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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TABLE OF CONTENTS

FROM THE EDITOR

Over the last twenty years, judicial decisions have poked small holes into the outer shell of the FCA vessel, causing the Act to drift slightly off the course that Congress charted in 1986. As the name implies, the FCA Correction Act of 2007 seeks to set the Act back on the correct fraud-fighting course by patching some of these holes.

Now, as we voyage into the next twenty years of FCA enforcement, we will most assuredly face turbulent waters, regardless of whether or not these amendments pass. However, we should be buoyed by the fact that we are increasingly coming together as one unit under one flag of shared interest and camaraderie. Indeed, whereas the 1986 *qui tam* community ventured out with barely a dozen on board, we have grown into a formidable force of nearly 400, dedicated to working in unison toward one common goal of fraud fighting in America.

Today, my hope is that we will further strengthen our resolve to build an even stronger legal community for tomorrow. In time, this devotion to sustainability will make the government's intervention decision largely irrelevant to the success of future FCA *qui tam* actions.

I want to express my deepest gratitude to those who fight the good fight against fraud and who have committed to the goal of making our collective vessel seaworthy.

To Senators Grassley, Durbin, Spector and Leahy, thank you for having the courage to protect the federal fisc and America's courageous whistleblowers by authoring the False Claims Act Corrections Act of 2007.

Best wishes,

Jeb White
jwhite@taf.org

FALSE CLAIMS ACT CORRECTIONS ACT OF 2007

To amend the False Claims Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `False Claims Act Correction Act of 2007'.

SEC. 2. FALSE CLAIMS GENERALLY.

Section 3729 of title 31, United States Code, is amended—

(1) by striking subsection (a) and inserting the following:

`(a) Liability for Certain Acts-

`(1) IN GENERAL- Subject to paragraph (2), any person who—

`(A) knowingly presents, or causes to be presented a false or fraudulent claim for Government money or property for payment or approval;

`(B) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim for Government money or property paid or approved;

`(C) conspires to commit any substantive violation set forth in this section or otherwise to defraud the Government by getting a false or fraudulent claim for Government money or property paid or approved;

`(D) has possession, custody, or control of Government money or property and, intending to defraud the Government, to retain overpayment, or knowingly to convert the money or property, permanently or temporarily, to an unauthorized use, fails to deliver or return, or fails to cause the return or delivery of the money or property, or delivers, returns, or causes to be delivered, or returned less money or property than the amount due or owed;

`(E) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

`(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

`(G) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government 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, its grantee, or administrative beneficiary sustains because of the act of that person.

`(2) LESSER PENALTY- If the court finds that—

`(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

`(B) such person fully cooperated with any Government investigation of such violation; and

`(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government, its grantee or administrative beneficiary sustains because of the act of the person.

`(3) COSTS OF CIVIL ACTIONS- A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages'.'.

(2) by striking subsections (b) and (c) and inserting the following:

`(b) Definitions- For purposes of this section—

`(1) the terms `known', `knowing', and `knowingly' mean that a person, with respect to information—

`(A) has actual knowledge of the information;

`(B) acts in deliberate ignorance of the truth or falsity of the information; or

`(C) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required;

`(2) the term `Government money or property' means—

`(A) money or property belonging to the United States Government;

`(B) money or property the United States Government provides, has provided, or will reimburse to a contractor, grantee, agent or other recipient to be spent or used on the Government's behalf or to advance Government programs;

`(C) money or property belonging to any administrative beneficiary, as defined herein;

`(3) the term `claim' includes any request or demand, whether under a contract or otherwise, for Government money or property; and

`(4) the term `administrative beneficiary' means any natural person or entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, collects, possesses, transmits, administers, manages, or acts as custodian of money or property.';

(3) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively; and

(4) in subsection (c), as redesignated, by striking `subparagraphs (A) through (C) of subsection (a)' and inserting `subsection (a)(2)'.

SEC. 3. GOVERNMENT RIGHT TO DISMISS CERTAIN ACTIONS.

Section 3730(b) of title 31, United States Code, is amended by adding at the end thereof the following:

`(6)(A) Not later than 60 days after the date of service under paragraph (2), the Government may move to dismiss from the action the qui tam relator that is an employee of the Federal Government if—

`(i) all the necessary and specific material allegations contained in such action were derived from an open and active fraud investigation by the Government; or

`(ii) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States, and none of the following has occurred:

`(I) In a case in which the employing agency has an inspector general, such person, before bringing the action—

`(aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed to such inspector general; and

`(bb) notified in writing the person's supervisor and the Attorney General of the disclosure under division (aa).

`(II) In a case in which the employing agency does not have an inspector general, such person, before bringing the action—

`(aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed, to the Attorney General; and

`(bb) notified in writing the person's supervisor of the disclosure under division (aa).

`(III) Not less than 12 months (and any period of extension as provided for under subparagraph (B)) have elapsed since the disclosure of information and notification under either subclause (I) or (II) were made and the Attorney General has not filed an action based on such information.

`(B) Prior to the expiration of the 12-month period described under subparagraph (A)(ii)(III) and upon notice to the person who has disclosed information and provided notice under subparagraph (A)(ii) (I) or (II), the Attorney General may file a motion seeking an extension of such 12-month period. Such 12-month period may be extended by a court for not more than an additional 12-month period upon a showing by the Government that the additional period is necessary for the Government to decide whether or not to file

such action. Any such motion may be filed in camera and may be supported by affidavits or other submissions in camera.

`(C) For purposes of subparagraph (A), a person's supervisor is the officer or employee who—

`(i) is in a position of the next highest classification to the position of such person;

`(ii) has supervisory authority over such person; and

`(iii) such person believes is not culpable of the violation upon which the action under this subsection is brought by such person.

`(D) A motion to dismiss under this paragraph shall set forth documentation of the allegations, evidence, and information in support of the motion.

`(E) Any person bringing a civil action under paragraph (1) shall be provided an opportunity to contest a motion to dismiss under this paragraph. The court may restrict access to the evidentiary materials filed in support of the motion to dismiss, as the interests of justice require. A motion to dismiss and papers filed in support or opposition of such motion shall not be—

`(i) made public without the prior written consent of the person bringing the civil action; and

`(ii) subject to discovery by the defendant.

`(F) If the motion to dismiss under this paragraph is granted, the matter shall remain under seal.

`(G) No later than 6 months after the date of the enactment of this paragraph, and every 6 months thereafter, the Department of Justice shall report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives relating to—

`(i) the cases in which the Department of Justice has filed a motion to dismiss under this paragraph;

`(ii) the outcome of such motions; and

`(iii) the status of false claims civil actions in which such motions were filed'.'.

SEC. 4. BARRED ACTIONS.

(a) Provisions Relating to Actions Barred- Section 3730(b)(1) of title 31, United States Code, is amended by adding at the end the following: `No claim for a violation of section 3729 may be waived or released by any action of any person, except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section. Nothing in this section shall be construed to limit the ability of the United States to decline to pursue any claim brought under this subchapter'.'.

(b) Dismissal- Section 3730(e)(4) of title 31, United States Code, is amended to read as follows:

`(4)(A) Upon timely motion of the Attorney General, a court shall dismiss an action or claim brought under section 3730(b) if the allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure of allegations or transactions in a Federal criminal, civil, or administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media.

`(B) In this paragraph:

`(i) The term `public disclosure' includes only disclosures made on the public record or that have otherwise been disseminated broadly to the general public.

`(ii) The person bringing the action does not create a public disclosure by obtaining information from a Freedom of Information Act request or from information exchanges with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed.

`(iii) An action or claim is based on a public disclosure only if the person bringing the action derived his knowledge of all essential elements of liability of the action or claim alleged in his complaint from the public disclosure.'.

(c) Qui Tam Awards- Section 3730(d)(3) of title 31, United States Code, is amended to read as follows:

`(3)(A) Whether or not the Government proceeds with the action, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which a person would otherwise receive under paragraph (1) or (2) of this subsection (taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation), if the court finds that person—

`(i) planned and initiated the violation of section 3729 upon which the action was brought; or

`(ii) derived the knowledge of the claims in the action primarily from specific information relating to allegations or transactions (other than information provided by the person bringing the action) that the Government publicly disclosed, as that term is defined in subsection (e)(4)(A), or that the Government disclosed privately to the person bringing the action in the course of its investigation into potential violations of this subchapter.

`(B) If the person bringing the action is convicted of criminal conduct arising from the role of that person in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.'.

SEC. 5. RELIEF FROM RETALIATORY ACTIONS.

Section 3730(h) of title 31, United States Code, is amended to read as follows:

`(h) Relief From Retaliatory Actions-

`(1) IN GENERAL- Any employee, government contractor, or agent shall be entitled to all relief necessary to make that employee, government contractor whole, if that employee, government contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, government contractor, or agent on behalf of the employee, government contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

`(2) RELIEF- Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, government contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.'.

SEC. 6. STATUTE OF LIMITATIONS.

Section 3731(b) of title 31, United States Code, is amended to read as follows:

`(b)(1) A civil action under section 3730 may not be brought more than 10 years after the date on which the violation of section 3729 or 3730 is committed.

`(2) Upon intervention, the Government may file its own complaint in intervention or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.'.

SEC. 7. CIVIL INVESTIGATIVE DEMANDS.

Section 3733(a)(1) of title 31, United States Code, is amended—

(1) in the matter preceding subparagraph (A), by inserting `, or a designee (for purposes of this section),' after `Whenever the Attorney General'; and

(2) in the matter following subparagraph (D), by—

(A) striking `may not delegate' and inserting `may delegate'; and

(B) adding at the end the following: `Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.'.

Recent False Claims Act & *Qui Tam* Decisions

JULY 1–OCTOBER 31, 2007

STATUTORY INTERPRETATIONS

A. Section 3729(a)(7) Reverse False Claim

U.S. ex rel. Little v. Eni Petroleum Co., Inc., 2007 WL 2407088 (W.D. Okla. Aug. 22, 2007)

An Oklahoma district court dismissed a reverse FCA *qui tam* action, which alleged that an oil and gas company falsely certified that calculating and reporting interest due on prior royalty underpayments would impose a hardship. The court found that a § 3729(a)(7) "obligation to pay" did not arise, for the allegedly false statements made no impact on whether the defendant would ultimately be obligated to pay. The court noted that the Secretary of the Interior Department is required to calculate the interest due on royalty underpayments, regardless of the companies' calculations.

U.S. ex rel. Rutz v. Village of River Forest, 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007)

After the city ignored his concerns, a city employee filed a Section 3729(a)(7) reverse FCA action, alleging that the grantee-police department had filed a bogus status report to conceal the fact that it had misappropriated grant funds. Reading a "claim" requirement into Section 3739(a)(7), an Illinois district court dismissed the suit, for the status report did not "request" additional money from the government.

B. Section 3730(c)(5) Alternative Remedy

U.S. ex rel. Hefner v. Hackensack University Medical Center, 2007 WL 2034087 (3d Cir. July 17, 2007)

The Third Circuit, finding that the relator failed to satisfy the FCA scienter element, affirmed a New Jersey district court's summary judgment dismissal of a *qui tam* action, where the relator alleged that a healthcare provider was reckless in not installing an adequate system for catch billing errors. In the alternative, the relator argued that he had, at least, a right to a share of an earlier government settlement. The court, however, pointed to the language of the Section 3730(c)(5) alternate remedy provision in stressing that a relator's rights in an alternate remedy proceeding are the "same rights" that the relator would have had if the action had proceeded under the FCA. Accordingly, because the relator did not raise an actionable FCA claim, the court ruled that he could not obtain a share of the alternate remedy.

U.S. ex rel. Hendow v. University of Phoenix, 2007 WL 2389842 (E.D. Cal. Aug. 20, 2007)

While *qui tam* relators were successfully appealing the dismissal of their FCA action against a for-profit university, the U.S. Department of Education (DOE) administratively settled the allegations for $9.8 million. The defendant-university, pointing to the Section 3730(c)(5) alternate remedy provision, argued that the relators' claims were now barred as moot and that the relators were limited to their share of the $9.8 million administrative settlement. A California district court, rejecting the defendant's argument, observed that the DOE settlement agreement explicitly excluded the defendant's potential FCA liability. The court further noted that the FCA "commits exclusive authority to settle…claims to the Attorney General," and the administrative settlement was entered into without the "knowledge of the Attorney General."

C. Section 3730(d)(1) Attorneys' Fees & Expenses

U.S. ex rel. Greendyke v. CNOS, P.C., 2007 WL 2908414 (D.S.D. Sept. 27, 2007)

Over the defendant's objection that the motion was untimely, a South Dakota district court granted a relator's motion for attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d)(1). The court found that the court's order dismissing the settled *qui tam* action did not trigger the requirement to file a motion for attorney fees within fourteen days after the entry of the order. The court noted that there were still issues before the court, including the amount of attorneys' fees the defendant would owe the relator and the amount of the relator's share.

D. Section 3731(d)(1) Collateral Estoppel

United States v. Convalescent Technologies, Inc., 2007 WL 2090210 (E.D.N.C. July 19, 2007)

After a jury found an ambulance transportation company guilty of 343 criminal health care violations, the government entered a summary judgment motion under the civil FCA, arguing that the criminal convictions for health care fraud have collateral effect under 31 U.S.C. § 3731(d), which prevents the defendants from denying FCA liability. While a North Carolina district court noted that an FCA violation and a criminal charge of health care fraud have different elements, it found that all elements of an FCA claim were presented to and decided by the jury in the criminal case. However, when it came to calculating the civil penalties for the FCA violations, the court observed that while the defendants were convicted of 343 counts of health care fraud, the jury never determined the exact number of false claims actually submitted to the government. Accordingly, the court granted the summary judgment motion for a single FCA violation, but encouraged the government to establish its right to recover for additional alleged FCA violations.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Boothe v. Sun Healthcare Group, Inc., 2007 WL 2247666 (10th Cir. Aug. 7, 2007)

The Tenth Circuit affirmed in part and reversed in part a New Mexico district court's dismissal of an FCA *qui tam* action, which had alleged ten distinct FCA claims against a defendant-healthcare provider. Pointing to the "claim-by-claim" FCA public disclosure bar inquiry recently adopted by the U.S. Supreme Court *Rockwell* decision, the court of appeals rejected the lower court's holding that a deficiency in one claim precludes jurisdiction over all claims joined in the same lawsuit. Highlighting that the lower court dismissed the suit under the FCA public disclosure bar based on only three of the claims, the Tenth Circuit remanded the case and held that an independent jurisdictional analysis of the remaining seven claims was needed.

U.S. ex rel. Montgomery v. St. Edward Mercy Medical Center, 2007 WL 2904111 (E.D. Ark. Sept. 28, 2007)

An Arkansas district court ruled that the FCA public disclosure bar precluded a non-intervened FCA suit where a relator amended his original complaint with information supplied by the federal government. The court ruled that a "public" disclosure had occurred, even though the relator had signed a confidentiality agreement with the government that explicitly stated that he was "providing services to the government in support of a civil law enforcement investigation."

U.S. ex rel. Wilson v. Maxxam Inc., 2007 WL 2781169 (N.D. Cal. Sept. 20, 2007)

Even though previous lawsuits generally disclosed the fraud to the public, a California district court ruled that the FCA public disclosure bar did not preclude a relator's *qui tam* suit, for the lawsuits did not contain enough information to allow the government to pursue an investigation into the particular fraud alleged by the relator. Moreover, the court found that the state government employee-relator could satisfy the "voluntariness" prong of the Section 3730(e)(4)(B) original source exception, for only *federal* auditors are compelled by the terms of their employment to disclose fraud on the federal government. Lastly, holding that the Section 3731(b)(2) three-year tolling provision applied to non-intervened *qui tam* suits the court found that the action was timely.

U.S. ex rel. Rose v. East Texas Medical Center Regional Healthcare System, 2007 WL 2350648 (E.D. Tex. Aug. 14, 2007)

A Texas district court rejected an FCA defendant-county hospital's argument that the FCA public disclosure bar applied when the hospital's board meeting broadly discussed the transactions underlying the relator's *qui tam* complaint. Specifically, the court ruled that a Section 3730(e)(4) "administrative hearing" had not occurred, for while the proceeding was open to the public, there was no evidence that the meeting was an extensive proceedings or that the meeting invited or received public comment.

U.S. ex rel. Smith v. New York Presbyterian Hospital, 2007 WL 2142312 (S.D.N.Y. July 18, 2007)

A radiologist filed an FCA *qui tam* action against two hospitals, alleging that the hospitals fraudulently received Medicare and Medicaid payments for two-component radiological studies, by submitting for the entire study even though only the first component was completed at the time of billing. The defendants argued to a New York district court that the FCA public disclosure bar precluded the suit, for the relator had filed a similar suit against other hospitals in another court. The court, however, noting that the earlier suit made no mention of the defendants in the present case, rejected this application of the FCA public disclosure bar. Ultimately, though, the court found that the complaint failed to satisfy the Rule 9(b) particularity requirements, for it did not identify any of the individual employees involved in the submission of the allegedly fraudulent claims and the complaint did not identify the amounts or the dates of the claims.

U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp., 2007 WL 2039544 (D.D.C. July 17, 2007)

A *qui tam* relator brought an action against a single hospital of a large hospital chain, alleging that the hospital was impermissively inflating costs so as to obtain a higher Medicare reimbursement rate in subsequent years. After newspaper articles chronicled similar schemes taking place at other branch hospitals, the relator filed an amended complaint that expanded her allegations to include these hospitals. A District of Columbia district court, following a recent U.S. Supreme Court ruling that demands a claim-by-claim analysis for FCA public disclosure bar issues, held that the additional hospital-allegations were barred. Moreover, because the relator did not assert any direct knowledge of anything that took place outside of the original hospital, the court ruled that he did not qualify for the § 3730(e)(4)(B) original source exception to the FCA public disclosure bar.

U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York, 2007 WL 2012901 (S.D.N.Y. July 13, 2007)

In support of its investigation and action against a New York county, a relator-organization obtained state administrative reports through a Freedom of Information Law

request. A New York district court, in rejecting the defendant-county's motion to dismiss, ruled that responses to a FOIA-type state law are not a *per se* "public disclosure" under the FCA public disclosure bar. Moreover, dissecting the exact language of the FCA public disclosure bar, the court held that the disclosure of *state* administrative reports does not trigger the bar, for it only applies to administrative reports that originate with the *federal* government.

U.S. ex rel. McBride v. Halliburton Co., 2007 WL 1954441 (D.D.C. July 5, 2007)

A former employee of an Iraq War contractor brought an FCA *qui tam* action against the company, alleging, *inter alia*, that it was overbilling the U.S. military. Pointing to several newspaper articles speculating about its corrupt practices, the company argued to a District of Columbia district court that the FCA public disclosure bar precluded the *qui tam* suit. The court, however, disagreed and found that the articles did not sufficiently disclose the particulars of the relator's allegations. However, when the relator sought to add additional relator-plaintiffs to support his allegations, the court ruled that the FCA public disclosure bar applied, for "substantially similar" allegations had already been disclosed by the unsealing the relator's original complaint. Moreover, the proposed additional relators did not qualify for the FCA public disclosure bar's original source exception, for they had not informed the government prior to filing their *qui tam* complaints.

U.S. ex rel. Fried v. Hudson Independent School District, 2007 WL 3217528 (E.D. Tex. Oct. 26, 2007)

Relators brought an FCA *qui tam* action against a Texas school system, alleging that the system's practice of hiring retired teachers for one day for sham positions defrauded the federal government of Social Security dollars. Highlighting a previous GAO report discussing the potential abuse of a "one day hiring plan," a Texas district court ruled that the FCA public disclosure bar precluded the relator's suit, even though the GAO report did not specifically mention the defendant. The relators countered that they had uncovered a previously undisclosed wrinkle to the fraud, namely that the employees were placed into sham, part-time positions. However, the court, maintaining that the relators only discovered this information via a FOIA request, ruled that the FCA public disclosure bar still applied under the controlling case law, which considers a response to a FOIA request a "public" disclosure.

U.S. ex rel. Kennedy v. Aventis Pharmaceuticals, Inc., 2007 WL 3145010 (N.D. Ill. Oct. 23, 2007)

FCA defendant-pharmaceutical companies filed a motion for reconsideration, requesting an Illinois district court to re-examine whether a *qui tam* action alleging off-label promotions survived the FCA public disclosure bar and Rule 9(b) scrutiny. Noting that the recent U.S. Supreme Court *Rockwell* decision requires a claim-by-claim analysis, as opposed to a count-by-count analysis, the court reconfirmed that

the relators overarching allegation cleared the FCA public disclosure bar. Moreover, the court once again maintained that the Rule 9(b) standards should be relaxed where the relator lacks access to all the facts necessary to detail his claim. Thus, even though the relator did not detail a specific claim submitted to the government, the court ruled that the action satisfied Rule 9(b), for the former sales representative-relator did not have access to actual medical claims.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

Thompson v. Quorum Health Resources, LLC, 2007 WL 2815972 (W.D. Ky. Sept. 27, 2007)

A Kentucky district court, highlighting that an FCA anti-retaliation claim can only be brought against one's *employer*, dismissed a plaintiff's suit brought against his employer's parent company.

U.S. ex rel. Marchese v. Cell Therapeutics, Inc., 2007 WL 2572347 (W.D. Wash. Sept. 6, 2007)

Ruling that the "most analogous" New York State law was a statute with a three-year statute of limitations period, a Washington district court dismissed a four-year old FCA anti-retaliation action for being untimely.

U.S. ex rel. Cody v. Computer Sciences Corporation, 2007 WL 2935019 (D.D.C. Oct. 9, 2007)

Citing numerous allegations of fraud on the government and repeated complaints to his managers about his employer's fraudulent practices, a terminated employee filed an FCA anti-retaliation suit against his former employer. A Massachusetts district court, in denying the defendant's motion to dismiss, determined that the plaintiff had sufficiently stated a claim, particularly at this early stage of the litigation.

COMMON DEFENSES TO FCA ACTIONS

A. Section 3731(b) Statute of Limitations

U.S. ex rel. Lewis v. Walker, 2007 WL 2713018 (M.D. Ga. Sept. 14, 2007)

A Georgia district court, in ruling that the FCA public disclosure bar did not preclude the relator's non-intervened suit, observed that while the relator relied on public information, his complaint disclosed *allegations* that had not been previously disclosed to the public. Moreover, even though the allegations were over six years old, the court ruled that the complaint was timely, for the Section 3731(b)(2) three-year tolling provision applies to intervened *and* non-intervened *qui tam* suits.

U.S. ex rel. Barys v. Vitas Healthcare Corporation, 2007 WL 2310862 (S. D. Fla. July 25, 2007)

The government brought an FCA action against a company and its CEO, alleging that the company received money under General Services Administration (GSA) contracts through bribery and overbilling. The defendants unsuccessfully argued to a Pennsylvania district court that most of the claims were untimely because the violations occurred over six years ago and that the GSA Inspector General had began an investigation into the claims over three years ago. The court concluded that the applicability of the Section 3731(b)(3) three-year tolling provision is a partly fact-driven inquiry that could not be decided at the pleading stage. Moreover, the court seemingly gave some weight to the government's argument that merely *beginning* an investigation does not start the clock on the three-year tolling provision.

B. Res Judicata

Cole v. Board of Trustees of the University of Illinois, 497 F.3d 770 (7th Cir. Aug. 16, 2007)

The Seventh Circuit, affirming an Illinois district court's decision to dismiss an FCA *qui tam* and anti-retaliation action, ruled that these claims were barred by *res judicata*, for they "could and should have been asserted in her first suit along with her Title VII claim." Engaging in a fact-intensive dissection of her previously settled Title VII action, the court of appeals determined that the factual allegations raised in this earlier suit were nearly identical to those raised in her present FCA action. In turn, according to the Seventh Circuit, *res judicata* applied because the FCA claims emerged from the "same core of operative facts as that earlier action."

C. Absence of a "False Claim"

U.S. ex rel. Howard v. Urban Investment Trust, Inc., 2007 WL 2893031 (N.D. Ill. Sept. 28, 2007)

A *qui tam* relator brought an FCA action against her former employer-bank, alleging that it made false records to conceal the fact that it was embezzling HUD funds. In its motion to dismiss, the defendant argued that there was no requisite "claim" presented to the government. The court, in denying the motion, quoted from the U.S. Supreme Court in holding that "all fraudulent attempts to cause the Government to pay out sums of money" qualify as false claims under the FCA. Furthermore, the court held that the mere taking of government money by a defendant for her own benefit consists a false claim even when an actual demand for the money was never made. In finding that the relator had also sufficiently alleged a Section 3729(a)(7) reverse FCA claim, the court found that the relator alleged both the existence of a false record and an immediate duty to the government to repay the stolen funds.

U.S. ex rel. Longhi v. Lithium Power Technologies, Inc., 2007 WL 2871018 (S.D. Tex. Sept. 27, 2007)

A Texas district court granted the government's motion for partial summary judgment in an intervened FCA action, which had alleged that a company wrongfully obtained an SBA grant by exaggerating its capabilities and expertise in its original grant proposal. While the defendant argued that it eventually obtained its stated capabilities, the court stressed that FCA liability attached because the grant proposal was false when it was submitted. The court stressed that this is ruling is especially important in cases such as this, for the false statements gave the defendant an advantage over more deserving candidates.

U.S. ex rel. Sanders v. American-Amicable Life Insurance Company of Texas, 2007 WL 2032914 (E.D. Pa. July 12, 2007)

A *qui tam* relator filed an FCA action alleging that a private life insurance company caused false claims to be submitted to the government by misleading military personnel into believing that they were investing in a savings account, when they instructed the government to automatically release a percentage of their paychecks to the defendant-company. A Pennsylvania district court, in dismissing the suit for failing to state an actionable FCA claim, ruled that the relator had not established that the scheme would cause an actual or potential economic loss to the *federal government*. In short, because the alleged fraud would not change the total amount of compensation the government would pay out, the court found that the government was not actually or potentially harmed by the scheme.

U.S. ex rel. Fago v. M & T Mortgage Corporation, 2007 WL 2840412 (D.D.C. Oct. 2, 2007)

Former employee of a home mortgage lender brought an FCA *qui tam* action, alleging that the lender violated the FCA by forging borrowers' signatures when their loan applications were incomplete, and then submitting these applications to HUD for insurance and in seeking HUD reimbursement upon the borrowers' default. A District of Columbia district court held that while the FCA did not attach to the original submission of the forged loan applications, they "ripened" into false claims when the lender sought payment for defaulted loans. However, in order for the relator to collect for actual damages, the court stressed that the relator needed to show that the specific misrepresentations made to HUD were the direct and *proximate* cause of HUD's losses and not merely the "but for" cause. Here, the court determined that the relator could not meet this causation standard, so he was limited to seeking recovery of statutory civil penalties.

D. Sovereign Immunity

U.S. ex rel. Stoner v. Santa Clara County Office of Education, 2007 WL 2556936 (9th Cir. Sept. 7, 2007)

The Ninth Circuit affirmed in part and revered in part a California district court's dismissal of a *pro se qui tam* action alleging that a public school system defrauded the federal government. Agreeing with the lower court, the court of appeals ruled that the school system cannot be sued under the FCA, for it is not a "person" under the FCA and is entitled to the State's Eleventh Amendment immunity. However, the Ninth Circuit held that state officials are considered "persons" under the FCA, because such actions seek damages from the individual defendants rather than the state treasury. Finally, the court of appeals joined the chorus of courts and ruled that a relator cannot proceed *pro se*. Notably, the court ruled that the relator could not proceed *pro se* in this action, even though he was licensed to practice law in *another* jurisdiction. The court remanded the case with instruction to give the relator reasonable time to find counsel or to obtain *pro hac vice* admission.

U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 2007 WL 2713913 (D.Utah Sept. 12, 2007)

In dismissing an FCA *qui tam* complaint premised on a false implied certification, a Utah district court stressed that the underlying rule or regulation claimed to have been violated still must *expressly* make compliance a condition of payment. The court, after assessing each of the alleged regulation violations, determined that none of the regulations included such an express condition.

United States v. National Training and Information Center, Inc., 2007 WL 2461662 (N.D. Ill. Aug. 23, 2007)

An Illinois district court refused to dismiss a government-initiated FCA action, alleging that a defendant wrongfully obtained government funds by falsely certifying that it would comply with the Byrd Amendment, which prohibits grantees from engaging in lobbying using federal funds. After deeming the Byrd Amendment constitutional, the court allowed the government to proceed with those claims that violated the Amendment.

E. Ineffective Service of Process

Fauci v. Genetech, 2007 WL 3020191 (D. Mass. Oct. 12, 2007)

Relators brought an FCA *qui tam* action against a U.S. State Department contractor that was hired to provide security services for the President of Afghanistan. After the relators served the complaint on the defendant over eleven months after a District of Columbia district court signed the unsealing order, the defendant filed a motion to dismiss, arguing that the relators failed to effect timely service of process. The court, granting the defendant's motion, ruled that the relators failed to show good cause why service was not diligently attempted within the 120-day time limit. Notably, the relators were unable to substantiate their claim that the complaint was sent to the defendant via certified mail.

FEDERAL RULES OF CIVIL PROCEDURE

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

Mitchell v. Beverly Enterprises, Inc., 2007 WL 2551404 (11th Cir. Sept. 7, 2007)

A *qui tam* relator brought an FCA action against a nursing home chain, alleging that it defrauded the federal government through fraudulent Medicare charges and noncompliance with its Corporate Integrity Agreement. After an Alabama district court dismissed the complaint for failing to satisfy Rule 9(b), the relator appealed the decision. Subsequently, in an unpublished *per curiam* decision, the Eleventh Circuit affirmed and held that Rule 9(b) requires "some indicia of reliability… in the complaint to support the allegations of an *actual false claim* for payment being made to the government." Here, however, the relator did not go past pleading "*his belief* that claims…must have been submitted, were likely submitted, or should have been submitted to the government."

U.S. ex rel. Bledsoe v. Community Health Systems, Inc., 2007 WL 2492439 (6th Cir. Sept. 6, 2007)

The Sixth Circuit affirmed in part and reversed in part a Tennessee district court's decision to deny a relator his supposed share of a settlement and to entirely dismiss his *qui tam* complaint. The court of appeals held that the relator could only obtain a share of this settlement if he could show that his FCA allegations cleared the Rule 9(b) hurdle and that these particular claims overlapped with those claims detailed in the government's settlement agreement. The court of appeals, first assessing the applicable bounds of Rule 9(b), held that the relator must allege with particularity specific false claims that were actually submitted to the government. However, because a corporate entity was the defendant, the relator did not necessarily need to allege the specific identity of the natural persons within the corporation that submitted the false claims. Instead, such information was merely relevant to the inquiry of whether the relator had pled the circumstances with particularity. Under this Rule 9(b) standard, the Sixth Circuit determined that only one of the relator's claims cleared the Rule 9(b) hurdle. However, according to the court of appeals, this surviving claim did not overlap with any of the claims previously settled by the government. In turn, the Sixth Circuit denied the relator a share of the earlier settlement, but the court permitted him to proceed against the defendant with this one surviving claim.

U.S. ex rel. Fowler v. Caremark Rx, LLC, 2007 WL 2142310 (7th Cir. July 27, 2007)

The Seventh Circuit affirmed an Illinois district court's dismissal of an FCA *qui tam* action, in which the relators alleged, *inter alia*, that a prescription benefits management company regularly double-billed the federal government for distributing the same individual drug. The court of appeals, reading Rule 9(b) to require evidence that a false claim was actually submitted to the government, determined that the relators did not present evidence *at an individualized transaction level* that the defendant failed to provide the government an appropriate refund or replacement product for a returned prescription. Notably, while the court ultimately dismissed the case on Rule 9(b) grounds, the Seventh Circuit ruled that the FCA public disclosure bar did not preclude the suit, for the relators' complaint was not "actually derived" from publicly disclosed allegations.

U.S. ex rel. Roop v. Hypoguard USA, Inc., 2007 WL 2791115 (D.Minn. Sept. 24, 2007)

A Minnesota district court dismissed an FCA *qui tam* action, which alleged that a medical device manufacturer provided false information to the FDA during the premarket approval process. The court ruled that the complaint failed to satisfy the Rule 9(b) particularity requirements, for it did not allege who specifically within the corporation provided the information, what the allegedly false information was, or when that information was provided to the FDA.

U.S. ex rel. Kennedy v. Aventis Pharmaceuticals, Inc., 2007 WL 2681701 (N.D. Ga. Sept. 13, 2007)

An Illinois district court ruled that the FCA public disclosure bar did not apply where a *qui tam* relator utilized public information to supplement her own personal knowledge of the fraud. According to the court, the suit did not "depend essentially" on publicly disclosed information, as would require the application of the bar in this particular jurisdiction. The court also found that the complaint satisfied Rule 9(b), even though it did not include specific facts regarding actual false claims. The court stressed that the Rule 9(b) particularity requirements are relaxed when the plaintiff lacks access to all facts necessary to detail her claim. This situation appeared here, where a former sales representative alleged that a pharmaceutical company was off-label marketing a drug. However, the court dismissed the relator's Section 3730(h) anti-retaliation claim, for while she complained to the company about the illegal marketing scheme, she did not inform the company that she suspected it was defrauding the government or that she was pursuing or assisting in making an FCA claim.

U.S. ex rel. Grant v. Thorek Hospital and Medical Center, 2007 WL 2484333 (N.D. Ill. Aug. 29, 2007)

Disagreeing with the courts in its own circuit, an Illinois district court held that the Rule 9(b) particularity requirements cannot be relaxed, even when the specific details of the claim are solely within the defendant's control. Under this rigid application of the Rule, the court found that the relator did not satisfy Rule 9(b), for her complaint did not include, at least, some representative examples of the alleged fraud.

U.S. ex rel. Marlar v. BWXT Y-12, LLC, 2007 WL 2273921 (E.D. Tenn. Aug. 6, 2007)

A *qui tam* relator alleged that a government contractor knowingly breached its government contract by regularly underreporting the number of work-related injuries. A Tennessee district court found that the relator's allegations did not satisfy the Rule 9(b) particularity requirements, for the relator did not identify any specific claims that were submitted to the government or indicate the dates when the claims were submitted or the names of the employees who submitted them.

U.S. ex rel. Ubl v. IIF Data Solutions, 2007 WL 2220586 (E.D. Va. Aug. 1, 2007)

A *pro se* relator alleged that his former employer fraudulently induced the General Services Administration to enter contracts with the company at inflated prices by falsely certifying that it had previously sold its goods to the public at the stated prices. A Virginia district court ruled that these allegations survived a Rule 9(b) motion to dismiss, for the allegations made the defendant sufficiently "aware of the particular circumstances for which [it] would have to prepare a defense at trial."

U.S. ex rel. West v. Ortho-McNeil Pharmaceuticals, Inc., 2007 WL 2091185 (N.D. Ill. July 20, 2007)

A former pharmaceutical sales representative brought an FCA *qui tam* action against his former employer-pharmaceutical company, alleging that it had, *inter alia*, illegally "off-label" marketed one of its drugs. An Illinois district court, applying a strict pleading standard, dismissed the complaint for failing to satisfy the Rule 9(b) particularity requirements. The court specifically faulted the complaint for failing to identify specific false claims that were submitted to the government or the identity of the individual person who submitted the claims. In addition, the court dismissed the action against his former employer's parent company, for a parent company is "not automatically liable for torts committed by its subsidiary" and the relator had pled no facts to "piece the corporate veil."

U.S. ex rel. Lindsey v. Easter Seals UCP North Carolina, Inc., 2007 WL 3124664 (N.D.N.C. Oct. 25, 2007)

On behalf of their physically handicapped foster care child, a North Carolina couple filed an FCA *qui tam* action alleging that a provider of health care services wrongfully obtained government funds by inflating medical bills and providing substandard care. A North Carolina district court dismissed the suit for failing to satisfy Rule 9(b), for the relators failed to identify a specific false claim that was actually submitted to the government. Notably, given the appalling allegations of this case, the court strongly encouraged the relators to pursue alternative legal actions.

B. Rule 15(c)(1) Relation Back Doctrine

In re Pharmaceutical Industry Average Wholesale Price Litigation, 2007 WL 2058731 (D. Mass. July 17, 2007)

An FCA *qui tam* complaint was filed against a pharmaceutical company in August of 1997, but the government did not intervene and a file a complaint-in-intervention until September of 2006. The defendant-company argued to a Massachusetts district court that the action commenced, for statute of limitations purposes, when the complaint-in-intervention was filed. Thus, the defendant maintained that any allegations that occurred prior to six years before this date would be time-barred. The court, however, held that under FRCP 15(c)(1), the complaint-in-intervention relates back to the filing date of the relators' initial complaint. Accordingly, the court permitted the government to proceed with all claims dating back to six years before the relators' initial filing.

LITIGATION DEVELOPMENTS

U.S. ex rel. Bogart v. King Pharmaceuticals, 2007 WL 2028124 (3d Cir. July 16, 2007)

The Third Circuit, affirming a Pennsylvania district court's decision to dismiss a relator's claim for attorney fees against non-*qui tam* states, agreed that a "common fund" had not been created when non-*qui tam* states settled claims against a defendant-company. The court of appeals ruled that a common trust had not created, for each non-*qui tam* state had separately negotiated a settlement agreement with the defendant. Moreover, there was no inequity for the court to redress, for the defendant had already paid in full the relator's fees and expenses attributable to the prosecution of his *qui tam* action. In other words, because the relator did not ultimately bear the cost of the litigation, it was irrelevant that the non-*qui tam* states were "unjustly enriched" by the relator's FCA action.

Akin, Gump, Strauss, Hauer & Feld, LLP v. U.S. Department of Justice, 503 F. Supp. 2d 373 (D.D.C. Sept. 4, 2007)

According to a District of Columbia district court, when information is shared between a *qui tam* relator and the government, attorney privileges are not waived, for any communications are conducted in furtherance of joint prosecution and on the basis of common interests. However, in this particular case, where the government had released documents to the relator with the explicit instructions of passing them along to a third party, the court ruled that the privileges had been waived. In turn, the court, faced with a law firm's challenge to the Justice Department's decision to withhold documents requested in a FOIA request, ordered the Justice Department to provide additional justifications for why one of the various FOIA exemptions applied to the nondisclosure of the documents.

U.S. ex rel. Miller v. Bill Harbert International Construction, Inc., 2007 WL 2219336 (D.D.C. Aug. 3, 2007)

After a jury returned a verdict in favor of the government in an FCA action, a District of Columbia district court dismissed the government's claims for unjust enrichment and payment under mistake of fact. The court ruled that since an adequate remedy had been had at law and that any further recovery would be duplicative, the equitable claims could not be pursued. The court, also ruling that the FCA defendant could not bring counterclaims against the relator, held that where an element of the defendant's claim is that the defendant is liable under the FCA, then the FCA bars the claim.

U.S. ex rel. Reynolds v. General Electric Company, 2007 WL 3020464 (D.S.C. Oct. 11, 2007)

After the government declined to intervene in an FCA *qui tam* action against the relators' employer, the parties agreed to settle the suit for $2 million, with the only remaining issues being whether the relators would get severance packages and whether the employer would expunge their records. However, before the parties actually signed the final draft of the agreement, the employer-defendant settled the FCA allegations with the government for $350,000. The relators filed a motion in a South Carolina district court to enforce the original settlement agreement. Although the parties had not signed the final draft, the court found that the agreement was enforceable, for there had been a meeting of the minds around the $2 million figure.

Judgments & Settlements

JULY 1–OCTOBER 31, 2007

Compiled by Asher S. Alavi

RECENT FCA SETTLEMENTS

***U.S. ex rel. Turner v. Maximus*, (D. D.C., July 17, 2007)**

July 17, 2007—Maximus Inc., a billing agent under contract with the District of Columbia's Child and Family Services Agency (CFSA), agreed to pay $30.5 million to the federal government and enter into a deferred prosecution agreement with the Department of Justice to settle charges that it defrauded the government by fraudulently billing Medicaid in violation of the False Claims Act. As part of its contract with the D.C. CFSA, Maximus would bill Medicaid for target case management (TCM) services provided to the foster children under the care of the CFSA. These services include medical, social, and educational components. The investigation of the case arose from a qui tam complaint filed in 2005 by relator Benjamin Turner, a former division manager of Maximus. In his complaint, Turner alleged that Maximus had defrauded Medicaid by submitting claims for reimbursement for each child in the CFSA program without regard to whether the TCM services were used by the child or not. As his share of the recovery, Turner will receive $4.93 million. Maximus will also enter into a corporate integrity agreement with the Office of the Inspector General of the Department of Health and Human Services. The Civil Division of the U.S. Department of Justice, the U.S. Attorney's Office for the District of Columbia, the Office of the Inspector General of the Department of Health and Human Services, and the FBI conducted the investigation that led to the settlement. Candace S. McCall of Candace McCall, PLC represented the relator.

***U.S. et al. ex rel. Lauterbach v. Orphan Medical Inc. and Peter Gleason,* (E.D.N.Y., July 17, 2007)**

July 17, 2007—Jazz Pharmaceuticals Inc. plead guilty to felony misbranding charges and agreed to pay $20 million to the federal government to settle criminal and civil charges that its subsidiary, Orphan Medical, defrauded the federal government by illegally marketing and misbranding its sleep medication, Xyrem, for off-label uses. Although Xyrem was only approved by the FDA for treatment of severe drowsiness and cataplexy caused by narcolepsy, Orphan Medical criminally misbranded and illegally marketed the drug for other uses. The civil and criminal settlement arose from a qui tam complaint filed in the Eastern District of New York by Shelley Lauterbach, a former sales representative of Orphan Medical. In the complaint, the relator alleged that Orphan Medical had violated the False Claims Act by causing doctors to submit non-reimbursable claims to Medicare and Medicaid by marketing Xyrem for off-label uses. Among the off-label uses marketed by Orphan were fatigue, insomnia, weight

disorders, depression, bi-polar disorder, and Parkinson's disease. Orphan Medical not only promoted off-label uses of Xyrem through sales representatives, but also paid a psychiatrist, Philip Gleason, to give speeches around the country about its supposed efficacy in these uses. Xyrem has been commonly used as a recreational drug and has been classified by the HHS as a potential 'date rape' drug. Abuse of the drug can have severe consequences, including dependence, seizures, coma, and sometimes death. Jazz Pharmaceuticals and Orphan Medical agreed to pay $12.2 million in criminal restitution to private and public insurers, $5 million in criminal fines, and $3.75 million for civil settlement of the False Claims Act suit. Jazz also agreed to enter into a Corporate Integrity Agreement with the Office of the Inspector General of the Department of Health and Human Services and to take other measures to prohibit off-label marketing. Assistant U.S. Attorneys Geoffrey Kaiser and Paul Kaufman prosecuted the criminal and civil cases. Erika Kelton and Larry Zoglin of Phillips and Cohen LLP and Jonathan A. Willens of Jonathan A. Willens LLC represented the relator.

Aggregate Industries NE Region, Inc. Settlement

July 31, 2007—Aggregate Industries NE Region Inc., one of the largest concrete providers in the Northeast, plead guilty to criminal fraud charges and agreed to pay $50 million to the U.S. and the State of Massachusetts to settle suits brought under the Federal False Claims Act and the Massachusetts False Claims that it defrauded the federal and Massachusetts governments by providing substandard concrete for use on the 'Big Dig' highway project in Massachusetts. The Big Dig project, officially known as the Central Artery/Tunnel Project, is a major highway project that will reroute the Interstate 93 Central Artery highway through a tunnel under the city of Boston. Aggregate joined the project as a subcontractor for the main contractor, Modern Continental, from 1996 to 2000. Its main purpose was to supply concrete for the project and to provide the foundation of the tunnel walls. Four separate cases were filed under the federal and Massachusetts False Claims Act against Aggregate Industries. Relator David Chase filed a qui tam case under the Massachusetts False Claims Act on May 16, 2005 and a qui tam case under the federal False Claim Act on August 3, 2005. Relators Joseph Harrington and Donald Finney filed a qui tam case on June 25, 2005 and added Massachusetts as a plaintiff in their second amended complaint on July 6, 2005. According to these complaints, Aggregate Industries had conspired to sell 5,700 loads of out of specification concrete to Modern Continental to use for the Big Dig project. Additionally, Aggregate deliberately conspired to conceal this scheme from inspectors to make them believe that the substandard concrete conformed to specification requirements. The result of this fraudulent activity was injury to the federal and Massachusetts taxpayers. Of the $50 million paid to the state and federal agencies, $15.5 million will be used to settle charges made under the federal False Claims Act. Susan McNeil of Susan McNeil, Esq. represented relators Joseph Harrington and Donald Finney. Suzanne Durrell, Rory Delaney, and Robert Thomas of Thomas & Associates represented relator Dan Johnston. The cases settled are *U.S. ex rel Harrington*

and Finney v. Aggregate Industries, Inc. et al. (D. Mass), *U.S. ex rel Chase v. Aggregate Industries, Inc. et al.* (D. Mass), *U.S. ex rel. Johnston v. Aggregate Industries PLC et al.* Civil Action (D. Mass), and *Commonwealth of Massachusetts ex. rel Chase v. Aggregate Industries et al.*

***U.S. ex rel. Main v. Oakland City University*, (S.D. Ind., July 31, 2007)**

July 31, 2007—Oakland City University in Oakland City, Indiana agreed to pay $5.4 million to the federal government to settle charges that it violated the False Claims Act by offering monetary incentives to admissions recruiters without reporting these payments to the Department of Education. Jeffrey Main, the former director of admissions for Oakland City University, filed a qui tam suit against the university under the False Claims Act. In his complaint, Main alleged that the university paid thousands of dollars and offered promotions to him and other university employees as a reward for successful enrollment recruitment. These payments directly violated the federal guidelines mandated in agreements that the university made with the federal government in order to receive federal funding. Although the university denies any wrongdoing, it agreed to change its compensation policy to comply with the Department of Education guidelines under the Higher Education Act. As his share of the recovery, Main will receive $1.4 million. Lane C. Siesky of Siesky Law Firm in Evansville, Indiana represented Main. The U.S. State's Attorney' s Office for the Southern District of Indiana, the U.S. Department of Education, and the U.S. Department of Justice conducted the investigation.

***U.S. ex rel. Klepacz v. Crane Co.*, (S.D. Tex, Aug. 14, 2007)**

August 14, 2007—Crane Co., a manufacturer of engineered industrial products, agreed to pay the federal government $7.6 million to resolve allegations that it violated the False Claims Act by selling uninspected valves to the Department of Defense. According to the qui tam complaint filed in 2005 Texas by a former Crane employee, Crane did not sell its products in accordance with the Qualified Products List regulations, which require all suppliers of government-used products to submit to government inspection prior to contract qualification and eligibility. Additionally, the complaint alleged that Crane's products violated the Berry Amendment and the Buy American Act that require the Pentagon to give preference to domestically produced products. Crane had sold such uninspected and unqualified valves to government contractors to be installed on Navy and Coast Guard vessels used in search and rescue operations in Afghanistan and Iraq. Relator Walter Klepacz will receive more than $1.3 million as his share in the recovery. Geoffrey Scott Binney of Gauntt & Kruppstadt, LLP represented Klepacz. U.S. Attorneys Andrew A. Bobb and Daniel David Hu of the U.S. Attorney's Office for the Southern District of Texas and Micheal Hertz of the Civil Division of the Department of Justice represented the U.S.

Burlington Resources Settlement

August 15, 2007—In the most recent settlement involving a Section 3729a(7) False Claims Act violation, Burlington Resources, a subsidiary of ConocoPhillips, agreed to pay the United States $97.5 million to resolve allegations that it underpaid royalties to the Department of Interior's Minerals Management Service. The settlement stemmed from a qui tam complaint filed in 2005 by two auditors with the Mineral Management Service, who alleged that a number of different oil companies had undervalued and underreported the value of the natural gas produced on land obtained from federal and Indian leases and underpaid royalties owed to the government. Burlington Resources, as well as other companies mentioned in the complaint, submitted false certifications to the Mineral Management Service, that the interest payments on royalties owed on crude oil, natural gas, and hydrocarbon production complied with federal law and regulations. The Department of Justice previously settled cases with Shell Oil Company for $56 million and Dominion Exploration and Production Company for $2 million. Assistant U.S. Attorneys Robert Don Evans and Ronny D. Pyle represented the U.S. Mark E. Hammons of Hammons Gowens & Associates represented the relators.

IBM/PriceWaterhouseCoopers Settlements

August 16, 2007—IBM and its recently acquired subsidiary, PriceWaterhouseCoopers, separately agreed to settle allegations that they violated the False Claims Act by providing and receiving unlawful kickbacks to capture government technology contracts. IBM agreed to settle for approximately $3 million while PriceWaterhouseCoopers agreed to pay $2.3 million. The settlement arose from a qui tam complaint filed in the Eastern District of Arkansas in 2004 by a former partner of PriceWaterhouseCoopers and a former employee of Acenture LLC who alleged that a number of companies including PriceWaterhouse Coopers and IBM had defrauded the government by engaging in illegal kickback schemes with systems integrators and vendors. According to the suit, a number of companies including PriceWaterhouseCoopers and IBM both gave and requested kickbacks to system vendors, hired under the guise of 'alliance benefits' in order to receive referrals and top preference for government contracts. Von G. Packard, Jacquetta Bardacos and Craig H. Johnson of Packard Packard & Johnson, Stephen C. Engstrom, and Shirley Gunthrap Jones represented the relators. Don Williamson and Clarence Daniel Stripling represented the U.S. The settlement is part of an ongoing investigation of kickback schemes in IT government contractors conducted by the Civil Division of the Justice Department; the U.S. Attorney's Office in Little Rock, Arkansas; the Office of the Inspector General of the Department of Energy; the Defense Criminal Investigative Service; the Office of the Inspector General of the General Services Administration; the Office of the Inspector General of NASA; the Army Criminal Investigation Command; the Defense Contract Audit

Agency; the Office of the Inspector General of the Environmental Protection Agency; the Office of the Inspector General of the Postal Service; the Navy Criminal Investigative Service and the Air Force Office of Special Investigations.

Aventis Pharmaceuticals Settlement

September 10, 2007—Aventis Pharmaceuticals agreed to pay over $190 million to the federal government, Washington D.C. government, and several state governments to settle allegations that it fraudulently priced and marketed its drug, Anzemet, in violation of the False Claims Act. The settlement arose from a qui tam complaint filed by Ven-a-Care of the Florida Keys, a home-infusion company, which alleged that Aventis had fraudulently inflated the price of Anzamet for reimbusement from Medicare and other federal and state health care programs. Anzamet, an antiemetic drug primarily used to prevent nausea and vomiting after radiation treatment and oncology, was then promoted and sold to doctors and health care providers at a much lower price. By unlawfully maintaining an inflated price, Aventis was able to 'market the spread' or the difference between what the drug was actually sold for to consumers and what it was reimbursed for by the government, in order to promote and sell its drug to both new and old customers. As part of the settlement, Aventis agreed to enter into a Corporate Integrity Agreement with the Office of the Inspector General of the Department of Health and Human Services. The U.S. Attorney's Office for the Southern District of Florida and the District of Massachusetts, the Office of the Inspector General for the Department of Health and Human Services, the Office of the Program Integrity of TRICARE Management Activity, and the National Association of Medicaid Fraud Control Units investigated Aventis. As its share of the recovery, Ven-a-Care will receive $32 million. TAF members Jim Breen and Allison Warren Simon of the Breen Law Firm and John E. Clark of Goode Casseb Jones Riklin Choate & Watson P.C. represented Ven-A-Care, along with Gary L. Azorsky, Genna Driscoll Kidd, Sherrie R. Savett, Jeanne A. Markey, and Joy P. Clairmont of Berger & Montague P.C., Carol Gilden of Cohen Milstein Hausfeld & Toll, Susan Thomas, Michael E. Moskovitz of Freed Kanner London & Millen LLC , Melinda J. Morales of Much Shelist Denenberg Ament & Rubenstein P.C., and Adam M. Miller, Adam D. Miller and Walter J. Lack of Engstrom, Lipscomb,& Lack.

Orthotics Companies Settlements

September 26, 2007—Five orthotics companies that account for 95% of the market of hip and knee replacements agreed to pay over $310 million to the U.S. government and enter into five year Corporate Integrity Agreements with the Office of the Attorney General of the Department of Health and Human Services to avoid criminal prosecution for providing unlawful kickback payments to surgeons as inducements to use their products. The companies, Zimmer Inc., Depuy Orthopaedics Inc., Biomet Inc., Smith & Nephew Inc., and Stryker Inc., also agreed to 18-month Deferred Pros-

ecution Agreements (DPA's) with the Department of Justice, in which they will be required to implement corporate compliance procedures and remain under federal monitoring. The criminal complaints filed against the companies alleged that they engaged in illegal consulting agreements with surgeons in violation of the federal anti-kickback statute and the civil False Claims Act from at least 2002 to 2006. In order to induce surgeons to use their orthotic products, these companies offered large sums of money and expensive gifts as incentives. Because it was the first to cooperate with the U.S. Attorney's Office, Stryker Inc. was allowed to enter into a Non-Prosecution Agreement with the government, under which it is required to comply with all of the reforms made by the other four companies. Zimmer Inc. agreed to pay $169.5 million and agreed to be monitored by former Attorney General John Ashcroft, the current chairman of the Ashcroft Group LLC. Depuy Orthopaedics agreed to pay $84.7 million and to be monitored by former U.S. Attorney Debra Yang. Smith & Nephew agreed to pay $28.9 million and to be monitored by former New Jersey Attorney General David Sampson. Biomet Orthopedics Inc. agreed to pay $26.9 million and to be monitored by former U.S. Attorney David N. Kelley. The fifth company, Stryker Orthopedics did not enter a civil settlement but will be monitored by John Carley, the former counsel to the Federal Trade Commission. The corporate integrity agreements and monetary payments made to the Office of the Inspector General of the Health and Human Services will settle any civil liability of the five companies, except Stryker Inc.which has not been given any release from civil liability. AUSA Rudolph Filko, Deputy Chief of the Civil Division and Stuart Minkowitz, Civil Health Care Fraud Coordinator, handled the civil case. U.S. Attorney Michelle Brown and Assistant U.S. Attorney Kevid O'Dowd investigated and prosecuted the criminal case with the assistance of the Chief of the Commercial Crimes Unit, AUSA Marc Ferzan, and AUSA Grace Park. The Office of the Inspector General of the Department of Health and Human Services, New York Regional Office, U.S. Postal Inspection Service, and the FBI assisted in the investigation that led to the settlement agreements.

Bristol-Myers Squibb Settlement

September 28, 2007—Bristol-Myers Squibb Co. and its subsidiary Apothecon agreed to pay $515 million to the United States and several states to resolve allegations that from 1994 to 2005 they violated the False Claims Act by unlawfully marketing drugs for off-label uses, unlawfully inflating prices for reimbursement from Medicare and Medicaid, and paying illegal kickbacks to doctors and healthcare providers as incentives to buy the companies' drugs. The settlement resolves a number of different qui tam cases filed against Bristol-Myers Squibb and Apothecon filed by relators Ven-A-Care of the Florida Keys, Kathy Cokus, Philip Barlow, Jospeh Piacentile, and Daniel Richardson. The government alleged that Bristol-Myers Squibb unlawfully promoted and marketed its anti-psychotic drug Abilify for off-label uses and unlawfully inflated the price for its anti-depression drug Serzone for Medicaid reimbursement. Additionally both Bristol-Myers Squibb and Apothecon allegedly provided illegal kickbacks

to health-care providers, retail pharmacies, and wholesale customers as incentives to buy their drugs. Apothcon and Bristol-Myers Squibb allegedly also falsely inflated the prices of a variety of other drugs for federal reimbursement. Of the total recovery, $328 million will go to the federal government, $187 million to various states participating in Medicaid, and $128,000 to entities of the Public Health Service. Bristol-Myers Squibb entered into a Corporate Integrity Agreement with the Office of the Inspector General of the Department of Health and Human Services as part of the settlement. Assistant United States Attorney Mark Lavine of the Southern District of Florida and Assistant U.S. Attorney Greg Shapiro of the District of Massachusetts represented the U.S. Jim Breen of The Breen Law Firm P.A. represented the Ven-A-Care of the Florida Keys relators: T. Mark Jones, Zachary Bentley, John M. Lockwood, and Luis B. Cobo. Elizabeth K.Ainsle of Schnaeder Harrison Segal & Lewis LLP represented relator Carol Forden. Nathan Schwed of Zeichner Ellman & Krause LLP represented relator Kathy Cokus. TAF member David S. Stone of Boies, Schiller, & Flexner LLP and Kirk E. Chapman of Milberg Weiss LLP represented relator Joseph Piacentile. Thomas M. Greene of Greene & Hoffman represented relator Philip Barlow. David K. Colapinto of Kohn, Kohn, & Colapinto, LLP represented relator Daniel Richardson. As their share of the recovery, the Ven-A-Care of the Florida Keys will receive $24,904,350, Carol Forden will receive $2,046,582, Kathy Cokus will receive $3,876, 200, Joseph Piacentile will receive $7,256,400, Philip Barlow will receive $235,992, and Daniel Richardson will receive $12,301,611.The cases resolved in whole or in part are: *United States ex rel. Richardson v. Bristol Myers Squibb*, Civil Action No. 06-11821-NG (D. Mass.); *United States ex rel. Piacentile v. Bristol-Myers Squibb Co.*, Civil Action No. 05-10196-MLW (D. Mass.); *United States ex rel. Forden v. Bristol-Myers Squibb Co.*, Civil Action No. 04-11216 -RGS (D. Mass.); *United States ex rel. Cokus v. Bristol Myers Squibb*, Civil Action No. 01-11627-RGS (D. Mass.); *United States ex rel. Barlow v. Bristol-Myers Squibb*, Civil Action No. 04-11540-MLW (D. Mass.); *United States ex rel. Ven-A-Care of the Florida Keys, et al. v. Apothecon, et al.*, Civil Action No. 00-10698-MEL (D. Mass.); and *United States ex rel. Ven-A-Care of the Florida Keys, Inc. v. Bristol Myers Squibb Co.*, Civil Action No. 95-1354 (S.D. Fla.).

Barr Pharmaceuticals Settlement

October 6, 2007—Two subsidiaries of the generic drug manufacturer, Barr Pharmaceuticals, agreed to pay $2 million to the state of Massachusetts to settle allegations that they falsely inflated the price of their drugs for Medicaid reimbursement. Barr's subsidiaries, Barr Laboratories and Duramed Pharmaceuticals, were two of the thirteen generic drug manufacturers named in a complaint filed in 2003 under the Massachusetts False Claims Act by Massachusetts Attorney General, Thomas F. Reilly. According to the complaint, the thirteen generic drug manufacturers falsely inflated the reported Wholesale Acquisition Costs (WAC) and Average Wholesale Prices (AWP) of their drugs to national pricing services in order to receive a higher reimbursement from the state Medicaid program. This settlement resolves the claims made concern-

ing the artificially inflated prices of a number of drugs made by Barr Laboratories or Duramed Pharmaceuticals including Methotrexate, Naltrexone, Hydrochloride, Warfarin Sodium, Apri, and Digoxin. Assistant Attorney Generals Peter A. Mullin, Richard C. Heidlage, Robert P. Patten, Colleen A. McCarthy, Robert C. Molvar, Anthony Bova, and Jay Pina handled the case along with investigators Anthony Megathlin, John Walsh, and Steve Devlin of the Medicaid Fraud Division.

U.S. ex rel. Reynolds et al. v. General Electric Corporation **(D. SC, October 11, 2007)**

October 11, 2007—General Electric agreed to pay $2 million to the federal government to settle allegations that it violated the False Claims Act by failing to meet Quality Assurance and Quality Control (QA/QC) specifications in its procurement contract with the Tennessee Valley Authority (TVA). According to a qui tam complaint filed in 2003, General Electric presented false invoices for repayment to the Tennessee Valley Authority and the U.S. by delivering electrical generation turbines to TVA which did not follow the QA/QC specifications required in the contract. Additionally, the complaint alleged that GE submitted false certifications to the TVA by providing documents indicating that each turbine it delivered met QA/QC specifications. Of the $2 million settlement, GE will pay $200,000 to resolve the False Claims Act suit and $1.8 million to pay the relators' attorney's fees and any other claims against the company made by the relators. Herman E. Cox of Cox & Fisher LLC, William Ashley Jordan of William Ashley Jordan, and Terry Edward Richardson and Matthew Thiesing of Richardson Patrick Westbrook & Brickman LLC represented relators Jack Reynolds, Lee Clements, Thomas Wilson, Curtis Hollingsworth, George Brown, Linda Whitlock, Joe Whitlock, Joseph Brown, Susan Brown, Tony Black, Tim Phillips, James Benhanna, Hardy Stewart, John Lehr, Mitchell Bryant, Amos Gilliam, Dan Lambert, and James Duncan. Assistant U.S. Attorneys George Conis and Fran Trapp represented the U.S. The Department of Justice and TVA investigated the case.

U.S. ex rel. Tiesinga v. Dianon Systems, Inc. **(D. CT, October 30, 2007)**

October 30, 2007—Dianon Systems Inc., a reference laboratory in Connecticut which specializes in cancer testing, agreed to pay $1.5 million to the federal government to settle charges that it mischarged Medicare and Tricare for certain cancer tests. The settlement arose from a qui tam complaint filed in 2002 by Dr. James Tiesinga, a former pathologist with Dianon Systems. According to the complaint, Dianon Systems increased the number of antibodies used in hematopathology flow cytometry without medical necessity in order to receive a higher reimbursement from Medicare. Because Dianon would bill Medicare for each antibody used in its flow cytometry tests, the Medicare program paid for antibodies that were not needed. Dr. Tiesinga will receive $300,000 as his share of the recovery. Bryan T. Carmody of Maya & Associates P.C.

represented Tiesinga. Assistant U.S. Attorney Richard M. Molot represented the U.S. along with Patricia Davis of the U.S. Civil Division. The investigation and settlement were conducted by the U.S. Attorney's Office for the District of Connecticut and the Civil Division of the U.S. Department of Justice, with assistance from the Office of the Inspector General for the Department of Health and Human Services, the U.S. Defense Criminal Investigative Service, and the FBI.

Hexcel Corporation Settlement

October 30, 2007—Hexcel Corporation, a manufacturer of structural materials, agreed to pay the U.S. $15 million to resolve allegations that it manufactured defective Zylon bullet-proof vests that were sold to federal, state, local, and tribal law enforcement agencies in violation of the False Claims Act. According to the allegations, Hexcel knowingly used substandard Zylon materials supplied by Toyobo Corporation to weave the vests, which were bought or reimbursed for by the United States. The Zylon material used by Hexcel was easily degradable when exposed to heat, light, and humidity and was made with lower quality thread than standard Zylon bulletproof vests. These substandard bulletproof vests were then sold to the U.S. and various state and local governments by a number of different body armor manufacturers, including Second Chance Body Armor, DHB Inc., Point Blank Body Armor, Protective Apparel Corp., American Body Armor, Safariland, and Gator Hawk Armor. This settlement arose from an investigation by the Civil Division of the Justice Department, the U.S. Attorney's Office for the District of Columbia, the FBI, the General Services Administration of the Inspector General, the Defense Criminal Investigative Service, the Army Criminal Investigative Division, the U.S. Agency for International Development Office of Inspector General, the Air Force Office of Special Investigations, and the Office of Inspector General of the Department of Energy. As part of the settlement, Hexcel agreed to cooperate with the government's ongoing investigation of other companies involved in the scheme.

Legislative Updates

United States *ex rel.* Quinn v. Omnicare: The Loophole Has Been Closed

United States of America *ex rel.* Quinn v. Omnicare, Inc.: The Loophole Has Been Closed

Harvey S. Mars[1]

I. INTRODUCTION

Since its enactment during the Civil War in 1863, the False Claims Act ("FCA")[2] has been a potent weapon in our country's seemingly endless fight against fraudulent activity aimed at the United States government. In recent years, the statute's *qui tam* provisions,[3] which permit private individuals to commence a civil action on behalf of the United States for monetary damages in exchange for a percentage of the recovery,[4] have been quite effective in routing out the corrupt practices of unscrupulous profiteers; practices—such as providing the federal government with shoddy, defective and/or worthless goods—which have cost taxpayers millions of dollars. According to statistics recently released by the U.S. Department of Justice, during fiscal year 2005 alone, the United States obtained over $1.4 billion from FCA litigation.[5] The FCA has been particularly effective in curbing fraudulent practices targeting the Medicaid and health care systems.[6]

Unfortunately, the FCA is a weapon with some severe limitations. No judicial decision reveals these limitations better than the Third Circuit's decision in *U.S. ex rel. Quinn v. Omnicare, Inc, et al.,* 382 F. 3d 432 (3d Cir. 2004)[7], a case in which a federal appeals court held that the Medicaid law did not explicitly prevent pharmacies from repeatedly billing Medicaid for returned pharmaceutical products and that this practice, known as restocking, was not in violation of the FCA. Even the panel who decided *Omnicare* was disturbed by the outcome of this case and noted in their opin-

1. Harvey S. Mars, Esq., Law Office of Harvey S. Mars LLC, was co-counsel to Relator Thomas Quinn. Many thanks to Richard Hedeman, Esq. , Summer C. Smith, and Jacob Heyman Kantor for their assistance in the preparation of this article.

2. 31 U.S.C. §§ 3729–3732 (1988 & Supp. 1993). The False Claims Act was enacted at the urging of President Abraham Lincoln during the Civil War to curb rampant corruption among government contractors who were engaged in fraudulent practices such as selling the Union Army boxes of "gunpowder" filled with sand. The complete history of the False Claims Act is contained in the legislative history of the False Claims Amendments Act of 1986, S. Rep. No. 99-345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5226.

3. The *qui tam* provisions of the False Claims Act are contained in 31 U.S.C. § 3730. The term "*qui tam*" is derived from the Latin phrase "*qui tam domino rege quam pro se ipso in hac parte sequitur*" meaning "he who brings the action for the king as well as for himself." William Blackstone, Commentaries on the Law of England, Book III, 160 (1768).

4. The percentage of the recovery an individual *qui tam* plaintiff (also known as a Relator under the statute) is entitled to varies from 15 to 30 percent depending upon whether the United States actually intervenes in the action. 31 U.S.C. § 3730 (d)(1).

5. 2005 U.S. Newswire 202-347-2770

6. *See* David J. Ryan, *The False Claims Act: An Old Weapon With New Firepower Is Aimed At Health Care Fraud*, 4 Annals Health L. 127 (1995); John M. Parisi, *The Gun's Loaded- Using The False Claims Act To Prevent Nursing Home Fraud And Patient Abuse*, 1 Ann. 2002 ATLA_CLE 1195 (2002).

7. *See* 2003 WL 24296532 (Slip Copy marked "Not for Publication") for the U.S. District Court for the District of New Jersey's unpublished decision in this litigation.

ion that "[w]e find the lack of legal authority, requiring Medicaid-provider pharmacies to credit Medicaid when a medication is returned for resale, is disturbing and [w]e believe that Congress and/or the New Jersey legislature might serve Medicaid well if this lack of regulation were corrected."[8] This lack of regulation continued unabated until Congress finally took action and enacted the Deficit Reduction Act in 2006.

The purpose of this article is to analyze in depth the various defects in the FCA as well as the Medicaid statute, as revealed by the *Omnicare* decision, and to highlight the legislative response that finally closed the loophole.[9]

II. THE STATUTORY FRAMEWORK OF THE FALSE CLAIMS ACT

The FCA imposes liability upon any person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;
>
> (2) 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;
>
> (3) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.[10]

Under the statute, a person acts "knowingly" when he or she (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information or (3) acts in reckless disregard of the truth or falsity of the information. No proof of specific intent to defraud (*scienter*) is required.[11]

Under the FCA, a "claim" is defined as any request for money or property made to the government, as well as any non-governmental third party, if the United States government provides any portion of the money or property that is requested, or if the government will reimburse the third party.[12]

Penalties under the FCA are harsh: a civil penalty may be imposed of between $5,500.00 to $11,000.00 for each false claim proven, plus three times the amount of proven monetary damage to the United States, plus costs and fees. An exception exists

8. *Id.*; *see also 3d Circuit Calls Medicaid Drug Return Procedure "Disturbing,"* Andrews Health Law Litigation Reporter, (September 22, 2004). In fact, during oral argument of the appeal, Third Circuit Judge McKee stated that he was "shocked" by the restocking practices engaged in by Omnicare.

9. Section 6033 of the Deficit Reduction Omnibus Reconciliation Act of 2005 contains curative language eliminating the industry-wide practice among long-term care provider pharmacies of multiple billing for returned medications. *See* S. 1932, 109th Cong. § 6033. This statute was signed into law by President Bush in February 2006 and became effective April 2006.

10. 31 U.S.C. § 3729(a)(1), (2) & (7). While there are other sections to the FCA, the sections listed above are the only provisions of the statute which are pertinent to the *Quinn* decision.

11. 31 U.S.C. § 3729(b). The 1986 amendments to the FCA made it clear that no specific proof of fraudulent intent to defraud is required to support an action under the FCA. This amendment cured a blatant ambiguity in the law concerning the meaning of the word "intent". S. Rep. No. 345, 99th Cong., 2d Sess. 21 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5266, 5286.

12. 31 U.S.C. § 3729(c).

when a person who has submitted a false claim brings this fact to the federal government within thirty days of the government's discovery of the violation. In that case, the penalty may be reduced to two times the actual damages plus costs.[13]

III. THE RELEVANT FACTS

(A) Quinn

In February 1996, Relator Thomas Quinn ("Quinn") was hired by Pompton Nursing Home Supplier ("Pompton"), a pharmaceutical provider for long term care facilities (i.e. nursing homes), as its Regional Controller. Pompton was a subscriber and participant in New Jersey's Medicaid program.[14]

Quinn was directed by Alan Traster ("Traster"), Pompton's then CEO, to issue monthly reimbursement checks to New Jersey Medicaid[15] for only 50% of the acquisition cost of unused (restocked) medicines returned by the nursing homes that Pompton had supplied. Quinn ascertained the value of these returned pharmaceuticals by referring to Pompton's computer-generated weekly returns reports.[16]

Quinn subsequently learned that the price of the pharmaceutical products on the returns report was already listed at 50% of their actual value. This meant, for a period of time, that the monthly reimbursement checks being submitted to Medicaid were only 25% of the value of the returned pharmaceuticals. Quinn verified this analysis with a Price-Waterhouse accountant employed by Omnicare who agreed that Pompton was only repaying Medicaid 25% of the value of returned pharmaceuticals.[17]

Quinn became alarmed about Pompton's Medicaid returns policy and sought guidance from Pompton's Special Program and Compliance Officer ("SPOC"). This individual advised Quinn that it was her belief that Pompton was obligated to pay Medicaid back the full value of returned pharmaceuticals and that its failure to do so possibly constituted fraud.[18]

Quinn also discussed with the SPOC Pompton's policy regarding redispensing opened pharmaceutical products. He had witnessed individuals working in the pharmacy's returns department removing pills from their original sealed packages by pushing them through the wrapping and then placing them into large bins. He witnessed other individuals in the pharmacy's returns department creating new packages for these loose pills.[19]

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13. 31 U.S.C. § 3729(a).

14. *See* Brief for Appellant ("BA"), p. 5, which may be obtained through Westlaw Court/Express, 1-877 DOC-RETR, or by contacting TAF at 202-296-4826 ext. 28.

15. *See* BA, pp. 5–6. The federal Medicaid program ("Medicaid") is a voluntary program operated by participating states. States which are allowed to participate in the program must have adopted all regulations that the federal government deems necessary for its administration, including regulations concerning distribution of and payment for prescription medications and regulations mandating that participating States prevent unreasonable costs. 42 U.S.C. § 1396(a)(30)(A).

16. *See* BA, p. 5–6.

17. *See* BA, p. 6.

18. *See* BA, pp. 6–7.

19. *See* BA, p. 7.

Based on Quinn's unabated fears concerning Pompton's returns policy, Quinn reported them in an August 1997 memorandum to Traster. Quinn was discharged from his employment approximately one week later.

Troubled by Pompton's conduct, Quinn initiated a *qui tam* suit against Pompton and its parent corporation, Omnicare, in 1998 in The United States District Court for the District of New Jersey.

(B) Omnicare

Omnicare, a publicly traded corporation, is the nation's largest provider of pharmacy related services to long term care facilities, such as nursing homes and assisted living communities, and at the time of the litigation, conducted business within 45 of the United States.[20] Pompton was purchased by Omnicare in 1997.

In or about April 1998, Omnicare entered into a Settlement Agreement and Release with the United States and the State of Illinois ("Agreement") for claims Illinois had brought against Omnicare under the FCA. Those claims arose out of the failure of another Omnicare acquisition, Home Pharmacy Services, Inc. ("HPS") to credit the State of Illinois' Medicaid program for recycled returned pharmaceuticals. In addition to paying a substantial sum of money, Omnicare was required to implement a formal compliance program to assure its future compliance with Medicaid and other federally funded programs.[21]

Though no formal compliance program was yet in place, Omnicare, through its counsel, had previously conducted two surveys of state Medicaid regulations, one in June 1996 and the other in October 1997. Both surveys contained a review of New Jersey's Medicaid regulations concerning crediting for returned medications.

The June 1996 survey indicated that "unit dose medications that are returned to the pharmacy if unused can be placed back into stock. . . . **the pharmacy must return, to Medicaid, a check representing the total returned drugs**" (emphasis supplied). The October 1997 updated survey was more detailed. This survey stated that "**if pharmacies accept and redispense returned medications, they must credit the Medicaid Program by sending a check for the unused drugs to the Treasury Department"** (emphasis supplied). It went on to state that New Jersey Medicaid relied upon the pharmacist to properly credit for returned reuseable pharmaceuticals and that the crediting process worked on the "honor system."[22]

As part of a formal compliance program required by the Agreement, Omnicare also submitted questionnaires to all of its pharmacy Unit Managers in May 1998 to inquire about their Medicaid returns policy. Cherry Hill, another Omnicare subsidiary operating in New Jersey, stated in its response to the questionnaire's inquiry about crediting the New Jersey Medicaid Program for returned drugs: "**the law states that the facility must have a system in place in the LTC facilities for the crediting of medications. Medicaid does expect credits but does not have any policy regard-**

20. *See* BA, p. 7.

21. *See* BA, pp. 7–8.

22. *See* BA, pp. 8–9.

ing crediting of meds [sic]." Pompton responded that **"credit must be given where applicable as per regulation. An administrative restocking charge is taken and the remainder is credited."** [23]

(C) Pompton

Prior to Omnicare's purchase of Pompton in 1997, both financial and operational due diligence reports were prepared. The operational due diligence reports indicated that 65% of Pompton's income came from Medicaid.[24]

With respect to Pompton's processing and repackaging of returned medications, the operational due diligence report noted "the actual recycling process is to push out the individual tablets and capsules and place them in separately labeled containers for subsequent use." Another section of the report indicated "[i]f bulk pre-packed card and can find bottle with same lot number will punch product back into bulk bottle. If can't find then destroy. Looked like they were punching everything back into bottles." [25]

The financial due diligence report also found that net New Jersey Medicaid sales represented roughly 60% of Pompton's total sales prior to Omnicare's purchase of Pompton. [26]

Pompton is a signatory to a standard provider agreement required by the New Jersey Department of Human Services, Division of Medical Assistance and Health Services ("DMAHS"), the agency that administers the New Jersey Medicaid program. The provider agreement contains the following certification: **"I understand that the maximum charge to the State of New Jersey for all Medicaid and PAAD prescriptions for covered drugs and related pharmaceutical products/devices may not exceed the pricing policies of the state as described in N.J.A.C. §10:51-1.5 and N.J.A.C. §10:51-4.5"** (emphasis supplied). The provider agreement also prohibits any false statement or representation of material fact made in order to receive any benefit or payment under the Medical Assistance Program.[27]

(D) Medicaid Returns—Defendants' Crediting Policies

(1) Omnicare

Omnicare's corporate returns procedure is contained within its Standard Operating Procedures manual ("SOP"). The SOP indicates "in those states that permit the return and re-use of noncontrolled substances: [e]stablish a detailed tracking system to enable the pharmacy to account for all returns, re-use and/or disposal and **full credit** has been issued." (emphasis supplied). [28]

23. *See* BA, p. 9.
24. *See* BA, pp. 9–10.
25. *See* BA, pp. 9–10.
26. *See* BA, p. 10.
27. *See* BA, p. 10.
28. *See* BA, p. 11.

(2) Pompton

In a memorandum produced during the litigation, Pompton noted that "since Medicaid does not spell out the financial terms for determining reimbursement, we have been following the concept that was already in place prior to Omnicare purchasing this unit. Although it is not in writing, this unit credits Medicaid at the rate of (average wholesale price) AWP-50%."[29]

The actual amount which Pompton credited to Medicaid was determined by its accounts payable staff who totaled the billing (remittance) reports for returned medications and then requisitioned checks based upon 50% of the amount billed. However, there was no effort by Pompton to trace or keep track of returned medications to ascertain where and to whom they had been initially dispensed. For a period of time the payment amounts contained within the billing statements were automatically reduced by 50% by Pompton's computer system.[30]

(D) The DOJ Investigation and the Price Waterhouse Analysis

During its investigation of this suit's allegations, the DOJ requested that Omnicare produce a copy of a February 1998 report prepared by Price Waterhouse concerning Pompton's Medicaid returns policy for the period August 1996 through December 1998. Omnicare's counsel prepared a written synopsis of the reports' factual findings and submitted that in place of the actual report.[31] The synopsis indicated "the actual percentage calculated by the Returns Entry process for drugs returned to New Jersey Medicaid is approximately 50% of AWP." It further verified that Pompton credited New Jersey Medicaid 25% of AWP from November 1996 through at least September 1997. [32]

The District Court held that the defendants, by producing a synopsis of the report, had waived the work product privilege concerning its factual contents and ordered them to turn over portions of that document and certain attachments to a July 1999 follow-up report. The 1998 report confirmed that the returns reports generated from Pompton's Medicaid initial billing statements were not actually sent to Medicaid with the credit payments and that Medicaid only received Pompton's credit checks without any supporting documentation.[33]

According to the report, Traster acknowledged that the computer system's field for returns automatically computed the returns at 50% of their value and admitted that he had designed this field. Traster acknowledged that Quinn "was not familiar

29. *See* BA, p. 11.

30. *See* BA, pp. 11–12.

31. *See* BA, pp. 12–13.

32. *See* BA, pp. 12–13.

33. The State of New Jersey provided plaintiff with copies of all monthly credit payments made by Pompton for the period October 1996 through October 2000. Each of the checks except one issued in December 1996, indicated that the credit payments were simply for returns. The December 1996 payment contains several ambiguous notations in its descriptive remarks section, which originally were not discovered by Medicaid representatives because the check had been poorly reproduced.

with anything that was going on with the computer." Price Waterhouse concluded that "it could not be determined if the change from 50% to 25% credit was an intentional change or a misrepresentation of the data generated by the computer."

Price Waterhouse was advised by Pompton's accounts payable staff that the returns report for each month were totaled and the resulting value was then reduced by 50%. Because of the 50% reduction automatically calculated by the computer, the net returns percentage for the New Jersey returns program was actually 25%.[34]

(F) New Jersey Regulations and Administrative Code Provisions

(1) Medicaid Claims—Payment and Adjustment

The procedure for Medicaid claims is set forth in a Fiscal Agent Billing Supplement ("FABS"). The FABS instructs provider pharmacies that **all Medicaid pharmacy claims** are to be submitted on the MC-6 claim form. The MC-6 form contains the following certification:

> PROVIDER CERTIFICATION: I certify that the services covered by this claim were personally rendered by me or under my direct supervision (as defined by Program regulations); that the foregoing information is true accurate and complete; and I agree to keep such records as are necessary to disclose fully the extent of services provided, and to furnish information for such services as the State Agency may request; and that the services covered by this claim and the amount charged thereof are in accordance with the regulations of the New Jersey Health Services Program; and that no part of the net amount payable under this claim has been paid; and that payment of such amount will be accepted as payment in full without additional charge to the patient or to others on his behalf. I also certify that the services have been furnished in full compliance with the non-discrimination requirements of Title VI of the Federal Civil Rights Act and Section 504 of the Rehabilitation Act of 1973. I understand that payment and satisfaction of this claim will be from Federal and State funds and that any false claims, statements or documents, or concealment of a material fact, may be prosecuted under applicable federal or State laws, or both.[35]

If New Jersey Medicaid pays a claim in error, the pharmacy provider is required to submit a "MMIS Adjustment Request Form." The FD-999 form itself specifically indicates that a claim must be voided when services are not provided. No reimbursement payment accompanies the FD-999 when a previously submitted claim is voided. Medicaid deducts

34. *See* BA, p. 13.

35. *See* BA, pp. 14–15.

the voided amount from the current Medicaid payment owed to the provider.[36]

Medicaid regulations are maintained by DMAHS. According to N.J.A.C. §10:49-8.3(b), when a claim is paid by New Jersey Medicaid in error, the provider is required to void the initial claim utilizing the proper Adjustment Form (FD-999(9/91)). Similarly, Medicaid regulations require that for electronically submitted claims, "pharmacies are required to initiate claim reversals for those services in which a claim was generated and adjudicated to payment by the fiscal agents' POS computer and the service was not provided to a Medicaid . . . beneficiary" N.J.A.C. §10:51-1.25(j)(2).[37]

Additionally, N.J.A.C. §10:49-14.5 prohibits a provider from charging Medicaid an "administrative charge or service fee for services for which reimbursement is included as part of the Medicaid fee." Medicaid also pays long term care provider pharmacies a "capitation" fee for each patient (bed) receiving Medicaid reimbursed pharmacy services. See N.J.A.C. §10:51-2.7. The amount of the capitation payment is dependent upon the method by which the medication is dispensed. The capitation fee is paid in order to reimburse the pharmacy provider for costs related to dispensing medications. A representative of New Jersey Medicaid verified that the capitation payment includes the costs associated with recycling medications because those costs are related to the dispensing of medication.[38]

(G) N.J. Regulations—Returns, Recycling and Credits

In New Jersey, long term care provider pharmacies may resell unused pharmaceuticals returned from long-term care institutions if certain conditions are satisfied. Pharmaceuticals may only be recycled if they are in unit (single) dose packaging, have been stored in a medication room or secure area, and have their seal and control number intact.[39] Unit dose medications may not be recycled if their expiration date is missing from the medication's label or has passed.[40]

Regulations governing the crediting of returned reusable medications were promulgated by the New Jersey Department of Health and Senior Services ("DHSS"). N.J.A.C. §8:39-29.4(j) states in its entirety: "Where allowable by law, the **facility shall** generate a **crediting mechanism** for medications dispensed in a unit-of-use drug distribution system, or other system which allows for re-use of medications. The **crediting** system **shall** be **monitored** by the **provider pharmacist** and a facility representative" (emphasis supplied).[41]

At the time of its enactment, New Jersey included the following assessment of the economic impact of this regulation in the New Jersey Register:

> [S]ignificant cost savings will accrue as a result of N.J.A.C. §8:39-29.4(j), which requires facilities utilizing unit of use medication ad-

36. *See* BA, p. 15.

37. *See* BA, pp. 15–16.

38. *See* BA, p. 16.

39. N.J.A.C. § 13:39-9.5.

40. N.J.A.C. §§ 13:39-5.9 and 13:39-9.15(a)(1).

41. *See* BA, pp. 17.

> ministration systems to establish a crediting system for return of unused pharmaceuticals. The rule discontinues the current requirement to destroy all unused medications within 30 days. When dispensed in single-use packages (for example,"bingo cards"), the product is returnable and can be dispensed again by the retail pharmacy. Although no statewide dollar impact is available, literally thousands of dollars of medications are destroyed by many facilities monthly. Both private pay consumers and the State Medicaid program will benefit from this proposed rule. [42]

The crediting requirement was again addressed by the state when it considered the economic impact of a 1997 amendment to the long term care regulations increasing the time unit dose medications could be retained in a pharmacy's inventory. It was projected that:

> The economic impact of this amendment should result in savings to residents and families and third party payors such as Medicaid. **These savings will occur as a result of drugs which will be returned to the pharmacy for credit. Drugs which have been discontinued for a particular resident and returned to the pharmacy will be credited to that resident.** The returned drugs which have some time remaining before they reach the expiration date will then be dispensed to another resident, rather than being disposed of in the pharmacy after six months regardless of the date listed on the label. The pharmacy will not dispense repackaged unit dose drugs with less than a thirty day expiration date. The overall savings to residents, families and Medicaid may exceed $200,000. There will also be savings to all long term care pharmacies, as they will not have to pay for waste removal of these products. (emphasis supplied).[43]

Further a January 13, 1998 letter from former DHSS Deputy Commissioner Susan C. Reinhard to a consultant pharmacist employed by a long term care provider pharmacy, indicated that "there is a requirement that the facility employ a crediting mechanism for medications dispensed in a unit-of-use drug distribution system which allows for the re-use of medications." Deputy Commissioner Reinhard further stated that "whoever supplies the medication must of course comply with the applicable requirements."[44]

Finally, a 1985 audit report concerning "credits to Medicaid for return of reusable drugs" prepared by the United States Department of Health and Human Services' Office of the Inspector General indicates that the State of New Jersey does require crediting for returned reusable pharmaceuticals.[45]

42. 26 N.J.R. 1776 (Monday May 2, 1994).

43. 29 N.J.R. 4415(a)(Monday, October 20, 1997).

44. *See* BA, p. 18.

45. *See* BA, p. 18.

(H) Deposition Testimony

Edward J. Vaccaro ("Vaccaro"), Assistant Director of the DMAHS Office of Health Service Administration, was deposed in this litigation. During his testimony, Vaccaro explained the contents of a December 4, 1998 letter he had written to Deputy Attorney General Krayniak regarding this suit—a letter which ultimately convinced the DOJ not to intervene in the suit.[46] Vaccaro stated that because DMAHS (N.J. Medicaid) did not have separate regulations pertaining to medication recycling, DMAHS had considered it a voluntary program. Vaccaro further testified that the DHSS had actually regulated this area. Medicaid relied upon pharmacists to comply with all relevant DHSS regulations. Vaccaro explained the genesis of this dichotomy. In 1998, former New Jersey Governor Christie Whitman issued an Executive Order which split the services provided under the Medicaid program between two Departments within state government. The responsibilities concerning seniors, including services performed by long term care providers, were transferred from DMAHS to the DHSS.[47]

When he reviewed N.J.A.C. § 8:39-29.4(j), Vaccaro said that its second sentence required the provider pharmacist to set up a crediting mechanism within its own facility and to support whatever credits are sent in to the state with adequate documentation. He verified that the long term care provider pharmacy is responsible for submitting credits to Medicaid for returned reusable pharmaceuticals.

Concerning the amount of credit, Vaccaro testified that the provider was required to pay back the full amount which Medicaid had originally paid. Vaccaro stated: "Whenever Medicaid makes a purchase and then there's any return of that money that was expended, it's a hundred percent, it's never a portion of it. Its state tax dollars. This is not a private commercial entity we're dealing with here. That's not just my expectation, it's also the expectation of my administrators, my supervisors, the director of the division." Vaccaro also stated that based upon his experience, it was understood that "if a product we purchased returns back at the inventory, that we get back our full credit for the purchase."[48]

IV. AN OVERVIEW OF THE THIRD CIRCUIT'S DECISION

The Third Circuit's decision,[49] issued on September 1, 2004, affirmed the United States District Court of New Jersey's unreported decision[50] granting Omnicare's motion for summary judgment dismissing Quinn's complaint in its entirety.[51]

46. *See* BA, pp. 18–19.

47. *See* BA, p. 19.

48. *See* BA, pp. 19–20.

49. *See* Sanford, Teplitzky, Health Law Handbook, Part III, Chapt. 7, "Update on Fraud and Abuse" § 7.7 , 2005 Edition and False Claims Act & *Qui Tam* Quarterly Review, Volume 35, October 2004 for general overviews of the decision.

50. United States ex rel. Quinn v. Omnicare, Inc., No. 98-2031 (DRD), slip op, 2003 WL 24296532 (D.N.J. filed March 28, 2003). The Third Circuit's complete procedural history of the litigation is contained in the BA, pp. 2–6.

51. The precedential decision in *Omnicare* was deemed controlling and compelled the Third Circuit to reject another litigant's FCA challenge to another long term care provider pharmacy's restocking practices. *See In re* Genesis Health Ventures, Inc., 2004 WL 2296093 (3d Cir. 2004). In *Genesis*, identical crediting practices were engaged by the defendant. In an

In his appeal, Relator Quinn asserted four theories for the imposition of FCA liability against Omnicare. First, Omnicare, by failing to void the initial MC-6 claim form when unused pharmaceuticals were returned, violated the FCA by obtaining payment from Medicaid for goods that were never provided ("worthless services"). Second, Omnicare violated the FCA by accepting multiple Medicaid payments for the same goods ("successive claims for recycled products"). Third, Omnicare violated the FCA by submitting claims to Medicaid for pharmaceutical products which were not processed in compliance with New Jersey Board of Pharmacy regulations ("adulterated products claim"). Finally, Relator Quinn asserted that the FCA was violated when Omnicare failed to return one hundred percent of the amount initially billed for returned medications ("Reverse False Claim").[52]

Regarding Quinn's assertion that Omnicare had violated the FCA when it failed to void its initial Medicaid claim forms when unused medications were returned for reuse, the Third Circuit held that the initial claim forms were accurate when they were originally submitted to Medicaid for reimbursement. Hence, since the forms could not be deemed false when they were originally submitted they were not actionable under the FCA.[53] Subsequent events, such as the return of medications, did not convert the initially accurate claim into a false one. Furthermore, the court held that New Jersey regulations did not specifically require that the forms be voided when medications were actually returned. The court noted that it would be "exceeding the intent of Congress in defining false claims if we were to permit the transforming of a valid claim into a false claim by the occurrence of a subsequent fortuitous event which is not itself the basis of any required adjustment."[54]

Next, the court rejected Quinn's FCA claim based upon Omnicare's successive billing for recycled medications. The Court held that because New Jersey regulations permit the return and recycling of medications to long term care facilities, and there was no regulation specifically requiring the pharmacy to credit Medicaid for amounts it had already paid, no FCA liability could attach to this practice.[55] The court held that without the existence of a clear regulation prohibiting this practice, it could not properly impose FCA liability on Omnicare:

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unreported decision issued a month and a half after *Omnicare*, the court held that "in the absence of any statute or regulation requiring health care providers in New Jersey to credit Medicaid for returned drugs, we conclude that neither West End's failure to do so, nor its alleged practice of successive billing based on a separate transaction theory, gives rise to a False Claims Act violation." *Id*.

52. The final theory of liability was asserted under "reverse false claims" provision of the FCA, 31 U.S.C. § 3729 (a)(7). *Omnicare,* 382 F. 3d 432, 436.

Whereas the other sections of § 3729(a) create liability when individuals obtain excessive payments from the federal government due to their submission of a "false claim" for payment, § 3729(a)(7) creates liability when individuals fraudulently conceal or understate money owed back to the federal government. Liability attaches under the reverse false claims provision when a party knowingly decreases or conceals an obligation owed to the government. United States v. Raymond & Whitcomb, 53 Fed. Supp. 2d 436 (S.D.N.Y. 1999); United States v. Pemco Aeroplex, Inc., 195 F. 3d 1234 (11th Cir. 1999); Pickens v. Kanawha River Towing, 916 Fed. Supp. 702, 708 (S.D. Ohio WD 1996).

53. *Omnicare*, 382 F. 3d 432, 436.

54. *Id*.

55. The court discussed applicable Medicaid regulations at length in the section of its decision which rejected Quinn's claim that Omnicare was legally obligated to credit Medicaid the full acquisition cost of returned medications. *See infra*, pp. 20–21.

> In so concluding, we recognize that the second claim would be submitted to Medicaid for payment for the *same* medication. When Pompton submits the second claim, it knows that the medication, which is the subject of that claim, was already dispensed once and returned. Pompton also knows that Medicaid has already paid 50% of the cost of the medication. However, because New Jersey regulations allow Pompton to recycle returned medications and because no regulation requires Pompton and other Medicaid pharmacies to credit Medicaid for the returns, we conclude that we cannot impose FCA liability based on the submission of the second claim.[56]

The court also rejected Quinn's successive claims theory of FCA liability on the ground that Quinn had failed to present clear evidence that any duplicate claims had actually been paid by Medicaid, even though it was clear that over 60% of Pompton's business was devoted to Medicaid participants and that some duplicate Medicaid claims had to have been submitted.[57] In support of this portion of its holding, the court cited two decisions that were decided outside the Third Circuit. Both decisions held that in order to defeat a motion to dismiss under Federal Rules of Civil Procedure, Rule 9 (b), an FCA plaintiff must allege in his or her complaint the existence of an actual false claim.[58] Omnicare's counsel, in fact, recently applauded this aspect of the ruling and proclaimed that it "should go a long way toward permitting healthcare providers, who have been sued by FCA relators, to challenge the legal underpinnings of the suit without risking a jury trial."[59]

The court rejected Quinn's adulterated medications claim on grounds similar to its rejection of his successive billing claim. The court held that this portion of Quinn's suit must fail because he failed to produce any evidence that Medicaid had paid for improperly processed medications. The fact that over 60% percent of Omnicare's business was devoted to Medicaid was deemed legally insufficient for purposes of imposing FCA liability:

> In the present case, however, Quinn cannot demonstrate either that an improperly recycled medication was paid for by Medicaid or that it was paid for by one of the other sources of payment for the medications that Pompton dispensed. Although we might hypothesize that 60% of the improperly recycled medications were paid by Medicaid, it is impossible to rule out the chance that they were paid by non-Medicaid sources. For this reason, we agree with the District Court that "even assuming that the MC-6 certified compliance with Board

56. *Quinn*, 382 F.3d 432, 441.

57. *Id.* at 439–40.

58. United States ex rel. Alfatooni v. Kitsap Physicians Service, 314 F. 3d 995 (9th Cir. 2002); United States ex rel. Clausen v. Lab. Corp. of America, 290 F. 3d 1301 (11th Cir. 2002).

59. *See* Harry R. Silver, *Third Circuit Rules That A Qui Tam Relator May Not Proceed To Trial Without First Establishing That False Claims Were, In Fact, Submitted*, November 2004 Patton Boggs News and Views, *available at* http:/www.pattonboggs.com/news/detail.aspx?news=128 (last visited November 1, 2007).

> of Pharmacy regulations as a condition of payment, Plaintiff has not pointed to sales inconsistent with the certification [citations omitted]." As with our discussion on successive claims, Quinn did not provide the District Court with a single instance where Pompton submitted a claim for payment for medications recycled in violation of § 13:39-9.15. For that reason, Quinn's false certification claim fails.[60]

Nonetheless, though the court denied Quinn's substantive claim for improperly recycled medications, it rejected the District Court's holding that the "implied false certification" theory of FCA liability was inapplicable here.[61] An implied false certification occurs when the government pays a claim based upon a claimant's false assertion that they have complied with all regulatory or contractual preconditions to payment.[62] In such a case, while the claim for payment is itself true, the certification of compliance is not.

The District Court held that since Medicaid's payment obligation was not specifically conditioned on the provider's compliance with the pharmacy regulation at issue here, § 13:39-9.15(a)(2), the false certification theory could not be asserted.[63] The Third Circuit disagreed. Since non-compliance with pharmacy regulations would disqualify a provider from continuing to participate in the Medicaid program,[64] compliance could not be deemed irrelevant to Medicaid's decision to pay.[65] Hence, even though Medicaid's payment obligation was not specifically conditioned on the provider's compliance with applicable pharmacy regulations, the court found that an implied false certification claim could still exist. Unfortunately, since the pharmacy regulations were not actually proven to have been violated, the court held that Quinn's implied false certification claim could not succeed.[66]

Finally, the court, in the most troubling portion of its decision, dismissed Quinn's reverse FCA claim [67] on the ground that in New Jersey, long term care provider pharmacies were under no clear obligation to credit Medicaid for the payments they received for returned medications which were resold back to Medicaid participants.[68]

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60. *Id.* at 443.

61. *Id.* at 442.

62. *See* United States ex rel. Siewick v. Jamieson Sci & Eng'g, Inc., 214 F. 3d 1372, 1376 (D.C. Cir. 2000); United States ex rel. Mikes v. Strauss, 274 F. Supp. 3d 687, 697, 702–703.

63. *Omnicare,* 382 F. 3d at 442.

64. The MC-6 form specifically required providers to certify that the pharmaceutical services they provide comply with all Medicaid regulations; regulations which in this case specifically incorporate New Jersey pharmacy regulations.

65. *Omnicare,* 382 F. 3d at 442.

66. *Omnicare* is significant in the respect that it is the first Third Circuit decision which has expressly adopted the "false certification" theory of FCA liability. *Id.* at 441. Furthermore, in it, the Third Circuit adopted the broader, less restrictive false certification approach adopted by several other circuit courts. *Id.* at 442, fn. 12. Ab-Tech Construction v. U.S., 31 Fed Cl. 429, 434 (Fed Cl. 1994), *aff'd.*, 57 F 3d. 1084 (Fed. Cir. 1995); U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, 238 F. Supp. 2d 258, 263 (D.D.C. 2002) ("The theory of implied certification, as set out in *Ab-Tech*, is that where the government pays funds to a party, and would not have paid those funds had it known of a violation of a law or regulation, the claim submitted for those funds contained an implied certification of compliance with the law or regulation and was fraudulent"); Lucky v. Baxter Healthcare Corporation, 183 F. 3d 730 (7th Cir. 1999); U.S. ex rel. Kneepkins v. Ganbro Healthcare, Inc., 115 F. Supp. 2d 35, 42 (D. Mass. 2000).

67. 31 U.S.C. § 3729(a)(7).

68. *Omnicare,* 382 F. 3d at 444.

The court held that the regulations cited by Quinn only require the long term care pharmacy provider to "monitor" the crediting mechanism which nursing homes have in place.[69] The pharmacy has no independent obligation to credit under New Jersey regulations as they currently exist. The fact that the legislative history of the regulations as well as the testimony of a New Jersey Medicaid representative tended to support Quinn's arguments was not deemed probative because of the clear lack of legal authority establishing that there was an obligation to credit.[70] The court also held that even if the regulations did establish a crediting obligation, they did not clearly require that any specific amount be paid for returned medications.[71]

V. ANALYSIS AND CRITIQUE

The *Omnicare* decision is an extremely troubling one. The Third Circuit has held that long term care provider pharmacies in New Jersey may legally bilk the United States by reselling it, multiple times, products it had already purchased—the very thing the FCA was intended to prevent! Certainly, this determination was not an easy one for the court, given its strong suggestion at the decision's conclusion that either the legislature or Medicaid close this loophole. However, the court's determination was not necessarily an inevitable one on the facts of this case.

First, it was contrary to the clear weight of the evidence presented to the court for it to have held that defendants were under no crediting obligation. While the regulations at issue in the suit were to some extent ambiguous,[72] taking into account their legislative history, the defendants' actual crediting practices, the opinion of a key New Jersey Medicaid official and the 1985 audit report of the United States Department of Health and Human Services' Office of the Inspector General finding that there was a crediting obligation in New Jersey,[73] the court could have easily found that a legally binding obligation existed.

Further, there is ample case law suggesting that no clear regulation is needed to establish FCA liability where "worthless services" are provided to the government.[74] A valid FCA action may exist even in the absence of statutory or regulatory requirements

69. N.J.A.C. § 8:39-29.4(j).

70. *Omnicare,* 382 F. 3d at 446.

71. *Omnicare,* 382 F. 3d at 445.

72. N.J.A.C. § 8:39-29.4(j).

73. *See* OIG-RPT, Med Guide 1985 Med-Guide-TB ◐ 34,646, Credits to Medicaid Following the Return and Redispensing of Prescription Drugs (May 22, 1985), Office of Inspector General Audit Report, No. ACN 10-50201.

74. *See*, e.g., United States v. Bornstein, 423 U.S. 303 (1976) (subcontractor furnished obsolete surplus radio tubes rather than new ones); U.S. ex rel. Lee v. SmithKline Beecham, Inc., 245 F. 3d 1048, 1050–53 (9th Cir. 2001) (knowingly billing for worthless services is actionable under the FCA where an operator of a regional clinical laboratory falsified laboratory test data when test results fell outside the acceptable standard of error); U.S. ex rel. Mikes v. Strauss, 274 F.3d. 687, 702–03 (2d Cir. 2001); Shaw v. AAA Engineering & Drafting, Inc., 213 F. 3d 519, 531–532 (10th Cir. 2000); Daff v. U.S., 78 F 3d 1566, 1574 (Fed. Cir. 1996) (supplying the federal government with defective power conditioners for use in TOW missiles violated the FCA); U.S. v. Mcleod, 721 F. 2d 282, 284 (9th Cir. 1983) (cashing an erroneously issued government check constitutes a violation of the False Claims Act); U.S. v. Areodex, Inc., 469 F. 2d 1003, 1007–1008(5th Cir. 1972) (FCA liability found where contractor furnished ostensibly new, but reworked renumbered aircraft engine bearings); U.S. v. Hydroaire, Inc., 1995 WL 86733 (N.D. Ill. 1995) (submitting non-conforming goods pursuant to a government military contract violated the FCA).

prohibiting the fraudulent conduct, the exact situation encountered in *Omnicare*. This was made clear by the Ninth Circuit in *Lee v. SmithKline Beecham, Inc.* where it explained that, "in an appropriate case, knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under §3729 [of the False Claims Act], regardless of any false certification conduct." [75] Even in *Mikes v. Strauss*, a decision in which the Second Circuit defined the parameters of false certification conduct, the Court recognized the viability of "worthless service" FCA claims which did not require certification conduct.[76]

The court, unfortunately, was unwilling to find a viable worthless service claim in *Omnicare* since medications were actually delivered to Medicaid patients. The error in this line of reasoning, however, is that it fails to focus on whether Medicaid participants actually received the medical benefit which the medications were intended to provide to them. In reality, that is the service for which Medicaid is paying. It seems counterintuitive to believe that "services" are actually being provided to Medicaid participants where medications are not used by them and are simply returned to the pharmacy.[77] The court's approach was a mechanistic one which was based solely upon the delivery of the medications, not upon their actual utilization. Under this constricted analysis, it would have been impossible to assert a worthless service claim.[78]

Next, Quinn's reverse FCA claim could have been sustained on the ground that Omnicare had acknowledged and represented to Medicaid that they were paying one hundred percent credit for returned medications when they submitted credit checks back. It was undisputed that Omnicare had regularly submitted reimbursement checks back to Medicaid.[79] Regardless of Omnicare's claimed motivation for making these payments, by virtue of the that fact they were made, Medicaid expected and believed that they were for the full amount of the returned medications. The record was clear that through the defendants' conduct and representations to Medicaid, they had acknowledged an indebtedness to pay full credit.[80] Omnicare's own conduct created an enforceable legal obligation which in and of itself should have been sufficient to establish liability for a reverse false claim.[81]

Omnicare's conduct was rendered even more odious by the fact that for a substantial amount of time it was not even following its own internal policy of submitting to

75. U.S. ex rel Lee v. SmithKline Beecham, Inc., 245 F. 3d 1048.

76. U.S. ex rel. Mikes v. Strauss, 274 F.3d. 607, 702 (2d Cir. 2001). (False certification conduct occurs when a claim for payment is submitted to the Government which certifies compliance, either expressly or implicitly, with a particular statute, regulation or contractual term.)

77. It should be emphasized as well that claims were required to be voided when services were not provided to the participant. The court failed to recognize that there is a distinction between failing to provide services and failing to provide medication.

78. While the court stated that it was not ruling on the "worthless service" claim because it had not been raised previously in the district court, it is clear that the court's rigid interpretation of the New Jersey regulation requiring the voiding of Medicaid claims when services are not provided to the Medicaid beneficiaries would have been fatal to such a claim. *Omnicare,* 382 F. 3d at 437 & 446 fn. 18.

79. *See* BA, p. 13, fn. 5.

80. *Omnicare,* 382 F. 3d at 446.

81. Syle v. Freedley, 99 A 2d 541, (N.J. Super., App. Div. 1953) (checks may constitute an acknowledgment of an indebtedness actionable at law); McPhilomy v. Lister, 19 A. 2d 143, 153 (S. Ct. Pa. 1941) ("there can be no more unequivocal acknowledgment of a present existing debt than a payment on account of it").

Medicaid fifty percent credit.[82] Omnicare's admission that it only credited Medicaid twenty-five percent between November 1996 and September 1997 could have been another basis for the court to find reverse FCA liability. Unfortunately, the decision did not even address the ramifications of this fact.

Finally, the court's denial of Quinn's duplicate payment and adulterated medications claims, based on his failure to produce evidence that improper Medicaid claims had actually been submitted, did not take into account the practical realities of the conduct engaged in by Omnicare. Omnicare failed to keep track of which returned medications were being resold to Medicaid.[83] Nor did Omnicare maintain any records which could have been used to demonstrate that improperly packaged medications were being sold to Medicaid. While it is true that submission of a false claim is the *sine qua non* of FCA liability, in this case, where even the court believed that duplicate claims were being submitted and compelling evidence existed that claims were being submitted in violation of pharmacy regulations, an exception to this requirement could have been made.[84] Certainly, the two Circuit Court decisions relied upon by the court did not mandate the dismissal of this claim under these particular circumstances.[85]

The result in *Omnicare* actually rewards the defendants for irretrievably hiding their potentially fraudulent practices from discovery.[86] At the very least, the FCA should be amended to revise the burden of production in cases where proper record keeping was not employed by defendants.

VI. THE LEGISLATIVE RESPONSE

In 1985, United States Department of Health and Human Services' Office of the Inspector General conducted an audit of the medication returns programs of 32 States ("OIG Report").[87] With regard to federal regulations pertaining to returned reusable medications, the OIG Report noted that "[t]hose regulations, however, are silent re-

82. *Omnicare,* 382 F. 3d at 435, fn. 6.

83. Obviously, Omnicare believed that a substantial amount of medications were being resold, or it never would have submitted any credit payments back to Medicaid.

84. *Omnicare,* 382 F. 3d at 441 & 443, fn. 16.

85. *See* United States ex rel. Alfatooni v. Kitsap Physicians Service, 314 F. 3d 995 (9th Cir. 2002); United States ex rel. Clausen v. Lab. Corp. of America, 290 F. 3d 1301 (11th Cir. 2002). *See also* U.S. ex rel. Crews v. NCS Healthcare of Illinois, 2006 WL 2371457 (7th Cir. Ill., August 17, 2006) (dismissed a suit based on facts almost identical to *Quinn*'s on the ground that no evidence of an actual false claim had been submitted by plaintiffs); United States ex rel. Debra Hockett v. Columbia/HCA Healthcare Corp., _____ F. Supp 2d ___, 2007 WL 2039544 (D.D.C. 2007)

86. In fact, based upon the *Omnicare* decision, a major publication read by pharmacists throughout the country recently proclaimed that the practices engaged in by Omnicare are not fraudulent. With such public announcement, it is clear that other long term care provider pharmacies would soon mimic Omnicare's practices and take advance of similarly ambiguous state regulations had the loophole not been closed. *See Medicaid Fraud or Not?,* Jesse C. Vivian, BS Pharm, JD, U.S. Pharmacist, US Pharm. 2004; 12:55–58. South Dakota and Idaho have regulations almost identical to N.J.A.C. § 8:39-29.4(j). Title 20 of the Administrative Rules of South Dakota, § 20:51:13:02.1 states "unused drugs from patients in a nursing facility may be returned to the pharmacy that dispensed the drugs for credit and redispensing." Title 1, Agency 27 (Board of Pharmacy) of the Idaho Administrative Code, § 27.01.01.156.05 states: "unit dose packaged medications for in patients of licensed skilled nursing care facilities and hospitals may be returned to the dispensing pharmacy for credit."

87. *See* OIG-RPT, Med Guide 1985 Med-Guide-TB ¶ 34,646, Credits to Medicaid Following the Return and Redispensing of Prescription Drugs (May 22, 1985), Office of Inspector General Audit Report, No. ACN 10-50201.

garding recovery by pharmacies of reusable drugs. They do not require that reusable drugs be recovered by pharmacies nor appropriate credits be made to Medicaid if the drugs are recovered."[88] As a result of the audit, the OIG Report recommended that "HCFA revise and strengthen the Medicaid regulations to require that, where State pharmacy policies and procedures allow for the return and redispensing of drugs provisions be made for appropriate credits to Medicaid."[89] Even more recently, a congressional report released in 2004 indicated that the federal government was not doing enough to combat Medicaid fraud. [90] The *Omnicare* decision is a direct result of the government's failure to heed the OIG Report's recommendation to strengthen Medicaid regulations.

After the *Omnicare* decision was published, there was considerable public outcry for the closure of the regulatory loophole exposed by the court, which permitted pharmacies to bill the government multiple times for the same medication .[91] In response to the decision, Taxpayers Against Fraud, a private watchdog group, advocated for the creation of a clear federal rule requiring pharmacies to reimburse Medicaid for drugs that were returned for resale.[92]

As a result, former United States Senator Jon S. Corzine (D.NJ) proposed legislation in 2004 that would have amended Title XIX of the Social Security Act to require proper crediting for re-dispensed medications.[93] This legislation died in Committee. However, in 2005, the Senate Budget Committee submitted to Congress the Deficit Reconciliation Act of 2005 which contained a section specifically prohibiting the practice of charging Medicaid a second time for the sale of recycled medications, based upon Corzine's 2004 proposal.[94] The Committee's notes that accompanied the proposed legislation specifically referred to the *Omnicare* decision and remarked that Section 6033 (prohibition on restocking and double billing of prescription drugs) "prohibits federal matching payments for the cost of a covered outpatient drug claim if the claim has already been submitted and for which the pharmacy has already received payment."[95] Section 6033 of the statute, as enacted, bars federal matching payment under the Social Security Act with respect to any amount expended for reimbursement to a pharmacy under that title for the ingredient cost of a drug for which the

88. *Id.*

89. *Id.*

90. *See* AP, Mark Sherman, *Study:U.S. Needs to Fight Medicare Fraud*, http://www.cbhd.org/news/2004-08.htm (last visited November 1, 2007).

91. *See* Life Science Weekly, *Loophole Lets Pharmacies Bill Government Twice*, 2004 WLNR 788097; Atlantic City Press, *Loophole Lets Druggist Double-Bill Government*; 2004 WLNR 17431438; The Star-Ledger, *Medicaid Helpless To Fight Double Billing*, 2004 WLNR 18053017; Cincinnati Post , *Loophole Lets Pharmacies Bill Government Twice*, 2004 WLNR 11505410; Cincinnati Post, *Court: Suppliers Paid Twice For Drugs*, 2004 WLNR 11540764; Health & Mediciane Week, *Loophole Lets Pharmacies Bill Government Twice*, 2004 WLNR 762811; Drug Week, *Loophole Lets Pharmacies Bill Government Twice*, 2004 WLNR 737170.

92. Drug Week, *Loophole Lets Pharmacies Bill Government Twice*, 2004 WLNR 737170.

93. *See* S. 2950, 108th Cong.

94. *See* S. 1932 § 6025, 109th Cong.

95. *See Chairman's Mark of the Deficit Reduction Omnibus Reconciliation Act Of 2005*, p. 24, *available at* http://finance.Senate.gov/sitepages/leg/10.250chmkmod.pdf (last visited November 1, 2007).

pharmacy had already received payment under that title (other than a reasonable restocking fee).[96] This provision became effective in April 2006.

VI. CONCLUSION

The *Omnicare* decision was at the same time both a failure and a success for the plaintiff. While Quinn was unsuccessful in reviving his FCA claims and never received his "bounty," the court drew attention to the lack of regulation which led to Medicaid being billed multiple times for resold medications and its inability to redress this apparent abuse. Clearly, the decision resulted in federal legislation which will significantly reduce Medicaid expenditures. This is rarely, if ever, a result which litigation alone accomplishes.

In fact, the Medicaid reform which was accomplished because of this decision is just the type of advocacy envisioned by Third Circuit Senior Judge Max Rosenn in his 1983 address to the student body at the University of Iowa College of Law, which he entitled "The Social Conscience of a Lawyer."[97] In this address, Judge Rosenn remarked that it was "[m]y hope that these changes and demands upon the legal profession will not blot out your social conscience as lawyers. . . . I believe that that lawyers not only have an obligation to advance and support their profession, but also an obligation to society in general."[98] The decision to pursue *Omnicare* before the Third Circuit represented plaintiff and his counsel's recognition of their larger obligation to society to promote the closure of a widely abused loophole that is costing taxpayers millions of dollars.

Nonetheless, as demonstrated in Section VI, there was a legal basis for the court itself to close the loophole. The Third Circuit's failure to issue a ruling recognizing this was extremely disappointing and, unfortunately, until the loophole was corrected by the legislature, continued to allow opportunistic pharmacies to profit at the taxpayer's expense.

Enforcement of the new prohibition on restocking and double billing of prescription drugs will now rely upon the vigilance on the part of potential *qui tam* relaters. Let's hope they keep a watchful eye.

96. A possible flaw in this legislation involves interpretation of what constitutes a "reasonable" restocking fee. Omnicare, during the litigation, contended that a 50% to 75% fee was appropriate, regardless of the cost of the medication. Clearly, a restocking fee of this magnitude does not appear reasonable.

97. *See* Senior Third Circuit Judge Max Rosenn, *The Social Conscience of a Lawyer*, 69 Iowa L. Rev. 319 (1983–1984). Judge Rosenn was a member of the three-judge panel who decided *Omnicare*.

98. *Id.*

From the Frontlines

Department of Justice Proposal:
Mandatory Compliance Programs
for Government Contractors
72 FR 64019-01

PROPOSED RULES
DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3, 9, 42, and 52

[FAR Case 2007-006; Docket 2007-0001; Sequence 11]

RIN: 9000-AK80

Federal Acquisition Regulation; FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting

Wednesday, November 14, 2007

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR), at the request of the Department of Justice (DoJ), in order to require contractors to have a code of ethics and business conduct, establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of Government contracts or subcontracts, and to notify contracting officers without delay whenever they become aware of violations of Federal criminal law with regard to such contracts or subcontracts.

SUPPLEMENTARY INFORMATION:

A. Background

On May 23, 2007, the Office of Federal Procurement Policy received a request from the Department of Justice to open a FAR case to require contractors to have a code of ethics and business conduct, establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of Government contracts or subcontracts, and to notify contracting officers without delay whenever they become aware of violations of Federal criminal law with regard to Government contracts or subcontracts.

The Councils published a proposed rule under FAR Case 2006-007, Contractor Code of Ethics and Business Conduct, 72 FR 7588, February 16, 2007. That rule proposed creation of a new Subpart 3.10 to address the requirements for a contractor code of ethics and business conduct, and an associated clause at FAR 52.203-XX. The comment period on that proposed rule closed on April 17, 2007, and 27 responses were received. It is still the intent of the Councils to issue a final rule under that case,

based on analysis of the public comments received, except that the final rule will not address mandatory disclosure to the Government.

That proposed rule covers some of the same areas requested by DoJ. However, several aspects of the DoJ request go beyond that proposed rule. The Councils therefore have decided to issue a new proposed rule under this FAR case 2007-006 to cover these new proposals.

Public comments are requested on the new changes not included in prior FAR Case 2006-007. Comments are also requested on mandatory disclosure, and full cooperation, which were in FAR case 2006-007 as examples in the clause of an internal control system. Also note that some paragraphs in that rule, which were not necessary for this rule, were not repeated and will be part of that case's final rule (hotline posters).

The new changes in this rule include:

Compliance program as part of contractor's obligation to have "a satisfactory record of integrity and business ethics"

As requested by DoJ, the Councils propose to amend the general standards of responsibility at FAR 9.104-1 to add a cross reference to Subpart 42.15, and to add at FAR 42.1501 "the contractor's record of integrity and business ethics" as relevant information to be included in past performance information. FAR 42.1501 already includes the requirement to report the contractor's record of conforming to contract requirements, which will include any information that the contractor has not complied with the clause at FAR 52.203-XX. For contractors that have had prior contracts subject to these new requirements, compliance as reflected in past performance rating will be an element for consideration in assessing whether a contractor meets the standard of having a satisfactory record of integrity and business ethics.

Applicability to small business concerns

The Councils propose that clause at FAR 52.203-XX be included in any contract that exceeds $5 million, but that the formal ethics awareness program and internal control system are not required if the contractor is a small business concern. This directly reduces the burden on small business concerns.

U.S. Sentencing Guidelines

The Councils propose to modify the clause at FAR 52.203-XX, Contractor Code of Ethics and Business Conduct, which was proposed under FAR Case 2006-007, to more closely match the U.S. Sentencing Commission Guidelines Manual, Section 8B2.1 (available at http://www.ussc.gov/). Not only DoJ requests this, but also a number of respondents to the proposed FAR rule 2006-007. The U.S. Sentencing Guidelines provide guidance on what the U.S. Sentencing Commission expects in the way of an effective compliance and ethics program from organizations convicted of a felony or Class A misdemeanor. DoJ and other respondents to the FAR Case 2006-

007 proposed rule considered that that proposed rule left out important elements that are covered in the U.S. Sentencing Guidelines and that this can create confusion. Businesses (especially small businesses) may believe they have met all the compliance requirements of the U.S. Government by following the FAR; this will create a false sense of security. Therefore, this rule proposes the following changes to the clause at FAR 52.203-XX:

- Add definitions of "agent," and "principals." The definition of "principals," is the same as the definition used at FAR 52.209-5. This definition has the advantage that it is already included in the FAR, and includes all the personnel covered in the U.S. Sentencing Guidelines definitions of "governing authority" "high-level personnel," and "substantial authority personnel."
- Amplify the paragraph FAR 52.203-XX(b)(2) requirement to promote compliance with the code of business ethics.
- Provide more detail in paragraph FAR 52.203-XX(c)(1) with regard to the ongoing ethics and business conduct awareness and compliance program.
- In paragraph FAR 52.203-XX(c)(2), make all the stated elements of the internal control system mandatory, rather than guidance.
- Add a new paragraph FAR 52.203-XX(c)(2)(ii)(A) requiring assignment of responsibility at a sufficiently high level of the organization and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.
- Provide additional detail in paragraph FAR 52.203-XX(c)(2)(ii)(C) with regard to the requirement for periodic reviews.
- Provide that disciplinary action shall be taken not only for improper conduct, but also for failing to take reasonable steps to prevent or detect improper conduct by others.

Contractor Integrity Reporting

The Councils propose to address the reporting of violations of Federal criminal law in connection with the award or performance of a Government contract or subcontract conduct as follows:

- Add at FAR 3.1002 a cross-reference to FAR 9.406-2(b)(1)(v) and 9.407-2(a)(7), that contractors may be suspended and debarred for knowing failure to timely disclose a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder.

- Modify the clause at FAR 52.203-XX(b)(3), which applies to both large and small business concerns, to require notification to the agency Office of the Inspector General, with a copy to the contracting officer, whenever the contractor has reasonable grounds to believe that a violation of criminal law has been committed in connection with the award or performance of the contract or any subcontract thereunder.

- Modify the clause at FAR 52.203-XX(c), which does not apply to small business concerns, to mandate that the internal control system of the contractor shall also include this requirement to report violations of Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder.

According to DoJ, the requirement for mandatory disclosure is necessary because few companies have actually responded to the invitation of DoD that they report or voluntarily disclose suspected instance of violations of Federal criminal law relating to the contract or subcontract.

The Councils invite comment as to whether there should be any appropriate limitation on the reporting requirement that accomplishes the objectives of this rule, such as the time period during which the violations to be reported occurred (look back).

Use of clause in contracts for the acquisition of commercial items awarded under FAR Part 12

The Councils do not recommend application of the clause to contracts for the acquisition of commercial items. Requiring commercial contractors to comply with the rule would not be consistent with Public Law 103-355 that requires the acquisition of commercial items to resemble customarily commercial marketplace practices to the maximum extent practicable. Commercial practice encourages, but does not require, contractor codes of business ethics conduct. In particular, the intent of FAR Part 12 is to minimize the number of Government-unique provisions and clauses. The policy at FAR 3.1002 of the proposed rule does apply to commercial contracts. All Government contractors must conduct themselves with the highest degree of integrity and honesty. However, consistent with the intent of Pub. L. 103-355 and FAR Part 12, the clause mandating specific requirements contractor compliance program and integrity reporting is not required in commercial contracts.

Causes for debarment or suspension

As requested by DoJ, the Councils propose modification of FAR 9.406-2 and 9.407-2 to include new cause for debarment or suspension: a knowing failure to timely disclose an overpayment on a Government contract or violation of Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or any subcontract thereunder.

Clause at FAR 52.203

Consistent with the proposed rule under FAR case 2006-007, the Councils propose use of the clause FAR 52.203-XX in solicitations and contracts expected to exceed $5 million if the performance period is 120 days or more, except for acquisitions under FAR Part 12 or contracts to be performed outside the United States.

Flowdown

The Councils propose flowdown of the clause FAR 52.203-XX to subcontracts valued at over $5 million, consistent with the proposed rule under FAR case 2006-007. The Councils decided that the same rationale that supports a threshold of $5 million for prime contracts, is applicable to subcontracts as well. The other conditions of the proposed rule under FAR case 2006-007 are also still applicable, i.e., performance period of 120 days or more, and the subcontract is not for acquisition of commercial items or to be performed outside the United States.

Full cooperation

In addition, the Councils have included in the proposed rule the requirements that an internal control system must require full cooperation with any Government agencies responsible for audit, investigation, or corrective actions. This requirement was originally derived from the Defense Federal Acquisition Regulation Supplement (DFARS) guidance at DFARS 203.7001(a)(7), with the addition of the word "audit" in response to a public comment under FAR case 2006-007.

The Councils are not including this requirement in the final rule to be issued under FAR case 2006-007, in order to allow further public comment and analysis of the relationship to waiver of the attorney-client privilege.

This is a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because it requires the contractor (including small business concerns) to notify the agency inspector general and the contracting officer in writing whenever the contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal criminal law in connection with the award of performance of any Government contract or subcontract. Although the Councils do not expect this to be a significant burden on small businesses, because it only impacts those small businesses that need to report violations of Federal criminal law in connection with the award or performance of a Government contract, the

Councils have prepared an Initial Regulatory Flexibility Analysis (IRFA) for public comment, that is summarized as follows:

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603.

The objective of the rule is to emphasize the critical importance of integrity in contracting and reduce the occurrence of improper or criminal conduct in connection with the award and performance of Federal contracts and subcontracts.

The rule imposes a clause that is applicable to contracts and subcontracts that exceed $5 million and with a performance period that exceeds 120 days. The clause does not apply to—

- Acquisition of commercial items, either at the prime or subcontract levels.
- Contracts or subcontracts performed outside the United States.

Although the clause requires all contractors to implement a code of business ethics, the clause requirements for a formal awareness/training program and internal control system will not apply to small business concerns.

The clause imposes a mandatory requirement to notify the agency Office of the Inspector General, with a copy to the contracting officer, whenever the contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal criminal law in connection with the award or performance of the contract or any subcontract thereunder. All contractors and subcontractors subject to the clause are required to report such violations. In addition, regardless of inclusion of the clause, a new cause for debarment and suspension has been added, for failure to timely report any such known violation of Federal criminal law.

Based on Fiscal Year 2006 data collected from the Federal Procurement Data System, the Councils estimate that this clause will apply to 1800 prime contractors per year, of which 700 companies are small business concerns. The clause also flows down to subcontracts that exceed $5 million, and we estimate that approximately 700 additional small business concerns will meet these conditions. We calculate the number of small business concerns that will be required to submit the report of violation of Federal criminal law with regard to a Government contract or subcontracts as follows:

700 contractors + 700 subcontractors = 1,400 x 2% = 28.

In addition, although there is no clause required, all contractors will be on notice that they may be suspended or debarred for failure to report known violations of Federal criminal law with regard to a Government contract or subcontract. In Fiscal Year 2006 there were 144,854 small business concern listed in FPDS-NG with unique DUNS numbers. We estimate that of the listed small business concerns, approximately 116,000 (80 percent) will receive contracts in a given fiscal year. Government small

business experts guess that at least twice that number of small businesses (232,000) will receive subcontracts. However, the only small business concerns impacted by this cause for suspension or debarment are those small business concerns that are aware of violation of Federal criminal law with regard to their Government contracts or subcontracts. Subtracting out those contracts and subcontracts covered by the clause (700), we estimate this number as follows: (115,300 + 231,300 = 346,600 x .5% = 1,733). We estimate a lower percentage than used for contracts and subcontracts that contain the clause, because these are lower dollar contracts and subcontracts, including commercial contracts, and there may be less visibility into violations of Federal criminal law. Because there is no contract clause, we estimate that only 1 percent of those contractors/ subcontractors that are aware of a violation of Federal criminal law in regard to the contractor or subcontract will voluntarily report such violation to the contracting officer.

The rule requires contractors to report to the agency inspector general and the contracting officer of violations of Federal criminal law in connection with the award or performance of any Government contract or subcontract for contracts and subcontracts that exceed $5 million, excluding contracts/subcontracts to be performed outside the United States or awarded under FAR Part 12. Such a report would probably be prepared by company management, and would probably involve legal assistance to prepare.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The Councils adopted the following alternatives in order to minimize the impact on small business concerns:

- The requirement for formal training programs and internal control systems are inapplicable to small business concerns, rather than tying the requirement to a dollar threshold based on contract value, which might make the requirements applicable to some small business concerns.

- The requirement for mandatory reporting is limited to violations of Federal criminal law in connection with performance or award of a Government contract or subcontract, rather than requiring report of any improper conduct, even that which is not a violation of Federal criminal law.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 3, 9, 42, and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C 601, et seq. (FAR case 2007-006), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements. Accordingly, the FAR Secretariat will submit a request for approval of a new information collection requirement concerning OMB Number 9000-00XX, Contractor Compliance Program and Integrity Reporting, to the Office of Management and Budget under 44 U.S.C. 3501, et seq.

There will be an estimated 20 burden hours for the required reporting to the contracting officer of violations of Federal criminal law in connection with the award or performance of any Government contract or subcontract.

Annual Reporting Burden:

Public reporting burden for this collection of information is estimated based on review of Fiscal Year 2006 contract awards as entered in the Federal Procurement Data System, the Councils estimate that 1400 contractors per year will be subject to the new clause FAR 52.203-XX (contracts greater than $5 million, not including contracts awarded under FAR Part 12). The Councils further estimate that of those 1400 contractors, 28 (2 percent) will report violations of Federal criminal law with regard to performance or award of a Government contract or subcontract. In addition, the Councils estimate that 17 contractors that do not have the clause at FAR 52.203-XX in the contract will also report such violations.

The annual reporting burden is estimated as follows:

Respondents: 45
Responses per respondent: 1
Total annual responses: 45
Preparation hours per response: 3
Total response burden hours: 135

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 3, 9, 42, and 52 as set forth below:

1. The authority citation for 48 CFR parts 3, 9, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Add Subpart 3.10 to read as follows:

Subpart 3.10—Contractor Code of Business Ethics and Conduct

Sec.

48 CFR 3.1000

3.1000 Scope of subpart.

This subpart prescribes policies and procedures for the establishment of contractor codes of business ethics and conduct.

48 CFR 3.1001

3.1001 [Reserved]

48 CFR 3.1002

3.1002 Policy.

(a) Government contractors must conduct themselves with the highest degree of integrity and honesty.

(b) Contractors should have a written code of business ethics and conduct. To promote compliance with such a code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that—

(1) Are suitable to the size of the company and extent of its involvement in Government contracting;

(2) Facilitate timely discovery of improper conduct in connection with Government contracts; and

(3) Ensure corrective measures are promptly instituted and carried out.

(c) A contractor may be suspended and/or debarred for knowing failure to timely disclose a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder (see 9.406-2(b)(1)(v) and 9.407-2(a)(7)).

48 CFR 3.1003

3.1003 Mandatory requirements.

Although the policy in section 3.1002 applies as guidance to all Government contractors, the contractual requirements set forth in the clauses at 52.203-XX, Contractor

Code of Business Ethics and Conduct are mandatory if the contracts meet the conditions specified in the clause prescriptions at 3.1004.

48 CFR 3.1004

3.1004 Contract clauses.

Insert the clause at FAR 52.203-XX, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed $5,000,000 and the performance period is 120 days or more, except when the contract—

(a) Will be for the acquisition of a commercial item awarded under FAR Part 12; or

(b) Will be performed entirely outside the United States.

PART 9—CONTRACTOR QUALIFICATIONS

48 CFR 9.104-1

3. Amend section 9.104-1 by revising paragraph (d) to read as follows:

48 CFR 9.104-1

9.104-1 General standards.

* * * * *

(d) Have a satisfactory record of integrity and business ethics (for example, see Subpart 42.15);

* * * * *

48 CFR 9.406-2

4. Amend section 9.406-2 by revising paragraph (b)(1) introductory text and adding paragraph (b)(1)(v) to read as follows:

48 CFR 9.406-2

9.406-2 Causes for debarment.

* * * * *

(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—

* * * * *

(v) Knowing failure to timely disclose—

(A) An overpayment on a Government contract; or

(B) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.

* * * * *

48 CFR 9.407-2

5. Amend section 9.407-2 by redesignating paragraph (a)(7) as (a)(8) and adding a new paragraph (a)(7) to read as follows:

48 CFR 9.407-2

9.407-2 Causes for suspension.

(a) * * *

(7) Knowing failure to timely disclose—

(i) An overpayment on a Government contract; or

(ii) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract; or

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

48 CFR 42.1501

6. Amend section 42.1501 by revising the last sentence to read as follows:

48 CFR 42.1501

42.1501 General.

* * * It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; the contractor's record of integrity and business ethics, and generally, the contractor's business-like concern for the interest of the customer.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

48 CFR 52.203-XX

7. Add section 52.203-XX to read as follows:

48 CFR 52.203-XX
52.203-XX Contractor Code of Business Ethics and Conduct.

As prescribed in 3.1004, insert the following clause:

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (DATE)

(a) Definitions. As used in this clause—

Agent means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

Principals means officers, directors, owners, partners, and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

United States means the 50 States, the District of Columbia, and outlying areas.

(b) Code of business ethics and conduct. (1) Within 30 days after contract award, unless the contracting officer establishes a longer time period, the Contractor shall—

(i) Have a written code of business ethics and conduct; and

(ii) Provide a copy of the code to each employee engaged in performance of the contract.

(2) The Contractor shall—

(i) Exercise due diligence to prevent and detect criminal conduct; and

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3) The Contractor shall notify, in writing, the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law in connection with the award or performance of this contract or any subcontract thereunder.

(c) Business ethics awareness and compliance program and internal control system for other than small businesses. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract. The Contractor shall establish the following within 90 days after contract award, unless the contracting officer establishes a longer time period—

(1) An ongoing business ethics and conduct awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

(i) The Contractor's internal control system shall—

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level of the organization and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include within the organization principals whom due diligence would have exposed as having engaged in conduct that is illegal or otherwise in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including—

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the organization's business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appro-

priate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) Timely reporting, in writing, to the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the Contractor or a subcontract thereunder; and

(G) Full cooperation with any Government agencies responsible for audit, investigation, or corrective actions.

(d) Subcontracts. (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of $5,000,000 and a performance period of more than 120 days, except when the subcontract—

(i) Is for the acquisition of a commercial item; or

(ii) Is performed outside the United States.

(2) In altering this clause to identify the appropriate parties, all reports of violation of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

Legal Analysis

Rockwell: Linking the Relator's Recovery to His Knowledge

ROCKWELL: LINKING THE RELATOR'S RECOVERY TO HIS KNOWLEDGE[1*]

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For the first time since Congress overhauled the False Claims Act ("the Act") in 1986, the Supreme Court has issued an opinion addressing the eligibility of a private citizen to file a lawsuit under the Act's "*qui tam*" provisions. In *Rockwell International Corp., et al. v. United States, et al.*, __ U. S. __, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (March 27, 2007), the Supreme Court interpreted the Act's "public disclosure" and "original source" provisions. The Court's decision to take the *Rockwell* case, rather than other cases involving these provisions, seemed unusual because the case involved only a few of the many interpretive questions arising from the provisions at issue. However, while directly addressing a few specific issues, the Court's opinion may contain a broader message concerning the proper use of *qui tam* suits. The Court's message may be that, when deciding whether a qui tam relator should be rewarded for initiating a lawsuit, a court should focus primarily on (a) what the relator knew at the outset of the case, and (b) the value of that knowledge in leading to any recovery. The mere fact that the relator initiated the chain of events that ultimately led to the government's recovery—i.e., that the relator was the one who first "got the ball rolling"—does not, in the Court's view, deserve a reward if, at the end of the day, the government recovered only on the basis of misconduct that was not known to the relator when he came forward. In short, the relator's knowledge of wrongdoing, rather than mere chance, should be the basis of the relator's recovery.

I. THE FALSE CLAIMS ACT AND ITS "QUI TAM" PROVISIONS

The False Claims Act, a civil statute codified at 31 U.S.C. §§ 3729–3733, is said to be the government's primary tool for recovering monies lost as the result of fraud against the government. *See* S. Rep. No. 345, 99th Cong., 2d Sess. At 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. The Act provides, among other things, that persons who knowingly submit or cause the submission of false claims for payment by the United States government, or who knowingly use false statements to get such claims paid or approved, are liable for treble damages plus civil penalties of between $5,500 and $11,000 per false claim. 31 U.S.C. § 3729.[2]

Since it was initially enacted in 1863, the Act has always contained "*qui tam*" provisions enabling a private citizen, known as the "relator," to enforce the Act's provisions

1. This article was originally submitted for the 2007 Taxpayers Against Fraud Education Fund Conference.

2. The False Claims Amendments Act of 1986 provided that the range of civil penalties was between $5,000 and $10,000 per false claim. However, this range was raised to between $5,500 and $11,000 per false claim for conduct which occurred on or after September 29, 1999. *See* 64 FR 47099, 47104 (8/30/99).

by filing a lawsuit as a private attorney general. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496–98 (11th Cir. 1991). If, through judgment or settlement, the government recovers any proceeds in a *qui tam* case, the relator is generally entitled to a percentage of the government's recovery.

In 1986, Congress modernized the FCA and its *qui tam* provisions. *See* Pub. L. No. 99-562, 100 Stat. 3153 (1986). Under the post-1986 version of the Act, the relator may "bring a civil action for a violation of [the FCA] for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1).

To commence a *qui tam* suit, the relator must file a complaint under seal—*i.e.*, secretly—in federal court and must not serve a copy of the complaint on the defendant until the court so orders. Instead, the relator delivers a copy of the complaint and a written disclosure of "substantially all material evidence and information the person possesses" to the United States Department of Justice ("DOJ"). The government then has the opportunity to investigate the relator's allegations and decide whether or not to intervene in the lawsuit. *Id.* at § 3730(b)(2). The government has at least 60 days in which to conduct this investigation, but upon a motion by the government showing "good cause," the court may extend this time period. *Id.* at § 3730(b)(3). In virtually any case that appears to have any merit, the government will file several motions for extensions of its time to investigate the relator's allegations while the case remains under seal. It is common for this time period to be extended for several years.

When DOJ formally decides whether or not to intervene, the court is supposed to unseal the action. If the government intervenes, it assumes "the primary responsibility for prosecuting the action," and the relator has "the right to continue as a party to the action." *Id.* at § 3730(c)(1). If the government declines to intervene, the relator may conduct the action without DOJ's participation. *Id.* at § 3730(c)(3). Even after declining to intervene, however, the Government may change its mind and intervene at a later date upon a showing of "good cause." *Id.*

If the *qui tam* suit results in a recovery, the recovery belongs to the government, and the relator is generally entitled to receive a percentage of the proceeds. In cases where the government has intervened, the relator generally may receive between 15 and 25 percent of the case proceeds, plus an award of reasonable attorneys' fees and costs from the defendant. *Id.* at § 3730(d)(1). In cases where the government declined but the relator successfully pursued the case to conclusion, the relator generally may receive between 25 and 30 percent of the case proceeds, plus an award of reasonable attorneys' fees and costs from the defendant. *Id.* at § 3730(d)(2).

The statute defines certain circumstances in which a relator either is ineligible to pursue a *qui tam* suit, or the relator is eligible to proceed but may be entitled only to a reduced recovery. The most commonly invoked bars against a relator pursuing a *qui tam* suit are the "public disclosure" bar and the "first to file" rule. As discussed in more detail below, the "public disclosure" bar precludes a relator from pursuing a *qui tam* suit based upon certain public disclosures of allegations or transactions, unless the relator

was an "original source" of the information upon which the lawsuit was based. *Id*. at § 3730(d)(4)(A). An "original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id*. at § 3730(d)(4)(B). Under the FCA's "first to file" rule, "[w]hen a person brings [a qui tam action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." *Id*. at § 3730(b)(5). The FCA also precludes a relator from proceeding with a *qui tam* claim if the relator "is convicted of criminal conduct arising from his or her role in the violation of [the FCA]." *Id*. at § 3730(d)(3).[3]

The FCA also defines certain circumstances under which a relator may be eligible to proceed with a *qui tam* suit, but the court may reduce the relator's award below the ordinary range specified in the Act. Most importantly, a court may reduce the relator's share if it finds that the relator "planned and initiated the violation of [the FCA] upon which the action was brought, . . . taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation." *Id*.

II. *QUI TAM* CASES IN PRACTICE

The life of a *qui tam* case usually starts when a potential "whistleblower" who has observed what he believes is wrongdoing contacts an attorney who knows about the False Claims Act. The whistleblower and attorney then work together to determine the strength and size of the case, which enables them to estimate the potential benefit of starting the action; in addition, they try to assess the risks such an action would entail. The decision to file a *qui tam* suit is frequently a career-threatening, or even career-ending, move. Except in rare cases, the target of the case, along with others in the industry, will eventually learn who has filed the lawsuit; if the relator is still employed with the defendant, the relationship will likely be untenable. Moreover, other potential employers may be unwilling to hire someone who has already sued an employer. Consequently, before filing suit, a relator will typically have to believe that the prospects of a lucrative recovery will outweigh the likelihood of a very significant career setback.

The relator usually has to make the critical decision of whether to file suit in the absence of all the information necessary to conclude that a suit will ultimately be successful. The typical relator knows that the defendant has been engaging in conduct that appears unlawful or improper on its face; usually, however, the relator can only infer that, as a result of this misconduct, the defendant has knowingly been submitting, or causing the submission of false claims for the payment of government funds. For example, a relator who works for a Medicare provider may be aware that physicians are knowingly performing unnecessary procedures on Medicare patients, but may not be aware of all the billing details. In such a case, the best the relator can do is to infer that

3. The FCA also precludes *qui tam* suits (1) by members of the armed forces against other members of the armed forces arising from the person's service, (2) against certain government officials if the action is based on evidence or information known to the government when the action was brought, and (3) based on allegations or transactions which are the subject of a civil suit or an administrative civil money proceeding in which the government is already a party. 31 U.S.C. § 3730(e)(1)-(3).

the physicians' misconduct is resulting in the filing of false claims. Or, if the relator is alleging that a military contractor is supplying the government with a product that has a hidden defect, the relator may not know whether the contractor has disclosed the problem to government officials, and whether they have decided to accept the product nonetheless; the best the relator may be able to do is to infer that, if government officials had known about the defect, they would not have accepted the problem.

Several provisions of the Act can make it hazardous for a relator to do an extensive investigation prior to filing suit, even where the relator's knowledge is incomplete. Because of the "first-to-file" rule, a relator's attorney could jeopardize his client's right to recover by interviewing other witnesses prior to filing suit; one of the witnesses might recognize the potential for a lucrative lawsuit, contact another attorney, and file the case first. Moreover, by doing anything that could alert the defendant to the possibility of a future *qui tam* suit, the relator could undercut the Government's ability to conduct an undercover investigation—which is perhaps the primary benefit the Government derives from the fact that the *qui tam* case is to be filed under seal.

Once the relator files a sealed *qui tam* suit, DOJ must decide whether it is in the Government's interest to intervene in the suit. For DOJ, the decision to intervene has traditionally amounted to a decision to adopt the case as the Government's own. For that reason, DOJ is likely to spend a significant amount of time and investigative resources prior to deciding to intervene in any case.[4]

DOJ usually interviews the relator shortly after the case was filed. The main purpose of the interview is to get a complete picture of the information that the relator has about the allegations, clarifying or supplementing whatever information the relator has already provided to the Government in the complaint and written disclosure statement. In some cases, where the relator has troves of information about the defendant's operations or expertise about a complex subject matter, there may be ongoing contact between the Government's investigative agent and the relator, continuing long after the initial interview.

For every False Claims Act case, there is at least one Government agency that is the payor of the allegedly false claims, and therefore, the "victim" of the alleged fraud. Typically, DOJ will want to find out any information it can from this Government agency about the claims that were submitted in connection with the alleged fraud, and about the agency's views about the alleged misconduct. For example, if the relator has alleged a fraud against the Medicare program, DOJ will want to know the view of the Centers for Medicare and Medicaid Programs on the following questions: Was the defendant's alleged conduct improper? If the defendant's actual conduct had been known to the agency, would that have affected the agency's decision to pay the defendant's claims?

In addition to finding out the agency's views on the allegations, DOJ will often want to use one of the Government's subpoena powers to obtain documents, or even

4. On the other hand, it is sometimes easy for DOJ to determine that it should not intervene in a *qui tam* suit. For example, upon receiving and reviewing a qui tam complaint, DOJ may realize that the complaint simply fails to state a claim upon which relief may be granted, or that the amount of the alleged fraud is trivial and not worth the expenditure of significant government resources.

testimony, from the defendant or third parties. In cases involving large amount of documents, or defendants who resist compliance with subpoenas, this process can take many months or even a few years.

During or after this process of investigation and analysis, DOJ will often try to explore the possibility of negotiating a settlement with the defendant. Alternatively, DOJ may simply want to understand the defendant's perspective on the allegations, and to know whether the defendant can offer any plausible defenses to the charges. To this end, DOJ may ask the court to partially lift the seal on the case, granting DOJ permission to disclose the relator's allegations, or even the complaint itself, to the defendant so that the parties can productively exchange information.

After this process, if DOJ still remains confident in the allegations and cannot reach a settlement with the defendant, DOJ will be ready to intervene. At this point in time—having gathered a substantial amount of information from other Government agencies, the defendant, and third parties—DOJ's "case" against the defendant is likely to consist of much more detailed underlying evidence than the case initially presented to DOJ by the relator.

III. THE ROCKWELL CASE

In *Rockwell*, *supra*, the Supreme Court answered some of the many questions arising from the Act's public disclosure bar and original source provisions. These provisions, codified at 31 U.S.C. § 3730(e)(4), state:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under the section which is based on the information.

A. The Facts of Rockwell

As summarized by the Supreme Court, the facts of *Rockwell* were as follows. Until March 1986, James Stone worked as an engineer at Rocky Flats, a nuclear facility managed by Rockwell International Corporation under a contract with the United States government. 127 S. Ct. at 1401. In the early 1980s, Rockwell considered a plan to store hazardous waste materials by mixing toxic sludge with concrete to form

blocks of "pondcrete." *Id*. In a written Engineering Order in 1982, however, Stone informed Rockwell management that he did not think that would work. Stone later testified that he believed the pipe system would not properly remove the sludge. *Id*. at 1401–02. Rockwell nonetheless proceeded with the plan and, for a period of time, successfully produced "concrete hard" pondcrete. *Id*. at 1402. In October 1986, after Stone had left Rocky Flats, Rockwell discovered that some of the pondcrete blocks were insolid. *Id*.

In June 1987, Stone approached the FBI and alleged that Rockwell had committed numerous violations of environmental laws. *Id*. In June 1989, based in part on the information Stone had provided, the FBI sought and obtained a warrant to search the Rocky Flats facility. *Id*. The FBI affidavit stated, in part, that pondcrete blocks were insolid "due to an inadequate waste-concrete mixture." *Id*. The allegations set forth in the affidavit were then reported in various newspapers. *Id*. at 1403.

In July 1989, Stone filed a *qui tam* suit. *Id*. In his disclosure statement to the Government, Stone alleged 26 violations, one of which pertained to the pondcrete. *Id*. Stone explained in his statement that he had reviewed the design for the pondcrete system and had foreseen that the piping mechanisms would not properly remove the sludge, which in turn would lead to an inadequate mixture of sludge and cement. *Id*.

After initially declining to intervene, the Government intervened in the case in November 1996 and, with the relator, filed a joint amended complaint. *Id*. at 1404. The amended complaint included an allegation that Rockwell was storing insolid pondcrete blocks, but it did not indicate that defective piping was a cause of the problem. *Id*.

The pondcrete block issue was subsequently addressed in a more specific Statement of Claims, which the district court later adopted in its final pre-trial order. *Id*. The final pre-trial order, by its own terms, superceded all prior pleadings in the case.

According to the Statement of Claims, plaintiffs alleged that Rockwell had replaced its pondcrete foreman in the winter of 1986—after Stone no longer worked there. In order to speed up production, the new foreman lowered the ratio of cement to sludge in the pondcrete; this alteration of the ratio of cement to sludge, in turn, resulted in the production of insolid pondcrete blocks. *Id*. The Statement of Claims did not include an allegation that there had been any problem with the pipe system, or that such a problem had contributed to the instability of the pondcrete blocks. *Id*.

When the case ultimately came to trial, no one introduced any evidence concerning any problem with the pipe system. *Id*. On the contrary, to the extent the evidence and arguments suggested that there had been a problem with the pondcrete, it all suggested that the problem had been caused by the reduction of the amount of cement used in the mixture. *Id*. The jury found in favor of the plaintiffs with respect to claims covering time periods between April 1, 1987 and September 30, 1988, and found in favor of Rockwell with respect to claims covering other time periods. *Id*.

B. The Court's Holdings in Rockwell

To resolve the case, the Supreme Court addressed several questions and made several

holdings. The first question addressed by the Court was whether the public disclosure bar was "jurisdictional." The Court held that it was. *Id*. at 1405. The Court held that when Congress explicitly states that the federal courts do not have jurisdiction over a defined category of cases, the courts do not have jurisdiction over those cases. *Id*. at 1405–06. Here, the category for which Congress withdrew jurisdiction were "False Claims Act *qui tam* cases based on publicly disclosed allegations as to which the relator was not an original source of the information." *Id*. at 1406. The chief significance of the Court's holding was that, because the relator's status as an "original source" arose in the context of an inquiry into whether the district court could exercise subject-matter jurisdiction, the defendant could not waive the issue by "conceding" or failing to contest the issue at any stage in the litigation. *Id*. at 1406–07.

The Court next addressed whether the relator's complaint was "based upon the public disclosure of allegations or transactions" in a government hearing or through the news media. Curiously, although the Court refused to accept any "concession" by Rockwell that the relator was an "original source"—because this question was jurisdictional—the Court was willing to accept, without further discussion, the concession by the parties that the claims on which the relator prevailed were "based upon publicly disclosed allegations" within the meaning of § 3730(e)(4)(A)—although that question too was jurisdictional. *Id*. at 1407.

The Court then addressed the question: What is the "information" of which the relator has to have "direct and independent knowledge" in order to be an "original source"? *Id*. Specifically, is it the information on which the allegations in the *qui tam* action are based? Or, is it the information on which the public disclosure of allegations or transactions is based? *Id*. The Court held that, to be an "original source," the relator must have "direct and independent knowledge" of the information underlying the allegations in the lawsuit, rather than the information underlying the public disclosure. *Id*.

The Court recognized that, although the allegations in the lawsuit might be the same as those that were publicly disclosed, the "information" underlying the relator's allegations might be different from that underlying the public disclosure. *Id*. For example, if an allegation was publicly disclosed in a newspaper, the reporter might have relied on a confidential source other than the relator. *Id*. at 1407–08. In that situation, a court could not possibly determine what the "information" underlying the public disclosure was—let alone whether the relator knew that information. *Id*. at 1408. On the other hand, it was reasonable to expect a court to determine the information that was the basis for the allegations in the *qui tam* lawsuit. It was this information of which the relator must have direct and independent knowledge.[5]

The Court next addressed whether the requirement that the relator have "direct

5. In holding that the relator need only have direct and independent knowledge of the "information" that is the basis for his lawsuit, rather than the "information" that was the basis for the prior public disclosure, the *Rockwell* Court undercut the rationale of *U.S. ex rel. Dick v. Long Island Lighting Co*., 912 F.2d 13 (2d Cir. 1990). *See also Chen-Chen Wang ex rel. U.S. v. FMC Corp*., 975 F.2d 1412 (9th Cir. 1992) (following *Long Island Lighting Co*.). In *Long Island Lighting Co*., the Second Circuit found that the term "information," when referring to the information of which a relator had to be an "original source," had to be the same "information" that was the basis for the allegations or transactions that had been publicly disclosed. The Second Circuit then reasoned that, to be an original source, the relator must have played a role in the public disclosure by providing his information, directly or indirectly, to the person or entity that later made the disclosure. In light of the *Rockwell* decision, it is doubtful that the *Long Island Lighting Co.* case or its progeny can still be considered good law.

and independent knowledge" referred solely to the information that was the basis of the allegations made at the commencement of the case—*i.e.*, the allegations in the relator's original complaint—or also to the information that was the basis of allegations that the relator made sometime later in the lawsuit, either in an amended complaint or in the pretrial order. *Id*. The Court held that if new allegations were made at any stage in the proceeding—for instance, after the plaintiffs filed an amended complaint incorporating new allegations—and these allegations had been publicly disclosed, then the relator had to have direct and independent knowledge of the information underlying the newly-made allegations. *Id*. The Court cautioned that if it were to limit the jurisdictional inquiry only to allegations made in the original complaint, the relator would be "free to plead a trivial theory of fraud for which he had some direct and independent knowledge and later amend the complaint to include theories copied from the public domain or from materials in the Government's possession." *Id*. The Court concluded, "we look to the allegations as amended—here, the statement of claims in the final pretrial order—to determine original-source status." *Id*. at 1409.

The Court then proceeded to analyze the allegation that was the basis for the plaintiffs' recovery in Rockwell, and it found that Stone did not have direct and independent "knowledge" of the information on which this allegation was based. *Id*. Within the relevant time period covered by the jury's finding of liability, the only pertinent problem was insolid pondcrete. *Id*. at 1409–10. The Court found: "Because Stone was no longer employed by Rockwell at the time, he did not know that the pondcrete was insolid; he did not know that the pondcrete storage was even subject to RCRA; he did not know that Rockwell would fail to remedy the defect; he did not know that the insolid pondcrete leaked while being stored onsite; and, of course, he did not know that Rockwell made false statements to the Government regarding pondcrete storage." *Id*. at 1410.

The Court continued: "Stone's prediction that the pondcrete would be insolid because of a flaw in the piping system does not qualify as 'direct and independent knowledge' of the pondcrete defect. Of course a *qui tam* relator's misunderstanding of *why* a concealed defect occurred would normally be immaterial as long as he knew the defect actually existed. But here Stone did not *know* that the pondcrete failed; he *predicted* it. Even if a prediction can qualify as direct and independent knowledge in some cases (a point we need not address), it assuredly does not do so when its premise of cause and effect is wrong. Stone's prediction was a failed prediction, disproved by Stone's own allegations." *Id*.

The Court next turned to the issue of whether Stone's joinder of the pondcrete claim with a second claim for which he was an original source—although there was no recovery on the second claim—cured any defect in jurisdiction. *Id*. The Court held that the relator's direct and independent knowledge of one claim, which did not result in any recovery, did not give the district court jurisdiction over other, distinct claims that were joined in the same action. *Id*. The Court concluded that the plaintiff's decision to join several claims in a single lawsuit should not rescue claims that would have been doomed if they had been asserted separately; likewise, however, the joinder of claims should not

result in the dismissal of claims that would have otherwise survived. *Id*.

Finally, the Court addressed the plaintiffs' contention that the Government's intervention in the qui tam suit "cured" any jurisdictional defect with respect to the relator's participation. *Id*. at 1410–11. The Court held that it did not. *Id*. at 1411. The Court held, however, that even though the lower court lacked jurisdiction over the relator's claim, it retained jurisdiction over the Government's action against Rockwell after the Government had intervened in the case. *Id*. The Court reasoned that, upon the dismissal of the relator, the lower court should treat the intervened action as though the Attorney General had brought the action, and the Government would be entitled to keep whatever recovery is achieved through the lawsuit. *Id*.

IV. THE CONSEQUENCES OF ROCKWELL

In several respects, the *Rockwell* case has increased the risk a relator faces when pursuing a *qui tam* case. First, the case establishes that the Court's jurisdiction over the relator's claims cannot be put to rest until the very end of the case. If, between the commencement of the case and its resolution, the plaintiffs pursue different "allegations" from those contained in the initial Complaint, and those allegations were publicly disclosed before they were first included in an amended complaint or superceding pleading (such as a pre-trial order), the relator may have to demonstrate that he was an "original source" of the new allegations—even though there were no public disclosures prior to the relator's initiation of the lawsuit.

Second, in the trial of any case involving prior public disclosures, the relator will have to make sure to present evidence sufficient to establish that the relator was an "original source" of the allegations being tried. If the Government attempts to resist the presentation of such evidence—for example, by arguing that such evidence would not be in the Government's best strategic interests—the relator must make a proffer of the evidence and argue to the Court that it should admit the evidence in order to establish its subject-matter jurisdiction.

Third, whenever a case involves a prior public disclosure and. therefore, the question of whether the relator was an "original source," one can expect the defendants to argue that the relator did not actually "know" of the defendant's misconduct, but rather, simply "predicted" that such misconduct would occur. If there is evidence to establish that misconduct did in fact occur, the relator can respond that, based on the other facts known to the relator, it was reasonable for the relator to infer that the misconduct took place. The relator could argue that a "reasonable inference" which turned out to be correct is distinguishable from *Rockwell*, where the relator made a "failed prediction" that turned out to be incorrect.

While the *Rockwell* case may impose additional burdens on some relators, it may also benefit some relators—particularly, those who are the second to file a case against a particular defendant. If the first-to-file relator has asserted an allegation that is flawed, and a second relator has asserted a <u>different</u> allegation that changes the direction of the Government's investigation and would support a recovery, the first relator

cannot simply argue that the first case got the Government started in its investigation and, therefore, deserves the entire reward. The first relator may have to argue that the second allegation was not substantially "different" from the first allegation or, in the alternative, demonstrate that he was an "original source" of the information on which the second allegation was based.

The Big Picture

U.S. Department of Justice Statistics
October 1987–September 2007

FRAUD STATISTICS—OVERVIEW

October 1, 1986–September 30, 2007
Civil Division, U.S. Department of Justice

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	340	3	86,479,949	0	0	0	**86,479,949**	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	**175,630,767**	88,750	8,437	97,187
1989	221	88	197,202,180	15,111,719	1,681	15,113,400	**212,315,580**	19,446,770	200	1,446,970
1990	240	75	189,564,367	40,483,367	75,000	40,558,367	**230,122,734**	6,590,936	20,670	6,611,606
1991	234	84	270,445,467	70,384,431	154,500	70,538,931	**340,984,398**	10,667,537	18,750	10,686,287
1992	285	113	137,358,206	134,549,447	994,456	135,543,903	**272,902,109**	24,196,648	259,784	24,456,432
1993	304	138	181,945,576	183,643,787	6,078,000	189,721,787	**371,667,363**	27,576,235	1,766,902	29,343,137
1994	279	219	706,022,897	379,018,205	2,822,323	381,840,528	**1,087,863,425**	69,453,350	838,895	70,292,246
1995	232	269	269,989,642	239,024,292	1,635,000	240,659,292	**510,648,934**	45,162,296	465,800	45,628,096
1996	186	344	247,357,271	124,361,203	13,390,011	137,751,214	**385,108,485**	22,119,619	3,731,978	25,851,597
1997	187	546	465,568,061	621,919,274	6,021,200	627,940,474	**1,093,508,535**	65,857,419	1,658,485	67,515,904
1998	118	467	151,435,793	438,834,846	30,248,075	469,082,921	**620,518,714**	70,264,372	8,486,645	78,751,017

FY	New Matters[1]		Settlements & Judgments[2]					Relator Share Awards[3]		
	Non Qui Tam	Qui Tam	Non Qui Tam[2]	Qui Tam			Total Qui Tam and Non Qui Tam	Where U.S. Intervened or Otherwise Pursued	Where U.S. Declined	Total
			Total	Where U.S. Intervened or Otherwise Pursued	Where U.S. Declined	Total				
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	**693,382,773**	63,018,064	1,374,487	64,392,551
2000	95	363	367,887,197	1,208,715,188	1,688,957	1,210,404,145	**1,578,291,342**	183,682,977	375,143	184,058,120
2001	86	311	492,196,974	1,167,531,786	128,587,151	1,296,118,937	**1,788,315,911**	186,908,812	30,701,881	217,610,693
2002	62	318	119,598,292	1,077,375,794	25,786,140	1,103,161,934	**1,222,760,226**	160,914,076	4,582,319	165,496,395
2003	92	334	703,003,368	1,512,457,284	5,185,911	1,517,643,195	**2,220,646,563**	331,873,857	1,382,741	333,256,598
2004	120	431	115,656,023	557,080,136	9,261,879	566,342,015	**681,998,038**	110,113,220	2,376,128	112,489,348
2005	107	406	276,914,983	1,148,057,102	7,081,143	1,155,138,245	**1,432,053,228**	168,409,043	1,911,560	170,320,603
2006	85	384	1,714,824,081	1,482,048,337	22,493,863	1,504,542,200	**3,219,366,281**	218,392,497	5,598,336	223,990,833
2007	128	356	559,255,115	1,436,468,132	15,370,120	1,451,838,252	**2,011,093,367**	173,221,033	4,169,498	177,390,531
Total	**3,751**	**5,813**	**7,621,383,590**	**12,332,298,469**	**281,976,663**	**12,614,275,132**	**20,235,658,722**	**1,939,957,511**	**69,728,640**	**2,009,686,151**

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).

Fraud Statistics—Health & Human Services[1]

October 1, 1986–September 30, 2007
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements & Judgements[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	12	3	11,361,826	0	0	**11,361,826**
1988	8	5	2,182,675	355,000	88,750	**1,737,675**
1989	20	16	350,460	5,099,661	50,000	**5,450,121**
1990	27	11	10,327,500	903,158	119,474	**11,230,658**
1991	22	12	8,670,735	5,420,000	861,401	**14,090,735**
1992	29	15	9,821,640	2,192,478	446,648	**12,014,118**
1993	22	38	12,523,165	151,760,404	22,946,101	**164,283,569**
1994	42	76	381,470,015	6,520,815	1,185,597	**387,990,830**
1995	26	87	96,290,779	85,681,789	14,803,782	**181,972,568**
1996	20	179	63,059,873	51,576,698	9,374,568	**114,636,571**
1997	50	274	351,440,027	579,079,581	58,872,855	**930,519,608**
1998	35	275	40,107,920	258,638,736	47,822,301	**298,746,656**
1999	28	315	38,000,792	404,128,379	45,492,385	**446,129,171**
2000	36	210	208,899,015	725,011,203	115,759,246	**933,910,218**
2001	35	177	433,549,179	900,260,345	147,318,543	**1,333,809,524**
2002	24	194	74,567,427	960,450,528	153,825,657	**1,035,017,955**
2003	26	219	536,834,879	1,287,796,031	279,770,601	**1,824,630,910**
2004	28	275	34,816,447	475,370,142	97,434,278	**510,186,589**
2005	34	271	204,821,548	911,972,558	122,597,758	**1,116,794,106**
2006	18	223	1,047,745,714	1,239,957,154	166,506,405	**2,287,702,868**
2007	22	196	461,582,993	1,084,809,242	153,138,241	**1,546,392,235**
Total	**564**	**3,071**	**4,028,424,609**	**9,140,983,902**	**1,438,414,591**	**13,169,408,511**

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary agency.

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

3. 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.

4. 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).

Fraud Statistics—Department of Defense[1]

October 1, 1986–September 30, 2007
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements & Judgements[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	245	22	27,897,128	0	0	**27,897,128**
1988	138	28	149,136,213	33,750	8,438	**149,169,963**
1989	128	32	154,588,297	10,002,058	1,394,770	**164,590,355**
1990	77	41	117,715,978	21,743,463	3,804,470	**139,459,441**
1991	79	44	227,813,245	57,327,000	8,636,300	**285,140,245**
1992	78	61	62,003,695	129,294,456	23,874,784	**191,298,151**
1993	94	53	83,742,840	29,707,641	4,951,923	**113,450,481**
1994	62	82	226,083,266	370,666,206	68,163,879	**596,749,472**
1995	54	87	111,424,866	140,563,237	28,348,711	**251,988,103**
1996	44	81	78,085,099	61,833,653	12,522,473	**139,918,752**
1997	45	82	33,723,347	36,528,913	6,392,620	**70,252,260**
1998	29	62	71,063,139	150,180,185	20,511,801	**221,243,324**
1999	33	70	30,522,711	15,859,646	2,863,936	**46,382,357**
2000	10	46	53,007,693	96,287,825	15,812,059	**149,295,518**
2001	11	42	17,715,878	116,188,794	25,067,682	**133,904,672**
2002	16	44	15,017,365	19,407,658	2,957,196	**34,425,023**
2003	11	36	107,337,000	205,124,468	48,640,795	**312,461,468**
2004	16	50	10,098,491	17,684,000	3,031,610	**27,782,491**
2005	16	49	19,049,935	102,234,052	21,649,855	**121,283,987**
2006	13	74	586,430,385	48,809,599	10,488,996	**635,239,984**
2007	22	66	16,400,000	32,035,609	1,681,419	**48,435,609**
Total	**1,176**	**1,152**	**2,198,856,571**	**1,661,512,213**	**310,803,717**	**3,860,368,784**

1. The information reported in this table covers matters in which the Department of Defense is the primary agency.

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

3. 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.

4. 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

Fraud Statistics—Other (Non-HHS, Non-DOD)[1]

October 1, 1986–September 30, 2007
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements & Judgments[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	92	6	47,220,995	0	0	**47,220,995**
1988	80	10	21,968,775	1,954,354	0	**23,923,129**
1989	82	40	42,263,423	11,681	2,200	**42,275,104**
1990	139	23	61,520,889	17,911,746	2,687,662	**79,432,635**
1991	134	28	33,961,487	7,791,931	1,188,586	**41,753,418**
1992	183	37	65,532,871	4,056,969	135,000	**69,589,840**
1993	189	47	85,679,571	8,253,742	1,445,113	**93,933,313**
1994	175	61	98,469,616	4,653,507	942,770	**103,123,123**
1995	152	95	62,273,997	14,414,266	2,475,603	**76,688,263**
1996	122	84	106,212,299	24,340,863	3,954,557	**130,553,162**
1997	91	190	80,404,687	12,331,980	2,250,430	**92,736,667**
1998	54	130	40,264,734	60,264,000	10,416,915	**100,528,734**
1999	79	108	126,866,982	74,004,263	16,036,231	**200,871,245**
2000	49	107	105,980,489	389,105,117	52,486,815	**495,085,606**
2001	41	92	40,931,918	279,669,798	45,224,468	**320,601,716**
2002	22	80	30,013,500	123,303,748	8,713,542	**153,317,248**
2003	56	79	58,831,489	24,722,697	4,845,202	**83,554,186**
2004	76	106	70,741,084	73,287,873	12,023,461	**144,028,957**
2005	57	86	53,043,500	140,931,636	26,072,989	**193,975,136**
2006	54	87	80,647,982	215,775,447	46,995,431	**296,423,429**
2007	84	94	81,272,122	334,993,400	22,570,872	**416,265,522**
Total	**2,011**	**2,357**	**1,394,102,410**	**1,811,779,018**	**260,467,847**	**3,205,881,428**

1. The information reported in this table covers matters in which an agency other than the Department of Health and Human Services or the Department of Defense is the primary agency.

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

3. 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.

4. 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).

Fraud Statistics
Qui Tam Intervention Decisions & Case Status
As of September 30, 2007
Civil Division, U.S. Department of Justice

	Active	Settlement or Judgment	Dismissed	Unclear	Total
U.S. Intervened	93	947	52	2	1,094
U.S. Declined	363	212	3,170	7	3,752
Under Investigation					967
					5,813

Upcoming Legal Battles

Allison Engine v. United States
***ex rel.* Sanders**

Allison Engine v. United States *ex rel.* Sanders:

The U.S. Supreme Court's Opportunity to Reject the Atextual "Presentment" Qualification

Joseph E. B. White[1*]

In 1986, after a General Accounting Office report detailed rampant fraud in the government procurement system, the United States Congress revitalized the federal False Claims Act (FCA), enlisting private citizens to guard the Federal Treasury from fraudfeasing government contractors. In the nearly twenty years since these amendments, the FCA has proven particularly effective in targeting fraud in the defense industry. Thankfully for the federal fisc, courts have largely honored the underlying congressional intent and broadly interpreted the liability provisions of this guardian Statute. Recently, however, a D.C. Circuit Court's reading of the FCA severely constricted the language of the FCA, permitting fraudfeasing subcontractors to raid federal funds with impunity. Specifically, in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), then-Judge John Roberts read a "presentment" qualification into 31 U.S.C. § 3729(a)(2), meaning that false claims submitted to a federal contractor to obtain federal funds are not actionable unless a *federal employee* actually reviews the claims.

Ever since this limiting decision was etched into the books, uncertainty has abound, leading most courts, and even Justice Roberts,[2] to reject or question this atextual reading of the Act. Now, with the U.S. Supreme Court granting *certiorari* in *United States ex rel. Sanders v. Allison Engine Company*, 471 F.3d 610 (6th Cir. 2006), the Court has an opportunity to clarify, once and for all, that the FCA does not include a "presentment" qualification and that the Act "'was intended to reach all types of fraud, *without qualification*, that might result in financial loss to the Government.'" S. Rep. 99-345, at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). The *Totten* "presentment" qualification is inconsistent with the Act's plain language, irreconcilable with applicable legislative history, and unmindful of the real-world implications to the modern-day government procurement system. This article explains why the U.S. Supreme Court should honor the Congressional intent by rejecting the *Totten* "presentment" qualification.

I. THE *TOTTEN* "PRESENTMENT" QUALIFICATION IGNORES THE PLAIN LANGUAGE OF THE FALSE CLAIMS ACT.

In 31 U.S.C. § 3729(a)(2), the False Claims Act imposes civil liability and treble damages upon any person who "knowingly makes . . . a false record . . . to get a false or fraudulent claim paid . . . by the Government." *Id.* § 3729(a)(2). The D.C. Circuit's *Tot-*

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2. Then-Judge John Roberts admitted during his Senate confirmation hearing that "it's certainly possible that the majority in [*Totten*] didn't get it right. And the dissent, that was a very strong dissent, did get it right. I think the majority got it right . . . . But Judge Garland disagreed, and so it's obviously, to me, a case on which reasonable judges can disagree."

ten decision declared that, under this provision, a false claim that is paid for by money the Government provides, does not fall within the scope of the False Claims Act if a claim is not actually reviewed by a federal employee.

By its terms, Section 3729(a) applies not only to a defendant who "presents" a false claim to a federal "officer or employee," but it also applies to a defendant who "makes" a false record to get a false claim "paid . . . by the Government." 31 U.S.C. § 3729(a)(1), (a)(2). Courts, honoring the language of these two distinct liability provisions, echo the warning of the U.S. Supreme Court: "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted).

In addition to grafting the "presentment" language of Section 3729(a)(1) to Section 3729(a)(2) and disregarding this accepted theory of FCA liability, *Totten* edits an additional requirement into Section 3729(a)(2), attaching liability only when the fraudfeasor was "paid . . . [directly] by the Government." While this insertion admittedly adds credence to the lower court's decision, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting the rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 (1978).

Moreover, *Totten* ignores the explicit definition of "claim" outlined in Section 3729(c). Most importantly for this case, Section 3729(c) explicitly states that an actionable false claim "includes any request or demand for money or property which is *made to a contractor . . . .*" *Id.* (emphasis added). The section further clarifies that a false claim submitted to a recipient of federal funds is a "claim" for purposes of the Act "if the United States Government provides any portion of the money or property which is requested or demanded." *Id.* Thus, Congress, in adding this definitional section to the Act, explicitly clarified that the fraudfeasor cannot escape liability by simply arguing that the claims were submitted to a recipient of federal funds, not the Government. The "presentment" qualification is therefore legally unsustainable.

II. THE *TOTTEN* "PRESENTMENT" QUALIFICATION IS INCONSISTENT WITH THE 1986 LEGISLATIVE HISTORY.

In addition to misinterpreting and misapplying the False Claims Act, the *Totten* Court's analysis disregards and directly conflicts with the applicable legislative history. With the author of the "presentment requirement" now raising doubts about his analysis,[3] ambiguity seems to color this judicial rewrite, begging the courts to examine the underlying legislative history. Notably, prior to the 1986 amendments to the Act, some courts applied a similar misinterpretation, ruling that false claims submitted to a recipient of federal funds were not covered by the False Claims Act because the recipient does not present a false claim to a federal employee. *See, e.g., United States v. Azzarelli Construction Co.*, 647 F.2d 757, 761 (7th Cir. 1981). Responding to such

3. *See infra* footnote 1.

judicial misreadings, Congress amended the False Claims Act in 1986, declaring that "the Committee intends . . . to overrule *Azzarelli* and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." S. Rep. 99-345, at 22, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286. Congress further stressed that the purpose of the amendments was to "clarif[y] that the statute permits the Government to sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of federal funds." S. Rep. 99-345, at 21, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286.

In fact, the legislative history addresses the exact issue raised by the lower court's ruling. The Senate Judiciary Committee singled out *United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196 (S.D.N.Y. 1938), as another example of where a court incorrectly held that "a fraud against the grantee does not constitute a fraud against the Government of the United States where once the United States has made the grant to the State . . . or other institution, it substantially relinquishes all control over the disposition of money." S. Rep. 99-345, at 21, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286. More specifically, the *Salzman* court dismissed the case because the defendant had allegedly submitted false claims for payment to the Red Cross, not the Government, even though the Red Cross paid the claim from money the Government had supplied. *Id.*

The addition of the Section 3729(c) definition of "claim" etched the underlying congressional intent into the False Claims Act. Congress, specifically intending to reject the reasoning that the district court espoused in the present case, clarified that "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345, at 10. Indeed, Congress "endorse[d]" the Supreme Court's interpretation that the Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. 99-345, at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). *Totten*'s reading, on the other hand, adds a "presentment" and "direct payment" qualification to Section 3729(a)(2) liability that appears nowhere in the statutory language, the controlling case law, or the applicable legislative history.

III. THE *TOTTEN* COURT FAILS TO CONSIDER THE IMPLICATIONS OF LIFTING THE FCA SHIELD PROTECTING FEDERAL CONTRACTORS.

With the *Totten* court failing to consider the implications of its ruling that a claim paid by a federal contractor with federal funds is not "paid . . . by the Government," a brief impact assessment is needed. Because the federal government lacks the manpower and equipment necessary to fill all of the needs of the modern-day society, the government relies heavily upon private contractors and grantees to supplement its

limited resources. Perhaps most poignantly, in the aftermath of Hurricane Katrina, the federal government enlisted the help of countless relief organizations, volunteers, and corporations to mobilize quickly, to distribute federal funds appropriately, and to respond efficiently. If the U.S. Supreme Court embraced the *Totten* "presentment" qualification, fraudfeasors would be permitted to drain these efforts of federal money and to escape the FCA with impunity.

In fact, a Texas district court recently faced this very fact pattern, in which the federal government had supplied millions of dollars to a federal contractor to hire and pay subcontractors to rebuild homes destroyed by a major storm that had hit the City of Houston, Texas. *See United States ex rel. Farmer v. City of Houston*, 2005 U.S. Dist. LEXIS 18387 (S.D. Tex. 2005). Coming on the heels of the *Totten* decision, the court ruled that the dishonest subcontractor-defendant could evade FCA liability, for the fraudulent claims were submitted to a federal contractor and a federal employee was not involved in the payment process, even though every single cent was "paid . . . by the Government." *Id*.

Likewise, as a Utah district court recently discussed in *United States ex rel. Maxfield v. Wasatch Constructors*, 2005 U.S. Dist. LEXIS 10162 at *19–29 (D. Utah 2005), the federal government largely relies upon state and local governments to oversee the expenditure of federal highway funds. The *Maxfield* court, honoring the intent of Congress by reading the FCA broadly, interpreted Section 3729(a)(2) to apply to a subcontractor who wrongfully obtained federal funds from a federal grantee, even though the supposed "presentment qualification" and "direct payment" requirements were not satisfied. *Id*. As the court stressed, "[Section 3729(a)(2)] provides that the claim must be paid or approved 'by the Government.' But this simply means that the government must be the ultimate source of the funds, either directly or indirectly." *Id*. at *22.

Perhaps most disturbing, the facts of the case at bar naturally lead to concerns about the current war on terrorism. The federal government, recognizing the limitations of the traditional governmental infrastructure, has increasingly reached out for government contractors to fill the resource void. Whether it is the construction of warplanes or the transportation of military supplies, the government depends upon private contractors for their specialized expertise and their ability to effectively and efficiently allocate resources where they are needed most. The *Totten* decision, however, refuses to extend FCA protection to federal funds allocated by federal contractors, even though "these funds are as much in need of protection from fraudulent claims as *any other federal money*." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544–45 (1943) (emphasis added). By adopting a blanket rule that lifts the FCA shield protecting federal contractors, *Totten* leaves these scarce funds vulnerable to fraudfeasing entities.

In short, by failing to recognize that claims seeking government funds are necessarily paid for by the federal government, *Totten* significantly restricts the reach of the False Claims Act in a manner that Congress did not intend, withdrawing False Claims Act protection with respect to federal contractors, leaving hundreds of billions of dollars in federal funds in jeopardy. This reading of the Act is legally unsustainable, and should be rejected by the U.S. Supreme Court.