.001–36.117, which mimics the federal False Claims Act's *qui tam* provision, 31 U.S.C. § 3729 et seq., the Texas Attorney General adopted Ven-a-Care's claims and partnered with the whistleblowers and their legal counsel in a lawsuit against three drug companies: Schering-Plough Corp.'s Warrick Pharmaceuticals, Boehringer Ingelheim's Roxane drug division, and Dey Laboratories. *See generally Warrick Petition*, *supra* note 10; *Bentley Testimony*, *supra* note 5. Like the federal suit, the Texas lawsuit targeted the pharmaceutical companies' alleged practice of overstating the price of prescription brand-name and generic-brand albuterols. *Id.*; Batstone, *Shaking Up*, *supra* note 5 at 19. The lawsuit trudged through three years of laborious hearings and seemingly endless deposition testimony, eventually extending into the term of Cornyn's successor, Gregg Abbott, before concluding with a settlement. *See* Appendix B. "It was a hard-fought settlement," said Susan Miller, an attorney in Abbot's office. *Id.* "We had at least a hearing a month regarding discovery and well over one hundred depositions." *Id.* But the struggle proved worth the effort. On May 3, 2004, Texas Attorney General, Gregg Abbott, announced that his office "scored a major victory" in the Ven-a-Care litigation under his state's Medicaid Fraud Prevention Act. *Texas Press Release*, *supra* note 24.

Through its suit, Texas recovered $45 million. Currently, Texas is among only twelve states and the District of Columbia that all have a statute modeled after the federal false claims statute. *See* Appendix A.& B; *see also* Taxpayers Against Fraud, "State False Claims Acts," *at* http://www.taf.org/statefca.htm. Other states with *qui tam* statutes and the District of Columbia have filed similar suits. *See e.g.* U.S. v. Merck-Medco Managed Care, LLC., 336 F. Supp.2d 430 (E.D.Pa. 2004) (a health care fraud case brought by two relators in partnership with the United States and several states under the federal False Claims Act and by the states of Florida, Tennessee, Nevada, Virginia, and the District of Columbia under their own false claims statutes); U.S. v. Merck-Medco Managed Care, LLC., NO. 00-CV-737-CN, 2004 WL 977200, *977200+ (Trial Pleading) (E.D.Pa. Apr 30, 2004). The Merck-Medco Managed Care case settled for $22.7 million in an agreement between the defendant and the various plaintiffs. *See* Pennsylvania Office of the Attorney General, Press Release: Pennsylvania Attorney General Ppert Announces $22.7 Million in Settlement With Medco Health Solutions resolving Allegations it Violated Consumer Protection Laws (April 26, 2004) *at* http://biz.yahoo.com/prnews/040426.phm021_1.html. For a sample of other effective state *qui tam* cases, see Taxpayers Against Fraud, "Sample of State False Claims Acts Cases" *at* http://www.taf.org/statefca.htm. For example, California Attorney General Bill Lockyer and his staff are currently pursing a related case with Ven-a-Care against Abbott Laboratories, Inc. and Wyeth Pharmaceuticals, Inc. Office of the Attorney General, State of California, *Attorney General Lockyer Accuses Two Major Drug Companies of Inflating Prices, Cheating California Taxpayers*, PRESS RELEASE (January 7, 2003) *available at* http://caag.state.ca.us/newsalerts/2003/03-004.htm [hereinafter *California Press Release*]. Originally filed on July 28, 1998, the California lawsuit remained under seal for almost five years, *See* State v. Abbott Laboratories, Inc, Case No. BC287198 A, Civil Complaint (Superior Court of California 2003), before Lockyer announced his accusations against the drug companies in early 2003. *Id.*

The Texas Attorney General readily admits that neither the lawsuit nor the large settlement would have been possible if the state had not amended its statute to include a *qui tam* or whistleblower provision. *Texas Press Release*, *supra* note 24; *see Big Pharma, supra*. Shortly after announcing the settlement with Schering-Plough, Abbot announced that Texas would be pursuing a similar suit against Abbot Laboratories and Baxter International. *Texas Suit Alleges Abbot, Baxter Inflated Prices for Medicaid Patients*, Chicago Sun Times (May 27, 2004).That suit is currently being litigated. *Id*; *Big Pharma, supra*. Illinois announced an almost identical price inflation suit against Abbot Laboratories and forty-seven other defendants (the largest single drug-pricing suit to date) under its state statute in early February 2005. Michael D. Sorkin, *Drug-pricing Practices Cost Consumers Millions, Illinois Says in Lawsuit*, St. Louis Post-Dispatch A01 (February 9, 2005).

22. The survey is limited to states with false claims statutes containing *qui tam* provisions in effect before January, 2005. See text and accompanying notes 80–83 *infra* discussing "*qui tam*" provisions.

I of this article provides an overview of the federal False Claims Act that serves as a prototype for the various state statutes. Part II discusses the results of the survey. Part III concludes with observations about the states' current experiences in a rapidly changing environment.

I. THE FEDERAL CIVIL FALSE CLAIMS ACT

Diseased mules, defective muskets,[23] and an iconic President's frustration[24] led to passage of the federal False Claims Act (FCA) in 1863.[25] The FCA gave the federal government a way to combat fraud suffered by the Union Army when it received deliveries of defective supplies.[26] Today the FCA is used against fraud perpetrated by all sorts of government contractors including health care providers,[27] defense contractors,[28] and oil and gas companies.[29]

Since its passage in 1863, the FCA has included a "*qui tam*" provision. "*Qui tam*" comes from the Latin phrase, "qui tam pro domino rege quam pro se ipso in hac parte sequitur" which means he "who pursues this action on our Lord the King's behalf as well as his own."[30] Private parties who allege and prove fraud against the federal government bring *qui tam* lawsuits.[31] If successful, these *qui tam* plaintiffs (known as

23. 132 Cong. Rec. H6482 (daily ed. Sept 9, 1986) (statement of Rep. Berman). According to the 1863 investigation, one thousand mules delivered to the Union army were "unfit for the service, and almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out or diseased." *Id. See generally False Claims Act Amendments: Hearings on H.R. 3334 Before the Subcomm. On Admin. Law & Gov't Relations of the House Comm. On the Judiciary*, 99th Cong. 1 (1986) [hereinafter *Hearings: False Claims Act Amendments*]; Note, *The History and Development of* Qui Tam, 1972 Wash. U.L.Q. (1972) [hereinafter *History of* Qui Tam]; J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539 (2000).

24. Beck, *supra* note 27 at 565–607.

25. Act of March 2, 1863, ch. 67, 12 Stat. 696–98.

26. S.Rep. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

27. "Approximately one of every three dollars recovered through false claims cases relate to healthcare fraud." The False Claims Act Resource Center, *Healthcare Fraud* Qui Tam *Cases*, *at* http://www.falseclaimsact.com/healthcare.html. *See also* Andy Schneider, *The Role of the False Claims Act in Reducing Medicare and Medicaid Fraud by Drug Manufactures: An Update*, 5 (November 2004) *at* http://www.taf.org/publications/TAFSingle.pdf. (noting that in the fall of 2004 according to the Assistant United States Attorney General in charge of the Civil Division, there were "under seal in the neighborhood of 100 whistleblower cases involving allegations against 200 drug manufacturers with respect to 500 different products"); U.S. Department of Justice fiscal year 2000 statistics indicate that in 1998, 61 percent of FCA *qui tam* cases filed involved the U.S. Department of Health and Human Services as the client agency. John T. Boese, *Fundamentals of The Civil False Claims Act and* Qui Tam *Enforcement*, ABA Nat'l Institute of Civil False Claims and *Qui Tam* Enforcement. Appendix B.

28. S. Rep. No. 345, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

29. In fiscal year 2000, the second largest category of fraud recoveries ($230 million) came from "companies alleged to have underpaid royalties on such production, including $95 million from Chevron, $56 million from Shell, $32 million from BP Amoco, $26 million from Conoco and $11.9 million from Devon Energy." Press Release, United States Department of Justice (Nov. 2, 2000), available at www.USDOJ.Gov.

30. Vt. Agency of Nat'l Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768, n.1 (2000); *History of* Qui Tam, *supra* note 27, (citing 3 W. Blackstone, Commentaries on the Laws of England 160 (1st Ed. 1768)).

31. 31 U.S.C. § 3730 (2001). There are seven types of conduct covered by the False Claims Act, all involving the submission of false claims to the federal government: the conspiracy to do so; the submission of a false statement in support of a claim; or the making, using, or causing to be made or used a "false record or statement to conceal, avoid or decrease an obligation to pay to transmit money or property to the Government. See, e.g., 31 U.S.C. § 3729(a) (2001); Pickens v. Kanawha River Towing, 916 F. Supp. 702, 705 (S.D. Ohio 1996). This is also known as a "reverse false claim."

"relators")[32] collect a percentage of the recovery.[33] The relator need not be personally injured or affected by the defendant's conduct, but is deemed to have standing on the theory that the federal government, as the real injured party, may assign its right to sue to a private plaintiff.[34]

Prior to 1986, the FCA was amended several times[35] in ways that weakened all *qui tam* actions,[36] so that they were rarely and ineffectively used.[37] In 1986, Congress substantially amended the FCA, invigorating *qui tam* actions.[38] The 1986 amendments increased the amount of recovery a relator could obtain,[39] established a gener-

32. John T. Boese, Civil False Claims and *Qui Tam* Actions 1–5 (Aspen 2005) [hereinafter, Boese, False Claims]. Boese's treatise is an excellent resource on the False Claims Act.

33. Relators may collect up to 30 percent of the total recovery, and barring a few limited situations set forth in the FCA, are guaranteed at least 15 percent. 31 U.S.C. § 3730(d). The recoveries are statutorily set treble damages (with double damages in instances of sufficient cooperation) and civil penalties at amounts of $5500 to $11,000. Id. § 3729(a). The statute specifies penalties of $5,000 to $10,000 but in 1999, Congress increased the penalty amount for all claims specified after Sept. 29, 1999 pursuant to the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 64 Fed. Reg.47099-104.

34. In Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, (2000), the Supreme Court held "that adequate basis for the relator's suit . . . is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. *Id.* at 773. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.

35. Act of March 2, 1863 at ch. 67, 12 Stat. 696–98 (1863), *amended by* Rev. Stat. 3490–94 and 5438 (1875), *amended by* 89 Cong. Rec. S7606 (Sept 17, 1943), *codified at* 31 U.S.C. §§ 232–35 (1976), *recodified at* 31 U.S.C. §§ 3729–31, Pub. L. 97-258, 96 Stat. 978 (1982), *amended by* Pub. L. 99-562, 100 Stat. 3153 (1986), *amended by* Pub. L. 103-272, 108 Stat. 1362 (1994).

36. For example, the 1943 amendments made it difficult for would-be relators to overcome the jurisdictional bar provision, by prohibiting FCA *qui tam* lawsuits when federal government personnel are already aware of the false claims even if the putative relator was the one who had informed the federal government about the fraud. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1944). A number of courts also limited use of the FCA in general through their interpretations of the mens rea requirement in the FCA. By 1986, a number of courts had interpreted the FCA's requirement of "knowledge" as necessitating proof of "specific intent to defraud," see United States v. Mead, 426 F.2d 118, 122 (9th Cir. 1970), or similarly high standard, see United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959).

37. Boese, False Claims, *supra* note 36, § 1.03.

38. *Id.* § 1.04[H].

39. The 1986 amendments increased damages from double to treble and increased penalties from $2000 per false claim between $5000 and $10,000 per false claim. 31 U.S.C. § 3729 (2001). The FCA provides no guidance on the amount of penalties within this range to be assessed. Most courts hold that, barring constitutional problems under the Eighth Amendment's excessive fine clause, assessment of at least $5000 (now $5500, see supra note 37) is not discretionary but rather mandatory. United States v. Cabrera-Diaz, No. Civ. 99-2416, 2000 WL 1015966 (D.P.R. June 23, 2000); United States *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 46 F. Supp. 2d 546, 565 (E.D. La. 1999). But see United States v. Greenberg, 237 F. Supp. 439, 445 (S.D.N.Y. 1965); United States v. Krizek, 909 F. Supp. 32, 33–34 (D.D.C. 1995) (providing two different calculations of the number of claims in the same case for purposes of establishing liability and penalties), rev'd and remanded 111 F.3d 934, 939–41 (D.C. Cir. 1997) (finding insufficient evidence to support the two different standards, but use of two standards implicitly approved). *Cf.* Hudson v. United States, 522 U.S. 93, 110–11 (1997).

The 1863 FCA gave the relator 50 percent of any successful judgment. 12 Stat. 698, § 6 (1863) (current version at 31 U.S.C. § 3729 (2001)). The 1943 Amendment reduced this to 10 percent maximum if the government intervened and 25 percent if the government did not, with no guaranteed minimum in any case. In addition, there was no provision for attorneys' fees and costs. 89 Cong. Rec. S7606. The 1986 Amendments increased the relator's share, guaranteed a minimum recovery in most cases and provided for attorneys fees and costs. A relator is now guaranteed 15–25 percent of judgment when the government intervenes, and 25–30 percent if the government does not intervene. 31 U.S.C. § 3730(d)(1)–(2). The FCA directs the courts to determine the appropriate percentage within the statutory range based upon "the significance of the information and the role of the person bringing the action in advancing the case to litigation." *Id.* § 3730(d)(1). Legislative history to the Senate version of the 1986 Amendments identifies factors to consider in assessing this percentage. S. Rep. No. 99-345, at 28 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5266, 5293. In addition, the DOJ has promulgated factors to consider. DOJ Relator's Share Guidelines, 11 TAF Q. Rev. 17, 19 (Oct. 1997), available at http://www.taf.org./taf/docs/Oct97qr.pdf. The amount may be reduced to 10 percent if the FCA case is based on information additional to that provided by the relator. 31 U.S.C. § 3730(d)(3). Any relator who is convicted of criminal conduct arising from his or her role in the FCA violation receives nothing. *Id.* §3730(a)(3). Reasonable attorneys fees and costs are also to be awarded under the 1986 ous mandatory minimum recovery for relators,[40] included the award of attorneys fees for relator's counsel, added whistleblower protections, and relaxed the "jurisdictional bar" provision that had prevented many relators from filing suit.[41]

This jurisdictional bar provision was included in the 1943 amendments to the FCA in an effort to ensure that relators provided government officials with new information and did not simply file an FCA action based upon information already available to government regulators.[42] In Congress's view a relator is not helping the government much (at least not enough to share in the judgment of the lawsuit) if government officials already know about the fraud the relator is disclosing.[43] Thus, after 1943 and until 1986, when the jurisdictional bar provision was again amended, the FCA jurisdictionally barred *qui tam* actions if the information included in the relator's lawsuit was known to the United States government when the action was brought.[44] Since the government often had some knowledge of the fraud, even if it did not have enough information to stop it, few if any relators could clear the "government knowledge" jurisdictional bar. The 1986 amendments to the FCA allowed relators to go forward in their lawsuit, even if government officials are aware of the fraud at issue, *if* the relator was an "original source" of the information about the fraud.[45]

The 1986 amendments made a remarkable difference in the use of the FCA. Before 1986, the DOJ received about six *qui tam* cases per year.[46] Since the 1986 amendments went into effect, and through September 30, 2004, 4,704 *qui tam* cases (415 in 2004) have been filed and $8.4 billion has been recovered ($5.5 million in 2004).[47]

The procedure for pursuing *qui tam* FCA actions is unique to American jurisprudence. The complaint filed by the *qui tam* relator is sealed and not served on the defendant or made public in any way. The entire action is in effect stayed while the federal government (acting through the United States Department of Justice and the appropriate United States Attorney) is notified of the lawsuit by service of a copy of the complaint and "written disclosure of substantially all material evidence and in-

Amendments. *Id.* §§3730(d)(1)–(2). *See generally* Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedures Under the Whistleblower Provisions of the Federal False Claims Act*, 71 Temp. L. Rev. 23 (1998).

40. Id. § 37309(d)(1)(2).

41. See *infra* text and accompanying notes 48–49.

42. Boese, False Claims, *supra* note 36, § 1.02.

43. *Id.*

44. See United States *ex rel.* State of Wisconsin v. Dean, 729 F.2d 1100, 1104–05 (7th Cir. 1984) (discussing the practical impact of this change). In Dean, the State of Wisconsin brought suit as relator against a physician for filing allegedly false Medicaid claims with the state of Wisconsin. The Seventh Circuit dismissed the lawsuit, finding that Wisconsin was jurisdictionally barred because the United States was "in possession" of the information in the lawsuit at the time the case was filed. This was true. The United States knew of Dr. Dean's Medicaid fraud, but only because Wisconsin, which had previously convicted Dr. Dean of Medicaid fraud for the same claims alleged to be false in its *qui tam* action, had provided information about Dr. Dean's conviction to the Department of Health and Human Resources as required in Medicaid laws. *Id.* at 1103. Recognizing the unfairness of its decision, the Seventh Circuit concluded its opinion in Dean by suggesting that Congress was the more appropriate body from whom relators should seek relief from an unfair jurisdictional bar provision. *Id.* at 1103.

45. 31 U.S.C. § 3730(e)(4).

46. Steve France, *The Private War on Pentagon Fraud*, 76 ABA Journal 46, 47 (Mar. 1990).

47. Civil Division, U.S. Dept. of Justice, *Fraud Statistics Overview October 1, 1996–September 30, 2004*, Press Release.

formation the person possesses."[48] While the complaint remains under seal, the DOJ evaluates the case, tests its merits, assesses its resources, and determines whether it will intervene.[49] If it enters the case, the DOJ assumes "primary responsibility" for the lawsuit but the relator continues as plaintiff.[50] The relator retains certain rights if the government intervenes, including the right to object and be heard on a motion to limit the relator's role, or to dismiss or settle the case.[51] If the federal government elects not to intervene, the *qui tam* relator may proceed with the action as the sole plaintiff.[52]

If the government intervenes in the lawsuit, for the most part the relator is guaranteed at least 15 percent of any judgment or settlement. The relator can receive or the court may award more—up to 25 percent. If the government does not join the lawsuit, the relator is guaranteed 25 percent and could receive up to 30 percent. Only in cases where evidence is based on publicly disclosed information, or the relator is partially at fault for the violations, does the relator get less.[53] Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments,[54] relators' taxable recoveries involve substantial sums.[55]

The federal *qui tam* FCA statute contains two features that render it extraordinarily successful as a regulatory and prosecutorial tool.[56] First, it brings forth "inside information" of fraud. Complex economic wrongdoing cannot be detected or deterred

48. 31 U.S.C. §§ 3730(b)(2)–(3). The written disclosure to the Government by a relator "of substantially all material evidence and information" helps the government focus its evaluation of the relator's claims. United States *ex rel.* Made in the USA Found. v. Billington, 985 F. Supp. 604, 608 (D. Md. 1997); Boese, False Claims, *supra* note 36, § 4.04. *See* Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedures Under the Whistleblower Provisions of the Federal False Claims Act*, 71 Temp. L. Rev. 23, 37 (1998).

49. Boese, False Claims, *supra* note 36, § 4.05.

50. 31 U.S.C.§ 3730(c)(1). This dual-plaintiff system creates interesting dynamics. When the government intervenes, *qui tam* actions become three-party lawsuits. The co-plaintiffs (the federal government and the relator) are united on some aspects of the litigation (gathering information of fraud, opposing most defense strategies and motions). But the government and relator become pitted against each other when, for example, the government seeks to have the relator jurisdictionally barred, see, e.g., United States *ex rel.* Fine v. Chevron, 72 F.3d 740, 745 (9th Cir. 1995), or disagrees with the award the relator seeks upon conclusion of the case. See, e.g., United States *ex rel.* Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 429–30 (E.D. Pa. 1998); United States v. Gen. Elec., 808 F. Supp. 580, 583–84 (S.D. Ohio 1992).

51. 31 U.S.C. § 3730(c)(2). During the litigation, the relator's role may be restricted by the court "[u]pon a showing by the Government that the unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment," *Id.* §3730(a)(2)(C), or "[u]pon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense." Id. § 3730(a)(2)(D). Some relators have successfully objected to proposed settlements between the government and *qui tam* defendants. *See, e.g.*, Gravitt v. Gen. Elec. Co., 680 F. Supp. 1162, 1165 (S.D. Ohio), *dismissed*, 848 F.2d 190, 190 (6th Cir. 1988).

52. 31 U.S.C. § 3730(c)(3). If the relator proceeds as the sole plaintiff after the DOJ has declined to intervene, the DOJ may request to receive copies of all pleadings filed and deposition transcripts (at the Government's expense). Upon a showing of "good cause," the court may permit the Government to intervene "at a later date." *Id.* § 3730(c)(3).

53. *Id.* §§ 3730(d)(1), (3). Note that the *qui tam* FCA provisions discourage class actions: the more plaintiffs there are, the less each will get of the percentage of a judgment statutorily allocated to relators.

54. For example, recent judgments in FCA *qui tam* cases include a $875 million settlement from TAP Pharmaceuticals, 55 Healthcare Fin. Mgt. 10 (2002), a $745 million settlement with HCA Healthcare Corporation to resolve some of the alleged FCA violations pending against HCA; a $385 million settlement with National Medical Care, Inc., a $325 million settlement with SmithKline Beecham Clinical Laboratorie, a $325 million settlement with National Medical Enterprises, and a $110 million settlement with National Health Laboratories. Boese, False Claims, *supra* note 36, § 1.05[A].

55. For example, recent relators' awards include $95 million, $44.8 million, $28.9 million, and $18.1 million. 21 TAF Q. Rev. 20–21 (Jan. 2001).

56. Pamela H. Bucy, *Private Justice*, 76 S.Cal. L. Rev. 1, 53–54 (2002).

effectively without the help of insiders, those who are intimately familiar with it. Inside information can alert the government and the public to ongoing or inchoate wrongdoing; in many cases, before harm has occurred. Insiders can also guide law enforcement officials as they investigate questionable activity and can help overcome concealment, obstruction and cover-ups.[57] Government officials confirm the importance of insiders: "Whistleblowers are essential to our operation. Without them, we wouldn't have cases."[58]

The FCA brings forth inside information through its damages and penalties provisions and its jurisdictional bar provision.[59] The damages and penalty provisions, coupled with the mandatory percentage allocated for the relator, provide a substantial incentive (i.e. potentially, a lot of money) to attract knowledgeable insiders to take the risks attendant with serving as whistleblowers. The jurisdictional bar provision, which disqualifies anyone from serving as a relator who brings information the government already has,[60] ensures that a relator's information is timely and of use to the government.

Second, the fact that DOJ and a relator continue together as plaintiffs, or at a minimum, that DOJ "monitors" the private plaintiff, provides a measure of perceived quality control on FCA actions. It also provides a way for knowledgeable relators (and of equal importance their counsel) to supplement regulators' strained resources.[61] The federal FCA has proven highly effective in recruiting legal talent who possess both the skill and resources to handle complex, time-consuming, and expensive cases. Because of the large recoveries available to private plaintiffs under the FCA through statutorily mandated percentages of large, fixed penalties, private plaintiffs' counsel can receive significant fees. Their fees are often a combination of court-awarded attorneys fees and a percentage of the recovery they negotiated pre-trial with their clients.[62] These large

57. Pamela H. Bucy, *Information as a Commodity*, 39 Hous. L. Rev. 905, 940–941 (2002).

58. Justin Gillis, *Whistleblowing: What Price Among Scientists?*, Wash. Post, Dec. 28, 1995, at A21 (quoting Lawrence J. Rhoades, a division director at the U.S. Department of Health and Human Services, which polices federal health research for scientific misconduct); *see also Health Care Initiatives Under the False Claims Act that Impact Hospitals: Hearing Before the House Subcomm. On Immigration & Claims of the Comm. On the Judiciary*, 105th Cong. 15 (1998) (statement by Lewis Morris, Assistant Inspector General for Legal Affairs, U.S. Department of Health and Human Services) (indicating that the FCA, a purpose of which is to encourage whistleblowing, has been an essential tool in combating fraud).

59. Bucy, *Private Justice*, *supra* note 60 at 60–62, 68-–69. This was one of its goals. As noted in the Senate Report accompanying the 1986 Amendments, "[t]he proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 345, 99th Cong., (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266–67.

60. As noted *supra*, text accompanying note 49, when information about the fraud is publicly available, the relator may proceed in the case as a plaintiff only if the relator is an "original source" of the information. 31 U.S.C. § 3730(e)(A).

61. The FCA contains another mechanism to help with quality control, but this mechanism, unlike the dual-plaintiff system, is not unique to the FCA. The FCA provides that parties filing frivolous *qui tam* actions may be held responsible for defendants' attorneys fees and expenses:

> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.31 U.S.C. § 3730(d)(4). *See, e.g.*, United States *ex rel.* Haycock v. Hughes Aircraft Co., 1996 Nos. 94-55620, 94-55826, WL 612680 (9th Cir. 1996); United States *ex rel.* Herbert v. Nat'l Acad. of Sci., No. 90-2568, 1992 WL 247587 (D.D.C. 1992).

62. For example, in United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec., relators' counsel and relator agreed that counsel would receive 25 percent of the relator's share. 41 F.3d 1032, 1036 (6th Cir. 1994). This percentage was in addition to attorney fees and costs awarded by the court pursuant to 31 U.S.C. § 3730(d)(1). The total amount awarded to relator's counsel in this case was $4 million. Id. at 1036.

fees are a significant incentive for top legal talent to undertake often-challenging *qui tam* plaintiffs' work.

Recent examples demonstrate the formidable legal and investigative resources the FCA brings to prosecutorial efforts. In one *qui tam* FCA case, six law firms devoted forty lawyers (twenty full time equivalents) to the case, and incurred $1 million in fees and expenses per month while the case was being intensively litigated.[63] In another recent *qui tam* FCA case, where there were 125 defense attorneys, fifteen relators' attorneys, plus DOJ attorneys, the federal courthouse was not large enough to accommodate the collective group for routine docket calls. The defendant, Shell Oil Company, produced 7,000 banker boxes of records. One of the relators' counsel took primary responsibility for handling all documents in the case. Doing so required 5,000 square feet of warehouse space (with the record boxes stacked seven feet high). This relator's counsel organized the records so that plaintiffs could respond to any defense request for identification of any record pertaining to any particular claim within thirty days by production of a CD containing the requested records.[64] This case was settled with a recovery to the U.S. Treasury of $400 million and a relator's share of $64 million.[65]

In short, because of its ability to attract knowledgeable insiders, recruit skilled legal talent and maintain a measure of quality control on private litigants, the federal FCA has proven to be a strong and lucrative tool for the federal government. Since 1986 when the federal False Claims Act was resurrected with significant amendments, *qui tam* recoveries under the Act have increased from none in 1986 to $1.4 billion in 2004.[66] The FCA has often been described by federal law enforcement officials as the Department of Justice's "primary civil enforcement tool to combat fraud"[67] and "an essential tool to protect the integrity of the Medicare program."[68] Key to the FCA's success is its revitalized "*qui tam*" provisions.[69] Not surprisingly, the success of the federal False Claims Act has motivated a growing minority of state legislators to pass similar statutes.

II. STUDY RESULTS

To conduct a study of states' experience with FCA statutes, the authors of this article interviewed the individuals in each state responsible for enforcing that state's FCA.[70]

63. John Phillips, Address before the ABA National Institute on the Civil False Claims Act and *Qui Tam* Enforcement, Panel: FCA Enforcement in the Post-Stevens World (Nov. 29, 2001).

64. Scott A. Powell, Address before Mealey's Conference, Litigating Whistleblower Cases Under the *Qui Tam* Provisions of the False Claims Act, Panel on Reports From the Field, Developments on Notable Cases (June 11, 2001).

65. Letter from the U.S. Department of Justice to Author, Response to FOIA Request 145-FOI-6072 (Oct. 30, 2001) (letter on file with the author).

66. Civil Division, U.S. Dept. of Justice, *Fraud Statistics Overview October 1, 1996-September 30, 2004*, Press Release.,

67. *Hearings Before House Comm. On Judiciary, Subcomm. On Immigration and Claims*, 105th Cong., 2d Sess. 14 (1998) [hereinafter *Subcomm. On Claims Hearings*] (testimony of Donald K. Stern, U.S. Attorney, Dist. Mass. And Chair, Attorney General's Advisory Comm., Dep't of Justice) ("[T]he False Claims Act . . . has been the Department's primary civil enforcement tool to combat fraud.")

68. Testimony of Lewis Morris, Assistant Inspector General, Dep't of Health & Human Services; *Id.*; Pamela H. Bucy, *Private Justice*, 76 S.Cal. L. Rev. 1, 76–80 (2002).

69. Bucy, *Private Justice, supra* note 60 at 61–62; Bucy, *Information as a Commodity, supra* note 61 at 906–909 (2002).

70. *See* Appendix B.

In every instance, this was an attorney(s) in the state Attorney General office.[71] All interviews were conducted between December, 2003, and February, 2005.[72] Only individuals in states with FCAs in effect prior to January 1, 2005, were surveyed.[73] A total of twenty individuals were interviewed, some multiple times for a total of thirty-three interviews.[74] Interviewees were questioned regarding investigative resources allocated to FCA cases, the practical application of each individual state *qui tam* provision, the effectiveness of each provision, the impact of federal cases upon state cases, and coordination efforts between federal and state offices.[75]

A. General Observations

Nineteen states have some type of FCA statute that provides civil and/or criminal liability for those who present false claims to the state (or conspire to do so).[76] Only thirteen of the nineteen statutes contain *qui tam* provisions.[77] This study focuses on only those states that have FCA statutes with *qui tam* provisions. As noted *supra*[78] "*qui tam*" provisions allow any person who is aware of false claims submitted to a state to bring a civil lawsuit alleging such conduct. This *qui tam* plaintiff (known as a "relator") need not be personally harmed. Standing to the relator is granted on an "assignment" theory—that the victim of the false claim, the government, may assign its right to bring suit. California was the first state to pass a false claims act with a *qui tam* provision, passing their statute in 1987.[79] Many of FCA statutes, however, are of very recent vintage: six of the thirteen were passed or amended to include *qui tam* authority in the last five years.[80] Massachusetts's *qui tam* provision is typical. It provides: "An individual, hereafter referred to as relator, may bring a civil action . . . for a violation of [the FCA] on behalf of the relator and the commonwealth or any political subdivision thereof. The action shall be brought in the name of the commonwealth or the political subdivision thereof."[81]

Ten of the thirteen statutes apply to any type of false claim against the state; three of the statutes are specifically limited to healthcare or only Medicaid fraud.[82] All of

71. *Id.* Actions in New Mexico are officially brought by the Human Resources Department, but the Attorney General has supervisory control. *See* N.M. Stat. Ann. § 27-14-4.

72. *Id.*

73. In January, 2005, New Hampshire's FCA statute with a *qui tam* provision became effective. *See* N.H. Rev. Stat. § 167:61-B et al. New Hampshire's statute is not included in this study because it was not effective before January 1, 2005.

74. Information on file with the authors.

75. The survey questionnaire is included at Appendix B.

76. Arkansas, California, Colorado, District of Columbia, Delaware, Florida, Hawaii, Illinois, Louisiana, Michigan, Montana, Nevada, North Carolina, Oklahoma, Tennessee, Texas, Utah, Virginia, Washington.

77. *But see* note 77. California, District of Columbia, Delaware, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, New Mexico, Tennessee, Texas, and Virginia. *See* Appendix A.

78. *See* text accompanying *supra* notes 34–38.

79. *See* Appendix A and B.

80. *See* Appendix A and B.

81. Mass. Gen. Laws Ann. 12 § 5C(2).

82. Appendix A. Tennessee has both a general and a healthcare specific statute. *See* Appendix B.

the thirteen statutes provide that relators will share in any recovery obtained.[83] At least two jurisdictions provide that relators can obtain as much as 50 percent, depending on the circumstances of the case.[84] All of the statutes provide the opportunity for some political subdivision of the jurisdiction to intervene and to continue the case as co-plaintiff with the relator.[85]

Every statute grants a political subdivision of the jurisdiction the authority to monitor the relator's case even if that political subdivision opts not to intervene as co-plaintiff.[86] All but one jurisdiction, Texas, provide that the relator may continue if the political subdivision responsible for FCA cases chooses not to intervene.[87] All of the statutes provide a procedure similar to the federal FCA statute: *qui tam* complaints are filed under seal and the action is stayed, remaining secret, while the attorney general investigates and decides whether to intervene.[88] All of the FCA statutes have a jurisdictional bar provision, forbidding the relator from going forward if the information is public.[89] All of the statutes provide some sort of "original source" provision, allowing a relator to go forward even if the information in the complaint is public, if the relator was the "original source" of the information.[90]

The thirteen jurisdictions with *qui tam* provisions are geographically dispersed, stretching from Hawaii to the District of Columbia. Interestingly, five of the thirteen statutes are in Southern states—more than any other region in the country.[91] Most of the statutes have seen only cosmetic amendments, if any, since the *qui tam* provision was passed.[92]

B. Investigation Resources

The thirteen states with *qui tam* FCA statutes employ similar methods for investigating *qui tam* actions. Most cases enter through a state's Attorney General office and are assigned to specific units such as the Medicaid Control Unit or Economic Crimes Division or the Anti-Trust or Consumer Fraud divisions.[93] Depending on the type of case, other state and local enforcement authorities often play a role in investigating the *qui tam* cases, such as investigators with state Departments of Transportations,

83. *See* Appendix A.

84. Nevada and California. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. (Florida, Louisiana, Tennessee, Texas, and Virginia). Two are in the Northeast. (Delaware and Massachusetts). Two are in the Southwest. (Nevada and New Mexico). One is in the Midwest, (Illinois), and one is on the West Coast. (California). *See* Appendix A.

92. Five of the thirteen have undergone such minor amendments. Appendix B. Illinois, for example, renamed its Civil Investigative Demand (CID) provision as a "Civil Investigative subpoena." Tennessee is the only state that has made a significant substantive amendment since passing its *qui tam* provision; it deleted criminal penalties from its statute. *See Id.*

93. *See* Appendix B.

Insurance, Education or Medicaid.[94] Virginia is the only state that has a Special *Qui Tam* Coordinator dedicated solely to the coordination, investigation, and prosecution of *qui tam* actions.[95]

Currently, only two of the thirteen jurisdictions allocate specific funds for investigative resources to pursue *qui tam* actions.[96] Four Attorney Generals' offices reported that a substantial portion of their budget for *qui tam* investigations is federally funded.[97] For example, the District of Columbia and Tennessee both reported that 75 percent of their budget for investigating and prosecuting Medicaid *qui tam* fraud cases comes directly from the federal government.[98]

Illinois is the only state that requires that a portion of *qui tam* recoveries be set aside for future fraud investigations: one sixth of all *qui tam* recoveries in Illinois must be placed in the Attorney General's whistleblower fund; one sixth must be placed in the state police whistleblower's fund; the remainder goes into the state's general fund.[99] Although Massachusetts' FCA statute does not mandate that a portion of *qui tam* recoveries go to future investigations, the statute contains a provision allowing the Attorney General to recover investigation costs and attorney fees.[100] All other *qui tam* recoveries in Massachusetts, however, must be placed in the state's general fund.[101] In Virginia, no specific investigative funds are allocated to *qui tam* cases, but the Medicaid Fraud Unit, which handles the bulk of the state's *qui tam* cases, is the only state agency authorized to "borrow" investigators from other state agencies.[102]

California is the only state with seasoned investigators specifically dedicated to pursuing *qui tam* cases.[103] California's Attorney General office has three investigative auditors and two analysts assigned to civil false claims cases.[104] In addition, there is a bureau-wide group of investigators that may be called upon on an as-needed basis.[105] Several states, such as Florida and Hawaii, have investigators with experience working on *qui tam* cases, but they are not assigned exclusively to *qui tam* cases.[106]

Most of the states utilize a variety of state investigative agencies to investigate *qui tam* cases brought by relators. Illinois, for example, uses the State Police and the Med-

94. *See id.*

95. *See id.* Virginia's *Qui Tam* Coordinator is veteran prosecutor Guy W. Horsley who works part-time in the Virginia Attorney General's office with the assistance of one full-time paralegal. *Id.* All *qui tam* cases in Virginia are first referred to Horsley, who then assigns investigators and manages the development of the case. *Id.* Although the Virginia Attorney General has approved a specific protocol for coordination of *qui tam* cases, the protocol has not yet been released for publication. *Id.*

96. *See* Appendix B.

97. *See* Appendix B.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

icaid Fraud Control Unit, together comprising approximately forty investigators.[107] Tennessee relies heavily on the Tennessee Bureau of Investigation, made up of approximately twenty-five investigators. [108] The Virginia AG's office supplements its own investigative resources with investigators "borrowed" from other state agencies and currently with volunteer law students.[109] It is significant to note that although many of the states have experienced investigators at their disposal, none of the states have investigators specifically trained to handle the intricacies associated with *qui tam* cases.[110] Several states made clear that they rely heavily on the investigative resources and information gathered by relators and their counsel to supplement their resources.[111]

Five out of thirteen states' FCA statutes contain Civil Investigative Demands [CID] or a similar type of subpoena power available for investigating *qui tam* cases.[112] CID provisions generally grant the express authority to the attorney general in a particular jurisdiction to demand evidence in the form of documentary material, answers to interrogatories, and oral testimony where there is "reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims investigation." [113] All of the offices with CID authority agree that CIDs are extremely powerful prosecutorial tools.[114] As one assistant Attorney General exclaimed, CIDs "are a terrific tool."[115] In the Attorney General's offices in the eight states without CID powers, all but two indicated that such powers would be helpful.[116]

C. Application

Regardless whether a state's *qui tam* statute applies to all false claims or only those concerning health care,[117] presently the majority of *qui tam* cases filed under the thirteen statutes are health care related. One assistant Attorney General explained that this was because most of the state *qui tam* cases are "global" Medicaid cases that were first

107. *Id.*

108. *Id.*

109. *Id*; *see* note 106, *supra*, and accompanying text.

110. *See* Appendix B.

111. *Id.*

112. *See* Appendix A & B.

113. *See e.g.* 18 U.S.C. §3733. *See also* Black's Law Dictionary (8th ed. 2004) (referring to similar CID provision authorized by the International Antitrust Enforcement Assistance Act (15 U.S.C.A. § 6202). CID authority usually cannot be delegated to relators or their counsel. *See e.g.* 18 U.S.C. §3733(a).

114. *See* Appendix B.

115. *Id.*

116. *Id.* The District of Columbia does "not see a need" for CIDs, and the Delaware AG's office "wouldn't mind having them, but does not believe that CIDs would enhance the ability to prosecute FCA cases." *Id.* If document requests are denied, then the Delaware AG office simply "goes after them with a search warrant." *Id.* When asked whether his state's statute authorized CIDs, at least one respondent exclaimed, "What the hell is a CID?" *Id.*

117. The FCA statute in three of the thirteen states pertains only to false health care claims. Appendix A & B. The remaining ten state statutes apply generally to any type of false claim against the state. Appendix A & B.

developed in federal courts as Medicare and Medicaid fraud cases.[118] "Global" cases are those that identify a nationwide fraud, usually investigated by multiple federal and state offices, and resolve the criminal, civil and administrative liability defendants face in multiple jurisdictions all at one time.[119]

Those responsible for enforcing state FCA statutes describe the quality of *qui tam* cases filed under their statutes as "good," (D.C., Delaware, Massachusetts), "fairly high quality," (Texas), and "half good, half bad" (Hawaii, Illinois, Tennessee).[120] All respondents agreed that generally the preparation by the relator and his or her counsel determines whether a case is good or weak.[121] The states rely on experienced relator counsel to provide needed discovery, to screen cases, and to provide litigation assistance.[122]

Once a relator brings a case to the attention of state officials, the thirteen states follow a variety of procedures.[123] Usually, the *qui tam* relator is required to serve a copy of the complaint as well as documentary material upon the government entity responsible for prosecuting FCA violations.[124] The complaint then remains under seal for between sixty days[125] in some jurisdictions and as many as one hundred and twenty days[126] in others.[127] Most jurisdictions allow the prosecuting authority to petition the court for extensions of the statutory period.[128] Before the statutory period expires the prosecutorial authority is required to either assume or to deny control of the action.[129] Government prosecutors maintain varying control over actions in which they

118. For an example of one such successful "global" case see U.S. v. Merck-Medco Managed Care, LLC., 336 F. Supp.2d 430 (E.D.Pa. 2004) (a "global" case involving 20 states, the federal government, and two *qui tam* relators); *see* note 25, *supra*, and accompanying text.

119. Appendix B.

120. Appendix B.

121. *Id.* One respondent provided an example of a weak case brought by an ill-prepared relator where the relator alleged that the state was defrauded by a defendant's failure to accurately report income or pay enough state taxes. *Id.* However, the state statute, like the federal FCA, excluded violations of the tax code from coverage under its FCA. *Id.*

122. Appendix B. One respondent enthusiastically exclaimed that relators' counsel are "extremely helpful," providing much of the discovery and often "present[ing] well screened cases and provid[ing] substantial assistance in litigation." *Id.* According to Christopher Ames of California, "There are *qui tam* plaintiffs' firms that are specialists, and they are good to excellent, and there are lawyers who have never seen or heard of False Claims cases [who] are full of problems." *Id.* Prosecutors in D.C., Delaware, Texas, Virginia, Massachusetts, Hawaii, and Nevada rate the quality of relator's lawyers they work with as either "good" or "pretty good." *Id.* Prosecutors in Florida, Louisiana, Tennessee, and Illinois have had a more mixed experience. *Id.*

123. *See* Appendix B.

124. *See* e.g. Mass Gen. L. Ann. 12 § 5C(3) ("a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses shall be served on the attorney general").

125. Sixty days is the statutory period that a complaint must remain under seal under the federal FCA. 31 U.S.C. 3730(b)(2). Most jurisdictions mimic the federal statute in this regard. *See* Appendix A.

126. *See* e.g. Mass Gen. L. Ann. 12 § 5C(3).

127. Appendix A.

128. *See* e.g. Mass Gen. L. Ann. 12 § 5C(3); Appendix A.

129. *See* e.g. Mass Gen. L. Ann. 12 § 5C(4); Appendix A.

intervene, with some maintaining "primary control"[130] and others assuming "exclusive control"[131] of the litigation.[132]

D. Effectiveness

Prior to passage of its FCA statute, only four of the states surveyed brought suit against defendants who were submitting false claims to the state. For the most part, few such cases were pursued even under relatively simple fraud theories.[133] Representatives in every state surveyed equivocally described their state FCA statute as an effective tool against fraud.[134] Although the state statutes are too new to accurately measure their deterrent impact, most state AG's believe that their FCA statute has the potential to deter fraud against state governments.[135]

III. OBSERVATIONS AND CONCLUSION

The survey we have conducted of states with *qui tam* FCA statutes has demonstrated six things. First, compared to recoveries obtained by the federal government under the federal False Claims Act, the recoveries obtained by the states under their FCA statutes have, to date, been modest. Whereas the total recoveries under the federal FCA in *qui tam* cases was $1.01 billion in 2002 and $1.5 billion in 2003,[136] recoveries obtained in the states are relatively small: approximately $4 million total since the statute was passed in 2000 through the fall of 2004 in Hawaii; approximately $1.2 million total in 2004 in D.C.; an approximate average of $1 million per year in Tennessee.[137] Texas had more than $ 45 million recoveries in 2004, but almost all of this came from one case—the Ven-a-Care case brought initially by Zachery Bentley and the United States Department of Justice.[138]

Second, virtually all the states report inadequate resources to develop cases under their own statutes. Only one state has full time personnel dedicated solely to *qui tam* cases;[139] only two states have specific funds allocated for investigative resources to

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130. Under the federal FCA, the government maintains "primary control" of the action. 31 U.S.C. 3730(c). Most jurisdictions mimic the federal statute in this regard. *See* Appendix A.

131. Delaware's statute expressly states that when the state intervenes in an FCA action, the attorney general "shall have exclusive responsibility" for the action." Del. Code. Ann. 6 § 1204(a). *See* Appendix A.

132. *See* Appendix A.

133. Massachusetts is the one primary exception. *See* Appendix B.

134. *Id.* Although none of the authorities responsible for enforcing the individual statutes yet have developed reliable or consistent methods for tracking recoveries in *qui tam* cases, all of the respondents to the survey stated equivocally that *qui tam* cases have some deterrent effect. *Id.*

135. *Id*. For example, California's pursuit of *qui tam* claims has spawned an entire compliance industry dedicated to helping companies that contract with the state. *Id.* In an effort to deter future fraud through negative publicity, the California AG posts the outcome of false claims cases on its website. *Id. See* http://caag.state.ca.us/.

136. Civil Division, U.S. Dept. of Justice, *Fraud Statistics Overview October 1, 1996–September 30, 2004*, Press Release.

137. Appendix B.

138. *See* note 25, *supra*.

139. *See* text accompanying notes 107–109 *supra*.

pursue *qui tam* actions.[140] Less than half of the states have CID investigative authority.[141] Third, most of the significant recoveries in the states have resulted from states' ability to piggyback federal law enforcement efforts and join global settlements. This raises the question whether the state statutes bring anything new to law enforcement or are simply using their statutes to maximize "piling on" or piggybacking opportunities. Fourth, despite their modest success and inadequate resources, law enforcement officials in the states with *qui tam* FCA statutes uniformly view their statutes as valuable in detecting and deterring fraud.[142] They may be right. The long term potential of such statutes is still under evaluation, but the prognosis for those states willing to invest in the process is optimistic. The federal statute did not enjoy immediate success; arguably it took half a dozen years after its revitalizing 1986 amendments before it was deployed effectively.

Fifth, the presence of state FCA statutes presents challenges in resolving what is already a complex prosecutorial environment. When there are multiple prosecuting entities, it is more difficult for a defendant to reach a global resolution of a nationwide regulatory problem. This complication poses problems for all players: government contractors who for business purposes need to anticipate and resolve all liability they may face and federal and state regulators who seek to coordinate their investigations among themselves. Sixth, the state authorities enforcing their new FCA have a steep learning curve. This is not surprising. The *qui tam* FCA regulatory model is unique in the way it partners private parties with public regulators as plaintiffs.[143] Like all new regulatory paradigms it takes time to understand how these statutes work and to deploy resources effectively. This survey revealed specific aspects of state FCA practice that need attention. The states as a whole need to do a better job of tracking their FCA recoveries and related statistics. More precision in the tracking of state recoveries will lead to better allocation of scarce investigative resources. Conducting this study revealed multiple lapses in the states' record keeping of FCA recoveries. The states need to enhance communication and coordination amongst themselves and their federal counterparts. States also need to become more effective in working with *qui tam* relators and their counsel.[144]

Given their modest recoveries, inadequate resources and at times appurtenant nature thus far, one may question the value of state *qui tam* FCA statutes. We suggest three reasons why state false claims statutes are valuable and will become even more valuable over time. First, state FCA statutes cover activity not reached by the federal FCA statute. Most notably, the state statutes apply to false claims submitted to state governments in programs funded with exclusively state or mixed state and federal funds. When there are no federal dollars at issue, the federal FCA has no applicabil-

140. *See* text accompanying note 100 *supra*.

141. *See* text accompanying notes 116–120 *supra*.

142. *See* text accompanying notes 138–139 *supra*.

143. *See* Bucy, *Private Justice*, *supra* note 60 at 43–54, 56–80.

144. Experience with the federal FCA has shown that cooperation with meritorious *qui tam* relators maximizes efficient use of the resources relators and their counsel potentially provide to regulators. Bucy, *Information as a Commodity*, *supra* note 61 at 959–972.

ity no matter how egregious the fraud. In this way state statutes are able to vindicate the rights of state citizens and state taxpayers which cannot be reached with existing civil statutes. The state FCA statutes provide an unprecedented opportunity for states with depleted treasuries to build up their investigative and prosecutorial resources and return needed funds to beleaguered state programs.

Second, almost every state FCA statute differs in some ways from the federal FCA statute.[145] In this respect the states provide mini-laboratories to study statutory variations. What works? What doesn't? What could be improved? For example, Texas includes a provision often discussed as a possible amendment to the federal FCA:[146] whether a relator's complaint should be dismissed if the government decides not to join the lawsuit as a plaintiff.[147] There were heated debates when this amendment was rejected in the federal statute. Congress believed a healthy tension between the DOJ and relators was in the end good for the taxpayers. *Qui tam* relators could push fraud theories that the DOJ felt uncomfortable or unable to pursue. Observing Texas's experience with this provision can shed light on whether such a requirement can in fact operate as a control on poorly conceived relators' actions. Texas's statute also includes another provision not in the federal FCA. Texas allows its prosecutors, as well as the private plaintiff, to recover attorney's fees upon prevailing in the case.[148] Observing experiences in Texas allows policymakers to study whether such provisions encourages FCA plaintiffs to litigate unnecessarily or whether an award of attorneys fees supplement state resources and thereby enhance the quality of FCA actions brought and prosecuted by states. The opportunity to observe these variations in FCA regulatory models could help refine existing or create new, more effective regulatory mechanisms.

Third, the presence of robust state FCA statutes provides what every capitalist endeavor needs: increased competition. Relators who may for whatever reason receive an unfavorable response from federal law enforcement officials have another venue in which to prosecute their claims. The states should encourage such competition. If state dollars are also at issue, they can take their case to the state or more likely a series or consortium of states which may be similarly impacted by the fraud scheme. *Qui tam* relators will quickly determine which states are serious about expanding their fraud fighting capabilities under their newly passed statutes and which ones are not. Healthy competition among the states and between the federal government will inure to the benefit of taxpayers. If current trends continue, more states will pass their versions of FCA. Before doing so these states should study those states which have been most successful and determine which provisions should be included in their statutes. Such competition will encourage responsiveness by government officials to meritorious relators and increase recoveries to taxpayers.

145. *See* Appendix A.

146. Bucy, *Private Justice*, *supra* note 60 at 72 note 384.

147..Tex. Hum. Res. Code § 36.104.

148. Tex. Hum. Res. Code § 36.110(c).

APPENDIX A

False Claims Statutes With *Qui Tam* Provisions* by Jurisdiction With Comparisons to the Federal False Claims Act

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
California	California False Claims Act	Cal. Gov't Code § 12650 et seq.	General	§ 12656	1987	Requires present or former state employees to exhaust internal procedures before becoming relator. § 12656(d)(4). Requires notice to political subdivision [PS] being defrauded and allows PS to also intervene. § 12656(c)(7)–(8). Grants a fixed 33% to intervening AG and/or PS. § 12656(g)(1)–(2). Allows AG to intervene in action after intially declining, but recovery remains the same as it would if gov. had not intervened. § 12656 (f)(2)(B). If AG or PS intervenes, *qui tam* award = 15–33%. § 12656 (g)(2). If AG or PS doesn't intervene, *qui tam* award = 25–50%. § 12656 (g)(3). No minimum % for state or former employees acting as relators.§ 12656 (g)(4).
Delaware	Delaware False Claims and Reporting Act	Del. Code. Ann. tit. 6, § 1201 et seq.	General	§ 1204–1205	2000	Allows action brought by "any affected person, entity, or organixation." § 1203(b) Private party may only bring the action after the AG has determined that there is "substantial evidence that a violation… has occurred." § 1203(b)(4)b. If the gov. proceeds, it shall have "exclusive responsibility" [rather than "primary"]. Private party only has right to continue as a nominal party and to participate as witness. § 1204(a). No § 3730(c)(5) provision.

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
District of Columbia	District of Columbia False Claims Act	DC ST § 2-308.14 et. al.	General	§ 2-308.15(b)	2000	Complaint under seal for minimum of 180 days. § 2-308.15(b)(2). No person shall bring an action based on info learned during course of internal investigation in prep. for voluntary disclosure. § 2-308.15(c)(3). Requires DC employees to exhaust internal procedures. § 2-308.15(c)(4). Bans actions brought by employees of Council of D.C., Corp. Counsel, Inspec. General, Auditor, CFO, or Metro Police if info discovered during term of employment. § 2-308.15(c)(5). Where gov. proceeds, *qui tam* relator recieves at least 10% but not > 20%. Where gov. doesn't proceed, *qui tam* receives at least 25% but not > 40%.

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
Florida	Florida False Claims Act	Fla. Stat. § 68.081 et seq.	General		1994	May elect to intervene w/in 90 days. § 68.083(3). Department of Banking & Finance allowed to take over some actions instead of Depatment of Legal Affairs. § 68.083(4). If the gov. does not proceeand the defendant prevails, the court "shall award" defendant reasonable attorney's fees and costs against person bringing action. § 68.086(3). [automatic —no showing of harassment neccesary]. Actions are barred if brought (a) by state's attorneys (b) by state employee or former state employee based on info obtained in course of employment (c) by person who obtained info from state or former employee NOT acting in scope of employment (d) against county or municipality.
Hawaii	Hawaii False Claims Act	Haw. Rev. Stat. § 661-22 et seq.	General		2000	Requires present or former state employees to exhaust internal procedures. § 661-27(e)(2) False claims include beneficiary of inadvertent submission of false claim who discovers & does not report. § 661-21(a)(8)
Illinois	Illinois Whistleblower Reward and Protection Act	740 Ill. Comp. Stat. Ann. § 175/1 et seq.	General	§ 175/4	1992	Practically identical.

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
Louisiana	Louisiana False Claims Act	La. Rev. Stat. Ann. § 46:439.1 et seq.	Specific to Medical Assistance	§ 46:439.1	1997	More than one *qui tam* relator allowed, provided each one is an "original source." § 46:439.1(B). No *qui tam* action shall be instituted later than one year after complaint is received by AG. § 46:439.1(C). Public employees banned from *qui tam* actions if had duty to investigate or report. § 46:439.1(F)(1) Public employees or former employees who had access to state records regarding health care providers banned. § 46:439.1(F)(2) Employer may fire *qui tam* plaintiff if court finds action frivolous, vexatious, or harassing. § 46:439.1(G). SOL for *qui tam* claims is one year from date knew or should have known. § 46:439.2(2)(b). Complaint under seal for 90 days. § 46:439.2(A)(4)(a) *Qui tam* relator must object to settlement in order to get hearing. § 46:439.2(B)(5). If AG proceeds, then relator receives 10%–20%. § 46:439.4(A) If AG doesn't proceed, relator may receive no more than 30%; but no minimum. § 46:439.4 (B).

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
Louisiana cont'd						Person who participated in violation may have award reduced. Person who planned violation barred from recovery. § 46:439.2(D). Court determines award to multiple *qui tam* plaintiffs. § 46:439.4(E). State must be "made whole" before dispersements to *qui tam* plaintiff. § 46:439.4(G). No job protection for frivolous, vexatious, or harassing *qui tam* plaintiff. § 46:440.3(D).
Massachusetts	Mass. False Claims Act	Mass. Ann. Laws CH. 12, § 5(A)-(O)	General	§ 5C– 5G	2000	Complaint under seal for 120 days. § 5C(3). No action allowed to be brought by state auditor, investiogator, attorney, financial officer, contracting officer or anyone who learned of info from such persons. § 5G(4). False claims include beneficiary of inadvertent submission of false claim who discovers & does not report. § 5B(9).

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
Nevada	Nevada Submission of False Claims to State or Local Government	Nev. Rev. Stat. § 357.010 et seq.	General	§ 357.080	1999	Complaint under seal until AG elects whether to intervene [up to 120 days per 357.110]. § 357.080(4). Requires present or former state employees to exhaust internal procedures. § 357.090. *Qui tam* plaintiff must request settlement hearing. § 357.120(3). If AG intervenes at outset, the qui tam recovery is 15–33%. § 357.210(1). If AG doesn't intervene, qui tam recovery is 25–50%. § 357.210(2). Public employees guaranteed no minimum reward. § 357.220. False claim includes: (a) knowingly buys public property from someone unauthorized to sell public property & (b) beneficiary of inadvertent submission of false claim who discovers and does not report. § 357.040(f) & (h). SOL is lesser of 3 years after AG discovered fraud or 5 years after fraud occurred. § 357.170

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
New Mexico	New Mexico Medicaid False Claims Act	N.M. Stat. Ann. § 27-14-1 et. al.	Specific to Medicaid	§ 27-14-7	2004	Actions are brought by the New Mexico Human Resources Department. § 27-14-4(A). Before filing an FCA action, the Human Resources Department must notify the attorney general in writing and "shall not proceed with the action except with the written approval of the attorney general. § 27-14-7(F). If the attorney general does not respond within twenty working days, consent is presumed. § 27-14-7(F). All dismissals and settlements must be approved by AG in writing. § 27-14-7(F).
Tennessee	Tennessee Medicaid False Claims Act	Tenn. Code Ann. § 71-5-181 et seq.	Specific to Medicaid	§ 71-5-183	1993	No bar against actions brought against members of the Congress, the judiciary or the senior executive branch.
Texas	Medicaid Fraud Prevention Act	Tex. Hum Res. Code § 36.001-36.117	Specific to Medicaid	§ 36.101	1995	If AG declines to take over action, action is dismissed. Relator barred from continuing as a party. § 36.104. AG may contract with private attorney to represent the state. §36.105. If state proceeds, relator entitled to 10–25%. If court finds action based primarily on disclosures other than those by relator, the court may award not more than 7%. Authorizes the state to act as qui tam relator in fed case. § 36.055.

Jurisdiction	Statute Name	Code Section	General or Specific	*Qui Tam* Provision	Date Passed	Key Differences from Federal False Claims Statute (31 U.S.C. § 3729 et seq.)
Virginia	Virginia Fraud Against Taxpayers Act	Va. Code Ann. § 8.01-216.3	General	§ 8.01-216.5	2002	Commonwealth has 120 days to decide whether to proceed. § 8.01-216-5(D). Persons that court finds planned and initiated violations as well as those who are convicted of criminal conduct are dismissed from action and receive no proceeds. § 8.01-216.7(C). Requires present or former state employees to exhaust internal procedures. § 8.01-216.8. State inmates barred from action. § 8.01-216.8.

APPENDIX B

An Empirical Survey of State False Claims Acts
With *Qui Tam* Provisions*

Responses from state attorney general offices collected in telephone interviews with the authors (December 2003–February 2005)

Background

Question I(a)	Do you have a False Claims Act Statute or a subject-specific statute?
California	Yes. It applies to all state funds and is broad in how it characterizes state funds.
D.C.	Yes
Delaware	General
Florida	Florida has a general False Claims Act Statute.
Hawaii	Yes. It is modeled almost verbatim to the Federal statute.
Illinois	We have a general false claims statute.
Louisiana	Our statute is Medicaid specific.
Massachusetts	Yes, we have a False Claims Act Statute. It is not subject specific.
Nevada	General
New Mexico	Subject Specific for Medicaid, but there is a general FCA statute being presented to the legislature.
Tennessee	We have both. Medicaid is TCA 71-5-181.
Texas	Texas' Statute (the Medicaid Fraud Prevention Act) only covers Medicaid.
Virginia	We have a False Claims Act Statute: Virginia Fraud Against Taxpayers Act.

I(b)	Does your statute have a *qui tam* provision? If so, how does it work?
Arkansas	
California	Yes. It is modeled after the Federal statute.
D.C.	Yes
Delaware	Yes. The statute is the same as the Federal FCA, except there are no CIDs and no express exemption for tax claims.

I(b)	Does your statute have a *qui tam* provision? If so, how does it work?
Delaware (2)	Yes. It's found in title VI, §§1203–1204. "It mirrors, in a lot of respects, the federal *qui tam* provision, though it's not as long or involved." How it works. A party can bring an action in state court—say a contractor supplies something to the state—someone who objects can bring an action through an attorney into state court under seal. The time during which the action is under seal is shorter than with the federal Statute; in Delaware the time is 60 days. After 60 days, the Attorney General's office can decide to intervene, decline, or ask for an extension, just like with the federal government. The AG's office investigates the case, bringing in the agency that might be involved (any state agency that is the beneficiary of a contract or is potentially defrauded by the contract in question). "The agency is asked about the complaint, the allegations, and whether the complaint is actually a problem or not—whether they're getting ripped off." From there, the AG's office will either decline to intervene, intervene, or apply to extend the seal. Ms. Barchi's office hasn't done anything in their unit as far as Delaware state courts are concerned; their office generally does federal claims. The Medicaid Fraud Control Unit has not had somebody come with a state claim that stands by itself and isn't appended to a federal claim. However, Delaware has been named as a plaintiff in numerous federal whistleblower cases that get filed in E.D. PA fed court.
Florida	It has a *qui tam* provision.
Hawaii	Yes. It is the same as federal rights of parties to the *qui tam.*
Illinois	Yes
Massachusetts	Yes. It works like the federal FCA, except that the period under seal is 120 days. After that, we must request an extension for an additional 90 days. There is no provision for further extension beyond 210 days. The statute allows for rule making by the Attorney General, but they haven't done any rule making. They did some rule making in general consumer protection. "We are gathering more experience with the statute, but do have rule making authority."
Michigan	No
Louisiana	Yes. It is just like the *qui tam* provision in the Federal FCA.
Tennessee	Yes. It is modeled after the FCA.
Texas	Yes, it does. When a *qui tam* action is filed, the party is required to give notice to the AG. The AG has 60 days past the date when it receives both the notice of the lawsuit and information detailing the nature of the complaint. If the AG does not intervene, the lawsuit is dismissed.
Virginia	Yes. It's modeled after the federal provision. The AG has 120 days to intervene. AG acts on behalf of the state and is limited to civil actions filed by private persons.
Nevada	Yes. It is just like the *qui tam* provision in the Federal FCA.
New Mexico	Yes. It is very unique because it requires that the Human Services Department (HSD) be served with any complaint. Then, it requires that HSD respond in writing to the defendant within 60 days with any determinations about the case. This can be a problem when a case is under seal or a defendant doesn't even know about a case.

I(c)	When was your state Statute passed?
Arkansas	
California	1987 and effective in 1988
D.C.	Unable to provide a response
Delaware	June 2000
Delaware (2)	2000
Florida	1994
Hawaii	Summer 2000
Illinois	1992
Massachusetts	It was passed in 2000 and enacted in July 2000.
Michigan	1977
Louisiana	1997
Tennessee	1993
Texas	1995
Virginia	July 2002
Nevada	1999
New Mexico	Effective May 19, 2004

I(d)	Has it been amended?
Arkansas	
California	There have been minor amendments.
D.C.	Unable to provide a response
Delaware	No
Delaware (2)	Hasn’t been amended
Florida	There have been no substantive amendments.
Hawaii	Not significantly
Illinois	Yes, in 2004. The CID provision was amended and renamed a subpoena.
Massachusetts	Unable to provide a response
Michigan	Yes in 1984. Minor changes were made.
Louisiana	I don’t think so, but new provisions have been added.
Tennessee	Yes. The amendment deleted one section that had criminal penalties.
Texas	Yes. It was amended in 1997.
Virginia	No, but it may need to be amended.
Nevada	No
New Mexico	No

Investigation Resources

II(a)	Do multiple agencies in your state enforce your Statute (i.e., Attorney General's Office, Medicaid Fraud Unit, Anti-Trust Division, Special *Qui Tam* Units)? If so, is one agency in charge? Which one? If there is coordination among enforcing agencies, is that a problem?
Arkansas	
California	At the state level, the AG is the only agency. However, local entities have enforcement authority with respect to their funds. There are hundreds of local entities and coordination occurs through the AG.
D.C.	Yes. We have an office of corporation counsel that enforces the *qui tam* statute and, on occasion, we do coordinate with them.
Delaware	Yes. Two. Medicaid Fraud Control Unit and the Civil Division of the Attorney General's Office. The Attorney General's Office is in charge. Since all agencies are in the AG's office, coordination presents no problems.
Delaware (2)	The investigating agency is the AG's office. The statute reads that the claim is brought by a private party and the action is brought in the name of the government and is served on the AG. "[The AG's office is] required to notify the affected agency that there is an investigation and give them a sketch of the allegation. [They'll ask them], 'Look at this, do you have damages, do you have losses, or is this not a problem?' But the other agency is not going to go to court. If [the AG's office does] intervene, then their office [the AG's office] is the one that speaks for the agencies."
Florida	The statute is enforced primarily by the AG's office. Some cases which involve matters under investigation by the Financial Services Dept. (formerly the Banking and Finance Dept. and the Insurance Dept.) are handled by that department. However, their involvement in cases as "minimal". The AG's office is at the forefront. The AG's office operates through the Dept. of Legal Affairs. When the statute speaks of that dept. it should be read as synonymous with the AG's office. The AG's office has two divisions which handle *qui tam* suits: the Medicare Fraud Unit and the Economic Crimes Division.
Hawaii	The statute is not limited, but in practice other divisions have not pursued these types of cases. We use special investigators within the Medicaid Fraud Unit. Medicaid fraud has been involved in our state *qui tam* law. We try to coordinate with Medquest. There is some communication between us and the Federal branch.
Illinois	Medicaid fraud is in the state police and we are in the prosecution arm. There is also a special prosecution unit within the Attorney General's office.
Louisiana	Yes. The Medicaid Fraud Unit and the Department of Health and Hospitals. There is coordination.
Massachusetts	The Attorney General's office is the agency with authority. It then delegates to the Chief of Business and Labor Protection Unit. Below that, there are numerous divisions, including the Bureau of Medicaid Fraud Investigations. There is no special *qui tam* unit. The *qui tam* relator is referred to the particular unit to which his/her claim relates.
Michigan	No. The prosecutors and investigators are self-contained.
Nevada	The AG is the specific agency that enforces this statute.

II(a)	Do multiple agencies in your state enforce your Statute (i.e., Attorney General's Office, Medicaid Fraud Unit, Anti-Trust Division, Special *Qui Tam* Units)? If so, is one agency in charge? Which one? If there is coordination among enforcing agencies, is that a problem?
New Mexico	Human Services Department would likey say no because they pursue the cases and enforce the statute, but the AG's office is involved.
Tennessee	We are the lawyers for the state and state agency. All lawsuits are handled by this office. Tennessee Bureau of Investigation handles the investigation unit.
Texas	Ms. Miller's office is pretty much the only unit of the AG's office that enforces the Statute. [Her office] handles all of the enforcement activities, though other agencies assist with their investigations.
Virginia	No. We would like to coordinate with the Medicaid Fraud Unit. Currently, there is a Special *Qui Tam* Unit with one attorney (part-time) and a paralegal. Attorney General has approved the protocol but has not yet published it. Still developing internal reporting system.

II(b)	Has your legislature allocated funds for investigative resources to pursue violations of your state's False Claims Act? If so, what? When were those funds first allocated? (i.e., when the Statute was passed, or after? If after, what led to the allocation?)
Arkansas	
California	n/a
D.C.	Yes. We receive funding from the DC City Council and 75% comes from the federal government.
Delaware	No special funding for investigations. They have their own state investigators in the AG's office. For example: In Delaware's Medicaid Fraud Control Unit, they have investigators who investigate allegations of fraud, so they would be the ones who would be spearheading the investigations should they get a state action involving Medicaid. Investigations of state *qui tam* claims would be investigated similarly to other allegations of fraud. There are other agencies—the Dept. of Education, etc.—that receive contracts and supplies just like any government entity that all have contracts with outside vendors.
Delaware (2)	They have their own state investigators in the
Florida	The state legislature has not specifically allocated funds for investigative resources to pursue violations of Florida's False Claims Act. However, the Medicare Fraud unit gets "Substantial %" of funds from federal government. Recovery for non-medicare goes back to the Economic Crimes Unit. I am unsure where Medicare money goes. However, the statute mandates that recovery go to the General Revenue Fund. If the Financial Services Dept were to recover money, the statute mandates it be deposited in that dept.'s Administrative Trust Fund.
Hawaii	No
Illinois	There is a provision that when we get recovery 1/6 will be allocated to the Attorney General's whistleblower fund and 1/6 to the state police whistleblower fund. The rest goes to a general fund.

II(b)	Has your legislature allocated funds for investigative resources to pursue violations of your state's False Claims Act? If so, what? When were those funds first allocated? (i.e., when the Statute was passed, or after? If after, what led to the allocation?)
Louisiana	In the state false claims act statute, we created a joint fraud and abuse protection fund. Anything that is not Medicaid restitution goes into the fund. There is a provision that allows for these funds to be used for Medicaid budget shortfalls. Use of this fund is governed by the legislature
Massachusetts	No. Complaints are handled like any other tip or whistleblower whether the FCA statute applies or not. All funding comes from the general fund of the Massachusetts State Treasury. However, there is a provision in the statute for the Attorney General to recover investigatory and attorney fees. These funds can be deposited into a false claims prosecution fund. All other recoveries go back to the general treasury.
Michigan	No response
Nevada	No
New Mexico	No
Tennessee	The Tennessee Bureau of Investigations Medicaid Fraud Unit is 75% Federal and 25% state.
Texas	No
Virginia	No. However, Medicaid Fraud Unit has been authorized additional investigators to borrow from other agencies for medical *Qui Tams*. All other state agencies (for instance, Virginia Department of Transportation) are limited to using investigators from their own particular agencies. In addition, there are volunteer intern programs under development—involving law students in second and third years of law school—that all agencies may utilize.

II(c)	What state resources are now available to investigate your state's False Claim Act? $ amount? $ type? $ budget line item? $ percentage of recoveries? $ federal funds? If so, what?
Arkansas	
California	In 1999 there was a new section of the AG's office created and given an independent budget allocation by the legislature. The realization of the size and complexity of the cases led to the allocation of the funds. Medical fraud preceded the 1999 split by a year and medical unit began to receive budget augmentation. Approximately 11 million for the false claims section as a line item budget. The false claims fund receives 33% of the false claims recoveries and it is that money that goes into the fund. We can tap into the false claims fund, but we have to keep the bookkeeping separate.
D.C.	Unable to respond
Delaware	Only the normal budget. No portion of the recovery is dedicated specifically to prosecutions of the False Claims Act. A Medicaid Fraud Unit's case starts with their investigators doing standard investigation work within the limits of their job. Investigation of false claims comes out of the normal resources of the Fraud Control Unit. If outside resources were required, I do not know where they would come from. Additional resources would have to come through the AG's office and the AG's finance director. Medicaid fraud claims are investigated out of the normal budget. There is no budget line-item that I am aware of.

II(c)	What state resources are now available to investigate your state's False Claim Act? $ amount? $ type? $ budget line item? $ percentage of recoveries? $ federal funds? If so, what?
Delaware (2)	A Medicaid Fraud Unit's case starts with their investigators doing standard investigation work within the limits of their job. Investigation of false claims comes out of the normal resources of the Fraud Control Unit. If outside resources were required, I do not know where they would come from. Additional resources would have to come through the AG's office and the AG's finance director. Medicaid fraud claims are investigated out of the normal budget. There is no budget line-item that I am aware of. I am only speaking to investigations of Medicaid fraud claims, and the situation may very well be different for other types of claims. The Statute speaks to what the *qui tam* plaintiff would get and what amount goes on to reimburse the defrauded agency, but the Statute doesn't talk about the AG's office getting any percentage or amount of money that I can see. The Statute really just addresses the *qui tam* plaintiff. The Medicaid Fraud Unit does receive federal funding as a Medicaid Fraud Control Unit, but that money is not specifically earmarked for the False Claims Act. Instead, federal funding helps run the unit generally, "whether it's patient abuse cases or fraud cases or anything else that comes through the door." I don't believe that there's any money segregated specifically for qui tam type actions. Her office investigates all allegations of fraud, including false claims. My office gets money from the federal government, so it is partially federally funded, but there's not X number of dollars for *qui tams* as opposed to X dollars for patient abuse. Funding is all bundled together.
Florida	The state legislature has not specifically allocated funds for investigative resources to pursue violations of Florida's False Claims Act. However, the Medicare Fraud unit gets "Substantial %" of funds from federal government. Recovery for non-medicare goes back to Economic Crimes unit. Stevenson was unsure where Medicare money goes. However, the statute mandates that recovery go to the General Revenue Fund. If the Financial Services Dept were to recover money, the statute mandates it be deposited in that department's Administrative Trust Fund.
Hawaii	There is no fund or money earmarked for these types of cases.
Illinois	75% of the resources come from the Federal Government and 25% comes from the state to litigate.
Louisiana	No Federal funds go into the fraud and abuse fund.
Massachusetts	The "lion's share" of false claims act investigation is conducted by the Medicaid Fraud Unit which is 75% supported by federal funds.
Michigan	Because it is Medicaid fraud, the state provides 25% of the funding and the federal government provides 75%.
Nevada	The state provides existing investigators.
New Mexico	The agency's general budget is all there is.
Tennessee	There is no line item for this. The reality is that as recoveries go by, this office retains 1/3 of penalties and interest and no federal funds are involved.
Texas	Unable to respond.
Virginia	Each agency is allotted its own budget through the AG's office for all types of cases. We hope to have our first recovery in approximately one week (late March 2004), which will help us in establishing the manner in which recoveries are distributed.

II(d)	Do you have dedicated investigators assigned to investigate filed *qui tam* cases? If so, how many?
Arkansas	
California	There are 3 investigative auditors and 2 analysts that work the civil false claims cases and there is a bureau wide group of investigators that can be called upon.
D.C.	Yes we do and the number varies.
Delaware	No
Delaware (2)	No dedicated investigators for *qui tam* cases. Her office's investigators investigate whatever comes through the door.
Florida	There are no investigators exclusively assigned to investigate *qui tam* cases. Two or three predominately do.
Hawaii	The cases are assigned randomly, and there are a couple of investigators that are experienced with pharmacy cases.
Illinois	We use the state police and the Medicaid fraud control unit. This is approximately 36–40 investigators.
Louisiana	Not specific investigators.
Massachusetts	No. We use the same investigators who are assigned to criminal and non-FCA civil cases.
Michigan	We have 34 personnel and are funded for 43. This includes 15 investigators, 7 prosecutors, 2 auditors, 1 analyst, and support staff. The budget is $4.8 million.
Nevada	No
New Mexico	No. We just have our normal investigators.
Tennessee	Tennessee Bureau of Investigation is used as help. This is approximately 25 people.
Texas	No. Other than cooperation from Texas agencies, this office does not have investigators. Investigation is done by cooperation with the agencies—like the Texas HHS commission—and through what relators' attorneys gather.
Virginia	No. However, Medicaid Fraud Unit has been authorized additional investigators to borrow from other agencies for medical *Qui Tams*. All other state agencies (for instance, Virginia Department of Transportation) are limited to using investigators from their own particular agencies. In addition, there are volunteer intern programs under development—involving law students in second and third years of law school—that all agencies may utilize.

II(e)	Do you have CIDs? If so, how are they administered? Do you use them? Do you want CIDs?
Arkansas	
California	The Attorney General has investigative subpoena powers and we issue them.
D.C.	No. We do not see a need for them.
Delaware	I wouldn't mind having them.
Delaware (2)	The DE AG's office has subpoena power; it's like a grand jury summons. AG subpoenas are only used to get documents. If document requests are denied, the AG goes after them with a search warrant.

II(e)	Do you have CIDs? If so, how are they administered? Do you use them? Do you want CIDs?
Florida	Florida has CIDs. The Economic Crimes Division and the Medicare Fraud Unit each have administrative subpoenas available.
Hawaii	No. We would like CIDs. They do allow pre-indictment subpoenas.
Illinois	We have CIDs now called subpoenas. We use them, but not a whole lot.
Louisiana	No. We use Article 66 subpoenas which are similar to a CID. These are sufficient.
Massachusetts	Yes. "They are used a lot and are a terrific tool." Section 5(n) outlines authority for CID, allowing for essentials like document requests, interrogations and depositions. CIDs are used in the same way as grand jury investigation subpoenas.
Michigan	We have the authority to use an investigative subpoena.
Nevada	No. We do not want them because we will just use the power of the grand jury subpoena if we need to go further.
New Mexico	The Medicaid Unit does not have CID authority.
Tennessee	Yes. We are pushing for an expanded CID request for consumer protection information. Our CIDs have to be signed by the AG.
Texas	Yes. CIDs are administered through Texas' Civil Medicaid Fraud section, and through the attorney that is in charge of the case. CIDs have been used and are wanted.
Virginia	No. Possibility in the future.

Application

III(a)	What types of cases are filed under your Statute (health care contract, other)?
Arkansas	
California	Unable to respond
D.C.	Civil and criminal healthcare cases are filed under the statute.
Delaware	Most are global *qui tam* cases. Recipient fraud is not investigated; the office is required by regulation to focus only on provider fraud. Currently filing a nursing home *qui tam* action. [By "global"—for example, pharma wholesale price cases filed against large pharma companies, Merck in particular.]
Delaware (2)	At present, no cases have been filed under the state statute.
Florida	Great rise in health care and "some more off the wall economic *qui tams*"; pharmaceutical; against specific health care providers alleging nonperformance or substandard performance.
Hawaii	No more than three have been filed under this statute and none of them have gone to trial. These were billing fraud cases.
Illinois	Medicaid because of limitations.
Louisiana	Most are drug pricing cases or failure of care by a facility.
Massachusetts	The lion's share are health care fraud. A few are non–healthcare, but it is problematic to characterize without disclosing what he cannot disclose. There is a trend by the False Claims Act Bar to look for a nationwide cause, file it with Main Justice, and then file it individually with the states. So essentially we get the same claims that the feds are getting.
Michigan	Medicaid provider fraud statute.
Nevada	Any claim against the government.
New Mexico	Medicaid by virtue of the statute. We also get named in all of the Federal ones as the other states with a statute do.
Tennessee	Upcoding, pharmaceutical industry, rebate program, off-label use, and short filling.
Texas	Provider fraud cases, drug manufacturer fraud cases, and a few nursing home fraud cases. As far as I am aware, no recipient fraud cases are pursued under the Statute.
Virginia	All types. Any civil case fits. So far, health care, VDOT and county contractor. Most health care cases are national in scope.

III(b)	How would you rate the quality of cases filed under your Statute?
Arkansas	
California	There are *qui tam* plaintiffs' firms that are specialists and they are good to excellent, and there are lawyers who have never seen or heard of False Claims cases and are full of problems. One of the threshold problems is that they haven't figured out whether the funds are state or federal.
D.C.	Good, but when we decide not to intervene, it is because there are no direct monetary damages incurred by the District of Columbia.
Delaware	Most of the cases filed are global and, as such, high quality.

III(b)	How would you rate the quality of cases filed under your Statute?
Delaware (2)	Not applicable
Florida	Quality of cases "ranges." An example of a "not strong case": Relator alleged Fla. was defrauded in reverse false claim where defendant failed to accurately report income and didn't pay enough taxes. The federal statute specifically excludes violation of tax code under FCA. Fla. doesn't specifically limit but presumptively tracks federal. AG declined to intervene. Still pending, not under seal. Fla. 2nd Circuit 03CA1092
Hawaii	50% of the cases are good. However, a problem arises when an initial *qui tam* case makes blanket allegations of wrongdoings and we find other stuff when we investigate. The conflict arises when we try to settle with the *qui tam* plaintiff because the plaintiff wants more.
Illinois	50% are good cases.
Louisiana	The majority of cases are of a national level that usually originated in another state. Thus, they are not usually high quality for our state.
Massachusetts	Generally, the cases are well put-together and the bar is good.
Michigan	Does not apply
Nevada	They are pretty good.
New Mexico	Unable to respond
Tennessee	50% that are filed are good cases and are being brought by lawyers that are doing it right.
Texas	Fairly high-quality, due to the threshold set by the Statute; if the AG doesn't intervene, the case is dismissed. So, to bring a case, attorneys know they'll have to have evidence and a pretty high-quality case.
Virginia	Unable to respond

III(c)	How would you rate the quality of the lawyers bringing these cases?
Arkansas	
California	Unable to respond
D.C.	Good
Delaware	High
Delaware (2)	Unable to respond
Florida	Quality of lawyers ranges. Some know how to proceed. For others, it's their first *qui tam* and they are uncertain how it works. Relators can be a problem. Many seem to have mentality of sitting back and waiting for the money to roll in.
Hawaii	One firm has made a point to make this a big part of their private practice. They are smart attorneys.
Illinois	Pretty good, but there is a group that isn't great.
Louisiana	"Lawyers are lawyers; some are good some are bad."
Massachusetts	Good cases and good lawyers
Michigan	Unable to respond
Nevada	They are pretty good.

III(c)	How would you rate the quality of the lawyers bringing these cases?
New Mexico	Unable to respond
Tennessee	50% are good.
Texas	Most of them are very good. Some of the provider-fraud case lawyers are average. But the national-scope fraud cases that are brought have good attorneys.
Virginia	They are good; however, there is one lawyer of whom we are suspicious.

III(d)	Were these cases pursued before your state's False Claims Act was passed? If so, by what agency?
Arkansas	
California	They were being pursued, but were not being pursued systematically by anybody.
D.C.	Unable to respond
Delaware	Delaware cases were pursued solely by federal agencies under the federal FCA prior to the passage of Delaware's Statute.
Delaware (2)	Unable to respond
Florida	Prior to FCA, cases were pursued by same two arms of AG office. *Qui tam* makes them aware of more specific examples.
Hawaii	Yes. Medicaid investigations fraud unit pursued these cases.
Illinois	Yes, under the vendor fraud statute that provides for the same penalties.
Louisiana	Unable to respond
Massachusetts	Yes, by the Attorney General under more general fraud statutes. We still use those statutes a great deal. Recently, Mass brought an FCA claim against 13 pharmaceutical companies, alleging FCA, fraud, etc.
Michigan	Unable to respond
Nevada	Yes. Usually with the Department of Justice under the Federal FCA.
New Mexico	Unable to respond
Tennessee	To a small extent, but it has grown since the passage of the statute.
Texas	As far as I know, there was no mechanism for these cases to be pursued until the Statute was passed.
Virginia	Yes, through Medicaid Fraud Unit and Antitrust and Consumer Unit. VDOT is a prolific source of *qui tam* actions. Consumers being overcharged, etc. could easily be brought as a *qui tam.* "Not foreign ground, just new remedy and procedure."

III(e)	How well does your office interface with the federal government?
Arkansas	
California	We work with them all over the country because when a Medicaid case is filed, it is filed in Federal Court and we are often named in the suit. We work well with them.

III(e)	How well does your office interface with the federal government?
D.C.	We interface very well. We have a close relationship with the United States Attorney's office.
Delaware	Well. The respective offices meet regularly, share resources and investigators, and trade referrals.
Delaware (2)	As far as I know, very well.
Florida	Office has a good working relationship with the 3 federal districts in Florida.
Hawaii	We are looking for more cooperation. Before the statute, they did not interface at all.
Illinois	Well
Louisiana	We have an excellent relationship with Federal prosecutors.
Massachusetts	Quite well—not only in healthcare fraud division of U.S. Attorney in Massachusetts (excellent relationships) but also with Main Justice in Washington. "We see each other coming and going." Personal relationships, e.g. dinners, family outings, etc. Mass. also interfaces with other states through multi-state things with Medicaid fraud units. "We are developing a multi-state organization called NAMFCU: National Association of Medicaid Fraud Units."
Michigan	We interface well.
Nevada	Not as well as we would like.
New Mexico	Unable to respond
Tennessee	This depends on who is involved, but generally it is tough because they do not like to share information.
Texas	Pretty well; my office has taken the lead on (something of) a national case, and they've had good relationships with the Federal lawyers.
Virginia	Hard to say how many cases, but the lawyers are dealing with Assistant U.S. Attorneys. Recently the federal prosecutors asked to sign our written consent order. They have experience.

III(f)	Are *qui tam* relators' counsel helpful? If so, how? If not, what problems do they present?
Arkansas	
California	Yes. Some present well-screened cases and provide substantial assistance in litigation later on and in other cases they are on the sidelines and do nothing. Some create problems. The statute has a provision that allows the problem-causing attorneys to be handled.
D.C.	Yes, they provide much of the discovery we need to decide if we should pursue a false claims case.
Delaware	Has very little interaction with relators' counsel. However, relators' counsel are indirectly helpful through knowledge of individual cases and have presented no particular problems.

III(f)	Are *qui tam* relators' counsel helpful? If so, how? If not, what problems do they present?
Delaware (2)	Relators counsel are "either too nosy and after you all the time ("Have you investigated this or that or the other thing?") or you can't get in touch with them—they just seem to be extremes." Anecdotes: One group not local to Delaware (not on the East Coast) brought a *qui tam* action through the E.D. of PA. I had to leave a number of messages for them and never got any information from them. I had to constantly pester them. The group didn't serve the complaint properly, either. At the opposite extreme is someone breathing down your neck every couple of weeks asking about progress.
Florida	*Qui tam* relator counsel "can be extremely helpful." But it's case-specific.
Hawaii	Experienced ones are helpful.
Illinois	Some are helpful and some are not.
Louisiana	Some are. Some are not. Some do little and some do a lot.
Massachusetts	Sure. There are good ones. We want to encourage the development of a *qui tam* bar to welcome the development of *qui tam* complaints. The purpose will be to make sure it's a good, well-researched case.
Michigan	Unable to respond
Nevada	Some are helpful and some are not.
New Mexico	Unable to respond
Tennessee	There are two things that have an effect: 1) do they know what they are doing and 2) do they keep us informed as the case moves forward.
Texas	For the most part, relators' counsel have been extremely helpful. They've helped Miller's office perform the investigations when the office hasn't had the sufficient resources to do it themselves. Relators' counsel provide Miller's office with enough evidence to determine whether or not they have a valid case.
Virginia	We work in tandem until get to part our ways. "Current situation where we believe case has no merit, but brought in good faith." Relators simply misinterpreting code. Probably will move to dismiss.

III(g)	Does your state *qui tam* apply retroactively to fraud that occurred prior to the passage of the Statute?
Arkansas	
California	No. It was a long time ago and we have a 10-year statute of limitations.
D.C.	No
Delaware	No
Delaware (2)	No. They've talked about it before in their unit. Nothing in the statute that says it's retroactive. If there isn't anything that specifically says that the statute should be applied retroactively, then in Delaware you can't apply it retroactively: "It wasn't a crime until you made it a crime, ergo, the bad guys weren't on notice."
Florida	Nothing in the *qui tam* statute facially prevents it from applying retroactively to fraud occurring before passage. I don't think it's ever been challenged. However, the Statute of Limitations allow for a maximum of 7 years—so, it is a moot point now.

III(g)	Does your state *qui tam* apply retroactively to fraud that occurred prior to the passage of the Statute?
Hawaii	If fraud was continuous from 1995, then yes, but before that or if it stopped, I do not know.
Illinois	I don't know because it has been around since 1992 and we have not had this issue come up.
Louisiana	Yes
Massachusetts	The Attorney General takes the position that it does, but the issue has not been decided by any court. Not pending.
Michigan	Unable to respond
Nevada	It says it does, but this might not withstand a challenge.
New Mexico	Unable to respond
Tennessee	Unable to respond
Texas	No
Virginia	No. It doesn't say one way or the other, but presumption is that it is not retroactive. One current case will probably be dismissed because the statute is not retroactive. *Qui tam* counsel will probably not oppose but will still wait to see.

III(h)	Can you explain the process your office follows once it receives a false claims complaint?
Arkansas	
California	We investigate it to determine the merits of the case, and there is a statutory requirement that we do that.
D.C.	We initiate an investigation and the matter is under court seal and once we investigate, a decision is made as to whether we want to intervene and the main force is investigating to make an intelligent decision.
Delaware	(1) Complaints are received by Delaware's State Solicitor, who is the head of the Civil Division of the AG's office; (2) The complaint is recorded in a special qui tam litigation list; (3) The State Solicitor determines whether the case will be handled by the Civil Division or by the Fraud Division; (4) The Division Leader assigns the case to a Unit Leader, who then assigns the case to a particular attorney and investigator.
Delaware (2)	A party can bring an action in state court—say a contractor supplies something to the state—someone who objects can bring an action through an attorney into state court under seal. The time during which the action is under seal is shorter than with the federal Statute; in Delaware the time is 60 days. After 60 days, the Attorney General's office can decide to intervene, decline, or ask for an extension, just like with the federal government. The AG's office investigates the case, bringing in the agency that might be involved (any state agency that is the beneficiary of a contract or is potentially defrauded by the contract in question). "The agency is asked about the complaint, the allegations, and whether the complaint is actually a problem or not—whether they're getting ripped off." From there, the AG's office will either decline to intervene, intervene, or apply to extend the seal. Ms. Barchi's office hasn't done anything in their unit as far as Delaware state courts are concerned; their office generally does federal claims. The Medicaid Fraud Control Unit has not had somebody come with a state claim that stands by itself and isn't appended to a federal claim.

III(h)	Can you explain the process your office follows once it receives a false claims complaint?
Florida	I read the complaint and send it to either Economic Crimes or Medicaid. I sometimes personally handle claims that could be sent to Medicaid. Decision of intervention is made. I have some input along with the boss, the Asst AG for Economic and Medicare Crimes and that person's boss, the Deputy AG. An investigation is begun. They quickly talk to relator and counsel. May be parallel civil and criminal investigations.
Hawaii	We don't have a process because there have been one or two cases where they kept it under seal and provide the office with little information.
Illinois	I contact the state police and they assign an investigator. Then we interview the relator. Based on that information, we decide whether to seek records through CID/subpoenas.
Louisiana	There are two ways. Either we keep the case in-house and work with relators' counsel or if the case is too big we bring in outside counsel, but maintain involvement in the case.
Massachusetts	The typical procedure is for a complaint to come in and be sent to the agency specializing in the case's subject area.
Michigan	All complaints are reviewed for fraud potential. There is an initial scan to determine whether to open or refer out. We may then close or decide to do some up front review. This is assigned to an investigative supervisor. Once it has been satisfied that a full scale investigation is warranted, the case is assigned to an auditor and an attorney.
Nevada	Determine whether to pursue and contact the appropriate division involved.
New Mexico	Unable to respond
Tennessee	First, we document when we received the complaint and the statement of material evidence. This begins the 60 days of seal. Then, we meet the relator and establish contact with the US Attorney's office. Last, we begin to work on CIDs.
Texas	If it is a *qui tam*, then the office will determine when they have to notify the court if they decide to intervene. Next, they will contact relators' counsel and proceed with them depending on what level they're at in the case.
Virginia	Once claim comes in to the Director of the *Qui Tam* Office, it goes to the senior chief unit and he assigns it to one of his lawyers.

Effectiveness

IV(a)	What is the total amount of funds recovered by your state as a result of your Statute? ($ breakdown by type of case and amount per year)
Arkansas	
California	Unable to respond
D.C.	FY 2002: $349,077; FY 2003: $ 13, 048, 538; FY 2004: $1.2 million
Delaware	This is impossible to answer. DE recently recovered $500,000 but that is atypical. I am unaware of any studies or legislative review of the Statute's effectiveness.
Delaware (2)	Unable to respond
Florida	There does not seem to be a process in place for keeping up with it. When asked about any specific cases or awards that come to mind, he paused a minute and said that all the cases that came to mind he thinks are actually federal cases where fraud occurred in Florida, leading to Florida sharing in recovery. Example is the March 2003 Bayer Pharmaceuticals case.
Hawaii	$3 million in restitution and damages and $1 million in liquidated damages. $1.2 million in Skill Nursing facility; $4 million in improprieties by a pharmacy; $1/2 to 1 million involving a Kaiser (a case where we are working with the federal government) for physician assistant practices.
Illinois	We have recovered around $6 to 7 million a year since 2000.
Louisiana	Unable to respond
Massachusetts	None yet
Michigan	FY 2004: $9.8 million ordered and $10 million recovered; FY 2003: $4.9 million ordered and $4.1 million recovered; FY 2002: $4.5 million ordered and $3.2 million recovered; FY 2001: $731,000 ordered and $877,000 recovered.
Nevada	We do not track this.
New Mexico	Unable to respond
Tennessee	The best guess is 10–12 million
Texas	It's very difficult [to pin down a figure]. Last year, we had a state *qui tam* case against a generic drug manufacturer for false price reporting was for $18 million. However, they'll also receive settlements for federal cases, and for state cases where her office is involved in the negotiations but not the litigation, such as the recent Bayer settlement, which paid $10 million.
Virginia	No recoveries yet. Currently negotiating a settlement.

IV(b)	How many cases are filed under your state Statute? (year by year since passage, if available)
Arkansas	
California	I don't know because we don't track that.
D.C.	Unable to respond
Delaware	Unable to respond

IV(b)	How many cases are filed under your state Statute? (year by year since passage, if available)
Delaware (2)	At present, there are no cases filed under the statute under the Medicaid Fraud Unit. There might be some cases floating around, but the contracts manager would know that.
Florida	He stated about 20–30 cases in the last year under the statute.
Hawaii	1 per year
Illinois	There are approximately 15 a year filed. 75% of the cases are intervened or settled (most are settled).
Louisiana	Few because most of the lawyers are unfamiliar with the state *qui tam* provision.
Massachusetts	Not available
Michigan	Fraud as well as abuse and neglect. There were 63 cases last year and approximately 60% were fraud. 2003 there were 54; 2002 there were 53 and 2001 there were 53 with approximately 50% being fraud cases for these years.
Nevada	Unable to respond
New Mexico	Unable to respond
Tennessee	There are 25 open right now.
Texas	Almost all the cases that are filed are still under seal, so she really can't tell us, as far as 2003 is concerned. Miller agreed to provide more detailed information for previous years.
Virginia	Estimated total of 35. We are keeping a computer database of actions.

IV(c)	What were your recoveries for false claims prior to the passage of the Statute (i.e., compared to after the Statute)?
Arkansas	
California	Unable to respond
D.C.	Unable to respond
Delaware	Unable to respond
Delaware (2)	Unable to respond
Florida	Unable to respond
Hawaii	Big settlements with pharmacies and drug wholesalers
Illinois	Unable to respond
Louisiana	Unable to respond
Massachusetts	None
Michigan	Unable to respond
Nevada	Unable to respond
New Mexico	Unable to respond
Tennessee	Unable to respond
Texas	None
Virginia	Unable to respond

IV(d)	Do you anticipate greater recoveries? If so, why? If not, why not?
Arkansas	
California	The number of attorneys who understand the existence of the FCA is growing and would suggest we can expect greater usage over time. There is no reason to thing that recoveries are going to diminish.
D.C.	Probably, because we are more interested in pursuing these cases.
Delaware	Definitely. "Once the plaintiff's bar figures it out and the word gets out that you can whistle-blow and get recoveries, people will start doing it. There's a lag time before litigation starts kicking in."
Delaware (2)	I don't know. They haven't really used the Statute in Medicaid fraud, so I can't say that her office has realized any greater recoveries. I think that they'll get more recoveries due to the Statute because they'll be more involved as state plaintiffs in federal cases, and have more control (presumably) in settlement negotiations.
Florida	Unable to respond
Hawaii	Yes. Because Hawaii has a False Claims Act, we are more involved with the national cases.
Illinois	Yes, because there going to be more cases filed as private citizens and attorneys become more aware of the statute.
Louisiana	We anticipate further reliance on the statute.
Massachusetts	Too soon to tell
Michigan	Yes, because the cases seem to involve larger fraud in terms of the money because of the emphasis single state agencies are placing on recoveries due to poor state budgets.
Nevada	Yes, because more and more cases are filed each year.
New Mexico	Unable to respond
Tennessee	Yes, because we have added another lawyer to help with the cases and take a more active role.
Texas	I anticipate greater recoveries, because a statute is now in place that allows them.
Virginia	Yes. Whether it's a cash cow or not, it's better than nothing. It's a good thing for the government to go after people who defraud the public trust.

IV(e)	Do you believe your state's False Claims Act has had a deterrent effect on those who would defraud your state? Why? Any data? Any anecdotes?
Arkansas	
California	You can tell by the attorneys that show up that what has happened before has made an impact on them. The biggest impact is the posting of the outcome of these cases on the Health and Human industry web site. The compliance industry has been built up in the last five years because the government has cracked down on fraud.
D.C.	Unable to respond
Delaware	Unable to respond
Delaware (2)	Unable to respond

IV(e)	Do you believe your state's False Claims Act has had a deterrent effect on those who would defraud your state? Why? Any data? Any anecdotes?
Florida	"Without question" the Florida FCA has had a deterrent effect on those who would defraud the state. "Wish more people knew about *qui tam* provisions."
Hawaii	Yes. Because we publish the recoveries and our AG does make a point to say we encourage people to come forward and collect. We have been generous to relators.
Illinois	Yes. Healthcare providers and drug companies are more aware of it.
Louisiana	No
Massachusetts	Unable to respond
Michigan	Yes, because of the publicity the cases have received as well as the education that has been provided to Medicaid providers regarding the statute. Some providers have been reluctant to sign up for Medicaid out of fear of being prosecuted.
Nevada	Who knows, but likely.
New Mexico	Unable to respond
Tennessee	No, not enough
Texas	It's probably too soon to tell. The unit has only been in existence since 1999, and the consequences of the Statute are just now coming to fruition. There are no statistics that would show whether or not the statute has been effective.
Virginia	It has a deterrent effect on contractors who see it happening and larger companies, such as pharmaceutical manufacturers. National suits backed by both federal and state governments have a deterrent effect. But it will not cure the ills of the world. There is always the possibility of disgruntled employees bringing frivolous suits based on personal vendettas.

IV(f)	In your opinion, is your False Claims Act effective? If so, how? If not, why not? What would improve its effectiveness?
Arkansas	
California	This is a question of the AG's agenda.
D.C.	I think it is an effective tool because there is trebling of money damages and a penalty provision that scares would-be violators.
Delaware	Informant believes the DE Statute is effective; the Statute is modeled after the federal FCA, so it's designed to work. DE has very few FCA cases at this point, so it is difficult to tell.
Delaware (2)	Unable to respond
Florida	Unable to respond
Hawaii	Yes. I am glad we modeled against the Federal statute.
Illinois	It is effective to an extent, but because they had the civil vendor statute before, this statute hasn't had a drastic effect. It is effective because the False Claims Act gets a lot of publicity (especially the drug company settlements).
Louisiana	Yes. The *qui tam* is not always effective, but it can be.

IV(f)	In your opinion, is your False Claims Act effective? If so, how? If not, why not? What would improve its effectiveness?
Massachusetts	"I believe it's going to be effective. It creates incentives for lawyers to pursue cases that otherwise wouldn't be pursued." The primary benefit is that it creates private attorneys general.
Michigan	Yes because it is comprehensive. The statute covers filing of the claim, kick-backs, ownership arrangements, lying on your application, and investigative powers for the Attorney General's office. The statute has a civil component as well as a provision for conspiracy that elevates it to a 10-year felony.
Nevada	Yes, because we get the money back for the program.
New Mexico	Unable to respond
Tennessee	Unable to respond
Texas	In general, it is effective, in the same way that every other penalty statute is effective. It's effective as a deterrent. As long as people know the Statute is out there, it in general should affect their decisions as to how they deal with the Medicaid program. Texas has a pretty strong statute already.
Virginia	For the most part, yes. However, I have doubts about one suit because it looks suspicious. Attention and reputation would improve its effectiveness.

IV(g)	What legislative or other changes would you like to see in your Statute? Why?
Arkansas	
California	Unable to respond
D.C.	None
Delaware	It wouldn't hurt to have CIDs. Having CIDs would not necessarily help the AG's ability to prosecute, as the AG has many ways of getting information, but CIDs would help other people who don't have the AG's authority.
Delaware (2)	Unable to respond
Florida	He wished the statute had a longer statute of limitations.
Hawaii	Addition of CIDs.
Illinois	It is good the way it is.
Louisiana	Unable to respond
Massachusetts	None
Michigan	If managed care is defrauded by a provider, our false claims statute would not apply because that HMO provider is not Medicaid, and likewise if the HMO defrauds Medicaid, it does not apply. There are other statutes, but it would be better if this was covered in the false claims statute.
Nevada	There is nothing I can think of.
New Mexico	The idea that HSD has to come up with a written determination of the mer-its before the defendant is even aware that there is a complaint filed against them should be changed.
Tennessee	CID power and restoration of the criminal aspect. The federal government has the authority to create a corporate integrity agreement with a company that allows you to settle under injunctions to do certain things. This is a way to make the company behave.

IV(g)	What legislative or other changes would you like to see in your Statute? Why?
Texas	I might favor increasing per-violation penalties.
Virginia	None. It's well written, similar to the federal FCA. We'll have to see how it fits the needs of the state. He needs clarification on what role his office will have once it intervenes. Will they still be able to use U.S. Attorney resources? The state statute contemplates that the state will take the lead, but state would like to coattail on feds and others. With multi-state actions (such as major pharmaceutical company multi-state actions) what will his office's role be? Will it be a committee of coordinated state AG offices?

Impact of Federal False Claims Act in Your State

V(a)	In your state, how active is prosecution by federal agencies under the federal False Claims Act?
Arkansas	
California	Prosecution is very active and a combo of the 3 US attorney's offices and main justice is involved in many cases.
D.C.	Very active
Delaware	Unable to respond
Delaware (2)	Barchi doesn't know. They have not received anything that has been filed through the District of Delaware and filed by their U.S. Attorney's office—again, though, Barchi is just speaking for the Medicaid Fraud Control Unit. There might be other [prosecutions], but Barchi hasn't seen anything yet for Medicaid.
Florida	The US Attorneys in Tampa and Miami are the most energetic in prosecuting the federal FCA in Florida. Prosecution has been slowed by the war on terrorism; attorney and FBI resources have been refocused.
Hawaii	We are more active than them.
Illinois	There are three districts and they are all active.
Louisiana	Immense. Our Federal prosecutors are active and we have a lot of success together.
Massachusetts	Very, very, very active.
Michigan	They are fairly active.
Nevada	Federal agencies are not particularly active in this area.
New Mexico	Unable to respond
Tennessee	I am only aware of the Medicaid side.
Texas	Part of that I do not know. Federal agencies don't just prosecute health-care related false claims. I do know that in our office's settlements they do take into account what the Feds do for their contribution to the Medicaid program. Federal agencies do have investigators that are dedicated to looking into Medicaid fraud. In her experience, they've been pretty vigilant.
Virginia	Pretty active. I do not keep tabs on it.

V(b)	Which federal offices are the most active prosecutors of the federal FCA in your state (a particular U.S. Attorney's office, Main Justice, etc.)?
Arkansas	
California	Unable to respond
D.C.	The US Attorney's office in DC and main justice.
Delaware	The U.S. Attorney for the E.D. of PA and "whatever district of MA files a bunch of these pharmaceutical cases in DE."
Delaware (2)	Again, she doesn't know. Most of the things they've handled have been out of the E.D. of PA and not through the district of DE. Again, her answer here just concerns Medicaid, Medicare, and pharmaceutical stuff. She doesn't know what's happening with other types of contracts, supplies, or vendors.

V(b)	Which federal offices are the most active prosecutors of the federal FCA in your state (a particular U.S. Attorney's office, Main Justice, etc.)?
Florida	The US Attorneys in Tampa and Miami are the most energetic in prosecuting the federal FCA in Florida. Prosecution has been slowed by the war on terrorism; attorney and FBI resources have been refocused.
Hawaii	United States Attorney's Office
Illinois	The Northern District of IL is the primary agency that prosecutes this and they are pretty active.
Louisiana	United States Attorney's Office
Massachusetts	Main Justice
Michigan	United States Attorney's Office (criminal and I do not recall seeing any *qui tam* actions)
Nevada	They are not particularly active.
New Mexico	Unable to respond
Tennessee	Unable to respond
Texas	The San Antonio U.S. Attorney's office is pretty effective. There may be other offices that are active, but with which I haven't dealt.
Virginia	The U.S. Attorney's office in Alexandria, VA is very active.

V(c)	Is there coordination on federal FCA cases between your office and federal law enforcement officials? If so, to what extent? How does such coordination come about? Could it be improved? How?
Arkansas	
California	Unable to respond
D.C.	When my office pursues a case under the DC statute there isn't really any coordination. There is coordination when my office decides to bring a Federal False Claim action. There is no improvement needed.
Delaware	Medicaid Fraud Unit and federal officials stay in touch on status of cases by fax, phone, and mail and by exchanging copies of complaints and seal extensions. Coordination is adequate. No need for improvement.
Delaware (2)	U.S. Attorneys certainly speak to them, but she's not aware that federal investigators have spoken with state investigators on any of the *qui tam* cases. There is talk between the DE AG's office and the U.S. Attorney's office—"Can you get this type of information, etc."—but it usually comes through the U.S. Attorney's office and not through federal investigators. There is coordination to some degree between the Medicaid Fraud Control Unit and U.S. Attorney's offices. Can there be improvement? "Well, it's a shame. [The folks from] the U.S. Attorney's office are quite overwhelmed, and it's pretty obvious. They need more personnel. These people are so busy. You'll leave voice mails, and they do get back to you eventually. It takes a while, because they're out of town, in court, whatever, but there just aren't enough of them to go around." They always get back to her, but they're just stretched too thin. Barchi can't get anything immediately. "[Dealing with them is] not something that goes fast."

V(c)	Is there coordination on federal FCA cases between your office and federal law enforcement officials? If so, to what extent? How does such coordination come about? Could it be improved? How?
Florida	In federal cases, if the fraud is primarily in Florida, then the state and the feds are on equal footing in the case. However, if Florida is one of several states in the action, then the feds act more as a coordinator of state investigations. Stevenson believes states are more apt to let the feds run the show, but "Florida is eager to step up to the plate and lead."
Hawaii	No response
Illinois	There is good coordination between our office and the United States Attorney's office.
Louisiana	Yes. Extensive. We have a state task force that meets with them regularly. We pursue cases together under a joint task force.
Massachusetts	We work closely with the feds. We talk to DOJ Main Justice and work cases together. One of the Mass. A.G. lawyers is also a Special Assistant U.S. Attorney deputized to participate in federal grand jury investigations.
Michigan	Yes, we are trying to coordinate various providers. We defer if the case involves more Medicare than Medicaid. We lend expertise or resources and try not to work the same target. We take cases that do not meet their minimum which is around $125,000. We have an appointed liaison for the Federal Government within our division and the US Attorney's office has put together a task force and we attend those meetings.
Nevada	There is not good coordination because we usually do not hear from them until they want us to sign off on a settlement agreement. We want to work on this.
New Mexico	Unable to respond
Tennessee	This varies from case to case, but the federal government could keep us more informed.
Texas	My office works with U.S. Attorneys' offices outside of Texas on national cases, generally when the relator wants to serve all the states that he alleges have been defrauded. Sometimes my office will be contacted directly by Federal officials when the defendant is a national provider (like Bayer), and it's known that all states have been affected. Extent of coordination depends on the case. My office can coordinate investigations with Federal officials so there's no redundancy. They try to coordinate court filings, so that everyone gets an extension if one is needed. If it's a national case, coordination depends on how the case goes. Sometimes the U.S. Attorney's office will get very involved at the front end of the case in negotiating with the defendants, and sometimes the states themselves do it. It depends on the case. The only way to improve coordination is to have more staff available.
Virginia	Yes, especially in Medicaid Fraud cases. In fact, I have a meeting on Tuesday to coordinate with the feds on a case. We have joined where the U.S. Attorney has requested. Both feds and state agencies have initiated coordination. No difficulties working with various public offices. One problem is trying to get judges to understand that there are/will be multiple states. Judges don't have experience working with states. It is incumbent on parties to educate judges. "It should be an interesting dance."

Catch-All Questions

VI(a)	Are there any reports, data, or memos addressing these questions and summarizing these facts that you can send to us?
Arkansas	
California	No
D.C.	No
Delaware	No
Delaware (2)	No
Florida	No
Hawaii	No
Illinois	The National Association of Medicaid Fraud Control Units in DC can get data on global settlements where all the states participate in settlements of national cases.
Louisiana	No
Massachusetts	No
Michigan	No
Nevada	No
New Mexico	No
Tennessee	No
Texas	No
Virginia	Maybe the internal protocol will be available in May 2004.

VI(b)	Is there anyone else in your office with whom it would be helpful for me to talk?
Arkansas	
California	No
D.C.	Rita Endecra in the office of Corporation Counsel (Charlotte Parker is the supervisor) Phone # (202) 727-4777
Delaware	No
Delaware (2)	No
Florida	No
Hawaii	No
Illinois	Bureau Chief of Special Litigation, Chaka Patterson (312) 814-1137
Louisiana	No
Massachusetts	No
Michigan	No response
New Mexico	Paul Ritzma 505-827-7729
Tennessee	No response
Texas	No
Virginia	Aubrey Ford III is a lawyer who helped draft the Virginia Fraud Against Taxpayers Act. He is with Canter, Arkema, Edmonds in Richmond, Virginia.

The Big Picture

The 1986 False Claims Act Amendments:
A Retrospective Look at Twenty Years of
Effective Fraud Fighting in America

THE 1986 FALSE CLAIMS ACT AMENDMENTS:
A Retrospective Look at Twenty Years of Effective Fraud Fighting in America

Joseph E. B. White

INTRODUCTION

During the Civil War, unscrupulous defense contractors drained the U.S. Treasury with impunity. President Abraham Lincoln responded by proposing the enactment of the False Claims Act (FCA) to unleash whistleblowers to help the government suppress fraud that was plaguing the Union Army. However, during World War II, Congress overreacted to an unfortunate situation where a False Claims Act suit was filed based entirely on the information in a government indictment. The amendments at that time had the unfortunate effect of disabling the FCA at the very moment when government programs entered an era of major growth. Not surprisingly, without whistleblowers to unravel the inner workings of fraudulent schemes, federal law enforcement officials were overwhelmed and outmatched by a well-funded army of dishonest government contractors.

The FCA was revived, in 1986, after congressional hearings and GAO reports exposed rampant fraud in the defense procurement process (you will recall the stories of $500 hammers and $7200 coffee makers). Senator Charles Grassley and Congressman Howard Berman collaborated to push Amendments through Congress that President Ronald Reagan signed into law, reenlisting whistleblowers in a national effort against fraud. Indeed, Congress's intent was to reinstate a "coordinated effort" between private citizens and the government, fighting side by side to effectively and to efficiently protect the U.S. Treasury, so as to "enhance the Government's ability to recover losses sustained through fraud against the Government."[1]

This publication chronicles the Act's remarkable success over the last twenty years and highlights the pivotal role whistleblowers have played in recovering nearly $17 billion in stolen funds.

THE SUCCESS OF THE 1986 FALSE CLAIMS ACT AMENDMENTS

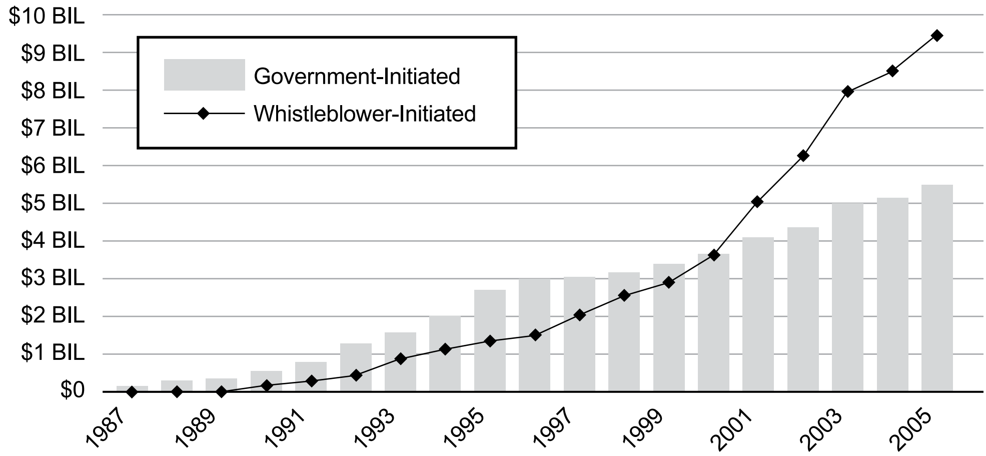
The 1986 False Claims Act Amendments have been a success on many levels. The Department of Justice's statistics on FCA settlements (see appendix) reveal that the '86 Amendments have ushered in a new era of fraud enforcement. The amount of fraud money recovered has risen dramatically and whistleblowers have become the primary source of successful FCA actions. The size of recoveries have increased significantly over time because of whistleblower suits and, whistleblowers have greatly expanded the reach of the Act to protect the American tax dollar from fraud in many new arenas.

With government spending reaching all-time highs and with fraud oftentimes masked by seemingly innocuous business transactions, the last twenty years of fraud

1. S.Rep. 99-345, at 1, U.S. Code Cong. & Admin. News 1986, 5266–67.

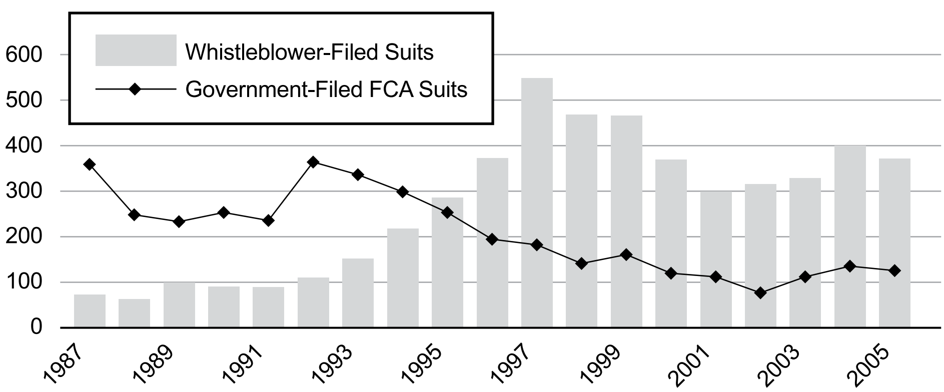
enforcement has been marked by a remarkable shift. Specifically, the U.S. Department of Justice has, over time, increasingly relied on whistleblowers to uncover and initiate cases against government contractors. Thus, in 1987, not a single stolen dollar was recovered through whistleblower-initiated suits; last year, however, over 80 percent of the money returned to the federal government originated from such cases. As this graph depicts, the trend has pushed the amount recovered by whistleblowers to nearly $10 billion.

Stolen Dollars Recovered in Government-Initiated FCA Suits Versus Whistleblower-Initiated FCA Suits



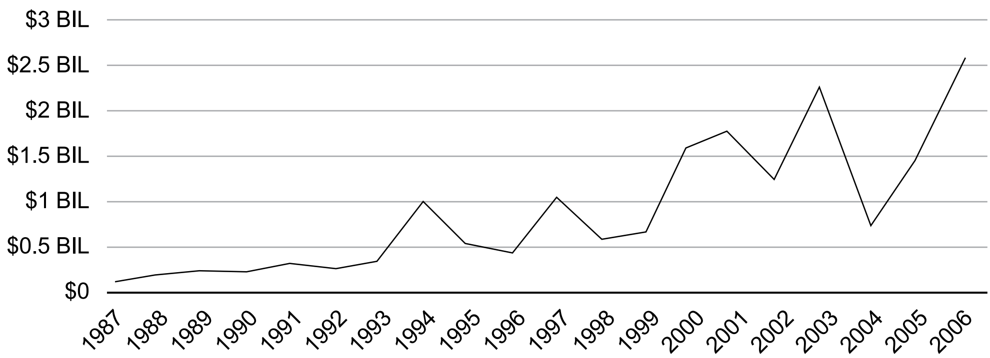
While the total number of new FCA actions has remained relatively constant (e.g., 427 in 1987, 513 in 1995, 494 in 2005), there has been a significant shift from government-filed suits to whistleblower-filed suits. Only 15 percent of all new FCA actions filed in 1987 were whistleblower suits. In 1995, this percentage rose to 54 percent. Last year, nearly 80 percent of all new FCA actions were filed by whistleblowers.

Number of Government-Filed FCA Suits Versus Whistleblower-Filed Suits



Even more impressive than the growing role of whistleblowers is the resulting efficiency whistleblowers have brought to the overall fraud enforcement system. In 1987, 73 FCA settlements returned only $87 million to the American treasury, or less than $1.2 million per settlement. Last year, however, the federal government, in securing over $1.4 billion in stolen funds, recouped close to $14 million per settlement. In addition, the total yearly recoveries have dramatically increased, jumping from an average of $368 million from 1987 to 1996, to an average of over $1.25 billion from 1997 to 2005. 2006 promises to be the most successful year yet under the FCA, with recoveries exceeding $2.6 billion.

Total Amount of Yearly FCA Settlements



As detailed by a recent Taxpayers Against Fraud Education Fund study,[2] the federal government is not only seeing an increased return in individual FCA settlements, but is now realizing a remarkable $15-to-$1 return to the government for money spent investigating and prosecuting FCA whistleblower actions involving health care fraud. In fact, this study is the third update of an original 2001 study that showed a return of $8 for every $1 invested. Each subsequent study has shown an increased return on investment, climbing from $8-to-$1 to $9-to-$1 to $13-to-$1 to $15-to-1. In short, despite the "concerns" defense industry opponents voiced that the 1986 FCA Amendments would "clog the system" with frivolous whistleblower suits, the Amendments have actually made fraud enforcement more cost-effective and efficient. Indeed, to appreciate the true reach and impact of the 1986 FCA Amendments, one only needs to view the different companies represented on the "Top 25 FCA Settlements" list of the past twenty years.

The Expansion of False Claims Act Legislation

Thankfully for the public fisc, it appears that the trend of increased reliance on whistleblower-initiated cases is continuing and spreading. In addition, nearly twenty states and two municipalities, recognizing the success of the federal False Claims Act, have passed their own versions of the Act. Remarkably, state False Claims Acts have been enacted in traditionally Republican states, such as Texas and Tennessee, to traditionally

2. *See* Jack A. Meyer, *Fighting Medicare Fraud: More Bang for the Federal Buck* (July 2006), *available at* http://www.taf.org/FCA-2006report.pdf.

Company	Settlement Amount	Date
1) Tenet Healthcare	$900,000,000	Jun-06
2) HCA *	$731,400,000	Dec-00
3) HCA *	$631,000,000	Jun-06
4) Serono Group *	$567,000,000	Oct-06
5) TAP Pharmaceuticals Products Inc. *	$559,483,560	Oct-06
6) Abbott Labs *	$400,000,000	Jul-06
7) Fresenius Medical Care of N. America*	$385,000,000	Jan-00
8) SmithKline Beecham Clinical Labs (tie)	$325,000,000	Feb-97
8) HealthSouth * (tie)	$325,000,000	Dec-06
9) National Medical Enterprises *	$324,200,000	Jun-94
10) Gambro Healthcare	$310,000,000	Dec-06
11) Schering-Plough *	$292,969,482	Jul-06
12) AstraZeneca *	$266,127,844	Jun-06
13) Saint Barnabas Hospitals	$265,000,000	Jun-06
14) Bayer Corp. *	$257,200,000	Apr-06
15) First American Health Care Of Georgia	$225,000,000	Oct-96
16) BankAmerica *	$187,000,000	Oct-98
17) Laboratory Corporation of America *	$182,000,000	Nov-96
18) Beverly Enterprises Inc. *	$170,000,000	Feb-00
19) Pfizer/Warner-Lambert *	$152,000,000	May-06
20) United Technologies (tied)	$150,000,000	Mar-94
20) GlaxoSmithKline	$150,000,000	Sep-06
21) Blue Cross Blue Shield Illinois *	$140,000,000	Jul-98
22) Caremark	$137,500,000	Sep-06
23) Mario Gabelli & Lynch Interactive	$130,000,000	Jun-06
24) King Pharmaceutical	$124,000,000	Nov-06
25) Northrop Grumman	$111,200,000	Jun-06

* means criminal fines were also levied. Amounts listed are only for Federal FCA settlements; additional state claims may also have been paid.

Democrat states, like California and Massachusetts. When it comes to fighting fraud in America, both sides of the aisle have truly embraced False Claims Act legislation.

However, while the federal False Claims Act has been quite successful, a significant lack of success in fighting fraud has, until very recently, characterized the Medicaid program. A 2003 Taxpayers Against Fraud report revealed that many times fewer Medicaid fraud dollars were being recovered than Medicare dollars.[3] This difference

3. *See* Andy Schneider, *Reducing Medicaid Fraud: The Potential of the False Claims Act* (June 2003), *available at* http://www.taf.org/publications/PDF/reducingmedicaidfraud.pdf (showing that the federal government was recovering 24 times more Medicare money under the FCA than Medicaid money, even though the two programs were roughly the same size).

derived from several problems, most of which have their root in the complications of the joint federal-state nature of the Medicaid program.

Recently, Congress sought to remedy this situation through section 6031 of the Deficit Reduction Act of 2005, which incentivizes States to pass their own FCAs and to use them to go after Medicaid fraud dollars.[4] Hopefully all States will enact FCAs that comply with the requirements of the Deficit Reduction Act, solidifying effective fraud fighting in America.

The Role of Taxpayers Against Fraud in Protecting the Act

Taxpayers Against Fraud (TAF) and its sister organization, TAF Education Fund, were created to protect the False Claims Act from special interests bent on weakening the new law. The first attacks came from the defense industry which sought weakening attempts from the Act in 1988 and 1990, and which then tried to get the courts to declare the False Claims Act unconstitutional. These attempts failed, thanks in part to a spirited defense put forth by friends and supporters of the FCA mobilized by Taxpayers Against Fraud.

In 1998, another attack against the FCA was launched, this time from the American Hospital Association. TAF joined with consumer and senior citizen groups to run full-page ads in *Roll Call* asking, "Remember when Congress used to be against fraud?" TAF pointed out, that in 1997 alone, prosecutors indicted 282 defendants for health fraud crimes, and opened more than 4,000 civil cases while regaining more than $1 billion for the U.S. treasury. That same year, the FBI and several other federal agencies served 35 warrants on the largest hospital chain in the world—an investigation that eventually recovered over $2 billion.

In the end, the Hospital Association's credibility failed in the face of overwhelming evidence, and the False Claims Act was unscathed. Since then, TAF has worked to defend and expand the Act in courts, in the States, and on Capitol Hill. Here is a brief look at some of TAF's efforts:

- TAF's research studies are quoted by *The Wall Street Journal and The New York Times* and have become well known among influential policy makers for highlighting the value of the FCA.
- TAF's *amicus curiae* briefs work to put individual cases within a larger context. One such brief was cited by the U.S. Supreme Court in the recent *Banks and Banaitis* decision, which excluded relators from that double-taxation ruling.
- TAF worked with Senator Grassley and his staff to repeal the unfair double taxation of *qui tam* relator awards.
- TAF works to defend the FCA in Washington against both overt and covert attempts to weaken the law, while pushing for increased enforcement and procedural clarifications to speed FCA recoveries.

4. For an additional information, including a model state FCA and a table on how much more money each state will get back if they have a qualifying state FCA law, please visit http://www.taf.org/cashbackstatefca.htm.

- TAF's web site, on-line newsletter, and *False Claims Act & Qui Tam Quarterly Review* are the leading edge of False Claims Act information, with each communications vehicle addressing different audiences. In print and on the web, Taxpayers Against Fraud remains the most comprehensive source of FCA information.
- TAF acts as the hub for the *qui tam* relator's bar, providing an online forum for practice advice and information sharing, message development, and continuing legal education through our annual conference and membership services.
- TAF is leading the push to get States to embrace their own False Claims Act laws, drafting model language and fighting off weakening amendments advanced by lobbyists for fraudsters.
- TAF is an active and trusted guide for prospective whistleblowers seeking to develop their own cases, find lawyers, and considering next steps. When a whistleblower is looking for guidance, TAF is often the first place they turn.

APPENDIX

Official U.S. Department of Justice Statistics
False Claims Act Settlements, 1987–2005

FY	New Matters[1]		Settlements & Judgments[2]					Relator Share Awards[3]		
			Non Qui Tam[2]	Qui Tam						
	Non Qui Tam	Qui Tam	Total	Where U.S. Intervened or Otherwise Pursued	Where U.S. Declined	Total	Total Qui Tam and Non Qui Tam	Where U.S. Intervened or Otherwise Pursued	Where U.S. Declined	Total
1987	361	66	86,479,949	0	0	0	86,479,949	0	0	0
1988	246	60	172,843,696	355,000	35,431	390,431	173,234,127	88,750	8,638	97,388
1989	236	95	197,202,180	15,111,719	0	15,111,719	212,313,899	1,446,770	0	1,446,770
1990	256	82	193,239,367	40,483,367	75,000	40,558,367	233,797,734	6,590,936	20,670	6,611,606
1991	243	90	270,945,467	69,705,771	69,500	69,775,271	340,720,738	10,667,537	18,750	10,686,287
1992	357	119	136,862,236	134,099,447	994,456	135,093,903	271,956,139	24,196,648	259,784	24,456,432
1993	329	132	187,234,076	171,438,383	5,978,000	177,416,383	364,650,459	25,636,134	1,756,902	27,393,036
1994	291	222	706,187,897	379,646,074	1,822,323	381,468,397	1,087,656,294	70,112,579	538,897	70,651,476
1995	236	277	279,522,866	245,463,627	1,813,200	247,276,827	526,799,693	46,475,379	517,238	46,992,617
1996	187	363	247,357,271	124,565,203	14,033,433	138,598,636	385,955,907	22,193,539	3,896,058	26,089,597
1997	185	533	468,549,359	622,666,381	7,136,144	629,802,525	1,098,351,884	65,938,921	1,981,346	67,920,267
1998	119	470	151,585,794	432,813,410	29,225,385	462,038,795	613,624,589	69,660,944	8,527,750	78,188,694
1999	141	481	196,613,009	454,268,984	62,509,047	516,778,031	713,391,040	49,414,054	17,593,462	67,007,516
2000	96	367	367,887,197	1,202,552,907	1,814,847	1,204,367,754	1,572,254,951	183,600,387	391,733	183,992,120
2001	88	309	494,496,974	1,175,104,715	125,726,963	1,300,831,678	1,795,328,652	187,475,850	30,294,843	217,770,693
2002	63	320	113,692,470	1,066,606,748	29,866,186	1,096,472,934	1,210,165,404	159,198,889	5,593,086	164,791,975
2003	93	334	703,003,368	1,429,086,502	87,140,070	1,516,226,572	2,219,229,940	308,280,386	19,322,900	327,603,286
2004	113	415	115,656,023	556,072,685	9,474,879	565,547,564	681,203,587	109,627,498	2,433,638	112,061,136
2005	100	394	276,794,983	1,119,347,507	22,396,229	1,141,743,736	1,418,538,719	160,199,544	6,175,933	166,375,477
Total	3,740	5,129	5,366,154,182	9,239,388,430	400,111,093	9,639,499,523	15,005,653,705	1,500,804,745	99,331,628	1,600,136,373

1. "New Matters" refers to newly received referrals and investigations, and newly filed *qui tam* actions.

2. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.

3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Governmental Perspectives

U.S. ex rel. Bridges v. Bryan Zatica and Macro-Z Technology Co.

EDITOR'S NOTE: At a recent ABA Conference on health care fraud, Michael F. Hertz, Director of the DoJ Commercial Litigation Branch, said that if you want to know the Government's position on the False Claims Act, you should review the DoJ's *amicus curiae* briefs. This year, with it being the 20th anniversary of the 1986 False Claims Act Amendments, it is time to take a close look at the DoJ's position on some of the most important legal issues.

The following *amicus curiae* brief is perhaps one of the best briefs written on the False Claims Act. It not only does a great job of diagramming the existing legal landscape, but it lays out the Government's position on such important issues as liability, damages, and scienter.

No. 05-55747

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. EARL BRIDGES,
Plaintiff-Appellant,

v.

BRYAN ZATICA and MACRO-Z TECHNOLOGY CO.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN
PARTIAL SUPPORT OF APPELLANT

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN PARTIAL SUPPORT OF APPELLANT

Pursuant to Fed. R. App. P. 29 and 28 U.S.C. 517, the United States submits this brief as amicus curiae in partial support of appellant.

INTEREST OF THE UNITED STATES

This case involves allegations under the False Claims Act, 31 U.S.C. 3729, et seq. ("FCA"), that a business certified as disadvantaged under Section 8(a) of the Small Business Act secured a Section 8(a) government contract by making false promises to limit subcontracting and perform a certain quantity of the work with its own employees. The United States declined to intervene in this case in district court, and takes no position on the ultimate question as to whether the evidence was sufficient to create factual questions for the jury as to defendants' False Claims Act liability. The United States files this brief as amicus curiae for the limited purpose of providing the Court with its position on the proper interpretation and application of the False Claims Act in cases premised on false promises made by government contractors. The United States has a substantial interest in the proper interpretation and application of the FCA because that statute is the government's primary tool to combat fraud and recover losses due to fraud in federally-funded programs.

STATEMENT OF FACTS

A. The False Claims Act

The False Claims Act, 31 U.S.C. 3729, et seq., prohibits, among other conduct, the submission of false or fraudulent claims for payment to the United States or the making of false statements for the purpose of causing a false claim to be paid. A violation of the FCA occurs when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1), or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. 3729(a)(2). In addition, the FCA prohibits conspiring to submit false claims and a variety of other practices that defraud the government of money or property. See 31 U.S.C. 3729(a)(3)-(7).

A person who violates the FCA is liable to the United States for civil penalties and for three times the amount of the government's damages. 31 U.S.C. 3729(a). However, "[n]o damages need be shown in order to recover the penalty." United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

Actions under the FCA may be brought either by the Attorney General of the United States or by a private person (known as a relator) in the name of the United States. 31 U.S.C. 3730(a) and (b)(1). See also Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 769–78 (2000). An FCA action brought by a relator is commonly referred to as a *qui tam* action. When a *qui tam* action is filed, the government may intervene and take over the case. 31 U.S.C. 3730(b)(2), (c)(3). If the government declines to intervene, the relator may conduct the litigation. If a *qui tam* suit results in damages or civil penalties, those damages and penalties are divided between the government and the relator. 31 U.S.C. 3730(d).

B. Government Contracts Awarded Under Section 8(a) of the Small Business Act

Congress enacted the Small Business Act in 1958, to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns." 15 U.S.C. 631(a). The Act created the Small Business Administration and charged it with carrying out the policies of the Act and issuing such rules and regulations as it deems necessary to fulfill its responsibilities. 15 U.S.C. 633(a), 634(b)(6).

Section 8(a) of the Small Business Act charges the SBA with creating a program to assist "socially and economically disadvantaged small business concerns." 15 U.S.C. 637(a)(1)(B). The purpose of this program is to "promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy," 15 U.S.C. 631(f)(2)(A), "promote the competitive viability of such concerns," id. 631(f)(2)(B), and expand the "procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals," id. 631(f)(2)(C). See also id. 637(a)(5), (a)(6)(A) (defining socially and economically disadvantaged individuals). One of the ways the Section 8(a) program advances these objectives is by providing Section 8(a) companies with the opportunity to obtain federal contracts, either on a sole-source basis or through competition restricted exclusively to Section 8(a) businesses. See id. 637(a)(1)(D), (a)(16)(A). SBA regulations pertaining to the Section 8(a) program are set forth at 13 C.F.R. Part 124. See also 48 C.F.R. 19.800 et seq. Section 8(a) contracts impose a number of requirements upon contractors that promote the objectives of the Section 8(a) program. The contracts thus incorporate a number of specified contract clauses that, among other things, impose limitations upon subcontracting. See, e.g., 13 C.F.R. 124.510(a), 13 C.F.R. 125.6. See also 48 C.F.R. 19.811–3 (Federal Acquisition Regulation ("FAR") setting forth required Section 8(a) contract clauses) . For instance, the FAR provisions incorporated into the contract at issue in the present case included provisions that: required the Section 8(a) contractor to perform at least 15 percent of the work under the contract, not including the cost of materials, with its own employees, 48 C.F.R. 52.219-14(b)(3); requiring the Section 8(a) contractor to obtain written approval from the SBA and the contracting officer before subcontracting any contractual requirements, 48 C.F.R. 252.219-7009(c); and requiring the contractor to "directly superintend the work or assign and have on the work site a competent superintendent," 48 C.F.R. 52.236-6. See Order Granting Defs.' Mot. for Judgment as a Matter of Law, District Court Record No. ("CR") 165 at 6 & n.4, 10 & n.7, 16 & n.17.

C. Proceedings Below

1. The present case involves a *qui tam* suit filed by relator Earl Bridges under the FCA against Macro-Z Technology Co. ("MZT") and its president, Bryan Zatica, and against Greg Harris Construction Co. ("GHC"), and John Harris, a director and principal of GHC. See Complaint, CR 1 at 1–2.[1] The United States declined to intervene in the case, CR 12, and the action proceeded on the merits between the relator and the defendants.

The relator's allegations stem from the U.S. Army Corps of Engineers' ("Corps") 1999 solicitation of bids from contractors to improve the banks of the Los Angeles River. Bidding was limited to firms that qualified as disadvantaged business enterprises under Section 8(a) of the Small Business Act, 15 U.S.C. 637(a)(1). See CR 1 at 2. Relator alleges that MZT, a participant in the Section 8(a) program, made false promises to the Corps to secure the contract, and that MZT and its president Bryan Zatica conspired with GHC and John Harris to make those false promises. Id. at 3–4; see also CR 165 at 1–2. The false promises pertained to the extent of the contract work that MZT would perform on the contract, as distinct from work that it would subcontract to GHC. See CR 1 at 3; CR 165 at 6–21. The thrust of the allegations is that MZT misrepresented the extent of its involvement and did not disclose that GHC, a non-Section 8(a) contractor, would perform virtually all work on the project.

1. Defendants GHC and John Harris are not parties to this appeal. Relator's Br. at 3.

2. After the district court denied in part and granted in part defendants' motions for summary judgment, see CR 120, the case proceeded to trial before a jury. See Reporter's Transcript ("RT") of Proceedings on April 5–7, 2005. After the relator completed his case in chief, the district court orally granted defendants' motion for judgment as a matter of law, RT 4/7/05 at 30, and issued its written Order explaining its decision in further detail six days later, CR 165.

The district court construed the relator's case to be premised upon a fraudulent inducement theory - that defendants MZT and Zatica made four false promises to win the contract. CR 165 at 6–7, 10, 13–14, 16–17. Those alleged false promises were:

(1) that MZT would perform 15 percent of the contract, excluding the cost of materials, with its own employees, CR 165 at 6–7; see 48 C.F.R. 52.219-14(b)(3);

(2) that MZT would obtain prior written approval of SBA before subcontracting the performance of any requirements under the contract to GHC, CR 165 at 10; see 48 C.F.R. § 252.219-7009(c);

(3) that MZT would, in accordance with the bid solicitation, employ a Contractor Quality Control System Manager, instead of subcontracting the position to John Harris of GHC, CR 165 at 13–14; and

(4) that MZT would directly superintend the project, rather than subcontracting that responsibility to GHC, CR 165 at 16–17; see 48 C.F.R. 52.2366.

With respect to each of the four allegedly false promises, the district court provided multiple independent reasons for holding that defendants were entitled to judgment as a matter of law. It held that the relator had failed to establish that, in fact, MZT ultimately failed to perform the assertedly false promises. See CR 165 at 8–9, 12. The district court also held that the relator had failed to present sufficient evidence that the defendants acted with the requisite knowledge of the falsity of their promises. See id. at 8 n.5, 11, 15, 17–18. With respect to MZT's promise to perform 15 percent of the cost of the contract with its own employees, for example, the district court held that the relator had "failed to adduce any evidence from which a reasonable jury could have concluded that the MZT defendants' certification * * * was an 'intentional, palpable lie.'" CR 165 at 7, quoting United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir.), cert. denied, 519 U.S. 865 (1996). The court reasoned that, even if "reckless disregard of one's ability to perform a promise can support liability under the FCA on a fraud in the inducement theory," the MZT defendants' failure "to read the ninety-nine FARs incorporated * * * into the contract by reference prior to submitting a bid and receiving the contract award" was, at most, negligence, not recklessness. Id. at 8, n.5.

The district court also found insufficient evidence to support the claim MZT falsely promised to employ a Contractor Quality Control System Manager, as the relator contended the bid solicitation required, when it intended to subcontract that position to John Harris of GHC. CR 165 at 15. The court held that the solicitation provisions at issue were ambiguous as to whether they permitted the employment of a subcontractor. Id. at 14. The court asserted that "[w]here there are reasonable grounds for disagreement regarding the meaning of a contractual provision, statements or promises regarding that provision are not considered false within the meaning of the FCA." Id. at 15.

The district court also granted judgment in favor of defendants on the claim that the MZT defendants conspired with the GHC defendants to make false claims based on the four false promises. CR 165 at 19–20.

Finally, the district court stated that, if it had "not found that defendants were entitled to judgment as a matter of law as to all of [the relator's] claims, it would have granted defendants' alternative motion for judgment as a matter of law on the issue of actual damages." CR 165 (Order) at 21. The court recognized that, if the relator had proved that MZT did not perform 15 percent of the contract with its own employees and instead contracted all the work to GHC, a non-Section 8(a) contractor, the record would support a finding that the Corps did not receive the full benefit of its bargain, because the latter's objectives included training and providing experience to a Section 8(a) contractor, as well as the completion of construction work. Ibid. Nevertheless, the court found no "evidence from which the jury could have found that the government suffered actual damages without resorting to speculation or guesswork." Id. at 22.

SUMMARY OF ARGUMENT

Although the United States takes no position on the ultimate question of whether this case should have been submitted to the jury, we submit this brief to present the Court with the United States' view on several analytical issues addressed in the district court's decision. To the extent that this Court's decision touches on these issues, the points of law discussed herein should be clarified.

1. a. The False Claims Act broadly prohibits "knowingly" obtaining government payments to which a party is not entitled. Unlike common-law fraud claims, which may require a showing of specific intent or actual knowledge, the FCA's statutory cause of action imposes liability where a defendant files a false claim for payment or makes a false statement to get a false claim paid with either actual knowledge of its falsity, or reckless disregard or deliberate ignorance as to its falsity. 31 U.S.C. 3729(a), 3729(b). This scienter standard applies to FCA claims where the factual allegations concern false promises and fraudulent inducement, just as it applies to other FCA claims. To the extent that language in the district court's decision suggests that a more stringent common-law scienter showing is required in the promissory fraud and fraudulent inducement contexts, this Court should clarify that the statutory language controls.

b. The district court held that, assuming that "reckless disregard" of the truth or falsity of defendants' promises would be sufficient to establish the requisite scienter, the relator had failed provide enough evidence to present a jury question on recklessness. The court specifically noted that the defendants' failure to read relevant contractual provisions and regulations was insufficient to establish recklessness under the evidence presented. That holding should not be read to suggest that failure to read the relevant regulations and contractual provisions necessarily precludes a finding of scienter in FCA cases, or that a defendant can insulate itself from FCA liability simply by "hiding its head in the sand" and failing to familiarize itself with its obligations. The statute clearly imposes FCA liability upon government contractors who engage in such "ostrich-like" behavior.

2. The district court analyzed this case solely under a "fraud in the inducement" theory based upon defendants' alleged false promises made at the time they bid and entered into the contract with the Army Corps of Engineers. Relator claims that those promises were false at the time they were made and induced the Corps to award a contract it would not otherwise have awarded. We note, however, that fraud in the inducement is not the only theory that potentially could support recovery under the False Claims Act. Even if a defendant's promise to comply with a condition of payment was true when originally made, a defendant can be subject to liability under the FCA if he later fails to fulfill the relevant promise and seeks payment without disclosing this change in circumstances. Similarly, even in the absence of an earlier promise, a government contractor who knowingly submits a claim for payment without satisfying the contractual requirements upon which payment is conditioned has submitted a false claim.

3. Defendants argued in part that they should not be liable under the FCA because certain contractual provisions and regulations that they are accused of violating were ambiguous. To the extent that the district court's decision could be read to suggest that such ambiguity is relevant to whether defendants' claims and statements were "false," the Court should clarify that, under its precedent, ambiguity may be relevant to whether a defendant acted with the requisite scienter, but it is not relevant to the question of whether the claim was false.

4. Finally, if the Court reaches the issue of damages, it should hold that the district court erred in finding that the relator failed as a matter of law to establish a basis for an award of actual damages. Defendants were not entitled to payment under the contract if, as alleged, they failed to satisfy central requirements on which the Section 8(a) contract was premised. Diverting federal funds from qualified disadvantaged small businesses to contractors that Congress did not wish to benefit from the Section 8(a) program effects a significant detriment to the United States.

ARGUMENT

I. In a False Claims Act Case, It Is the Act's Scienter Requirement That Applies, Regardless of the Factual Theory Under Which the Case Proceeds.

The False Claims Act expressly provides that specific intent to defraud is not required to establish a violation. 31 U.S.C. 3729(b). Rather, a claim or statement need only be "knowingly" false or fraudulent. 31 U.S.C. 3729(a). Within the meaning of the statute, "knowingly" means that a person, with respect to information, either "has actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. 3729(b). It is irrelevant if a common law cause of action involving similar factual allegations might be subject to a different scienter standard. This case was brought under the False Claims Act, not the common law, and the statutory standard plainly governs.

As the House Report accompanying the bill containing this language explains, the statutory definition extends liability not only to those who make claims or statements that are deliberately false, but also to those who make claims that they should be aware are false:

> [T]he committee intends not only to cover those individuals who file a claim with actual knowledge that the information is false, but also to confer liability upon those individuals who deliberately ignore or act in reckless disregard of the falsity of the information contained in the claim. It is intended that persons who ignore "red flags" that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act. This definition, therefore, enables the Government not only to effectively prosecute those persons who have actual knowledge, but also those who play "ostrich".

H. R. Rep. No. 99-660, at 21 (1986).

Some of the language in the district court's decision could be read to suggest that in a FCA case based on allegations of promissory fraud, proof of a specific intent to defraud is required. See CR 165 at 4 (stating that in a fraudulent inducement case based upon promissory fraud, "there must be proof of a fraudulent intent not to perform the promise at the time it is made"); see also id. at 7, n.5. We do not read the district court's decision to have held unequivocally that promissory fraud cases require a showing of "intentional" falsehood. Rather, we read the decision to invoke "intention" as a shorthand reference to the Act's scienter element. But to the extent the decision could be construed to impose a different standard, the statutory language plainly controls.

A. An FCA Action Premised Upon Promissory Fraud Requires a Showing of a "Knowing" False Statement, As That Term Is Defined in the Statute.

There is no basis for departing from the language of the False Claims Act in determining the showing necessary to establish scienter in an FCA case premised upon fraudulent inducement or promissory fraud. As observed in United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co., 183 F.3d 1088, 1092 (9th Cir. 1999), cert. denied, 530 U.S. 1203 (2000), this Court has "repeatedly emphasized [the] statutory language when describing the scienter requirement under the FCA."

Thus, the relator establishes a knowing violation based upon false promises by demonstrating that defendants made the relevant promises with either actual knowledge that they would not keep them, or with "reckless disregard" or "deliberate indifference" as to whether they would be able to keep them. See 31 U.S.C. 3729(b). The fact that a promise is forward-looking does not preclude application of this standard. As the Fourth Circuit explained in Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999), "an opinion or estimate carries with it 'an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it.'" The same reasoning applies here. Indeed, although the district court did not find the issue dispositive, it assumed, without deciding, that the scienter requirement could be satisfied by establishing "reckless disregard." CR 165 at 8, n.5.

While there are statements in some of this Court's decisions that, standing alone, could be read to suggest that the FCA requires an "intentional lie" to trigger liability, see United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir.), cert. denied, 519 U.S. 865 (1996), Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1478 (9th Cir. 1996), cert. denied, 519 U.S. 1115 (1997), this Court has since clarified that those statements should not be read to impose a specific intent requirement under the FCA or otherwise deviate from the clear statutory standard. C.W. Roen, 183 F.3d at 1092–93 ("While some of our cases may contain extraneous comments that might be read out of context to suggest that the FCA requires an intentional lie to trigger liability, those cases almost invariably reiterate the controlling statutory language that is determinative of their outcome."). To the extent the district court decision could be read to suggest that Hopper departs from the statutory standard, see CR 165 at 8 n.5, this Court should reiterate that, as the C.W. Roen Court made clear, any such conclusion is unjustified in light of the plain statutory language.

B. Failure to Read Relevant Contractual Provisions and Regulations May Be Evidence of a Knowing False Statement Under the FCA Standard.

Although the district court assumed that reckless disregard could support liability under the FCA on a fraudulent inducement theory, CR 165 (Order) at 8 n.5, 12 n.10, 17 n.19, it concluded that no reasonable jury could have found reckless disregard based upon the defendants' "failure to read the ninety-nine FARs incorporated * * * into the contract by reference prior to submitting a bid and receiving the contract award" and other evidence submitted. CR 165 at 8 n.5; see id. at 12 n.10, 17 n.19.

The district court determined that the record in this particular case was insufficient to support a jury finding of recklessness or deliberate ignorance. We express no position on whether that determination was well-founded. But a party's promise to comply with applicable legal requirements carries with it an obligation to know what those legal requirements are. If such a promise were made with reckless disregard or deliberate ignorance as to what those requirements entail, that would provide a basis for FCA liability. See United States v. Mackby, 261 F.3d 821, 828 (9th Cir. 2001) ("By failing to inform himself of [Medicare] requirements, particularly when twenty percent of Asher Clinic's patients were Medicare beneficiaries, [defendant] acted in reckless disregard or in deliberate ignorance of those requirements, either of which was sufficient to charge him with knowledge of the falsity of the claims in question."). As the Senate Report accompanying the 1986 amendments to the FCA explains, "'ostrich-like' conduct" is not a defense to the FCA, and "those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." S. Rep. No. 99-345, at 7 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272; see also id. at 14–15, 17, 20–21. See also Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 63 (1984) (noting general rule that "those who deal with the Government are expected to know the law").

II. Fraudulent Inducement Is Not the Only Theory Under Which the Relator's Allegations Could Give Rise to Liability Under the False Claims Act.

The district court assumed that the relator's claim was premised upon a "fraud in the inducement" theory of promissory fraud. See CR 165 at 4–6. As the court recognized, seeking payment under a contract procured through fraud or false statements violates the False Claims Act. See United States ex rel. Marcus v. Hess, 317 U.S. 537, 543–44 (1943) ("'The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. * * * This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment * * *."); Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991) ("A contract based on false information is a species of false claim * * *."); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 78788 (4th Cir. 1999) (seeking payment on contract that was "obtained originally through false statements or fraudulent conduct," violates FCA under a "fraud-inthe-inducement" theory). See also S. Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274 ("[E]very claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.").

In conducting its analysis, the district court required the relator to establish that defendants' contractual promise to obtain written approval of subcontracts was false at the time it was made. CR 165 at 11. This Court articulated this temporal requirement for falsity in United States ex rel. Hopper v. Anton, 91 F.3d at 1267, which involved alleged false promises made on certifications assertedly needed to maintain a school district's eligibility to receive federal funds. Notably, in Hopper, the Court concluded that the allegedly false promises were not false claims because, in fact, the promises were not a prerequisite to receipt of federal funds. See 91 F.3d at 1267. In any event, Hopper's statement that a "promise must be false when made," ibid., makes sense in the fraudulent inducement context, where the false statement causes the government to take action at the time the initial promise is made that it otherwise would not have taken (i.e., award a contract it would not otherwise have awarded). The relator in Hopper appears to have similarly suggested that the promise at issue had immediate significance, i.e., maintaining the defendant's eligibility to receive federal funds that would otherwise have been suspended. See 91 F.3d at 1267–68 (rejecting that allegation).

We note, however, that to the extent that relator's claim here was not limited to fraudulent inducement, Hopper is inapposite and application of its temporal limitation was misplaced.[2] Indeed, this Court has long recognized as a general matter that "[t]he test of whether a claim is false must be as of the date when the claim [for payment] is made." United States v. National Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956), cert. denied, 353 U.S. 930 (1957).

Assuming that the relator presented sufficient evidence to demonstrate that at the time defendants submitted claims for payment, they knew they had failed to keep their promise to comply with requirements on which contractual payments were conditioned, that failure could state an FCA claim regardless of whether the promise was false at the time it was made. A defendant's failure to disclose that he or she did not comply with an earlier promise on which payment is conditioned can be evidence that the claim for payment was false under 31 U.S.C. 3729(a)(1), or that the defendant used "a false record or statement * * * to get a false or fraudulent claim paid or approved by the Government" under 31 U.S.C. 3729(a)(2).

Stated another way, neither the objective reasonableness nor the subjective good faith of a defendant's initial promise will insulate a defendant from FCA liability if it fails to alert the government to changed circumstances that bear on its continued entitlement to payment. It is well-established in the common law that a failure to correct or update a prior statement may support a claim for fraud or misrepresentation if the statement is relevant to an ongoing transaction. See Harper, James and Gray, The Law of Torts § 7.14, at 474 (2d ed. 1986) ("A party has the duty to disclose facts discovered after having made a representation to another if one knows or believes that these facts make untrue or misleading the original statement * * *."). See also, e.g., Restatement (Second) of Torts, § 551(2) ("One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated * * * (b) any subsequently acquired information which he recognizes as making untrue or misleading a previous representation which when made was true or believed to be so."); Id., Comment (f) ("One who having made a representation which when made was true or believed to be so remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him is morally and legally in the same position as if he knew that his statement was false when made."). This duty to update has been applied to forward looking statements involving future events as well as to historical statements of fact. See, e.g., In Re Time Warner Securities Lit., 9 F.3d 259, 267 (2nd Cir. 1993) ("We agree that a duty to update opinions and projections may arise if the original opinions and projections have become misleading as the result of intervening events."); Backman v. Polaroid Corp., 910 F.2d 10, 17–18 (1st Cir. 1990) ("[I]n special circumstances, a statement correct at the time, may have forward intent and connotation upon which the parties may be expected to

2. Although the trial focused (without objection) upon a fraudulent inducement theory, the relator does not appear to have expressly limited his case exclusively to the inducement context. While the relator's counsel appears to have agreed that he was obliged to establish that the promises were false at the time they were made, he also argued that the defendants had an obligation to inform the government if they could not comply with earlier promises. See RT, 4/6/05, at 227.

rely. If this is a clear meaning, and there is a change, correction, more exactly, further disclosure, may be called for.").

The duty to update or disclose non-compliance with a promise applies with particular force in the FCA context. Unlike an action for common law fraud, an FCA claim premised on a promise to perform necessarily involves a subsequent act by the defendant beyond the promise itself—the submission of a claim for payment. As the D.C. Circuit has explained, withholding of "'information critical to the decision to pay * * * is the essence of a false claim.'" United States v. TDC Mgmt. Corp., Inc., 288 F.3d 421, 426 (D.C. Cir. 2002) (citation omitted). See also, e.g., United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 415 (6th Cir. 2002) (FCA "liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned"). A defendant's non-disclosure, at the time payment is sought, of the fact that he failed to fulfill a previous promise upon which entitlement to payment is conditioned, is functionally equivalent to an explicit false representation or certification that he is entitled to payment. In both cases, the government has been induced to pay money that it would not have paid if the defendant had disclosed the true set of facts, which is the essence of an FCA violation. See United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) (FCA's purpose is to prevent "all fraudulent attempts to cause the Government to pay out sums of money").

Indeed, although the trial focused upon the promises defendants made at the time the contract was entered, we discern no obvious reason that the case needed to be so limited. Assuming that the evidence at trial was sufficient to establish that defendants knowingly submitted payment requests without satisfying the contractual requirements upon which payment was conditioned, those requests would be false claims regardless of whether false promises had earlier been made. Such conduct would fall squarely within 31 U.S.C. 3729(a)(1), which prohibits a person from "knowingly present[ing], or caus[ing] to be presented" to the government "a false or fraudulent claim for payment or approval." See S. Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274 (explaining that "a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation," and noting that "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program.") (emphasis added). See also, e.g., United States ex rel. Augustine, 289 F.3d at 415; Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519, 531–33 (10th Cir. 2000).

III. The Fact That a Statute, Regulation, or Contractual Requirement Is Ambiguous May Be Relevant to Whether a Defendant Acted With the Requisite Scienter, But It Is Not Relevant to Falsity.

The district court held that because portions of the contract solicitation pertaining to employment of a quality control system manager were ambiguous, the relator failed to establish a basis for finding an FCA violation based on MZT's failure to have an employee rather than a subcontractor serve that function. CR 165 at 15. The court then asserted that "[w]here there are reasonable grounds for disagreement regarding the meaning of a contractual provision, statements or promises regarding that provision are not considered false within the meaning of the FCA." Ibid. (emphasis added). This statement may cause some confusion as to how FCA claims should be analyzed, because, as this Court has held, ambiguity as to applicable law may be relevant to whether a defendant acted with the relevant scienter, not to whether the claim or statement at issue was false. Indeed, the authorities cited by the district court for its statement themselves appear to have been discussing scienter. See id. at 15.

Thus, in United States ex rel. Oliver v. The Parsons Co., 195 F.3d 457, 463 (9th Cir. 1999), cert. denied, 530 U.S. 1228 (2000), this Court held that ambiguity of a regulation (a federal cost accounting standard) does not preclude a finding that a party's assertion of compliance with the regulation was false. 195 F.3d at 462–63. The Court explained that "it is [the defendant's] compliance with these regulations, as interpreted by this court, that determines whether its accounting practices resulted in the submission of a 'false claim' under the Act." Id. at 463. While "the reasonableness of [the defendant's] interpretation of the applicable accounting standards may be relevant to whether it knowingly submitted a false claim, the question of 'falsity' itself is determined by whether [the defendant's] representations were accurate in light of applicable law." Ibid. (emphasis added).[3] The Court explained that if ambiguity were relevant to falsity rather than scienter, a defendant who submitted a claim with the requisite knowledge of its falsity nevertheless would be able to "avoid liability by successfully arguing that its claim reflected a 'reasonable interpretation' of the requirements." Id. at 463 n.3.

IV. The United States Is Entitled to Actual Damages When It Makes Payments on a Contract That Was Awarded on the Basis of False or Fraudulent Statements.

Finally, should the Court reach the issue, it should hold that the district court erred in holding that defendants were entitled to judgment on the issue of actual damages. CR 165 (Order) at 21.[4] "'Ordinarily the measure of the government's damages [under the FCA] would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful.'" United States v. Mackby, 339 F.3d 1013, 1018 (9th Cir. 2003) (citation omitted), cert. denied, 541 U.S. 936 (2004). If defendants obtained the contract under false pretenses—e.g., based on their knowingly false assurance that at least 15 percent of the work would be performed by a Section 8(a)-eligible business under the Small Business Act—then defendants had no right to subsequently confer any services on the government or receive payment for those services. The jury therefore could have awarded damages of the entire amount of the contract price paid by the government, trebled. See 31 U.S.C. 3729(a).

3. The mere existence of an ambiguity would not be relevant to scienter, however, if the defendant was unaware of the asserted ambiguity and did not rely upon it in good faith when submitting the claim.

4. Even if the district court were correct that the relator had failed to prove any actual damages, that alone would not provide a basis for judgment as a matter of law. As explained at p. 3, supra, this Court has recognized that "[n]o damages need be shown in order to recover the [statutory] penalty" for a False Claims Act violation. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

The fact that the construction work contemplated under the contract was completed does not foreclose this result. In Mackby, 339 F.3d at 1018–19, this Court found, for purposes of evaluating an Excessive Fines Clause challenge to an FCA judgment, that the government was damaged by the full amount paid to an ineligible Medicare provider notwithstanding that defendant's physical therapy services had been competently provided to Medicare patients. The same reasoning applies here.[5] An alternative measure of damages would be the full contract price, trebled, minus an offset for the value, if any, of the services defendants provided under the contract. See United States v. Bornstein, 423 U.S. 303, 316 (1976) ("[I]n computing the [then] double damages authorized by the [FCA], the Government's actual damages are to be doubled before any subtractions are made for compensatory payments previously received by the Government from any source.").

In any event, even if the relator had failed to adduce sufficient evidence to justify a damages award in the amount of the contract price, it is clear that, whatever the proper measure of the government's damages might be based upon the evidentiary showing in a particular case, the damages should not be zero. Diverting federal funds from qualified disadvantaged small businesses to contractors that Congress did not wish to benefit from the Section 8(a) program effects a real and significant impairment of federal interests. A defendant who fraudulently obtains contract payments that were intended to benefit a different class of recipients should not escape liability for actual damages entirely. Limiting recovery to statutory penalties would neither compensate the government for its loss, nor deter government contractors from fraudulent conduct.

5. See also Peterson v. Weinberger, 508 F.2d 45, 52 (5th Cir. 1975) (holding in FCA case that government was damaged by full amount paid to ineligible Medicare provider for physical therapy services notwithstanding that "the physical therapy services were performed by qualified people [and] the patients receiving these services were entitled to them under Medicare"), cert. denied, 423 U.S. 830 (1975); cf. United States v. Brothers Constr. Co. of Ohio, 219 F.3d 300, 317–18 (4th Cir.) (holding that, under criminal sentencing guidelines, the government's loss was the full amount paid to defendant, a Section 8(a) disadvantaged contractor, notwithstanding that the work was satisfactorily performed by a different Section 8(a) contractor, because the government funds were fraudulently diverted from the intended beneficiary), cert. denied, 531 U.S. 1037 (2000).