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

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

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

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FROM THE EDITOR

The late Samuel Dash, a renowned law professor and the former chief counsel of the Senate Select Committee on Watergate, would oftentimes warn his students: "If you don't explain where you stand on an issue, your opponent will explain for you." After paying out billions of dollars for False Claims Act violations and withstanding heightened public scrutiny, hospital administrations and drug companies have increasingly sought to portray the FCA and the relators' bar as being antithetical to the very principles the Act purports to protect. If the relators' bar does not continue contributing an informed, rational counter-analysis to the legal debate, the sole voice of explanation will come from the most egregious violators of the Act.

As the new editor the *Quarterly Review*, my hope is that this publication will not only be a reliable source for recent judicial decisions, but will also be a forum for educating the legal community about the true scope and purpose of the False Claims Act. Providing the most up-to-date information, this double issue summarizes court decisions from the last six months, tracks developments in the FCA litigation practice, and highlights settlements from around the country. While the large number of settlements undoubtedly adds to the deterrent effect of the Act, some of the judicial decisions outlined in this issue have potentially chipped away at the overall strength of future FCA enforcement.

The *Quarterly*, seeking to refocus the legal debate surrounding the reach of the FCA, is looking for well-written, thought-provoking articles that analyze the emerging legal trends in the law. Striving to also educate the next generation of *qui tam* attorneys, the *Quarterly* is hoping to circulate practical and effective litigation strategies, thereby enhancing the overall quality of relator representation. We need your help. Add your voice to the legal debate by submitting your written impressions to the *Quarterly Review*.

Lastly, with the hope of improving the *Quarterly*'s readability, accessibility, and credibility, we have reformatted the overall layout of the publication; reached an agreement with Westlaw, making all of our past and future issues available to the legal community; and secured articles for future issues that add insight to the nuances of the False Claims Act. We hope you enjoy the new *False Claims Act & Qui Tam Quarterly Review.*

Sincerely,

Jeb White
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Recent False Claims Act & *Qui Tam* Decisions

APRIL 1–SEPTEMBER 30, 2004

FALSE CLAIMS ACT LIABILITY

A. Liability of Governmental Entities

U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 2004 WL 1856834 (D. Utah Aug. 17, 2004)

A Utah district court granted the defendants' motion to dismiss in a *qui tam* action alleging that the defendant Medicare carrier paid claims for laboratory testing submitted by the defendant health care provider that did not adequately document the medical necessity of the tests and were potentially improper claims under Medicare regulations. The court also ruled that the wholly-owned health care corporation of a state university was sufficiently tied to the university so as to be considered an arm of the state. Accordingly, the court found that, as a state entity, the corporation is not a "person" under the FCA.

On February 12, 1999, Edyth Sikkenga, employed by Regence Bluecross Blueshield of Utah (Regence), brought a *qui tam* action against Regence and Associated Regional and University Pathologists, Inc. (ARUP). Sikkenga alleged that Regence and ARUP violated the FCA when Regence, a major Medicare Part B carrier for the State of Utah, paid claims for laboratory testing submitted by ARUP that did not adequately document the medical necessity of the tests and were potentially improper claims under Medicare Part B. The Government declined to intervene.

In November 2001, the court dismissed the relator's claim without prejudice for failure to plead the claim with particularity under Fed. R. Civ. P 9(b). Sikkenga filed an amended complaint, but Regence filed a second motion to dismiss, which the court granted. ARUP, on the other hand, answered the amended complaint, but subsequently filed a motion to dismiss. This motion raised the central issue of whether ARUP is an arm of the state, and thus entitled to Eleventh Amendment immunity.

Factors Utilized to Determine Whether Defendant Is a "State Entity"

To determine whether the defendant is a state entity, and thus not a "person" under the terms of the FCA, the court applied a two-step approach that is oftentimes utilized by the Tenth Circuit to evaluate Eleventh Amendment immunity eligibility. First, the court determined whether the entity would be legally liable for the anticipated judgment. Second, applying the factors outlined in Sturdevant v. Paulsen, 218 F.3d 1160 (10th Cir. 2000), the court determined whether the entity is an instrumentality of the state by evaluating several factors, including: "(1) the characterization of the government unit under state law; (2) the guidance and control exercised by the state over the governmental unit; (3) the degree of state funding received; and (4) the government unit's ability to issue bonds and levy taxes on its own behalf."

Wholly-Owned University Entity Is an Arm of the State

The court's arm-of-the-state analysis highlighted the factual similarities between the case at bar and *Watson v. University of Utah Medical Ctr.*, 75 F.3d 569 (10th Cir. 1996), 25 TAF QR 4 (Jan. 2002), in which the Tenth Circuit determined that a university medical center was an arm of the state because it was not autonomous from the University or the State and the bulk of the monies to satisfy a judgment would have come from the State's Risk Management Fund. In the case at bar, the parties did not dispute a similar relationship between ARUP and the University of Utah. Their main contention, however, rested on the issue of whether ARUP's corporate status changes its designation as an arm of the state.

The relator argued that, unlike the other entities that have been previously addressed by the courts, ARUP, as a corporation, should not be entitled to arm-of-the-state status. Sikkenga contended that ARUP could generate its own additional revenues. He also argued that the University chose to insulate itself from ARUP's financial liabilities by utilizing the corporate shield provided for under the State's corporation laws. ARUP, on the other hand, maintained that Sikkenga's argument failed because the corporate organization is not inherently incompatible with state agency status.

Corporation Can Be An Arm of the State

The court rejected the relator's argument. Highlighting the facts underlying the Tenth Circuit's *Watson* decision, the court admitted that it was not clear whether the medical center was incorporated, but the University itself was a "body politic and corporate" under state law and was held to be an arm of the state. Additionally, the court cited two recent decisions in which the courts dismissed FCA claims where universities had been organized and operated in a corporate form. Furthermore, the court referenced *Donald v. University of California Board of Regents*, 329 F.3d 1040 (5th Cir. 2003), 30 TAF QR 3 (July 2003), in which the Ninth Circuit affirmed that the University of California, which is organized as a corporation, is nevertheless immune from FCA claims filed by private relators because the University is ultimately a state entity.

Moreover, in rejecting Sikkenga's argument, the court relied on *United States ex rel. Adrian v. Regents of the University of California*, 363 F.3d 398 (5th Cir. 2004), 34 TAF QR 43 (Apr. 2004), in which the Fifth Circuit affirmed the dismissal of an FCA claim against a university laboratory managed by the University of California. In *Adrian*, the relator argued that a corporation that can sue and be sued should be considered a person under the FCA. The Fifth Circuit disagreed, holding that the laboratory is "plainly a 'state or state agency.'" Noting the similarities between the arguments championed by Sikkenga and those rejected by the Fifth Circuit in *Adrian*, the court reached a similar conclusion. The court ruled that the University and ARUP do not forfeit their arm-of-the-state status simply because of their corporate organization. ARUP's corporate structure, the court ruled, does not change its basic organizational relationship with the University in any significant way. Furthermore, the court noted that ARUP's Articles of Incorporation specifically state that it is wholly-owned by the University, its revenues accrue to the State of Utah, and all of ARUP's property actually belongs to the State.

Ultimately, the court concluded that ARUP was sufficiently tied to the University of Utah to be considered an arm of the state, and therefore, as a state entity, ARUP was not a "person" under the FCA. Accordingly, the court granted ARUP's motion to dismiss.

U.S. ex rel. Pollak v. Board of Trustees of the University of Illinois, 2004 WL 1470028 (N.D. Ill. June 30, 2004)

An Illinois district court granted the defendants' motion to dismiss state and FCA retaliation claims against a state university and against individual defendants in their official capacity. The court ruled that the University, which had been deemed an "arm of the state" in a prior judicial matter, does not lose its status as a governmental entity unless there has been a clear change in circumstances. Likewise, the court found that the Eleventh Amendment protects an individual defendant that is sued in his official capacity. The court also ruled that, under the facts of this case, the FCA does not impose liability upon individuals in their individual capacity. With no pending federal questions, the court dismissed the remaining state retaliation claims because the court could not exercise supplemental jurisdiction over these claims.

Dr. Raymond Pollak, a former employee at the University of Illinois, brought an action against the Board of Trustees of the University of Illinois (BOT) and against several of his former supervisors, alleging *qui tam* and private claims for retaliation under the federal FCA and the Illinois Whistleblower Recovery and Protection Act (IWRPA). After the State of Illinois and the United States intervened and settled the *qui tam* claims against BOT, Pollak was only left with his private claims for retaliation. BOT and the individual defendants moved to dismiss the remaining claims on Eleventh Amendment grounds.

Eleventh Amendment Shielded State University From State Retaliation Claims

The court granted the defendants' motion. The court observed that the Eleventh Amendment shields states and "arms of the state" from suit in federal court, unless the states consent or Congress confers jurisdiction. The court also noted that the Seventh Circuit, in *Cannon v. University of Health Sciences/Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983), explicitly held that BOT qualified as an "arm of the state" for purposes of the Eleventh Amendment.

The relator argued that, while the court had historically characterized the BOT as a state entity, the BOT had evolved over the years to the point that it no longer functions as an "arm of the state," and should now be susceptible to suits in federal court. The relator pointed out that contributions from the State now make up a small percentage of the BOT's operating budget. The relator also highlighted that other circuits have refused to characterize certain state universities as state entities, even though these universities received comparatively less support from their state governments. In turn, Pollak asked the court to reassess the status of the BOT so as to determine whether or not the BOT still qualified as a state entity.

While the court agreed that an arm of the state could lose its status as a state entity, the court ruled that the BOT still qualified as a state entity. Because the Seventh Circuit had recently affirmed the BOT's status as a state entity, in *Kaimowitz v. Board Of Trustees of the University of Illinois*, 951 F.2d 765, 767 (7th Cir. 1991), the district court required the relator to demonstrate a "clear change in status" before the district court would even consider overruling the higher authority of the circuit court. The district court ruled that the relator had not met this high standard.

Pollak also argued that the BOT had waived its right to assert sovereign immunity when the State of Illinois decided to intervene and settle the *qui tam* action. In the alternative, Pollak asserted that the Government's intervention in the FCA action voided any sovereign immunity claim that the BOT could have invoked.

The court rejected the relator's argument, noting that the State of Illinois and the Government, while they intervened and settled the relator's *qui tam* claims, the retaliation claims were still on the table. Furthermore, the court noted that the BOT signed settlement agreements that stated that the BOT "expressly reserves any and all defenses to any and all remaining counts of the Civil Action." Thus, the court ruled that the BOT still had the right to invoke sovereign immunity in the underlying retaliation claims suit. Accordingly, the court held that sovereign immunity shielded the BOT from suit under the IWRPA and the FCA.

Eleventh Amendment Protected Individual Defendants in Their Official Capacities

The court also dismissed the relator's suit against the individual defendants in their official capacities. The court, applying the same rationale that protected the BOT, ruled that the Eleventh Amendment also precluded Pollak from maintaining a suit against the individual defendants in their official capacities.

FCA Liability Did Not Attach to Supervisors in Their Individual Capacities

While the district court agreed that the Eleventh Amendment does not protect individual defendants in their individual capacities, the court nevertheless ruled that these FCA claims lacked merit. The court ruled that the relator failed to even establish that the FCA applied to such suits. The district court, recognizing that the Seventh Circuit had never addressed this issue, relied on decisions from surrounding circuits, holding that the FCA only imposes liability upon "employers." The court further noted that supervisors, such as the individual defendants in the case at bar, have not qualified as "employers" subject to FCA liability. Accordingly, the court also dismissed the relator's FCA claim against the individuals in their individual capacities.

Because the court had dismissed all federal claims in this action, the court lost its supplemental jurisdiction over Pollak's state-based claims. Accordingly, the court also dismissed the state retaliation claims against the individual defendants, and granted the defendants' motion to dismiss.

***U.S. ex rel. Bulbaw v. Regents of the New Mexico State University*, 324 F. Supp. 2d 1209 (D.N.M. Apr. 4, 2004)**

A New Mexico district court granted in part and denied in part the relator's motion to add additional defendants in a *qui tam* action. The court ruled that an unincorporated division of a state university with no independent legal existence was not a "person" subject to FCA *qui tam* liability. However, the court ruled that state employees could be held liable in their individual capacities if they were sufficiently involved in a statutory violation.

Edward Burlbaw and Donald Bustamante brought this *qui tam* action in 1999 against the New Mexico State University (NMSU), alleging that it falsely certified that it was a minority

institution in connection with government contracts awarded to its Physical Science Laboratory (PSL). After the Supreme Court ruled in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000), that states and state agencies are not "persons" subject to *qui tam* FCA liability, the relators sought voluntarily to dismiss their complaint. However, the consent of the Government was not obtained, and a final judgment of dismissal was never entered.

The relators obtained new counsel and reopened the case. In order to avoid the impact of *Stevens*, they moved to amend their complaint to name PSL as a defendant, as well as several individual defendants in their individual capacities.

Unincorporated Division of State University Not Subject to *Qui Tam* Liability

The court granted the motion in part and denied in part. The court held that PSL is not a "person" subject to *qui tam* liability under the FCA. The court observed that PSL is not incorporated, has not registered as an unincorporated association, is not a partnership, and is not any other type of recognized legal entity capable of suing or being sued. It does not enter into contracts in its own name; the contracting party is the NMSU Board of Regents. Similarly, it owns no property; rather, the NMSU Board of Regents owns the laboratory. The court found it unlikely that given the state of the common law in 1863, when the FCA was enacted, Congress would have understood the term "person" to include a non-legal entity that has no power to own property, enter into contracts, or sue or be sued.

Alternatively, the court also held that PSL is simply a division or department of NMSU, and is therefore an "arm of the state" for purposes of the FCA and the Eleventh Amendment. The court again observed that PSL has no independent legal existence, and any debts it incurs are debts of NMSU, allocated to PSL only for accounting purposes. PSL's annual budget, like budgets of all other university departments, is approved by the NMSU Board of Regents. Hiring decisions and salaries at PSL are subject to the approval of the NMSU personnel office or provost office, and PSL employees are considered NMSU employees. PSL ability to purchase equipment or services is subject to NMSU's control.

In opposition to these facts, the relators pointed to several pieces of evidence regarding the degree of financial independence that PSL has from NMSU. PSL derives all of its funding from research grants and contracts it obtains from the Federal Government and other entities, and receives no funding from the State of New Mexico. PSL's existence depends on its ability to obtain such grants and contracts, rather than from state funds. The relators also noted that the director of PSL has the ability to sign contracts, albeit in the name of the NMSU Board of Regents, and that PSL operates with a great deal of autonomy, because the NMSU administration rarely, if ever, rejects the contracts that have been negotiated. PSL appeared to have approximately five million dollars in surplus funding that could be used to pay a settlement. Finally, the relators observed that PSL competes with private businesses for government research contracts, and so acts in the arena of private enterprise rather than performing a more typical government function.

The court found the facts in *Watson v. University of Utah Medical Center*, 75 F.3d 569 (10th Cir. 1996), 25 TAF QR 4 (Jan. 2002), strikingly similar to those in the case at bar. In

Watson, the medical center was governed by the university's board of trustees, which approved its budget, construction, capital financing, and fundraising programs. However, the medical center derived only 5 percent of its annual budget from state funding, receiving the rest from patient billings, and was therefore essentially operating in the same manner as a private hospital. However, given the overall control the university had over the medical center's operations, the Tenth Circuit ruled that the medical center was an arm of the State of Utah.

Like the medical center in Watson, the PSL competes with private businesses and survives only because of the revenues generated from its activities. Nevertheless, NMSU appeared to have even greater control over PSL than the control exercised by the state in Watson. Therefore, the court was constrained to find that PSL is an arm of the state, and thus not a "person" for FCA purposes. Accordingly, the court denied the relators' motion to add PSL as a defendant in their amended complaint.

State Employees Involved in Submission of False Claims May Be Sued in Their Individual Capacities

However, the court granted the relators' motion to add individual employees of NMSU and PSL as defendants in their individual capacities. The court observed that the plain language of the FCA applies to any person who submits a false claim, and nothing in the statute creates an exception for state employees. The court therefore ruled that under the FCA state employees are persons who may be sued if they are sufficiently involved in the submission of a false claim to the United States.

The court next examined whether the state employees enjoyed any immunity from suit. The employees did not have Eleventh Amendment immunity, because they were being sued only in their individual capacities, and damages were not being sought from the state. Moreover, the fact that the state might indemnify the employees for any judgment against them did not bring the Eleventh Amendment into play.

Court Rejects "Scope of Duties" and "Personal Benefit" Tests

Normally, a government employee, even when simply performing her duties, is at most entitled to qualified immunity from suit. There are limited exceptions to this rule when the employee is acting in a prosecutorial, judicial, or legislative capacity, but these exceptions clearly do not apply to state employees being sued under the FCA for submitting false claims. The court rejected the approach of *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 937 (8th Cir. 2001), 25 TAF QR 1 (Jan. 2002), which held that a state official could not be sued in his individual capacity unless he was acting outside his official duties when he took the action complained of. As the dissent in that case pointed out, the Eighth Circuit majority's approach is tantamount to granting absolute immunity from FCA liability to all state employees for any actions taken within the course and scope of their duties. The district court observed that such a grant of immunity is contrary to the Supreme Court's public employee immunity jurisprudence. Moreover, because no public employee would be authorized to knowingly present a false claim, there is no reason to immunize employees who do so.

The court also rejected certain district court decisions holding that a state employee cannot be sued in her individual capacity for her acts as an official unless she personally benefited

from the false claim. *C.f., e.g., United States ex rel. Honeywell, Inc. v. San Francisco Housing Authority*, 2001 WL 793300 (N.D. Cal. July 12, 2001), 24 TAF QR 6 (Oct. 2001). The difference between an official-capacity suit and an individual-capacity suit is not whether the state employee was acting for her own benefit, or performing an action that was not part of her regular duties. Instead, a state employee is acting in an individual capacity, and may be sued as an individual, if she was sufficiently involved personally in the statutory or constitutional violation at issue. *See Alden v. Maine*, 527 U.S. 706, 757 (1999). This is true, the district ruled, even if the state officer was simply doing her job when she violated the statute.

The defendants argued that the distinction between official and individual capacities was created only for the purpose of actions under 42 U.S.C. § 1983, and that it was doubtful whether it was applicable to an FCA action. In effect, they argued that individual-capacity lawsuits should be allowed against state officials only in § 1983 actions. However, the court ruled, that is not the law. The individual-capacity lawsuit and the attendant qualified-immunity doctrine are not limited to § 1983 actions, but have been applied to a wide variety of federal statutory claims.

The court could see no principal reason to treat the FCA differently than any other federal statute for purpose of public-employee liability. Therefore, the court ruled that individual state employees may be sued under the FCA as under other federal statutes, and are generally entitled only to qualified, not absolute immunity. Accordingly, the court granted the relators' motion to drop NMSU as a defendant and add the individual employees as defendants in their individual capacities.

B. False Certification

U.S. ex rel. Taylor v. Gabelli, 2004 WL 1719357 (S.D.N.Y. July 29, 2004)

See "Federal Rules of Civil Procedure: Rule 9(b)" *below at page 84.*

U.S. ex rel. Lee v. Fairview Health System, 2004 WL 1638252 (D. Minn. July 22, 2004)

See "False Claims Act Liability: State Law Violations" *below at page 15.*

U.S. ex rel. Quinn v. Omnicare, Inc., 2004 WL 1933626 (3d Cir. Sept. 1, 2004)

The Third Circuit affirmed a district court's decision dismissing a *qui tam* action on summary judgment. The court of appeals ruled that because there was no regulation requiring Medicaid-provider pharmacies to credit Medicaid for drugs returned for resale, FCA liability did not attach when a pharmacy only credited Medicaid 50 percent of what it had originally paid the pharmacy. The Third Circuit also held that, in order to proceed with an FCA action, the relator must present evidence of an actual submission of a false claim.

Thomas Quinn was a regional comptroller for Pompton Nursing Home Suppliers, Inc. (Pompton), a wholly-owned subsidiary of Omnicare, Inc. Quinn discovered that it was Pompton's policy, when medications were returned to the pharmacy company, to remove the capsules from their sealed containers and place them in new packages for resale. Pompton would also send Medicaid a check for fifty percent of the cost of these medications. Quinn, concerned about Pompton's Medicaid recycling and crediting practices, raised his concerns to Alan Traster, the president of Pompton. Traster told Quinn that the company was not required to credit Medicaid for the returned medications. Quinn was terminated from the company a few days after meeting with Traster.

In March 2003, Quinn brought an action against Pompton under the FCA and New Jersey's Conscientious Employee Protection Act, alleging that Pompton (1) failed to submit adjustments to Medicaid for returned medication; (2) sold the same medication twice; (3) submitted claims to Medicaid for medication that was inappropriately removed from unit dose packaging; and (4) submitted less than 100 percent of the cost to Medicaid for returned medication. In addition, Quinn argued that his termination from Pompton violated the FCA's anti-retaliation provisions. The district court granted the defendant's motion for summary judgment. Quinn appealed the decision

The Third Circuit affirmed. The court observed that the New Jersey Medicaid's Pharmacy Services Fiscal Agent Billing Supplement (FABS) instructs provider pharmacies to submit pharmacy claims on a particular form, an MC-6 form, which contains a "Provider Certification" that certifies that "the services covered by this claim and the amount charged thereof are in accordance with…[Medicaid] regulations…" FABS also instructs the pharmacies to fill out an "Adjustment Request" when a claim is paid in error. However, as the court pointed out, none of the regulations specifically instruct the pharmacies on how to adjust a claim after medications have been returned for recycling.

Quinn argued that Pompton's initial claims became false when medications were returned, for these claims became claims for services that were never provided to Medicaid beneficiaries.

In other words, unless Pompton reversed their original claim for returned medication, the certification on the initial MC-6 form would be false. The lower court refuted this argument, noting that there is no explicit language on the form or in the Medicaid regulations that states that medications cannot be returned.

The Third Circuit agreed with the district court's rationale, adding that there is no regulation mandating the reversal of a claim once a medication has been returned to the pharmacy. Repeating the ruling of the lower court, the court of appeals held that because there was no requirement to adjust the initial claim, there was no liability for a failure to do so.

Initially Valid Claims Did Not Transform Into False Claims

In this case, the Third Circuit was also faced with the issue of whether an initially valid claim could later be deemed false when the medication was returned. The court of appeals ruled in the negative, holding that Pompton was not liable under the FCA for the submission of the initial Medicaid claims or for the failure to adjust an initial claim when a medication is returned.

Quinn argued that FCA liability could attach, even if the original claim submitted was not false. The court, however, citing to the legislative intent behind the FCA, observed that the FCA imposes liability for a range of conduct, including "each and every claim…which was *originally* obtained by means of false statements or other corrupt or fraudulent conduct." S. Rep. No. 99-345 (1986) (emphasis added by the court). Here, the defendant's claims were not *originally* false. The Third Circuit refused to exceed the legislative intent behind the FCA by broadening the reach of the Act to attach liability to initially valid claims that later became false.

Quinn also argued that the resale of returned medication resulted in Pompton making a claim for an amount that had already been paid by Medicaid. He also argued that the defendant violated the FCA when it partially credited Medicaid for returned medication and then submitted a new claim for the medication once it was resold to another Medicaid beneficiary. Quinn maintained that Pompton must have resold returned medications to Medicaid, for 60 percent of its customers were Medicaid beneficiaries.

Relator Failed to Offer Evidence of an Actual Submission of a False Claim

The district court and the court of appeals rejected Quinn's argument, holding that, without offering evidence of an actual submission of a false claim, Quinn had not raised a genuine issue of material fact. The court further observed that, at the summary judgment stage, the burden was on Quinn to offer evidence of a false claim, and he had not met this burden.

In support of their holding, the court of appeals pointed to an analogous case in the Eleventh Circuit, *United States ex rel. Clausen v. Lab. Corp. of America*, 290 F.3d 1301 (11th Cir. 2002), 26 TAF QR 14 (Apr. 2002). In *Clausen*, the relator alleged that the defendant medical testing company overbilled the Government by performing unauthorized medical tests. The Eleventh Circuit affirmed the district court's dismissal of the action because the relator never offered evidence of a single false claim that was actually submitted for payment. The Third Circuit highlighted a similar Ninth Circuit ruling, *United States ex rel. Aflatooni v. Kitsap Physicians Service*, 314 F.3d 995 (9th Cir. 2002), 29 TAF QR 3 (Jan. 2003), in which that court held that a relator must appear in court with a "claim in hand."

In the case at bar, while Pompton admitted that sixty percent of its customers were covered by Medicaid and that it resold returned medication, Quinn, similar to the relators in *Clausen* and *Aflatooni*, did not highlight a single claim that the defendant actually submitted to Medicaid that covered a medication for which the defendant had already received payment. The court ruled that, without evidence of an actual claim, there was no issue of material fact.

The court also ruled that, even assuming the defendant submitted successive claims for the same medications, FCA liability did not attach, for the New Jersey regulations specifically entitle pharmacies to recycle medications. Furthermore, the court observed that these regulations do not require pharmacies to credit Medicaid for returned medications. Thus, the court ruled that because the defendant could legally resold the medications and did not have to credit Medicaid, the initial sale and the subsequent resale of the same medication were two legally valid transactions. Accordingly, the court concluded that FCA liability could not be imposed based on the submission of the second claim.

"Implied False Certification" Claim Failed Because No Proof of Actual Submission

Quinn also argued a "certification theory" of FCA liability, highlighting the MC-6 form, which required pharmacies to certify that the "services covered by this claim and the amount charged thereof are in accordance with…[Medicaid] regulations…." Quinn argued that Pompton, by submitting claims on the MC-6 form, violated the FCA by falsely representing compliance with Medicaid regulations.

As an initial matter, the court of appeals noted that the Third Circuit had not yet adopted the "implied false certification theory." In this case, while not explicitly adopting this theory, the court observed that, because Quinn failed to offer evidence that an actual claim was made by the defendant to Medicaid for an improperly recycled medication, the relator had not proven that Pompton had made any false certifications. Accordingly, the court ruled that Quinn's false certification claim failed.

Absence of Legal Obligation Defeated Reverse False Claim Liability

In addition to his other theories of FCA liability, Quinn also alleged that Pompton violated the reverse false claim provision of the FCA, which imposes liability on a person who "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." 31 U.S.C. § 3729(a)(7). Quinn argued that Pompton was liable under this provision because Medicaid regulations required Pompton to credit Medicaid for returned medications and Pompton failed to give full credit.

However, the court, after reviewing the exact language of the relevant New Jersey regulations, determined that pharmacy providers, at the most, were only required to "monitor" the crediting mechanism put in place by long-term care facilities. The court of appeals found no evidence that this obligation included crediting Medicaid for returned medications. Furthermore, the court noted that, even if there was an obligation to credit Medicaid, the regulation was silent as to the specific amount to credit for returned pharmaceuticals. Thus, the court of

appeals ruled that, because there was no clear obligation to credit Medicaid, Pompton was not liable under the FCA.

Because no legal authority prohibited Pompton's actions, the Third Circuit had no choice but to affirm the district court's grant of summary judgment against Quinn. Sending a message to the legislative branch of Government, the court of appeals ended their opinion with a plea for help: "[W]e are constrained by the lack of regulation requiring that credit be given for recycled medications. We believe that Congress and/or the New Jersey legislature might serve Medicaid well if this lack of regulation were corrected."

C. Medicaid Fiscal Intermediary

U.S. ex rel. Barron v. Deloitte & Touche, L.L.P., 2004 WL 1790005 (5th Cir. Aug. 11, 2004)

The Fifth Circuit reversed a district court decision that had erroneously held that a Medicaid fiscal intermediary was necessarily entitled to Eleventh Amendment immunity. The court ruled that because the defendant had not shown that the state government would be subject to any legal liability for damages assessed against the intermediary, the intermediary was not considered an arm of the state, and thus not immune from *qui tam* False Claims Act suits.

Toni Barron and Vicky Scheel brought this *qui tam* action against National Heritage Insurance Company (NHIC), Deloitte & Touche, and Medicaid Claim Solutions of Texas alleging that the defendants participated in the knowing submission of false claims for Medicaid reimbursement. Based on Eleventh Amendment immunity, the district court dismissed the complaint against NHIC, which processes claims and distributes federal Medicaid funds for the State of Texas. Barron and Scheel appealed, arguing that the district court erred in finding that NHIC was acting as an arm of the state.

The Fifth Circuit reversed. Employing a six-factor test outlined in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), the court of appeals sought to determine if the State was the "real, substantial party in interest," in particular whether "the suit seeks to impose liability which must be paid from public funds in the state treasury." The six factors considered by the court were (1) whether state statutes and case law view the defendant as arm of state; (2) source of defendant's funding; (3) defendant's degree of local autonomy; (4) whether defendant is concerned primarily with local as opposed to statewide problems; (5) whether defendant has authority to sue and be sued in its own name; and (6) whether defendant has the right to hold and use property.

Under the six-factor *Clark* inquiry, the court determined that the second factor—the source of the entity's funding—was the controlling factor under the facts of the case. Here, because a contract between NHIC and the State of Texas explicitly dictated that NHIC was to pay its own judgments and indemnify the State from any liability, the State's public funds were protected from liability under this action. Analyzing the remaining five factors of the *Clark* test, the court did recognize some state control over the intermediary, including the State dictating how to pay Medicaid claims for school-based health services; however, the court found it dispositive that NHIC was contractually obligated to pay its own judgments and to indemnify the State from any liability.

The defendant, to no avail, sought to rely on *Shands Teaching Hospital & Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308 (11th Cir. 2000), in which the Eleventh Circuit, relying on cases extending federal sovereign immunity to Medicare fiscal intermediaries, granted the defendants—an administrator for the State of Florida's employee health plan and a managed-care company—Eleventh Amendment immunity. However, the Fifth Circuit distinguished the *Shands* ruling because a contract existed between the State of Florida and the hospital that "expressly provides that the penalty for the failure to reimburse claims within thirty days is payment of the full amount of the claims. Such payment for medical services rendered is an obligation of the state." By contrast, NHIC offered no evidence that the State of Texas would bear any liability for damages assessed against NHIC. Accordingly, the court of appeals reversed the judgment of the district court.

D. State Law Violations

U.S. ex rel. Lee v. Fairview Health System, 2004 WL 1638252 (D. Minn. July 22, 2004)

A Minnesota district court granted the defendant's motion to dismiss a *qui tam* action pursuant to Federal Rules of Civil Procedure 12(b)(6). The court ruled that because the defendant's employees did not violate the state licensing laws by practicing outside of the scope of their license, the relator was unable to present evidence of an actionable false claim under the FCA.

In January 2002, Toni Lee, a former licensed physical therapist for the Fairview Health System, brought this *qui tam* action against Fairview, alleging that the defendant permitted athletic trainers to provide physical therapy services to patients and then submitted reimbursement claims to Medicare and Medicaid for those services. According to Lee, Minnesota law prohibits its medical facilities from delegating physical therapy services to athletic trainers. Lee, in turn, argued that Fairview violated the FCA by submitting these reimbursement claims for services that were in violation of the State licensing laws. The Government declined to intervene. Fairview moved to dismiss the relator's complaint under Fed. R. Civ. P 12(b)(6) for failure to state a claim upon which relief could be granted.

The court granted the defendant's motion. While the Eighth Circuit had not explicitly adopted the "implied false certification" theory of FCA liability, the district court assumed, for the sake of argument, that the theory applied to the case at bar. The court observed that the theory is predicated on the idea that the act of submitting a reimbursement claim to the Government implies compliance with the governing rules that are a precondition to reimbursement. The court further noted that other courts have only applied the "implied false certification" theory when the underlying federal statute or regulation provides that compliance is a condition to payment.

Lee argued that the defendant, by seeking reimbursement from Medicare and Medicaid, had impliedly certified that it complied with regulations that physical therapists practice within the scope of their license. Lee also argued that state statutes specifically outline who may perform physical therapy services, and athletic trainers do not fall within any of the accepted categories. Thus, Lee asserted that the defendant's physical therapists practiced outside the scope of their state license by delegating physical therapy services to athletic trainers.

Relator's "Implied False Certification" FCA Claim Failed

In addition to assuming that the Eighth Circuit would adopt the "implied false certification" theory, the court also assumed that Medicare would condition reimbursement payments upon the defendant's physical therapists practicing within the scope of their state licenses. The court, even with these basic assumptions, ruled that the relator had not presented an actionable claim under the FCA.

Lee argued that, according to state law, only physical therapists, physical therapists assistants, and physical therapy aides may perform functions in a physical therapy setting. However, citing to section 148.7806(e) of the Minnesota Athletic Trainers Act, the court observed that the legislature allowed athletics trainers to provide such services under the direct supervision of a physical therapist. Lee also argued that athletic trainers must function as physical therapy

aides. The court, on the other hand, observed that the relevant statute specifically allowed for less supervision for athletic trainers, and thus the legislative intent was to treat athletic trainers differently than physical therapy aides. Lastly, Lee read the state statute to limit athletic trainers to "treating athletic injuries," not physical therapy. The court refuted this argument, stating that if the legislature intended to limit athletic trainers in such a way, the statute would have clearly said so.

Thus, the district court determined that the Minnesota legislature intended to allow athletic trainers to provide physical therapy services when working under the direct supervision of a licensed physical therapist. Because Lee did not argue that the defendant violated this reading of the relevant state statute, the court ruled that the relator failed to allege that the physical therapists were practicing outside the scope of their license. Accordingly, the court rejected the relator's "implied false certification" FCA claim, and granted the defendant's motion to dismiss.

STATUTORY INTERPRETATIONS

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

United States v. Harvard College, 323 F. Supp. 2d 151 (D. Mass. June 28, 2004)

See "Statutory Interpretations: Section 3729(b) Knowledge Requirement" *below at page 32.*

U.S. ex rel. Totten v. Bombardier Corp., 2004 WL 1906880 (D.C. Cir. Aug. 27, 2004)

A divided panel of the D.C. Circuit, affirming a lower court's decision to grant a defendants' motion to dismiss, held that FCA liability cannot be imposed for claims submitted to a federal grantee, unless the claims were actually presented for payment to an officer or employee of the United States Government. Because the defendants submitted their allegedly false claims to Amtrak, which the court ruled was not the Government, FCA liability did not attach.

Edward Totten brought this *qui tam* action against Bombardier Corporation and Envirovac, Inc., alleging that the defendants delivered defective rail cars to Amtrak and submitted invoices for payment. Totten further alleged that Amtrak paid the defendants from an account that included federal funds. The district court dismissed the case, ruling that 49 U.S.C. § 24301(a) barred FCA suits involving Amtrak. The D.C. Circuit reversed and remanded the suit, holding that there is not a statutory bar to FCA suits against those who submit claims to Amtrak. Subsequently, the district court, granting the defendants' motion to dismiss, ruled that because the defendants had not presented their claims to an officer or employee of the Government, the relator had not presented an actionable FCA claim. The relator appealed.

The D.C. Circuit affirmed. The court, addressing an issue that had not been resolved in the other circuits, was faced with the question of whether FCA relators may prevail against a defendant who submits a false claim to a federal grantee, without offering evidence that the claim was eventually submitted to the Government. The majority read Section 3729(a)(1) of the FCA to contain a "presentment requirement," requiring claims to be "presented to an officer or employee of the Government before liability can attach."

Amtrak Is Not the Government

As initial matter, the court was first faced with the issue of whether Amtrak qualified as "the Government" under the FCA. Totten argued that Amtrak did qualify because it was a mixed-ownership government corporation prior to 1997, the Government had continued to provide large subsidies to Amtrak, and the Government held all of Amtrak's preferred stock. The D.C. Circuit disagreed, observing that Congress, in 49 U.S.C. § 24301(a)(3), had statutorily declared that Amtrak "is not a department, agency, or instrumentality of the United States Government." Even the Government, which had not intervened in the case but did file an amicus brief in support of the relator, conceded that Amtrak was not an agency of the Government.

FCA Requires Presentment to an Officer or Employee of the Government

Arguing in the alternative, Totten asserted that the FCA "presentment requirement" was satisfied because a claim to Amtrak *effectively* presented a claim to the Government. In support of this position, Totten relied on dicta from *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 738 (D.C. Cir. 1998), 15 TAF QR 21 (Oct. 1998), which suggested that claims presented to grantees may be considered "'effectively' presented to the United States" if the claims are paid with funds the grantee received the Government.

The defendants argued, and the court agreed, that the relator's reading of the statute conflicted with the "unambiguous language" of Section 3729(a)(1), which attaches FCA liability when any person "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." 31 U.S.C. § 3729(a)(1) (emphasis added by the court).

Totten argued that reading a "presentment requirement" into Section 3729(a)(1) conflicts with the plain meaning of Section 3729(c), which defines a claim to include a request for payment made to a grantee "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse . . . [the] grantee." 31 U.S.C. § 3729(c). Thus, Totten maintained, a presentment requirement would "render [] the first 'if' clause meaningless."

The court refuted Totten's argument, highlighting that Section 3729(c) specifically uses the present tense word "provides." With this definition of Section 3729(c), the court translated the statute to mean that FCA liability attaches if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government, or if, after the grantee presents the claim, the Government *provides* the funds directly to the claimant. The court further observed that liability would attach if, after presentment of a claim, the Government reimburses the grantee for funds the grantee paid to the claimant. The court maintained that no matter how you defined a "claim" under the FCA, the claim must be "presented (or cause to be presented) to a federal officer or employee."

Again, Totten directed the court's attention to the *Yesudian* decision, in which the D.C. Circuit suggested that based on the legislative history of the statute, it was "possible to read the language [of Section 3729(a)(1)] to cover claims presented to grantees, but 'effectively' presented to the United States because the payment comes out of funds the federal government gave the grantees." 153 F.3d at 738. However, in the case at bar, the D.C. Circuit soundly rejected such an interpretation, stating that the plain language of the statute precluded a need for legislative history analysis. Furthermore, the court noted that Totten did not even argue that the language of Section 3729(a)(1) was somehow unclear or ambiguous.

While the relator did not raise the argument on appeal, the majority went to great lengths to dismiss the dissent's assertion that subsection (a)(2) provides the grounds for resolving this case. The majority argued that, even if the relator had raised this argument, the position would have failed because making a false statement to get a claim paid by Amtrak is not making "a false record or statement to get a false or fraudulent claim paid or approved *by the Government*." 31 U.S.C. § 3729(a)(2) (emphasis added by the court). The majority observed that Congress had specifically added the words "by the Government" to (a)(2), and Congress did not broaden the statute by adding the words "or a grantee, contractor, or other recipient as provided in subsection (c) of this section."

Dissent Argues Presentment Not Required for FCA Liability to Attach

Judge Garland dissented, arguing that FCA liability can be imposed for claims submitted to a federal grantee, even if the claims were not actually presented for payment to the Government. The dissent argued that the majority's statutory interpretation of the FCA was inconsistent with the plain language of the statute. Pointing to the absence of an express requirement of presentment in subsection (a)(2) and the statutory definition of "claim" outlined in subsection (c), the dissent argued that Congress clearly intended to attach FCA liability to the defendants' actions. Moreover, the dissent warns that the majority's interpretation of the statute is entirely inconsistent with the legislative history of the 1986 Amendments to the FCA, in which Congress stated that "the statute permits the Government to sue under the False Claims Act for funds perpetrated on Federal grantees, including States and other recipients of federal funds." S.Rep. No. 99-345, at 21.

U.S. ex rel. Hunt v. Merck-Medco Managed Care, L.L.C., 2004 WL 2137355 (E.D. Pa. Sept. 23, 2004)

A Pennsylvania district court denied the defendant's motion to dismiss FCA and Anti-Kickback Act claims but granted the defendant's motion to dismiss active and constructive fraud claims, in a Government-intervened *qui tam* action against a pharmacy benefits manager company. The court ruled that the defendant "caused" a private health plan company to submit false claims to the Government, for the private entity would subsequently seek reimbursement from the Government after satisfying the defendant's requests for payment.

Merck-Medco Managed Care (Medco), one of the largest pharmacy benefit managers (PBM) in the United States, manages prescription drug benefits for several large health plans by providing mail-order pharmaceuticals to plan beneficiaries. Medco provided such services to beneficiaries of Blue Cross, a health plan that provides health care to federal employees and their families, through the Federal Employee Health Benefits Program (FEHBP).

The Government intervened in a *qui tam* action against Medco in which the relators were seeking relief under the FCA, the Public Contracts Anti-Kickback Act (AKA), and the common law. The Government adopted the relators' argument that Medco defrauded the Government through its contractual relationship with Blue Cross. In addition, the Government alleged that the defendant violated the AKA by making and receiving payments for favorable treatment with other corporations.

Medco filed a motion to dismiss the Government's complaints based on the Government's failure to plead fraud with particularity pursuant to Rule 9(b) and based on Government's failure to state a claim upon which relief can be granted pursuant to 12(b)(6). The defendant also moved to dismiss two of relators' claims based on the FCA public disclosure bar. The district court denied Medco's motion with respect to every issue, with the exception of the common-law claims of active and constructive fraud.

Complaint Satisfied the Particularity Requirements of Rule 9(b)

The court, without much discussion, rejected the defendant's argument that the Government's FCA allegations failed to meet the Rule 9(b) standard for particularity. The court ruled that

the complaint specified a time period during which the alleged conduct occurred, highlighted which particular agreements were involved, and outlined what claims were actually false. Accordingly, the court denied the defendant's Rule 9(b) motion.

Government Raised Actionable Section 3729(a)(1) and (a)(2) Claims

The court also denied the defendant's Rule 12(b)(6) motion, which argued that the Government failed to state an actionable claim under Sections 3729(a)(1) and (a)(2) of the FCA. Because the defendant challenged the Government's allegations on every element of their FCA claims, the court assessed the existence of each element.

First, the court ruled that the complaint adequately alleged that the defendant "caused to be presented to an agent of the United States a claim for payment," as required under 31 U.S.C. § 3729(a)(1). Here, Blue Cross was considered an agent of the Government, and Medco billed Blue Cross for the services it provided federal beneficiaries. In turn, the Government would then reimburse Blue Cross.

Second, the court determined that the second element was present in the Government's complaints, for the complaint outlined numerous false statements by the defendant. In particular, the Government alleged that Medco "made false statements and cancelled or destroyed mail order prescriptions to avoid paying penalties for delays in filling orders, billed for prescriptions containing less then the required number of pills, created false records showing that physicians had been contacted to discuss various issues when no such contacts took pace, billed the Government for prescriptions not authorized by law to be filled, fraudulently induced physicians to authorize drug switches, and favored Merck drugs over other manufacturers' even though Merck drugs were more expensive."

Third, as for the scienter element of the Government's FCA allegations, the court determined that the complaint sufficiently alleged that the defendant knowingly submitted false claims. Or, at the very least, the Government argued that the defendant's compliance procedures were insufficient, and thus falling under the "reckless" requirement of the FCA.

Fourth, the court ruled that the "presentment requirement" was satisfied in the Government's complaint, for the allegedly false claims were "presented to the Government." The defendant argued that the claims were never submitted "to an officer or employee of the United States Government," as required by 31 U.S.C. § 3729(a)(1), but were actually submitted to Blue Cross, a private entity. Furthermore, the defendant noted that, despite the traditionally broad definition of "claim" in 31 U.S.C. § 3729(c), the plaintiff still had to show that the claim was or would have been submitted to the Government.

The Government, however, interpreted the FCA differently. The Government pointed out that Blue Cross pays Medco and then Blue Cross seeks reimbursement from the Government via a special government account. Thus, the defendant, according to the plaintiffs, caused Blue Cross to submit its claims to the Government.

The court, noting that there had been no briefing on how much discretion Blue Cross has in tapping into the government account, still ruled that the Government's arguments were "sound enough to survive a motion to dismiss." The court conceded that additional discovery on this issue "may (but will likely not) alter the Court's analysis on this point."

Fifth, as for the harm element, the court noted that under Section (a)(1), the Government did not have to plead that the false statements actually harmed the Government, only that they

could have. Conversely, claims brought under Section (a)(2) must allege that the Government actually suffered harm.

The defendant attacked the Government's Section (a)(1) allegations, arguing that (1) the Government failed to plead that the defendant's actions actually caused economic harm, and furthermore that (2) because of the way the FEHBP is funded, it was impossible for the defendant's actions to actually inflict harm on the Government.

The court, rejecting the defendant's Section (a)(1) arguments, instead ruled that the plaintiff merely had to allege that the Government *could have been* harmed. Citing to a controlling Third Circuit decision, the court ruled that liability attached if the Government "has been billed for nonexistent or worthless goods, [or] charged exorbitant prices, *or the fraud might* cause the government to suffer economic loss." *United States ex rel Watson v. Connecticut General Life Ins. Co.*, 87 Fed. Appx. 257, 260 (3d Cir. 2004), 34 TAF QR 2 (Apr. 2004) (emphasis added).

Under this interpretation of the FCA, the district court determined that the Government had adequately pled that the defendant's actions harmed, or could have harmed the Government.

Government's 3729(a)(2) Claims Sufficiently Alleged That the Government Suffered Actual Harm

On the other hand, the court maintained that, when a plaintiff alleges Section 3729(a)(2) violations, the plaintiff must show that harm was inflicted on the Government. The Government argued that the Government was actually harmed even though Medco's actions only decreased the future money supply of the FEHBP. Medco, however, argued that the allegedly false claims did not harm the Government, for the claims did not cause the Government to immediately increase its contributions to the FEHBP.

The court observed that a court of appeals had rejected a similar defense argument in *United States ex rel. Yesudian v. Howard University et al.*, 153 F.3d 731 (D.C. Cir. 1998), 15 TAF QR 21 (Oct. 1998). In *Yesudian*, the relator sued the defendant after he was fired for allegedly discovering inappropriate billing practices at the university's hospital involving federal grants.

In the case at bar, the district court, in deciding that fixed-grant programs could be subject to FCA liability, observed that Congress intended to rectify issues raised by the Seventh Circuit's ruling in *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). Specifically, in *Azzarelli*, the court of appeals held that there was no harm to the Government, and thus no FCA liability, where the Government distributed a fixed amount to a state government for road projects and thus the amount contributed would have remain the same even if contractors submitted fraudulent claims to the state. The Senate Judiciary Committee, in proposing the 1986 FCA Amendments, "intended . . . to overrule *Azzarelli* . . . to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." S. REP. NO. 99-345, at 22, *reprinted* in 1986 U.S.C.C.A.N. at 5287.

Accordingly, with the plaintiffs claiming that the Government was harmed by money wasted on fraudulent claims, the court agreed that FCA liability could attach in the case at bar.

Complaint Raised Actionable Reverse FCA Claims

In assessing the Government's reverse false claims allegations, the court noted that, under 31 U.S.C. § 3729(a)(7), a plaintiff must show that a defendant "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 [G]overnment."

The defendant raised three arguments against the Government's Section (a)(7) allegations. First, Medco argued that it did not owe an obligation to the Government. Second, even if it did, the FCA did not apply because the obligations did not exist when the allegedly false statements were made. Third, the Government was not harmed by the alleged reverse false claims. The district court addressed each of these arguments.

As for the defendant's first argument, Medco maintained that Section 3729(a)(7) mandates that the obligation be owed directly to the Government, without any intermediate players. The court, finding no support for the defendant's "direct privity" argument, ruled that, because the defendant's actions had the predictable result of depriving the Government of funds it was owed, the defendant's conduct fell under Section (a)(7) of the FCA. In reaching its conclusion, the court conceded that there was a lack of case law addressing this particular issue.

Addressing the defendant's second argument, the court observed that the controlling contractual agreement between Medco and Blue Cross indicated that Medco could wait until the end of the calendar year to pay any penalties it incurred in the prior twelve months. Medco argued that their contractual obligations owed to Blue Cross, and thus the Government, did not arise until that time.

The court, quickly disregarding the defendant's third argument, ruled that the defendant's action could have harmed the Government, for the Government would have been entitled to any contractual penalty payments. Accordingly, after dismissing all of the defendant's arguments, the court determined that the Government could proceed with its reverse false claims allegations.

The defendant also argued that the relator's drug-switching allegations should have been dismissed, for the claims were publicly disclosed and the relators were not the original source of the information. While the court agreed that the information had been publicly disclosed, the court refused to rule on the defendant's original source argument, for the complaint had not adequately outlined the facts surrounding this determination. The court stated that additional briefings were required to assess this issue.

As for the defendant's Rule 12(b)(6) motion against the Government's AKA allegations, the court ruled that Government had raised an actionable claim against Medco. However, the district court, assessing the common law allegations, dismissed the Government's active and constructive fraud claims. The court dismissed the constructive fraud claims because the Government failed to show that Medco owed the Government the requisite heightened legal duty to support a claim of constructive fraud. The court dismissed the active fraud claims because the Government failed to sufficiently plead the elements of active fraud.

Accordingly, the district court denied the defendant's motion to dismiss the Government's FCA and AKA claims, but granted the defendant's motion to dismiss the Government's active and constructive fraud claims.

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

United States v. Harvard College, 323 F. Supp. 2d 151 (D. Mass. June 28, 2004)

See "Statutory Interpretations: Section 3729(b) Knowledge Requirement" *below at page 32.*

U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co., 2004 WL 1686958 (E.D. Pa. July 28, 2004)

A Pennsylvania district court granted the defendants' motion for summary judgment in a *qui tam* action that alleged that a defendant shipbuilding company and a defendant bank conspired to defraud the Government. The court ruled that the relator merely listed reasons the shipbuilding company might have wished to avoid its obligation to record a security agreement between the Government and the corporation. The court ruled that the "meeting of the minds" requirement was not met because the relator failed to offer any evidence that the alleged co-conspirators shared a common objective, that the shared objective was fraudulent, and that the nature of the goal was to perpetrate a fraud on the Government.

In 1984, the Navy solicited bids for the construction of oil tanker ships. Pennsylvania Shipbuilding Co. (Penn Ship) was awarded the government contract on the condition that Penn Ship secured it against reprocurement costs the Navy would incur if Penn Ship defaulted on the contract. In turn, with First Fidelity Bank, N.A. (Fidelity) serving as the trustee, Penn Ship drafted a trust indenture that named the Navy as the beneficiary. The Government agreed to the financial arrangement; however, Penn Ship never recorded the documents required to perfect Fidelity's security interest in the various property and equipment identified in the trust indenture. After Penn Ship experienced financial difficulty in the late 1980s, the Navy and Penn Ship decided to end their contract and terminate the trust indenture.

In 1994, Paul Atkinson and his former co-relator Eugene Schorsch filed a *qui tam* action under seal against Penn Ship, Fidelity, and Sun Ship Inc. After considerable delay, including multiple extensions of time for the Government, dismissal of some of the claims, and a second and third amended complaint that dropped Sun Ship as a defendant, the sole claim remaining before the court alleged that Penn Ship and Fidelity conspired to defraud the Government in violation of section 3729(a)(3) of the FCA. Atkinson alleged that Fidelity and Penn Ship conspired to defeat the Navy's security interests under the trust indenture by not properly recording the security instruments. Specifically, Atkinson argued that Penn Ship's role in the conspiracy was its failure to record, while Fidelity's role involved its failure to ensure that the security instruments were actually recorded. Atkinson maintained these actions were undertaken to defraud the Government of property and money it was entitled to under the terms of the oil tanker contract. The defendants moved for summary judgment.

Shared "Conspiratorial Objective" Required to Prove FCA Conspiracy

The court granted the defendants' motion. To state a claim under FCA section 3729(a)(3) for conspiracy, a relator must show: (1) that the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States, and (2) that one or more conspirators performed any act to get a false or fraudulent claim allowed or paid. Typically,

the court noted, the first required element has been described the courts as the "meeting of the minds requirement." Put differently, Atkinson was required to present evidence that would enable a reasonable juror to conclude that Penn Ship and Fidelity shared a "conspiratorial objective," meaning the parties must be "aware of the harm or wrongful conduct at the inception of the combination or agreement." The court determined that Atkinson had not met this evidentiary hurdle.

Atkinson highlighted three events that he believed demonstrated the existence of a conspiracy. First, Atkinson argued that Penn Ship, "on at least two occasions . . . consciously omitted a requirement that the Navy or the Trustee be noticed of filing." However, the court determined that omitting a provision from a trust indenture did not amount to a conspiracy to defraud the Government, especially because neither the Navy attorney nor the defendants' attorneys could recall why it was stricken or whether its subsequent omission was the result of a conscious or extensive discussion.

Second, Atkinson maintained that Fidelity had knowledge of the contract that triggered Fidelity's obligations as trustee and Penn Ship's duty to record. The court ruled that, even if Fidelity knew that the contract had been awarded to Penn Ship, the relator has nonetheless failed to establish a conspiracy under the FCA. According to the court, Fidelity's failure to ensure the perfection of the Navy's security interest amounted to a breach of Fidelity's fiduciary duty to the Navy. Furthermore, even if the Navy could bring a successful cause of action against Fidelity for breach of fiduciary duty, this breach, the court determined, neither involved Penn Ship nor a "meeting of the minds," nor did it otherwise suggest the existence of a conspiracy to defraud the Navy.

Third, the relator argued that a conspiracy had to exist because Penn Ship's motives for not recording the security instrument were so compelling that there was no other explanation for the creation of the trust indenture. Specifically, Atkinson argued that because the defendants could not offer a legitimate rationale for creating the trust indenture, conspiracy had to be the driving force behind its creation. Atkinson claimed that Fidelity's motivation was rooted in securing an ongoing banking relationship with Penn Ship. Again, the court disagreed with Atkinson's reasoning. The court warned that just because Atkinson could not identify a compelling reason behind the creation of the trust did not mean that no such reason existed. Furthermore, the court noted that the Navy had numerous opportunities to review the trust indenture, and nothing in the document prevented the Navy from checking to determine whether the instrument had been recorded. Accordingly, the court ruled that no reasonable juror could conclude that the use of the trust indenture established the requisite "agreement" to defraud the Navy.

No FCA Conspiracy Because There Was No Intent to Defraud the Government

Alternatively, the relator argued that, if the use of the trust indenture was not conspiratorial, the failure to record was. According to Atkinson, Penn Ship conspired not to record the security instruments because Penn Ship feared alerting other potential bidders who might contest the contract award. The court struck down this argument because the allegation did not include the requisite "intent to defraud the government" element needed for an FCA conspiracy action. The court maintained that the Navy would have, in actuality, shared in the

defendants' intent, for the Navy had an interest in not further delaying the construction of the oil tankers. Furthermore, as the court pointed out, Atkinson failed to offer any evidence that demonstrated that Fidelity even had an opportunity to profit from a rebidding process, much less a "conspiratorial objective."

More significantly, the court determined that the relator presented no evidence demonstrating a "meeting of the minds" between Fidelity and Penn Ship, and thus the relator, despite his numerous assertions of a conspiracy, failed to produce any evidence of a shared conspiratorial objective. Accordingly, the court granted the defendants' motion for summary judgment because no reasonable jury could have concluded that Penn Ship and Fidelity formed an agreement to defraud the Government.

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

***U.S. ex rel. Quinn v. Omnicare, Inc.*, 2004 WL 1933626 (3d Cir. Sept. 1, 2004)**

See "False Claims Act Liability: False Certification" *above at page 10.*

***Kennard v. Comstock Resources, Inc.*, 2004 WL 723249 (10th Cir. Apr. 5, 2004)**

See "Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" *below at page 61.*

***U.S. ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.*, 2004 WL 2137355 (E.D. Pa. Sept. 23, 2004)**

See "Statutory Interpretations: Section 3729(a)(1) Presentment Requirement" *above at page 19.*

***U.S. ex rel. Bain v. Georgia Gulf Corp.*, 2004 WL 2152360 (5th Cir. Sept. 27, 2004)**

The Fifth Circuit reversed and remanded a district court's ruling that a relator had stated an actionable reverse FCA claim. The court of appeals, interpreting the reverse FCA provision, ruled that an "obligation to pay . . . the Government" did not arise merely because the defendant committed an unlawful act that was subject to a fine.

Starting in 1982, Ronald Bain slowly worked his way up the corporate ladder at Georgia Gulf Corporation, eventually becoming a "top deck operator," monitoring and recording the releases of carcinogenic vinyl chloride gas from the company's Louisiana polyvinyl chloride (PVC) chemical plant. Periodically, Georgia Gulf was required to deliver these records to the Environmental Protection Agency (EPA) and the Louisiana Department of Environmental Quality (LDEQ).

After being promoted to his new position, Bain discovered that the company regularly and knowingly released vinyl chloride gas into the air without measuring the emission, and would then submit records to the EPA and the LDEZ that failed to document these additional gas releases. Subsequently, Bain brought a *qui tam* action against Georgia Gulf alleging that the defendant's actions constituted reverse false claims under the FCA, for "the actions of Georgia Gulf have deprived the United States of America and State of Louisiana of fines, and other monetary assessments which would have been made had the actions of Georgia Gulf not been concealed." The defendant filed a motion to dismiss pursuant to Rule 9(b) and 12(b)(6).

The district court denied Georgia Gulf's motion, ruling that Bain had adequately alleged that the defendant's actions violated the FCA. Specifically, the district court held that the defendant's actions constituted reverse false claims under the FCA, for "the making of false or fraudulent records prepared by the defendant would allow Georgia Gulf to 'avoid' an 'obligation to pay' what the Government would have received had Georgia Gulf submitted accurate records."

Subsequently, in the matter at bar, the defendant brought an interlocutory appeal challenging the lower court's denial of its Rule 9(b) and 12(b)(6) motions.

Relator Did Not Raise an Actionable Claim under the Reverse False Claims Act

The Fifth Circuit reversed the district court's decision and remanded the case for further proceedings. In assessing the relator's reverse FCA argument, the court of appeals noted that a defendant's conduct does not result in improper payment by the Government to the defendant, but instead results in no payment *to* the Government when a payment is obligated. Under this reading of the FCA, the Fifth Circuit ruled that the relator's complaint did not state a claim under Section 3729(a)(7), the reverse False Claims Act provision.

Bain's reverse FCA claim centered on allegations that the defendant concealed from the Government the fact that it had submitted false records in an attempt to avoid a fine to which Georgia Gulf might have been subjected to if Government had known and taken action against the defendant. Georgia Gulf, however, argued that their state permit was "merely a grant of authority to discharge, not a contract setting forth obligations owed to and/or from the Government."

Bain, on the other hand, asked the court to consider the permit as a government contract that imposed an "obligation" on the defendant in the form of a fine for contractual violations. The defendant countered that the potential fine could not be the basis for a reverse FCA action.

The Government, through an amicus brief, argued that the avoidance of a potential fine, like under the facts of the case at bar, did not give rise to liability under the reverse FCA provision. The court of appeals agreed that, at least under the facts of this case, reverse false claims liability did not attach.

The Fifth Circuit disagreed with the district court's ruling that an " 'obligation to pay' . . . the Government" was satisfied by the defendant committing an unlawful act that was subject to a fine or monetary penalty. The court of appeals observed that no fine or penalty, with respect to gas emissions allegedly misrepresented in government reports, had ever been imposed on the defendant. The court also pointed out that the Government had never commenced a formal proceeding to impose a potential fine or to determine to impose any such fine or penalty.

The defendant argued that Section 3729(a)(7), the reverse FCA provision, should be interpreted so that potential fines could not form the basis on a reverse FCA action. Echoing the Sixth Circuit's rationale in *United States ex rel. American Textile Mfrs. Inst., Inc. (ATMI) v. The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999), Georgia Gulf argued that reverse FCA liability only attaches when the defendant has made or submitted a false claim at the time that the defendant owed an obligation to the Government.

Conversely, Bain argued that potential fines should be considered "obligations" for the purposes of Section 3729(a)(7). To add support to his argument, Bain pointed to *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), for the proposition that Congress intended the FCA to be interpreted broadly so as to "reach all types of fraud, without qualification, that might result in financial loss to the Government."

In addition, the relator cited *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1237 (11th Cir. 1999), 16 TAF QR 19 (Apr. 1999), for the proposition that the existence of a need for further government action before an obligation is liquidated does not preclude a reverse false claims action. In *Pemco Aeroplex*, the Eleventh Circuit ruled that a reverse FCA liability attached when the defendant had an existing agreement with the Government, in the form of

an actual contract, which created "a specific legal obligation at that time to dispose of any excess property in accordance with the [G]overnment's instructions."

While the United States, as amicus, maintained that Section 3729(a)(7) did not require that there always be a specific fixed legal obligation at the time the alleged false record or statement was made, the Government argued that a potential violation of this particular environmental permit did not constitute a reverse false claim. Also quoting from *ATMI*, the Government further pointed out "there is no free-floating obligation actionable under the False Claims Act that arises merely because a person must obey the law" or the terms of a regulatory permit, and that "the False Claims Act does not apply when the false statements at issue merely conceal the fact that the person making the statement engaged in criminal or otherwise unlawful conduct, and therefore might properly be subject to fines, penalties, or forfeitures." *ATMI*, 190 F.3d at 739-40.

The Fifth Circuit, agreeing with the Government, ruled that the reverse FCA does not extend to the potential obligations to pay the Government fines which have not been imposed and which do not arise out of an economic relationship between the Government and the defendant. Here, the court of appeals noted that noting in the complaint suggested that the defendant had any sort of contractual or economic relationship with the Government other than having a permit allowing certain limited gas emissions. The court further determined that such a relationship was purely regulatory and not one in which "any economic or financial transfer or payment by Georgia Gulf to the Government was contemplated." Accordingly, the Fifth Circuit ruled that the district court erred in ruling that Bain had stated an actionable claim under Section 3729(a)(7). In turn, the Fifth Circuit reversed the district court's decision and remanded the case to the lower court for proceedings consistent with the circuit court's decision.

***U.S. ex rel. Bahrani v. Conagra, Inc.*, 2004 WL 2244533 (D. Colo. Sept. 30, 2004)**

A Colorado district court granted the defendants' motion for summary judgment in a *qui tam* action that alleged the defendant violated the reverse FCA provision, Section 3729(a)(7). The court ruled that the relator failed to raise an actionable claim, for the requisite "obligation to pay" did not exist *prior* to the defendant committing the allegedly unlawful act.

Ali Bahrani, while working for defendant Conagra, Inc., allegedly discovered that the defendant's documentation department regularly altered or falsified USDA Export Certificates in an attempt to avoid obtaining $21-$24 replacement certificates. According to Bahrani, Conagra engaged in such misbehavior up to 200 times per week for over ten years, potentially defrauding the Government out of up to a billion dollars in fees that it would have obtained had the defendant properly requested replacement certificates. Bahrani filed a *qui tam* action against Conagra under Section 3729(a)(7) of the FCA. The defendant filed a motion for summary judgment.

Relator Failed to Raise an Actionable Reverse FCA Claim

The district court, ruling that Bahrani failed to offer sufficient evidence to support an actionable Section 3729(a)(7) claim, granted Conagra's motion for summary judgment. The court,

determining that the overarching question centered on the viability of Bahrani's reverse FCA argument, posed a series of questions to the parties about the particular elements of a reverse FCA action. In the end, the court ruled that the relator failed to offer evidence that the defendant engaged in an unlawful action for the purpose of avoiding or decreasing an actual or existing "obligation to pay" moneys otherwise due and owing to the Government, as required under Section 3729(a)(7).

The district court pointed out that, while the Tenth Circuit had not yet fully addressed this section of the FCA, the existing case law analysis seem to consistently focus on the nature of the "obligation" on which a reverse false claim might be based. The district court also pointed to the Sixth Circuit's ruling in *United States ex rel. American Textile Mfrs. Inst., Inc. (ATMI) v. The Limited, Inc.*, 190 F.3d 729, 738 (6th Cir. 1999), in which the court of appeals ruled that an obligation "that will arise only after the exercise of discretion by government actors" is not actionable under Section 3729(a)(7).

In the case at bar, the court recognized that the defendant's "obligation" to pay the fees was "contingent not only on the nature of the 'obligation' to obtain and pay for replacement certificates in the first instance when information on existing certificates is changed, but also on the Government's discretion to consent to changes being made directly on the certificate without the need for a replacement." Accordingly, the district court ruled that Bahrani's complaint stated no actionable claim under the reverse FCA.

Defendant Did Not Have a Pre-existing "Obligation to Pay"

In assessing the relator's allegations, the court had trouble locating the specific source of the supposed "obligation" to obtain replacement certificates when making a change to an original USDA certification. In response to this inquiry, the relator directed the court's attention to 9 C.F.R. 322.2. However, the court noted that Section 322.2 was silent as to the circumstances in which securing and paying for a replacement certificate was necessary. Again, the court turned to Bahrani to locate the source of the defendant's supposed "obligation to pay . . . money . . . to the Government" for replacement certificates.

In response, Bahrani attached the affidavit of a retired USDA official, who, without reference to any federal statute or agency regulation, stated that it was a "long-standing [USDA] policy" that "any change, correction, or alteration made to a USDA export certificate after it has been signed by a USDA official is serious and improper." The district court further noted that the official did not specifically identify the source for the fees that the defendant allegedly avoided. So, the court determined that the "'obligation' to obtain replacement certificates and 'to pay' the Government a user fee for doing so appeared to be based, at most, on an informal agency practice . . . and not any duty or obligation codified anywhere in the applicable regulations."

Again, the district court, recognizing the existing case law, ruled that the FCA did not contemplate an "obligation" that is contingent, or that will arise only after the exercise of discretion by government actors. *See ATMI*, 190 F.3d at 738 (citing cases). In *ATMI*, the Sixth Circuit ruled that the statutory "obligation" had to exist *prior* to the allegedly fraudulent action taken to avoid it. With this understanding of the *ATMI* decision, the district court determined that the action at bar was precisely the kind of conduct deemed inactionable as a reverse false claim.

Accordingly, the district court ruled that the defendants' action did not give rise to an actionable Section 3729(a)(7) claim, for "behavior that might or might not result in the creation of

an obligation to pay or transmit money or property to the Government" does not qualify as a reverse false claim. Therefore, the court granted the defendants' motion for summary judgment.

U.S. ex rel. Grynberg v. Ernst & Young LLP, **323 F. Supp. 2d 1152 (D. Wyo. June 25, 2004)**

A Wyoming district court granted the defendants' motion to dismiss a *qui tam* action pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). The court ruled that the relator's *qui tam* allegations did not satisfy the particularity requirements of Rule 9(b), for the relator failed to specifically identify which accounting standards created the affirmative duty that was allegedly violated. The court also ruled that the defendant did not raise an actionable claim under 12(b)(6) because the allegedly false reports filed with the Securities and Exchange Commission are not actionable under the FCA.

Jack Grynberg brought this *qui tam* action under the False Claims Act against several large accounting firms, including Ernst & Young LLP and Pricewaterhouse Coopers LLP, alleging that, in their roles as auditors of various natural gas companies, the defendant accounting firms knowingly caused the filing of false royalty reports with the Government. According to Grynberg, these accounting firms, in the course of auditing their clients' financial statements, should have realized that their clients were undermeasuring the volume and heating content of natural gas produced from federal lands, resulting in the underreporting and underpayment of royalties due to the Government and to certain Indian tribes. Based on this theory, Grynberg argued that the defendants were liable under the FCA for "causing" the making or use of false reports that incorrectly decreased the royalties payable to the Government. The defendants moved to dismiss, contending that the *qui tam* allegations failed to satisfy Fed. R. Civ. P. 9(b) for failure to plead with particularity and Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Relator Did Not Cause the Making of a False Record

The court granted the defendants' motion. The court observed that the FCA liability attaches to "[a]ny person who…*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." 31 U.S.C. § 3729(a)(7) (emphasis added by the court).

The relator identified two reports filed with the Department of Interior's Minerals Management Service, which allegedly resulted in the underpayment of royalties. The defendants argued that the relator failed to allege facts demonstrating that the defendants caused false claims to be made for purposes of avoiding or decreasing a payment due to the Government.

Citing to *United States ex rel. Piacentile v. Wolk*, 1995 WL 20833 (E.D. Pa. Jan. 18, 1995), 2 TAF QR 5 (Apr. 1995), the court noted that allegations that a defendant had knowledge of a fraud but did nothing to stop it were not sufficient to state an actionable FCA claim. The court also cited to another case, where an allegation that the defendant "caused some of the circumstances that led to the submission of the false claims" was not sufficient to satisfy the requirement of pleading that the defendant *caused* a false claim to be made. *See United States ex rel. Atkinson v. Shipbuilding Co.*, 2004 WL 12007462, *14 (E.D. Pa. Aug. 24, 2000).

The relator argued that the case at bar should be distinguished from *Piacentile* and *Atkinson*, in that he is not suing the defendants for mere inaction, rather the defendants were under

an affirmative duty to act. The relator maintained that the American Institute of Certified Public Accountants (AICPA) and the Financial Accounting Standards Board (FASB) imposed standards and affirmative duties on the defendant auditors. The relator argued that, by not properly following the standards established by the AICPA and the FASB, the defendants were also liable under the False Claims Act.

The court rejected the relator's argument. The court ruled that the relator failed to identify a specific accounting standard that created the affirmative duty that the defendants allegedly violated. The court also ruled that reports filed with the Securities and Exchange Commission (SEC) are not actionable under the FCA. The court also found that the complaint presented no facts to support the contention that the defendants *caused* the companies to submit false reports.

Relator Failed to Prove the Defendants Acted Knowingly

The court also rejected the relator's argument that the defendants had to know about their clients' alleged fraud. The relator presented no evidence in his complaint that the defendants had actual knowledge of fraudulent activity. The court also maintained that an audit of a company's financial statements does not reveal all aspects of a client's business practices. Accordingly, the court ruled that the defendants failed to plead facts showing that the defendants acted knowingly, or even that the defendants "caused" the making or use of the allegedly false reports.

Therefore, because the court had ruled that the relator failed to make an actionable claim, the court reached its conclusion without even addressing the defendants' Rule 9(b) motion. Accordingly, the court granted the defendants' motion to dismiss.

D. Section 3729(b) Knowledge Requirement

United States v. Harvard College, 323 F. Supp. 2d 151 (D. Mass. June 28, 2004)

A Massachusetts district court granted in part and denied in part the parties' motions for summary judgment in a *qui tam* action, which alleged that FCA violations occurred when a university and two university employees allegedly breached a government contract. The court ruled that a university employee, who approved expenses while he was violating a contractual provision, violated the FCA. On the other hand, an employee who did not take any action to have claims submitted to the Government was not liable for making false claims. The court ruled that a question of fact existed as to whether the employees knew of the falsity of statements submitted. The court also determined that the University was not liable under the FCA, for the University did not know that the statements it certified to the Government were false.

In 1992, Congress enacted the Freedom for Russia and the Emerging Eurasian Democracies and Open Market Support Act, 22 U.S.C. §§ 5801 *et seq*., which authorized the United States Agency for International Development (USAID) to contract with organizations to help support the Russian reform effort. USAID signed contractual agreements with several nongovernmental entities, including the Harvard Institute for International Development (HIID), an entity of Harvard University. Under HIID's specific agreement, HIID received government grants to undertake a project to help Russia in developing foreign investments and capital markets. USAID conditioned the receipt of government funds on HIID employees not personally investing in the Russian markets. Specifically, the contract prohibited economic transactions or investments, including "holding of debt instruments, maintaining any interest whatsoever in any local business, or making investments of any kind in [Russia]."

In 1997, USAID's Inspector General began investigating possible conflicts of interest involving two HIID employees, Jonathan Hay, the top Moscow-based advisor, and Andrei Shleifer, the program director of the project. In May 1997, HIID fired Hay and removed Shleifer from the project, for the university discovered the two employees had violated the provisions of the USAID contract by making personal investments in the Russian markets. A few days, later USAID permanently ended the project.

In September 2000, the Government filed a complaint alleging several legal claims against Harvard University, Jonathan Hay, and Andrei Shleifer. In addition to claims for breach of contract and other various common-law theories, the complaint also included three claims under the FCA, including claims under Sections 3729(a)(1), (a)(2), and (a)(3). Parties filed cross-moved for summary judgment.

The district court granted in part and denied in part the parties' motions for summary judgment. In a lengthy analysis of the Government's Section 3729(a)(1) allegations, the court granted the Government's motion for summary judgment against Hay only, and granted Shleifer's and Harvard's motions for summary judgment.

The court observed that the FCA defines a "claim" as "any request or demand, whether under a contract or otherwise, for money or property." 31 U.S.C. 3729(c). The court noted that Harvard submitted three types of forms to the Government to process Russia Project funds: Federal Cash Transaction Reports (FCTRs), Financial Status Reports (FSRs), and Requests for Funds. The court found that these forms, which HIID was required to submit to USAID

on a regular basis, qualified as "claims for payment or approval" under the FCA. These forms itemized the amount of federal funds that had been drawn on HIID's letter of credit. The court noted that, because USAID used these numbers to set future disbursements, the forms were considered "claims for payment presented to an officer of the Government," as defined under the FCA.

Employees' Actions Materially Violated Government Contract

The court also recognized that whether or not the claims for payment submitted by the University were false depended upon whether the employees' investments were material violations of the USAID contract. The court ruled Hay's investments were a material violation. The court also ruled that, if Shleifer was subject to the contract restrictions on employee investments, then his investments were also a material violation.

The Government pointed out that each of the FCTRs, FSRs, and Request for Funds forms had a statement certifying the validity of the information included in the reports. The Government argued, under the "false certification" theory of the FCA, that these statements turned these forms into false claims. Echoing the court's language in *United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996), 7 TAF QR 8 (Oct. 1996), the Government reminded the court: "It is a false certification of compliance which creates liability when certification is a perquisite to obtaining a government benefit." *Id*. at 1266. The Government argued that this theory of liability applies to all three financial forms. The court, in turn, analyzed the applicability of this theory to all three forms.

First, the court observed that the FTCRs included the statement: "I certify to the best of my knowledge and belief that this report is true in all respects and that all disbursements have been made for the purpose and conditions of the grant or agreement." The defendants argued that the submitted FTCRs were not false, for the forms only certify that "payments" and "disbursements" complied with the USAID agreement. On the other hand, Shleifer and Hay's actions, the defendants argued, only involved "private investments."

The court rejected the defendants' arguments. The court noted that the employees' salaries were themselves disbursements, and the contract specifically stated that "no employee of the grantee shall . . . make loans or investments to or in any business . . . in the foreign countries to which the individual is assigned." Therefore, because HIID had at least one employee violating this provision and HIID billed the salaries of those employees to USAID, the certifications in the FCTRs were false.

Second, the court, in assessing the language of the Request for Funds forms, noted that the claimant certified that "the data reported is correct" and that the document was drawn "in accordance with the terms and conditions of the Letter of Credit." The court highlighted that the Requests for Funds did not certify, unlike the FCTRs, that it complied with the underlying USAID contract agreement, and thus the court ruled that the Requests for Funds were not false claims.

Finally, the court noted that the employees who signed the FSRs certified that "to the best of my knowledge and belief [ ] this report is correct and complete and that all outlays and unliquidated obligations are for the purposes set forth in the award documents." The court determined that the University's FSR certifications were not literally untrue. According to the court's rationale, the "outlays" for these particular employees' salaries were, in fact, for the

purposes outlined in the award documents, even if they violated its *conditions*. Accordingly, the court ruled that the FSRs were not false claims under the FCA.

False Statements Were Material Under FCA

Recognizing that the common law has inferred a materiality requirement into the FCA, the court then assessed whether the false statements had "a natural tendency to influence agency action or [were] capable of influencing agency action." *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 914 (4th Cir. 2003), 33 TAF QR 2 (Jan. 2004) (quoting *United States ex rel. Berge v. Bd. Of Trustees*, 104 F.3d 1453, 1459 (4th Cir. 1997), 9 TAF QR 9 (Apr. 1997)).

The Government argued that the claims were material because, as soon as USAID discovered the prohibited investments, USAID ended the project. The court, accusing the Government of "mischaracter[ing] the history," noted that USAID actually tried to continue the project without these two rogue employees, and that USAID only terminated the project after the Russian government ended the venture. With that being said, the court still rejected this approach to determining materiality, arguing that materiality should not be assessed according to how the government agency actually reacted to the violation. Instead, the court focused on the dispute over what constituted a condition of payment under the USAID contract and what must be material for FCA liability to attach.

The Government, arguing that the contract provision itself was material to the agreement, offered testimony from USAID employees explaining the importance of unbiased advice in the project. These employees also maintained that they would have ended the project if they knew sooner about the employees' prohibited investments. The defendants, on the other hand, contended that the provision must not have been that material to the agreement. In support of their position, the defendants pointed out that USAID had not even trained the HIID staff on the contract provision and that many USAID employees in Moscow were not even aware of the provision. Furthermore, the defendants argued that the contract provision was hidden in the "boilerplate" text of the contract. In the end, the court agreed with the defendants' position, noting that the provision did not specify that funds would be withheld if that particular provision was violated. Quite to the contrary, the provision outlined specific employee sanctions, which supports the contention that USAID contemplated the project continuing, even if an employee violated the contract provision.

Continuing its analysis into the materiality of the false claims, the court took a closer look at the certifications in the FCTRs. The court noted that several defense witnesses had testified that, by submitting these financial forms to USAID, the witnesses were under the impression that Harvard was certifying that it had complied with the initial USAID contract. The Government added that USAID accounting staff always reviewed the FCTRs to make sure the forms were signed. According to USAID policy, if a FCTR was not signed, the accounting staff would return the form to the grantee for signature, resulting in delayed payment. Thus, according to the Government witnesses, if Harvard had not signed the certifications, then they would not have received payment from the Government.

The defendants disagreed with the Government's assertion. Harvard highlighted several instances where USAID had authorized payment before USAID's accounting staff even had an opportunity to verify the signature. While the court conceded that USAID's procedures

did not always work perfectly, the court noted that the Government's burden of materiality is merely to show that the false statement "has a natural *tendency* to influence agency action or is *capable* of influencing agency action." *Harrison*, 176 F.3d at 785 (emphasis added by the court). In the case at bar, the court concluded that the materiality of the false claims turned on whether a failure to certify that the disbursements met the conditions of the contract could have resulted in USAID refusing to pay. According to the court, the defendants' argument failed on this point.

FCA Liability for Breaching Employee Who Approved Expenses

After determining that the FCTRs were materially false claims, the court ruled that Harvard's actions met the "presented" requirement under Section 3729(a)(1). The employees, on the other hand, did not present any claims to the Government; however, the Government argued that the employees' actions "caused" the presentment of false claims, so FCA liability should attach.

According to the court, to "cause" the presentment of a false claim, the defendant must participate, at least to some degree, in the claims process. Pointing to the Ninth Circuit's reasoning in *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir. 2001), 22 TAF QR 13 (Apr. 2001), the district court ruled that actually delegating the submission of claims to one who then files a false claim suffices under the FCA. However, while the courts have traditionally interpreted the reach of the FCA broadly, the court did require a showing that the defendant knew that the claim was being submitted to the Government.

In the case of Hay, the court ruled that there was sufficient evidence to tie Hay to the claims process. The court observed that, while he did not personally file the financial forms with USAID, he was aware that the project was funded by USAID. The court also determined that Hay was aware that the invoices and reports he was reviewing were being submitted to the Government. The court also ruled that, if the basis for the allegation that Hay "cause[d] to be presented…a false or fraudulent claim for payment" was his approval of invoices, then the Government must show that the claims he caused to be presented were actually false. However, the court ruled that the Government does not need to show that the particular expenses he approved violated the USAID contract. Because Harvard had certified that "all disbursements have been made for the purpose and conditions of the grant or agreement" and because Hay's salary qualified as a disbursement, Hay, according to the court, caused a false FCTR to be presented when Hay both (1) violated the contract by investing in Russian markets, and (2) approved some expense that was eventually submitted to USAID.

Employee Not Involved in the Claims Process Did Not Satisfy the FCA Presentment Requirement

On the other hand, in the case of Shleifer, the court found that he did not cause a false claim to be submitted to the Government, for he did not take any actions to have the claims submitted. In fact, the Government offered no evidence that Shleifer approved any expenses that were submitted to USAID. Accordingly, because there was no evidence that Shleifer "presented or caused to be presented" false claims under the FCA, the court granted Shleifer's motion for summary judgment on the Section 3729(a)(1) allegation.

In assessing the remaining Section 3279(a)(1) claims against Hay and Harvard, the court highlighted Section 3729(a)(1), which only attaches FCA liability if a defendant "*knowingly* presents, or causes to be presented . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1).

Hay asserted that he never knew about the contract provision that prohibited him from investing in the Russian markets. The Government refuted the defendant's assertion, offering evidence of multiple communications between Hay and HIID in which the discussion centered on the USAID's "conflict of interest" policy against investments in Russia. The court determined that, based on this evidence, a reasonable jury could find that Hay was aware, or at least acting in reckless disregard to the existence, of the contract provisions and the USAID regulations governing expenditures. Accordingly, the court ruled that Hay had the requisite knowledge of the falsity of the information in the claims that he caused to be presented to the Government.

No FCA Liability for University Because No Knowledge of the Falsity of Claims

As for the Government's 3729(a)(1) claims against Harvard University, the Government claimed that the University's failure to prevent their employees' conflicts of interest constituted reckless disregard. In support of their position, the Government pointed to several "red flags" that should have warned Harvard that it was submitting false claims to the Government.

The court, after reviewing all of the evidence, determined that there was not sufficient evidence to hold the University accountable. While agreeing that the University had a responsibility to assess the validity of the claims it submitted to the Government, the court nevertheless ruled that it would have been unreasonable to find that Harvard was in reckless disregard, or was willfully ignorant, because it did not adequately investigate their employees' personal investments. Accordingly, because the Government had not provided sufficient evidence to show that Harvard should have been alerted to the improper investment activity, the court ruled that the University did not have knowledge of the falsity of the claims it submitted to USAID. Thus, the court granted Harvard's motion for summary judgment.

University Not Vicariously Liable

Alternatively, the Government argued that, even if the University did not have the requisite knowledge, the University should still be held vicariously liable for the actions of its employees.

The court, however, refused to apply a theory of vicarious liability for two reasons. First, the court ruled that the necessary apparent authority analysis was inapplicable, for the University itself presented the claims to the Government, and the apparent authority issue only arises when an employee, acting on behalf of his employer, presents a claim to the Government. In the case at bar, the employees did not present the allegedly false claim to USAID, the University did. Second, the court ruled that apparent authority is only applicable when a person holds himself out as agent of a principal. In this case, neither employee held himself out to the Government as agent of the University while conducting their prohibited investment activity.

Both Employees Liable Under § 3729(a)(2) Because Broader Liability Covered

In the court's analysis of the Government's Section 3729(a)(2) allegations, the court granted the Government's motion for summary judgment against Hay, but the court granted Harvard's motions for summary judgment because Harvard did not knowingly make false records or statements.

In assessing Hay's liability under FCA Section 3729(a)(2), the court, observing that the Government was only required to show that Hay caused a false statement to be made or used, ruled that Hay could be liable even where he had no role in the claims process. Accordingly, the court ruled that Hay was liable for any financial form submitted to USAID in a month in which he had inappropriately invested in the Russian markets.

In the case of Shleifer, the defendant argued that, even if he was bound by the contractual restrictions, and even if he caused a false report to be submitted, he did not know of their falsity. Specifically, Shleifer maintained that he did not know about the contract provisions and, when he found out about the restrictions, he did not know that he was subject to them. Therefore, he argued that his actions were not done in reckless disregard of the falsity of the claims submitted to the Government.

The court, even after reviewing the evidence, was unable to find that Shleifer was actually bound by the contract provisions. Therefore, the court could not find, on summary judgment, that Shleifer *knew* that the provisions bound him. However, because the court determined that a genuine dispute of fact existed as to whether he knew of the falsity of the statements, the court could not dismiss this count against Shleifer on summary judgment.

Proof of 3729(a)(3) Conspiracy Between Employees, Not University

In the assessing the Government's Section 3729(a)(3) allegations, the court ruled that, as a matter of law, there was sufficient evidence under the FCA to show that the two employees conspired to defraud the Government. Conversely, in the case against Harvard University, the court ruled that Harvard University could not be held liable under this section of the FCA, for there was no evidence of an agreement between the University and the conspiring employees.

The court observed that, in order for Section 3729(a)(3) liability to attach, the plaintiff needs to show that (1) the defendant conspired with one or more persons to get a false claim paid by the Government; and (2) one or more conspirators performed any act in furtherance of the conspiracy. As an initial matter, the court pointed out that, even if the two employees were not bound under the USAID contract, the employees could still be liable under this conspiracy provision of the FCA.

The Government pointed to "undisputed facts" that showed, at the very least, a working understanding between the two employees that they would invest their own money into particular entities in the Russian markets. The Government, arguing that the parties performed several acts in furtherance of this agreement, cited to numerous email messages, meetings, and discussions among the parties about prohibited investment activity. Based on this evidence from the Government, the court ruled that there was sufficient evidence, as a matter of law, to show that Shleifer and Hay acted in agreement to invest in the Russian markets, which, in turn, caused the submission of false claims to the Government.

On the other hand, in the Section 3729(a)(3) case against Harvard University, the court held that the defendant was not liable. The court reached this conclusion because it could find no evidence of an agreement between the University and the two conspiring employees. The court also ruled that, under the facts of this case, Harvard could not be held vicariously liable for the actions of these two employees, for the employees never acted with apparent authority towards the Government.

Accordingly, in assessing the Government's claims of Section 3729(a)(3) violations, the court granted the Government's motion for summary judgment against Shleifer and Hay, and granted Harvard University's motion for summary judgment.

E. Section 3729(c) Definition of "Claim"

United States v. Harvard College, 323 F. Supp. 2d 151 (D. Mass. June 28, 2004)

See "Statutory Interpretations: Section 3729(b) Knowledge Requirement" *above at page 32.*

United States v. Orrego, 2004 WL 1447954 (E.D.N.Y. June 22, 2004)

A New York district court granted the Government's motion for summary judgment against the defendant, and the Government was awarded a judgment of $5,500 in a separate *qui tam* action against the defendant. The court ruled that the defendant's false liens, lien notices, and invoices, which were sent to government officials, qualified as "claims" under the FCA, for the defendant used these devices in his attempt to get a false claim of debt paid.

In February 2004, a New York district court determined that Adalberto Orrego, a federal inmate convicted by one court of importation of heroin, had recorded false liens against a New York district court judge, an Assistant United States Attorney (AUSA), and the warden of the facility detaining Mr. Orrego. The defendant had alleged that, by using his name in official government documents, the alleged debtors had violated the supposed copyright protecting his name. The defendant then submitted an invoice to the AUSA, requesting six million dollars for the use of his name in the complaint, indictment, and plea agreement. At the time of the defendant's February hearing, the court granted a temporary restraining order (TRO), voiding the liens and restraining Orrego from enforcing the liens. Orrego subsequently attempted to file additional liens against the parties, and the court found Orrego in civil contempt for violating the TRO. At a subsequent court proceeding in late February, the court held that a contempt sanction of $5,000 was appropriate. In the case at bar, the Government filed a summary judgment motion against the defendant and requested the court to order the defendant to pay a civil penalty for violating the FCA.

The district court granted the Government's motion for summary judgment and ordered Orrego to pay $5,000 under the FCA. With the defendant not opposing the Government's motion for summary judgment, the court devoted most of its opinion to analyzing the Government's FCA claim. The court observed that the definition of an FCA claim includes "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 1329(c).

The district court found that Orrego's liens and lien notices qualified as "claims" under the FCA. In addition, the court ruled that Orrego's six million dollar invoice to the AUSA qualified as a false claim, in that the demand for payment had no basis in law and that the defendant submitted the claim with the intent to fraudulently secure payment from a government official. However, because the defendant had limited access to financial resources, the court ruled that Orrego was liable to the Government for $5,000, the minimum fine under the FCA.

FCA RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

Fanslow v. Chicago Manufacturing Center, Inc., 2004 WL 2085511 (7th Cir. Sept. 20, 2004)

The Seventh Circuit reversed and remanded for further development of the record a district court's dismissal of an FCA § 3730(h) retaliation action. The court of appeals held that the record was insufficient to determine whether the employee was engaged in protected conduct under the FCA. The court also ruled that the record was insufficient to determine whether the employee's discharge was motivated, at least in part, by his protected conduct.

William Fanslow, the former director of information technology (IT) at Chicago Manufacturing Center (CMC), a nonprofit corporation that provides IT services to manufactures, sued CMC, alleging that the company retaliated against him in violation of the whistleblower provisions of the FCA and the Illinois Whistleblower Reward and Protection Act. Fanslow maintained that CMC retaliated against him after he informed a government official that CMC was misappropriating federal funds. Specifically, Fanslow claimed that he informed CMC leadership about a conversation he had with a federal official concerning two executive's inappropriate diversion of nonprofit funds to a for-profit entity. He also maintained that he refused to approve the purchase of equipment for this for-profit entity using nonprofit funds. In the months after Fanslow allegedly took these actions, Fanslow was terminated.

An Illinois district court granted the defendant's motion for summary judgment, ruling that Fanslow failed to establish a connection between his supposed whistle-blowing activities and his termination from the company. Fanslow appealed the decision.

The court of appeals reversed and remanded the district court's decision. In assessing whether the relator had brought forth an actionable FCA retaliation claim, the court, citing to 31 U.S.C. § 3730(h), required the relator to offer evidence showing the following elements: (1) his actions were taken "in furtherance of" an FCA enforcement action and were therefore protected by the statute, (2) his employer had knowledge that he was engaged in this protected conduct, and (3) his discharge was motivated, at least in part, by the protected conduct.

Insufficient Record Prevented Determination of "Protected Activity"

The court of appeals was first faced with the issue of whether or not the relator was engaged in protected conduct under the FCA. The Seventh Circuit observed that the term "protected activity," as it applies to the FCA retaliation provision, has been interpreted broadly by the other circuits. *See generally United States ex rel. McKenzie Bell South Telecommunications, Inc.*, 123 F.3d 935, 944 (6th Cir. 1997). Furthermore, mirroring the test adopted by the other circuits, the Fifth Circuit determined that the relevant concerns are whether (1) the employee in good faith believed, and (2) a reasonable employee in the same or similar circumstances might have believed, that the employer was committing fraud against the Government.

Congress, pursuant to 15 U.S.C. § 278k, had authorized the National Institute of Standards and Technology (NIST), an agency of the Department of Commerce, to establish centers, like CMC, to "enhance productivity and technological performance in United States manufacturing." 15 U.S.C. § 278k(a). In setting up these centers, the NIST required the entities to sign cooperative agreements with the NIST. Fanslow believed that CMC was violating its NIST agreement by utilizing nonprofit funds to support the launching and development of a for-profit venture.

Faslow maintained that he reasonably and in good faith believed that CMC was defrauding the Government. He argued that he made contact with a government official after hearing the official warn that nonprofit centers, like CMC, should not be engaged in spin-off ventures. He also pointed out that he reported this communication to his employer, for he had seen resources being diverted to a for-profit entity. Despite his admonitions, the company allegedly continued shifting NIST funds to for-profit expenditures.

The district court, only focusing on Fanslow's conversations with the NIST official, ruled that a reasonable juror could (albeit barely) conclude that he was investigating possible fraud against the Government. The Seventh Circuit chastised the district court for just focusing on the relator's conversation with the government official, and for ignoring the numerous internal complaints the relator made to CMC executives.

The court of appeals stressed that an employee's internal complaints within the corporation may be considered protected conduct for purposes of the FCA whistleblower provision. The court further ruled that an employee did not need to raise his concerns directly to the Government. Because the district court did not adequately address the relator's efforts inside the confines of the corporate structure, the Seventh Circuit directed the district court to consider whether Fanslow's actions were the type of internal complaints covered by the FCA.

As it stood, the court of appeals ruled that the district court prematurely granted summary judgment in this case, for the record was insufficient to determine whether the employee was engaged in protected conduct under the FCA. Therefore, the Seventh Circuit ordered the district court to develop the record further, so it could determine whether employee in good faith believed, and whether a reasonable employee in similar circumstances would have believed, that CMC executives were defrauding the Government.

Employer Put on Notice of Possible FCA Action

The court of appeals then addressed the next issue of whether the relator's conduct put the defendant on notice of a possible FCA action. The Seventh Circuit, disagreeing with the district court, held that Fanslow had met this notice requirement of the FCA.

The district court ruled that Fanslow failed to satisfy this element, for he had not specifically used the terms "illegal, fraudulent, or false" in his discussions with the CMC executives. The lower court ruled that the relator's use of the word "unallowable" did not go far enough to provide notice of a possible FCA suit.

In rejecting the lower court's ruling, the court of appeals distinguished the facts of the present case from *Brandon v. Anesthesia & Pain Mgmt. Assoc., Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002), 26 TAF QR 21 (Apr. 2002). In *Brandon*, the Seventh Circuit stressed the importance of considering whether monitoring was a part of the relator's ordinary job. In that case,

the relator was a physician who discovered that some of his associates were submitting false payments to Medicare. After confronting his coworkers about their unlawful billing practices, the relator experienced problems at work and was eventually fired. The court determined that the relator had not put the employer on notice of a possible FCA action because this type of monitoring was also part of his particular job description.

Conversely, in the case at bar, Fanslow, as director of the IT department, did not have any reporting duties, and therefore the court did not require Fanslow to use any "magic words," such as "illegal, fraudulent, or false," to put CMC on notice of a possible *qui tam* suit. Therefore, the Seventh Circuit ruled that Fanslow only had to show that CMC was aware of his investigation.

The circuit court determined that the record supported a finding that the employee met the notice requirements of the FCA. The evidence showed that Fanslow informed CMC executives about his conversation with the NIST official, that Fanslow reported the company's action because he was worried the executives were jeopardizing CMC's federal funding, and that he refused to purchase equipment for the for-profit entity using government funds.

Insufficient Record Prevents Determination of Whether Discharge Was "Motivated By" Protected Conduct

Analyzing the last element, the Seventh Circuit ruled that the record was insufficient to determine whether Fanslow's discharge was motivated, at least in part, by the protected conduct. The court of appeals pointed out that once the employee asserting a "whistleblower" claim under the FCA has shown that the discharge was motivated, at least in part, by his protected conduct, the burden of proof then shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity. *See United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998), 15 TAF QR 21 (Oct. 1998).

In the case at bar, the court of appeals was unable to apply the *Yesudian* legal standard to the facts of the case. The Seventh Circuit complained that the records lacked explanations from important CMC decisionmakers, and thus the court could not begin to determine whether the discharged was "motivated, at least in part, by his protected conduct." Therefore, without evidence that the company had a legitimate reason for discharging Fanslow, the court of appeals ruled that the case could not be dismissed on summary judgment.

Accordingly, the Seventh Circuit reversed and remanded the case for further development of the record. Citing the same the rationale it used in assessing the FCA claim, the court also remanded the state law claims for reconsideration.

***U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District*, 2004 WL 906498 (4th Cir. Apr. 29, 2004)**

The Fourth Circuit reversed a district court's dismissal of an FCA § 3730(h) retaliation action. The court of appeals held that the six-year limitations provision of § 3731(b)(1) applies to retaliation actions, and thus the district court erred in applying a three-year limitations period drawn from an analogous state statute.

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

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

Six-Year Statute of Limitations Applies to Retaliation Claims

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

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

The court rejected the defendants' argument that while claims under § 3730(a) or (b) are tied to a violation of § 3729, claims under § 3730(h) are not. Because an action under § 3730 will not lie absent an alleged violation of § 3729, the court concluded that Congress elected to identify a single, readily identifiable point at which to begin the limitations period for all actions under § 3730. Indeed, as the Seventh Circuit noted, "[I]t is easier to determine the date of a false claim than to pit down the time of retaliatory acts; the claim is a document, but

arguments about retaliation depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication." *Neal v. Honeywell*, 33 F.3d at 865.

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

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

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

Advantages of Uniform Six-Year Statute of Limitations in Retaliation Actions

The Fourth Circuit found that the purposes of the FCA are well served by the application of § 3731(b) to retaliation actions under § 3730(h), for three reasons. First, Congress intended that the 1986 Amendments would enhance the incentives for relators to file suit. As Wilson's experience attested, recourse to the generally shorter provisions provided by analogous state statutes inherently affords the employees less protection than the six-year period provided by the FCA. While the North Carolina statute of limitations applied by the district court in this case was three years, other state retaliation statutes provide for limitations periods as short as 180 days. Such an abbreviated period may be too short for an employee to adequately marshal the evidence necessary to support a claim that she was discharged because of protected activity. The court could not see how the purposes of the FCA could be advanced by subjecting federal retaliation claims to the vagaries of a patchwork of state limitations periods, some as short as six months.

Second, the uncertainty inherent in the process of identifying which of several potentially applicable statutes in any given state is "most analogous" would further undermine the protection afforded by § 3730(h). Many states have enacted multiple statutes of limitations for personal injury actions, and it may be difficult to ascertain which is most analogous. The collateral litigation necessary to resolve this issue would exacerbate any uncertainty as to the time

available for filing a retaliation claim, and thereby reduce the employee's incentive to report an FCA violation.

Third, choice-of-law issues would create additional uncertainty for employees in deciding whether to report false claims violations. The importance of this consideration is underscored by the legislative history of the 1986 Amendments, which noted that large contractors commit much fraud against the Government with a presence in several states. Thus, a single consistent statute of limitations would best effectuate the purposes of the FCA.

Therefore, the Fourth Circuit concluded that § 3731(b)(1) provides the limitations period for retaliation actions under § 3730(h). Accordingly, the court of appeals vacated the district court's order dismissing Wilson's retaliation claim, and remanded for further proceedings.

Dissent Argues State Limitations Period Applies

Judge Wilkinson dissented, arguing that the district court correctly applied North Carolina's three-year statute of limitations for wrongful discharge to Wilson's federal FCA retaliation claim. The dissent argued that the majority's approach failed to give employees adequate notice concerning when the statute of limitations begins, and could preclude challenges to retaliatory acts under § 3730(h) before that cause of action has even accrued. In the dissent's view, by providing that the six-year period begins to run on the date of the "violation of Section 3729," Congress made it clear that the limitations period of § 3731(b)(1) applies only to false claims actions and not to retaliation actions.

U.S. ex rel. Maturi v. McLaughlin Research Corp., **2004 WL 1638085 (D.R.I. July 22, 2004)**

A Rhode Island district court granted the defendant's motion for summary judgment on state and FCA retaliation claims brought by former defense contractor employees. Because the employees' warnings about unlawful expenditures fell under their regular responsibilities and neither plaintiff filed or threatened to file a *qui tam* action pre-termination, the court ruled that the employees failed to show that they engaged in protected conduct under the FCA. The court also ruled that the employees' statements to the board of directors that a worker's alleged double salary and benefits violated government regulations did not overcome the presumption that the employees' statements were within the scope of their employment obligations. The court also rejected their state law retaliation claim because the employers' actions were not statutorily prohibited at the time of termination, and later amendments to the state law were not retroactively applicable.

McLaughlin Research Corporation (MRC), a defense contractor that provides engineering services to the Federal Government, employed Harold Maturi and Henry Maturi from the mid-1970s until their termination in September 1998. Henry, MRC's executive vice-president, and Harold, MRC's COO and president, had complete managerial authority to determine whether or not to submit a particular charge to the Government. In 1998, the chairman of the board of directors added two family members to MRC's payroll, which in turn was submitted to the Government for payment. After discovering that the two new employees were receiving improper compensation, including collecting double 401K contributions and two salaries, the relators informed the chairman of the board that these payroll expenditures

violated regulations of the Defense Contract Audit Agency (DCAA). Citing these allegations as "the last straw," MRC terminated its contract with the relators.

The Maturis filed suit against MRC in December 1999, alleging unlawful retaliation in violation of the FCA's whistleblower provision as well as a claim under the Rhode Island Whistleblower's Act. The defendant moved for summary judgment.

Actions Within Relators' Employment Obligations Are Not "Protected Conduct" Unless Relators Clearly Communicates FCA Suits

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

There was not sufficient evidence to withstand summary judgment that the relators in this case were engaged in protected activity. The court, applying a rule that had not been directly adopted in the First Circuit, ruled that employee actions that would otherwise be deemed "protected conduct" cannot sustain an FCA action if the conduct falls under the regular responsibilities or duties of the employee. In this case, the relators had unfettered authority to deem a government claim allowable, including the alleged overpaid salaries and benefits that were highlighted in the complaint. Because the discretion to investigate and to disallow these costs was within the relators' employment obligations, the court ruled that the relators had to make clear that they were bringing or assisting in an FCA action in order to overcome the presumption that they were merely acting in accordance with their employment obligations. The court found no evidence to overcome this presumption; therefore, the court ruled that the Matsuris failed to show they engaged in "protected conduct" under the FCA.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Section 3729(e) Tax Bar

U.S. ex rel. Lissack v. Sakura Global Capital Markets, Inc., 2004 WL 1725333 (2d Cir. Aug. 3, 2004)

In August 2004, the Second Circuit affirmed a New York district court's decision to dismiss *qui tam* claims based on the FCA Tax Bar. The court of appeals held that, while the relator wasn't seeking to recover federal taxes, his claims were still barred by the Tax Bar because the falsity of the claims depended on proving a violation of the Internal Revenue Code.

Michael Lissack, a former banker in a large financial institution's public finance department, filed a *qui tam* action against Sakura Global Capital Markets, Inc. (Sakura), alleging that Sakura was involved in a highly complex scheme involving tax-exempt government bonds known as advance refunding bonds. Lissack alleged that Sakura rigged the bidding process for "forward supply agreements" for state and local government bonds. In particular, Sakura allegedly arranged for noncompetitive bidders to submit below-market bids, and thus ensuring the municipalities would select Sakura's similarly below-market-value bid. Lissack also alleged that Sakura concealed the rigged bidding process and made false statements that the bonds were not in jeopardy of the IRS's arbitrage restrictions, inducing municipal issuers to incorrectly certify that their bonds complied with federal law yield restrictions and thus qualified for tax-exempt status. According to Lissack, the scheme lowered the price paid for the forward supply agreements below market value and, in turn, decreased the yields of the municipalities' escrow accounts below what the yields would have been in the absence of the fraudulent scheme, a financial fraud known as "yield burning" because the yield is artificially lowered (or "burned") through the mispricing of the forward supply agreement.

In February 1995, Lissack filed his original complaint, naming several defendants, all of whom were financial institutions, but did not include Sakura. The Government intervened in that prior action and reached settlement agreements with twenty-seven municipal bond issuers or securities dealers, resulting in approximately $200 million in penalties.

In May 1996, Lissack filed an amended complaint that outlined allegations against Sakura based on ten allegedly fraudulent forward supply agreements. In March 2001, Lissack filed an amended complaint, identifying five additional agreements. Unlike Lissack's prior cases, the Government refused to intervene against Sakura. The defendant filed a motion to dismiss, arguing that the case was "barred by the clear language of the FCA's Tax Bar." The district court granted the defendant's motion, and Lissack appealed the decision.

The Second Circuit affirmed. The court focused on the primary issue of whether the FCA Tax Bar applies in a case where the relator does not seek to recover federal taxes, but where the falsity of the underlying claim depends on a Tax Code violation. Noting that this decision has never been addressed by the circuit courts, the Second Circuit nevertheless ruled that the language and intent of the Tax Bar prohibits such actions.

Relator's Claim Depended on Defendant's Violation of the Tax Code

The court of appeals observed that the relator's claim rested entirely on the defendant's alleged violation of provisions of the IRS Tax code. In particular, the Tax Code, in relevant parts, provides for the tax-exempt status of municipal bonds, excludes from tax-exempt status any bond classified as an arbitrage bond, and establishes rules of bidding on forward supply agreements. The relator countered that his claim was not made under the Tax Code, for he was not seeking to recover taxes; he was seeking to recover the amount of money the Government lost through the purchase of municipal bonds. However, after a series of direct questions at oral argument, the relator conceded that his case would not prevail in the absence of a violation of the Tax Code. Borrowing from the lower court's decision, the court agreed: "While far more complex than most income tax schemes, at its heart, this alleged fraud was still focus on the wrongful preservation of a tax-free status."

IRS Had Complete Authority to Prosecute the Defendants

Moreover, the Second Circuit observed that the IRS, by enforcing the Tax Code provisions requiring that municipalities rebate any positive arbitrage to the Government, had the ability to recover the exact amount that Lissack was seeking in this action. In fact, the IRS had been involved in cases with similar schemes and had even released official statements about this exact yield-burning practice. In short, the court of appeals ruled that the Tax Bar applied to the case at bar because the Government had specifically empowered the IRS to deal with such fraudulent schemes.

Lissack attempted to rebut the lower court's decision by relying on two cases from another circuit. Lissack pointed to *United States v. Raymond & Whitcomb Co.*, 53 F. Supp. 2d 436 (S.D.N.Y. 1999), 17 TAF QR 10 (July 1999), in which the defendant falsely claimed that it was eligible for the nonprofit mailing rate, and to *United States v. First Nat'l Bank of Cicero*, 957 F.2d 1362 (7th Cir. 1992), in which the defendant, in securing a Small Business Administration loan, used false claims, including a false tax return. In both cases, Lissack argued, the cases proceeded without regard to the Tax Bar, even though the cases involved a violation of the IRS Tax Code.

The court rejected Lissack's reliance on *Raymond & Whitcomb* and *Cicero*, noting that because neither decision even mentioned the Tax Bar, there was no evidence that the issue was even considered by the courts. The Second Circuit further maintained that both decisions were ultimately decided without even assessing the defendants' compliance with the Tax Code. The case at bar, on the other hand, required the court to assess "a scheme organized and governed entirely under the provisions of the Tax Code." Thus, the IRS, with its authority to prosecute such fraud, was the correct vehicle for recovery in this case. Accordingly, the court held that the Tax Bar prohibited the relator's FCA claim, and thus the court affirmed the lower court's decision.

B. Section 3731(b) Statute of Limitations

U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District, 2004 WL 906498 (4th Cir. Apr. 29, 2004)

See "Section 3730(h) Retaliation Claims" *above at page 43.*

U.S. ex rel. Vosika v. Starkey Laboratories, Inc., 2004 WL 2065127 (D. Minn. Sept. 8, 2004)

A Minnesota district court denied a defendant's motion to dismiss a *qui tam* action based on the FCA's statute of limitations provision. The court ruled that the FCA's statute of limitations begins to run on the date an allegedly false claim is made or paid and, therefore, does not wait for all of the payments made by the Government pursuant to a contract. In turn, the court ruled that some, but not all, of the relator's claims were barred by the FCA's statute of limitations.

Rob Thompson, the current marketing program manager at Defendant Starkey Laboratories, and Dale Vosika, a former Starkey employee from 1979 to 1999, filed a *qui tam* action against the company alleging violations of the FCA.

According to the relators' complaint, Starkey Laboratories, a manufacturer and distributor of hearing aids, entered into a contract with the Department of Veterans Affairs (VA) to provide custom hearing aids. The contractual agreement included a Most Favored Customer (MFC) provision, requiring Starkey to extend the VA the lowest available price.

The relators alleged that the defendant violated the MFC provision, for the company sold hearing aids to two of its customers at prices less than the prices fixed in the VA contract. The relators also alleged that Starkey submitted false pricing information to the VA while the contract was being negotiated. The relators argued that Starkey's actions were part of a scheme to knowingly charge the VA more than allowable under the contract. In turn, the relators argued that each invoice that Starkey submitted during the contract period constituted a false claim under the FCA.

Starkey filed a motion to dismiss the suit, arguing that the relators failed to plead fraud with particularity as required by Rule 9(b). The defendant also argued that all claims submitted before December 18, 1995, should be dismissed with prejudice because the claims supposedly violate the FCA's six-year statute of limitations While the court refused to rule on the defendant's statute of limitations motion, the court dismissed the suit without prejudice under Rule 9(b), allowing the relators to file a second amended complaint. In April 2004, the relators filed their amended complaint, and the defendant filed a second motion to dismiss.

FCA's Six-Year Statute of Limitations Applicable to Relators' Claims

The district court agreed with the defendant's reading of the FCA's statute of limitations provision. The defendant maintained that the relators' allegations based on invoices submitted prior to December 18, 1995, should be barred by the FCA's six-year statute of limitations. The defendant argued that the FCA's equitable tolling provision is not available to private relators. The defendant also maintained that that the second amended complaint did not relate back to the original complaint. Lastly, the defendants asserted that the statute of limitations began to run upon submission of each individual invoice.

Conversely, the relators, citing to the Federal Court of Claims' decision in *TS Infosystems, Inc. v. U.S.*, 36 Fed. Cl. 570, 573 (Fed. Cl. 1996), argued that the FCA's statute of limitations does not begin to run until the Government makes its final payment pursuant to a series of transactions under the contract. The relators also maintained that their second amended complaint related back to their original complaint.

As an initial matter, the court determined that, pursuant to Rule 15(c)(2), the allegations outlined in the second amended complaint "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Thus, the court ruled that the second amended complaint related back to the original complaint and that the statute of limitations stopped running once the original complaint was filed.

The court next recognized that there is a disagreement among the courts over whether the statute of limitations begins to run once a claim is made or once a claim is paid. The court determined that the better rule is that the statute of limitations "begins to run on the date the claim is made, or, if the claim is paid, on the date of payment." Thus, the court explicitly rejected the *TS Infosystems, Inc.* rule that the FCA's statute of limitations does not begin to run until all of the payments are made by the Government pursuant to a contract.

Applying the court's reasoning to the case at bar, the court ruled that each allegedly false invoice paid by the Government constituted a separate claim with its own six-year statute of limitations period. In turn, the court found that the relators' claims based on payments made prior to April 24, 1995, were barred by the FCA's statute of limitations provision.

Relators Pled Fraud With Particularity

The court denied the defendant's motion to dismiss regarding the relators' price negotiation allegations. Specifically, the relators had alleged that the defendant failed to disclose certain discounts it provided to its customers during price negotiations with the VA. The defendant maintained that it sufficiently complied with the VA's request for information by submitting a list of general discounts. The defendant argued that the list did not need to specifically identify every single discount extended to its customers, but instead it only needed to describe the range of discounts offered to other purchasers. The relators alleged, however, that discounts whose terms were significantly better than those disclosed to the Government were regularly granted to customers.

The defendant countered that the facts of their case were comparable to those of *United States v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992), in which the First Circuit ruled that a contractor did not breach its government contract by failing to provide a written disclosure of certain discounts that it provided to large commercial purchasers.

Data Translation Distinguished

The district court distinguished *Data Translation*, both factually and procedurally, from the case at bar. In *Data Translation*, the contractor had orally informed the Government that certain purchasers were receiving discounts in excess of those offered the Government. Here, on the other hand, the relators specifically alleged that such discounts were never disclosed to the VA. In *Data Translation*, the circuit court also determined that the contractor would not have been able to comply with a literal reading of the Government's request for the information. In

this case at bar, the relators alleged that the defendant was aware that some of the discounts it offered to other customers exceeded the discounts offered to the VA. Lastly, in *Data Translation*, the court of appeals reached its conclusion after the case had been tried in the district court. Here, conversely, the defendant attempted to have the case dismissed even before trial.

While the court eventually agreed with the defendant's blanket assertion that it did not have to identify every discount ever extended to its customers, the court still ruled that the relators' allegations were still sufficient at this stage of the litigation to survive the defendant's motion to dismiss. Specifically, the court found that the relators alleged that the discounts offered to some customers exceeded those offered to the VA. Accordingly, the court denied the defendant's motion to dismiss.

JURISDICTIONAL ISSUES

A. Stay of Proceedings

U.S. ex rel. Taylor v. Gabelli, 2004 WL 2066888 (N.D. Ill. Sept. 14, 2004)

An Illinois district court denied defendants' motion for a stay pending referral to the FCC in a *qui tam* action. The district court, in refusing to apply the primary jurisdiction doctrine, ruled that the analysis of the relevant FCC regulations were within the conventional expertise of the court, that there was little danger of inconsistent rulings, and that the administration of justice would not be hindered by deciding the matter without the FCC's input.

On July 29, 2004, the court denied in part and granted in part the defendants' Rule 9(b) and 12(b)(6) motions in a *qui tam* action, which alleged a conspiracy to defraud the Government through abuse of the FCC bidding process for wireless telecommunications licenses. In the matter at bar, the defendants requested a stay of the proceedings so that the FCC could address two issues: (1) whether the defendant minority investors "exercised *de facto* control over the small businesses and their owners who bid on certain telecommunications licenses" and (2) whether these "bidders intentionally failed to disclose in their auction applications and statements the assets and revenues of minority investor defendants, thereby violating FCC regulations and policies and fraudulently inducing the FCC to award the licenses to them."

Judicial Branch Can Assess FCA Intent Element

The district court denied the defendants' motion. As an initial matter, the court quickly answered the second issue raised in the defendants' motion. First, the court observed that the FCA does not include an "intention to deceive" element, as argued by the defendants. In fact, as the court pointed out, "[f]or purposes of the FCA, 'knowing' and 'knowingly' do not require proof of a 'specific intent' to defraud." The court ruled that an assessment of whether the defendants acted with the requisite intent under the FCA does not necessitate "technical, agency-specific expertise."

Dan Caputo Distinguished

In addressing the first issue raised by the defendants, the court assessed the application of the primary jurisdiction doctrine in the context of the FCA. The district court observed that courts have rarely deferred to a federal agency, even when the FCA allegations involve violations of agency regulations. In fact, the defendants only cited one court of appeals case in which the applicability of this doctrine to the FCA was analyzed. Specifically, in *U.S. v. Dan Caputo*, 152 F.3d 1060 (9th Cir. 1998), the Ninth Circuit was faced with the issue of whether the Department of Labor should assess the defendant's possible violation of a specific agency regulation.

While the Ninth Circuit eventually deferred to the federal agency in the *Dan Cupoto* decision, the district court distinguished that case from the case at bar. In particular, the district

court observed that, unlike the issues raised in *Dan Cupoto*, the alleged misconduct that supposedly violated a federal agency regulation was "neither within the exclusive, nonreviewable jurisdiction of the FCC, nor [was] it a matter of first impression for the FCC." Thus, the district court determined that the *Dan Cupoto* ruling, standing alone, did not require deference to the FCC.

Factors Weigh Against Applying Primary Jurisdiction Doctrine

The district court then considered the factors that are typically assessed in deciding whether to apply the primary jurisdiction doctrine. First, the court assessed whether the interpretation of the FCC regulations was within the conventional expertise of judges. The defendants argued that the issue of *de facto* control of a business required the FCC's policy expertise. The court disagreed, stating that, while the FCC's input would be helpful, this determination was not a technical issue that required the FCC's intervention.

Second, the court considered whether there was a substantial danger of inconsistent rulings. The defendants maintained that ignoring the FCC could severely undermine the agency's regulatory scheme, especially because the FCC had not addressed this particular issue. The court again rejected the defendants' argument. As the defendants had highlighted, the *de facto* control assessment was fact intensive, so there was little danger of inconsistent rulings.

Lastly, the court considered whether bypassing the FCC would hinder the administration of justice. The district court, quoting from the Second Circuit, quickly answering this inquiry by noting that "[a]gency decisionmaking often takes a long time and delay imposes enormous costs on individuals, society, and the legal system." *National Communications Ass'n v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 225 (2d Cir. 1995). Thus, the court determined that the administration of justice weighed against applying the primary jurisdiction doctrine in this case.

Accordingly, after considering the existing case law and assessing the traditional factors for applying the primary jurisdiction doctrine, the court denied the defendants' motion for a stay pending referral to the FCC.

B. Subject Matter Jurisdiction

U.S. ex rel. Gear v. Emergency Medical Associates of Illinois, Inc., 2004 WL 1433601 (N.D. Ill. June 25, 2004)

See "Federal Rules of Civil Procedure: Rule 9(b)" *below at page 86.*

U.S. ex rel. Anthony v. Burke Engineering Co., 2004 WL 2106621 (C.D. Cal. Sept. 13, 2004)

A California district court granted in part and denied the defendant's motion to dismiss a *qui tam* action pursuant to Rule 9(b), 12(b)(1), and 12(b)(6). The court dismissed the defendants' 12(b)(1) motion, for the relator sufficiently argued that that a "common scheme involving federal and state governments" gave the court subject matter jurisdiction over the state claims. The court also ruled that the complaint sufficiently satisfied the Rule 9(b) and 12(b)(6) hurdles, as it relates to the FCA allegations. The district court granted the individual defendants' motion to dismiss the FCA retaliation claims, for individual supervisors are not liable.

Charles Anthony, a former employee of defendant Burke Engineering Co., a company that sells heating, air conditioning, and refrigeration controls to government entities and other purchasers, brought an action against the defendant under the federal, California, and Nevada False Claims Acts. Anthony alleged that the defendant sold items to government employees for their personal use, but the defendant demanded payment for the items from the various governments. After discovering the alleged fraudulent activity, Anthony was fired from the company. In turn, the relator also brought an employment discrimination suit against his former supervisors. The defendants filed a motion with the district court to dismiss the case.

District Court Had Subject Matter Jurisdiction Over State Claims

The defendants argued that the federal district court did not have jurisdiction over the state claims pursuant to Rule 12(b)(1). According to *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003), the court must grant the defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction if the complaint failed to outline grounds for federal subject matter jurisdiction. The defendants maintained that the relator failed to allege a single transaction that involved both federal and state entities.

The relator argued the "transaction or occurrence" phrase of Rule 12(b)(1) included allegations of an overall scheme of false claims submitted by the defendants. The district court agreed with relator's assessment. Given the early stage of the litigation process, the court was satisfied that a "common scheme involving federal and state government[s]" was sufficiently present to satisfy Rule 12(b)(1). Accordingly, the court denied the defendants' motion to dismiss the state claims.

The defendants also made a Rule 12(b)(6) motion to dismiss, arguing that the relator failed to raise an actionable claim. In assessing the relator's complaint, the court was faced with this issue of whether the facts alleged, if true, would have entitled the Anthony to any form of relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Anthony had alleged in his complaint that the defendants submitted false claims for payment to government entities for items that were actually provided to employees for their per-

sonal use. The court observed that, assuming these allegations were true, these facts stated a claim under the federal, California, and Nevada False Claims Acts. Accordingly, the court denied the defendants' Rule 12(b)(6) motion.

Relator Pled Fraud With Particularity

In addition, the court, in denying the defendants' Rule 9(b) motion, ruled that the relator had pled fraud with particularity in his complaint. The court noted that the relator provided detailed descriptions of two specific schemes in which the defendants allegedly engaged in fraudulent activity. The court also noted that the relator provided specific examples of items that were allegedly given to employees and how those items were billed to the governments.

While the defendants pointed out that the relator did not list any specific transactions, the court noted that the relator supposedly had information on seventy claims that he obtained from the defendants' computer system. The court ruled that it was not necessary for the relator to detail each of these claims, for the relator's complaint was not based on the particular transactions, but "on the alleged overall scheme used by defendants over seven years." The court also noted that specific information about these claims and other alleged false claims were within the defendants' knowledge, so this detail, according to *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993), was not needed. Accordingly, the district court, ruling that the defendants were provided with sufficient information to prepare an answer to the relator's complaint, denied the defendants' Rule 9(b) motion.

Retaliation Claims Dismissed Because Supervisors Not Liable Under the Acts

The district court granted the individual defendants' motions to dismiss the FCA employment discrimination suit. The defendants maintained that the FCA only addressed discrimination by employers, not supervisors. The court agreed with the defendants' interpretation of the FCA. The relator, however, countered that Burke Engineering was a family company that was directed by the individual defendants. Nevertheless, the district court, citing to other decisions that similarly interpreted the FCA, ruled that companies, not supervisors, could be liable under the Act. *See, e.g., United States ex rel. McVey v. Bd. of Regents*, 165 F. Supp. 2d 1052, 1056 (N.D. Cal. 2001). Accordingly, the court granted the individual defendants' motions to dismiss the FCA retaliation claims.

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

U.S. ex rel. Reagan v. East Texas Medical Center Regional Healthcare System, 2004 WL 1959083 (5th Cir. Sept. 21, 2004)

The Fifth Circuit affirmed a Texas district court's dismissal of a *qui tam* action pursuant to the public disclosure bar. Because the information underlying the relator's allegations had previously been disclosed in a state civil action, in an agency report, and in an agency's response to the relator's FOIA request, the court ruled that the information had been "publicly disclosed" for the purposes of the FCA's jurisdictional bar. The court of appeals also ruled that the relator was not the original source of the information, for the relator did not have "independent or direct" knowledge of the information.

Sally Reagan, a former executive director of University Park Hospital (UPH), a nonprofit hospital owned by East Texas Medical Center (ETMC), allegedly uncovered "financial irregularities," including false Medicare reporting, in the hospital's accounting practices. After investigating the issues further, Reagan was terminated by UPH. Subsequent to her termination, Reagan reported her findings to the Health Care Financing Administration (HCFA), and to Blue Cross and Blue Shield of Texas (BCBS), the fiscal intermediary between individual Medicare claimants in Texas and the HCFA. In addition, Reagan filed a lawsuit in state court against UPH and ETMC, alleging that she was terminated because she refused to ignore the allegedly fraudulent Medicare claims.

Reagan also filed an FCA action, in which the Government refused to intervene, asserting that the defendants violated the FCA. Specifically, Reagan argued that the defendants falsely certified that it was complying with all applicable Medicare regulations, and that the hospital mischaracterized its status as a "related party" to ETMC, thereby receiving reimbursements to which it was not entitled. The district court, in granting the defendants' motion for summary judgment, ruled that the action was barred under the "public disclosure bar" of the FCA. Reagan appealed the decision.

The court of appeals affirmed the district court's decision. In assessing the applicability of the FCA's "public disclosure bar" to the facts of this case, the Fifth Circuit, pointing to the language of 31 U.S.C. § 3730(e)(4), considered three questions: (1) whether there has been a public disclosure of allegations or transactions, (2) whether the *qui tam* action is based upon such publicly disclosed allegations, and (3) if so, whether the relator is the original source of the information.

Allegations Had Been Publicly Disclosed

The court of appeals, agreeing with the district court's assessment, ruled that the relator's allegations had been publicly disclosed in three ways: (1) the relator's state court lawsuit; (2) HCFA and BCBS audits; and (3) documents procured by the relator pursuant to her FOIA requests.

Reviewing the ramifications of the relator's state civil action, the Fifth Circuit, quoting from its *Federal Recovery Services* decision, stressed: "Any information disclosed through civil litigation . . . is 'public disclosure' of allegations in a civil hearing for purposes of the [FCA's] jurisdictional public disclosure provision, and this includes civil complaints." *Federal Recovery*

Services, Inc. v. Crescent City E.M.S., 72 F.3d 447, 450 (5th Cir. 1995), 4 TAF QR 12 (Jan. 1996). Based on the facts on the case at bar, the court quickly determined that allegations disclosed in the relator's state court suit were publicly disclosed.

The court of appeals also ruled that the audits conducted by BCBS and the HCFA resulted in "public disclosure" of information underlying the relator's complaint, for these audits were conducted prior to Reagan initiating her *qui tam* suit. The relator argued that the information she supplied to the audit investigation cannot be considered "publicly disclosed," for Section 3730(e)(4)(B) specifically required her to provide this information to the Government before filing her suit. The court of appeals determined that the relator had misconstrued the FCA, for the explicit terms of the Act merely require that "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses" be served on the Government pursuant to Section 3730(b)(2). Here, on the other hand, the relator had disclosed information to the Agency before filing her initial complaint.

The court next addressed the issue of whether a relator's FOIA request constitutes a "public disclosure." Recognizing that it had never addressed this issue, the Fifth Circuit borrowed from the Third Circuit's decision *United States ex rel. Mistick v. Hous. Auth. of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999), where the court held that "the disclosure information in response to a FOIA request is a 'public disclosure'" under § 3730(e)(4)(A). *Mistick*, 186 F.3d at 383. The Fifth Circuit was particularly swayed by the *Mistick* court's reasoning that the specific purpose of the FOIA was to make information available for public scrutiny. Accordingly, the Fifth Circuit ruled that the Agency's response to Reagan's request under Freedom of Information Act was "public disclosure." In turn, the court ruled that the FCA's public disclosure bar prevented relator from moving forward with her case, unless she was the original source of the disclosed information.

Relator Was Not the Original Source of the Information

In determining whether Reagan was the original source of the disclosed information, the court observed that the relator must satisfy a two-part test: "(1) the relator must demonstrate that he or she has 'direct and independent knowledge of the information on which the allegations are based' and (2) the relator must demonstrate that he or she has 'voluntarily provided the information to the Government before filing' his or her *qui tam* action." *United Sates ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs., Co.*, 336 F.3d 346, 352 (5th Cir. 2003) (quoting 31 U.S.C. § 3730(e)(4)(B)). The court, citing its earlier analysis, quickly determined that Reagan had satisfied the second part of the *Laird* test, for she clearly provided information to the HCFA.

In analyzing the facts of this case under the first part of the *Laird* test, the court of appeals noted that, even if the relator's action was only partly based upon public information, it would nonetheless be based upon such allegations for purpose of the FCA's public disclosure bar. The court also noted that to show that the relator had direct and independent knowledge of information, the relator was not required to have direct and independent knowledge of each false claim alleged in his complaint; instead, the relator was simply required to possess direct and independent knowledge of the information on which the publicly disclosed allegations were based.

The Fifth Circuit observed that the plain meaning of the term "direct" requires knowledge derived from the source or acquired by the relator's own efforts rather than learned second-

hand through the efforts of others. In other words, the court explained that the relator's investigation must either expose additional compelling information, or must show an undisclosed connection between disclosed facts, that ultimately reveals a fraud to the Government, where that fraud might have evaded the Government's attention.

In this particular case, Reagan admitted to the court that that her knowledge of most of the alleged events was not "independent," but based on public records, including documents acquired through FOIA requests and stored at the state archives. However, Reagan maintained that her complaint provided new connections between the underlying facts, highlighting a relationship that was not uncovered by the BCBS or HCFA audits. The court of appeals, however, determined that this proffer from Reagan was not information obtained from "independent" knowledge, but was instead a difference of opinion with respect to the same information.

Therefore, the Fifth Circuit ruled that, because the relator's knowledge was derived almost entirely from publicly disclosed sources, the information underlying her allegations were not independent or direct, and thus Reagan was not the original source of information, so her action was barred by the FCA's public disclosure bar. Accordingly, the Fifth Circuit affirmed the decision of the district court to dismiss this matter on summary judgment.

***Kennard v. Comstock Resources, Inc.*, 2004 WL 723249 (10th Cir. Apr. 5, 2004)**

The Tenth Circuit reversed a district court judgment dismissing a *qui tam* action pursuant to the public disclosure bar. Because the relators did not merely compile public information, but discovered the alleged fraud through independent investigation, deduction, and effort, the court ruled that they qualified as an original source.

Don Kennard and Harold Wright brought this *qui tam* action against Comstock Resources, Inc., alleging that Comstock, which allegedly underpaid royalties pursuant to oil and gas leases to the Mineral Management Service, an agency under the Secretary of the Interior, who acts as fiduciary for the owner, an Indian tribe. Wright owned royalty interests in gas wells in a tract of land near the tribe's reservation. When the operator on Wright's property sold its lease interests in Comstock, Wright's royalty payments dropped dramatically. Wright speculated that Comstock was underpaying him and others, including the tribe, and informed Kennard of his suspicions. After investigating public records and based on their extensive oil and gas experience, Wright and Kennard concluded that Comstack was knowingly underpaying the tribe. After consulting with attorneys including a Mr. Sydow, they determined that Comstock had violated the FCA and began drafting a *qui tam* complaint. Wright and Kennard invited the tribe to join them as a co-relator but the tribe declined.

On October 21, 1998, Wright and Kennard sent the required prefiling disclosure statement to the Government with the still unfiled complaint attached. On October 26, Sydow filed a non-FCA contract action based on substantially similar allegations, but on behalf of the tribe, not Wright and Kennard. The following day, Wright and Kennard filed their *qui tam* complaint. They allege that Sydow essentially stole their information in preparing the tribe's complaint that was filed the day before.

The district court dismissed Kennard and Wright's *qui tam* action for lack of subject matter jurisdiction pursuant to the public disclosure bar. The court ruled that the Sydow com-

plaint was a public disclosure, and that the relators were not an original source because they merely compiled public information. The relators appealed.

Action was Based Upon Public Disclosure

The Tenth Circuit reversed. As an initial matter, the court rebuffed the relators' argument that it should not validate Sydow's allegedly unethical use of their information in drafting his complaint for the tribe. The court ruled that the public disclosure bar allows for no exceptions unless the relator is an original source, even if the public disclosure is made by somewhat nefarious means. The remedy for Sydow alleged conversion of information, the court indicated, lay elsewhere.

Accordingly, the court analyzed the case to determine whether the public disclosure bar applied. In the Tenth Circuit, this is a four-step inquiry: (1) whether the alleged public disclosure occurred in one of the statutorily enumerated fora; (2) whether this disclosure was "public" within the meaning of the FCA; (3) whether the relators' complaint is "based upon" this disclosure; and (4) whether the relators qualify as an "original source." Consideration of the fourth question is necessary only if the court answers the first three questions in the affirmative.

In this case, the alleged public disclosure was the Sydow complaint, filed in a "civil . . . hearing," one of the statutorily enumerated fora in § 3730(e)(4)(A). Moreover, the filing of a civil action, the court ruled, is in itself an affirmative act of public disclosure. It did not matter that disclosure was made only to a single government filing clerk who stamped the Sydow complaint. Once the complaint is filed, disclosure has occurred, and there is no requirement that the clerk or any member of the public read the complaint. Moreover, the court rejected the relators' argument that, by providing the unfiled complaint to the Government with their disclosure statement, they immunized themselves from the operation of the public disclosure bar.

Moreover, the court concluded that the relators' complaint was "based upon" the Sydow complaint. The court found no merit in the relators' argument that, because the Sydow complaint was based exclusively on their information and complaint, it was impossible for their complaint to be based upon the Sydow complaint. The court ruled that "based upon" for purposes of the Statute means "supported by." Thus, a relator need not have learned of the basis for the *qui tam* action from the public disclosure for the action to be considered "based upon" the disclosure if the allegations are substantially similar. Because the relators conceded that the complaints at issue were substantially similar, the court concluded that the *qui tam* action was based upon the public disclosure.

Relators Were Original Source

Nevertheless, the Tenth Circuit concluded that the relators qualified as an original source. Comstock argued that the relators were not an original source because: (1) they did not possess substantive information about the fraud; (2) they were not insiders of Comstock or the tribe; and (3) they relied on public records. The court rejected each argument in turn.

The court ruled that Comstock's first argument had no basis in Tenth Circuit precedent. To qualify as an original source, a relator need not have knowledge of the actual fraudulent conduct. The statute requires only knowledge of "the information on which the allegations are based." Thus knowledge underlying or supporting the fraud allegation is sufficient, and knowledge of the actual fraudulent submissions is not required.

Comstock's second argument was similarly without merit. There is no requirement that a relator be a corporate insider, and the court could think of no reason for creating such a restriction.

Comstock's third argument deserved more attention. The court declined to adopt a bright-line rule disqualifying a relator who relied on public records as an original source. The court stated that when a *qui tam* action is based solely on material elements already in the public domain, the relator is not an original source. On the other hand, a relator starting with innocuous public information and completing the equation with information independent of any preexisting public disclosure may qualify as an original source.

The court of appeals determined that the case at bar fell into the latter category. It disagreed with the district court's conclusion that Wright and Kennard merely compiled publicly available information. Wright relied exclusively on his own private royalty records, not on any public information. Kennard did examine public records in the course of his independent investigation, but the court of appeals observed that this did not disqualify him as an original source, as many investigations of fraud on the Government will necessarily involve a review of the relevant publicly available contracts out of which the claim arises. Significantly, none of the public documents disclosed alleged fraud. It was only through independent investigation, deduction, and effort that the relators discovered the alleged fraud. The court concluded that the relators had direct and independent knowledge of the alleged fraud because they were the persons responsible for ferreting it out in the first place. Accordingly, the court concluded that they qualified as an original source.

False Claims to Minerals Management Service Actionable Under FCA

The court rejected Comstock's alternative argument that the FCA's *qui tam* provisions do not authorize a relator to sue based upon losses suffered by an Indian tribe. Comstock's argument misstated the issue, because an FCA *qui tam* suit is brought on behalf of the United States, not an Indian tribe. The fraud at issue was that which occurs when a lessee underreports the amount of royalties due to the Minerals Management Service of the United States, not that which occurs when the tribe receives less royalties than are due. The FCA's reverse false claims provision, § 3729(a)(7), broadly encompasses any fraud on the Government that occurs when a person or entity makes a false statement in order to decrease an obligation to transmit money to the Government. There is no requirement that the Government have an ongoing or beneficial interest in the funds, nor is there any requirement about how the funds are disbursed. Comstock could not dispute that it had a legal obligation to transmit royalty payments to the Government. Therefore, the relators' allegations that Comstock submitted false reports to avoid its obligation fell squarely within the purview of the FCA's reverse false claims provision. Accordingly, the Tenth Circuit reversed the judgment of the district court and remanded the cases for further proceedings.

***U.S. ex rel. Heath v. Dallas/Fort Worth International Airport Board*, 2004 WL 1197483 (N.D. Tex. May 28, 2004)**

A Texas district court denied the defendant's motion to dismiss a *qui tam* action pursuant to the FCA's public disclosure bar. The court ruled that, while the relator had reviewed

two publicly disclosed reports, the relator still constituted an original source of the information contained in the reports, for the relator had direct and independent knowledge of the information.

Susan Heath, a former environmental affairs analyst at Dallas/Fort Worth International Airport (DFW Airport), discovered that the DFW Airport was making misrepresentations to the Government in order to secure federal funding for several airport improvement projects, including twenty-four expansion projects. Filing a *qui tam* complaint against the DFW Airport in 1999 and later amending the complaint in April 2001, Heath raised allegations that (1) the defendant submitted grant applications to the Federal Aviation Administration (FAA), in which the defendant misrepresented that it was complying with all state and federal environmental regulations; and (2) the defendant knowingly violated the Clean Water Act by releasing pollutants into the waters surrounding the airport. More specifically, Heath claimed that the defendant failed to disclose to the FAA that the airport's industrial waste system was permitting impermissible levels of pollutants to drain through the system's storm drains and into state and federal waters. DFW filed a motion for summary judgment for lack of subject matter jurisdiction, claiming the FCA public disclosure bar prevented the court from having jurisdiction over the relator's claim.

Public Disclosure Bar Did Not Apply to Relator's Claims

The district court denied the defendant's motion. To determine whether the court had jurisdiction over Heath's *qui tam* claim, the court applied a three-step inquiry that the Fifth Circuit had adopted in *Federal Recovery Services Inc. v. U.S.*, 72 F.3d 447, 450: (1) whether there had been a "public disclosure" of the allegations; (2) whether the *qui tam* action was "based upon" such publicly disclosed allegations; and if so, (3) whether the relator is the "original source" of the information.

The defendant argued the relator's allegations should be barred under the FCA public disclosure bar, for several publicly disclosed documents had previously announced that DFW's industrial waste system was permitting pollutants to enter into the surrounding waterways. According to the defendants, these documents also disclosed that DFW had nonetheless certified to the FAA that it was in full compliance with all state and federal environmental regulations.

In assessing whether the documents qualified as "public disclosure" under the FCA, the court utilized an approach outlined in *U.S. ex rel. Barrett v. Johnson Controls, Inc.*, 2003 WL 21500400 (N.D. Apr. 9, 2003), 30 TAF QR 15 (July 2003), in which court divided the inquiry into three parts: (1) "public" disclosure; (2) in a particular form specified in the statute; and (3) of "allegations or transactions." In the case at bar, the parties only disagreement centered on whether the disclosures constituted "allegations or transactions."

In tackling the third part of the *Barrett* analysis, the district court, with the encouragement of both parties, relied on the D.C. Circuit Court of Appeals approach in *U.S. ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). Under *Springfield Terminal*, the court must assess whether "the critical elements of the fraudulent transaction [X and Y] were in the public domain." According to the court's reading of *Springfield Terminal*, the critical elements had been disclosed if the disclosures, taken together, enabled the Government to draw an inference of fraud.

In this case, the defendant argued that the relator had not sufficiently linked its disclosures to these "critical elements." The relator, however, maintained that, without the factual details outlined in her complaint, the Government would not have been able to draw an inference of fraud. In particular, the relator explained that the disclosures revealed that DFW was releasing small amounts of pollutants into the surrounding waterways. The relator further argued that only her complaint exposed the truth—DFW was knowingly permitting large amounts of pollutants to escape from the airport's the industrial waste system.

The defendant, on the other hand, argued that both requisite elements were disclosed to the public. The defendant asserted that the disclosed documents contained information that DFW certified that it fully complied with environmental regulations and that, notwithstanding this certification, the airport violated these regulations. The defendants maintained that the Government could have inferred fraudulent activity based solely on these publicly disclosed documents.

Pre-1998 Documents Were Not "Public Disclosures of Allegations or Transactions"

In analyzing the various DFW disclosures, the court first analyzed the documents released prior to 1998. According to the court, these documents did not raise the inference that the defendant was defrauding the Government in conjunction with the defendant's FAA grant applications. Conversely, the relator's complaint filled in the necessary holes, providing allegations from which fraud could be inferred. Accordingly, the court ruled that the pre-1998 documents did not constitute "public disclosures of allegations or transactions" for purposes of FCA liability, and thus the court dismissed the defendant's motion as to the relator's claims based on alleged pre-1998 conduct.

Conversely, as to a government document published on September 1, 1998, the court reached a different conclusion. This document, an EPA Engineering Site Visit Report, revealed that DFW was aware that large amounts of pollutants were entering the surrounding waterways, and thus violating environmental regulations. The court ruled that, based on the information disclosed in this report, one could have inferred fraudulent activity. In turn, the court found that this report publicly disclosed the "critical elements" of the relator's claim of FCA violations occurring after September 1, 1998. Proceeding to the next step in the analysis, the court determined whether the relator's claims were "based upon" this report and, if so, whether the relator was nonetheless an "original source" of the information.

Relator Was Original Source of Information Published in 1998 EPA Report

The court, without any analysis, quickly reached the conclusion that the relator's allegations that the defendant violated the FCA after September 1, 1998, were based upon information in the EPA report. Thus, the court then had to determine whether the relator was an original source of the information revealed in this report. The court ruled that, while the relator had read the EPA report, the relator still constituted an original source, for the relator had direct and independent knowledge of the information.

To determine whether the relator qualified as an "original source" under the FCA, the court applied the usual two-part test: (1) the relator must show that she had "direct and independent knowledge on which the allegations are based" and (2) she must demonstrate that she voluntarily provided the information to the Government before filing her *qui tam*. Because the parties agreed that the second element was met, the court focused its analysis on the first element.

The court, in assessing whether Heath needed to have direct and independent knowledge of the actual grant application process, pointed to an analogous case, *Coppock v. Northrop Grumman Corp.*, 2003 WL 21730668 (N.D. Tex. July 22, 2003), 36 TAF QR 26 (Oct. 2003). In *Coppock*, the defendant encouraged the court to dismiss the relator's claims, in part, because the relator lacked direct and independent knowledge of the actual statements made to the Government. The court, rejecting the defendant's position, ruled that the relator only needed to demonstrate direct and independent knowledge of the fraudulent occurrences, not of the misrepresentations themselves. In the case at bar, the court, agreeing with the rationale underlying *Coppock*, found that Heath's lack of participation in the application process did not preclude her from qualifying as an original source.

The defendant pointed out that, while Heath conducted her own investigations into DFW's alleged misconduct, her investigations only began after she read two 1994 documents. Agreeing with the defendant's findings, the court had to determine whether these two documents precluded her from having direct and independent knowledge of the information that was eventually disclosed in the 1998 EPA report. The district court ruled that they did not.

The court observed that the two 1994 documents established that DFW's industrial waste system had a limited capacity that was likely to be exceeded, and thus there was a likelihood that pollutants would leak into the surrounding public waterways. However, as the court pointed out, there is a difference between what could potentially happen and what actually was happening. Because the relator's complaint educated the Government on what was *actually* happening at DFW, the court ruled that the two documents did not preclude Heath from having direct and independent knowledge of the same information disclosed in the EPA report. The court also ruled that the relator's own investigation into the matter provided her with direct and independent knowledge of the information.

Accordingly, the court ruled that Heath constituted an original source of the information contained in the 1998 EPA report, and thus the court found that it also had jurisdiction over the relator's claims of FCA violations occurring after September 1, 1998. Therefore, the court denied the defendant's motion for summary judgment for lack of subject matter jurisdiction.

***U.S. ex rel. Yannacopoulos v. General Dynamics*, 2004 WL 911746 (N.D. Ill. Apr. 27, 2004)**

An Illinois district court denied the defendants' motion to dismiss a *qui tam* action pursuant to Fed. R. Civ. P. 9(b) and the FCA's public disclosure bar. The court ruled that the relator had pled details of the fraud with sufficient particularity to satisfy Rule 9(b). The court ruled that foreign court proceedings and foreign publications did not publicly disclose the allegations or transactions upon which the *qui tam* claim was based, and that mere disclosure to a requesting party pursuant to a FOIA request was not public disclosure for FCA purposes unless the material had actually been disclosed to the public.

Dimitri Yannacopoulos, a Greek citizen formerly employed by General Dynamics (GD), brought this *qui tam* action against his former employer its successor in interest Lockheed Martin Corporation, alleging that they violated the FCA by submitting false claims in connection with the sale of F-16 fighter aircraft to Greece. Yannacopoulos alleges that GD fraudulently obtained the F-16 contract with Greece, but that alleged initial fraud was not the subject of his *qui tam* suit. The alleged initial fraud was the subject of parliamentary and criminal proceedings conducted under seal in Greece beginning in 1989, after the political opposition ousted the government that had originally negotiated the sale. The Greek proceedings concluded with a determination that no wrongdoing had occurred, and thereafter Greece purchased more F-16s from GD.

Also in 1989, approximately six months after the Greek proceedings commenced, Yannacopoulos sued GD in federal district court in the District of Columbia. In that action (*Yannacopoulos I*), which was later transferred to the Eastern District of Missouri, Yannacopoulos alleged both a personal claim for approximately $50 million in commissions from the F-19 sale and three RICO counts. In 1994, the court granted summary judgment for the defendant in that case in unpublished decisions ultimately affirmed by the Eighth Circuit. *See Yannacopoulos v. General Dynamics Corp.*, 75 F.3d 1298 (8th Cir. 1996).

Yannacopoulos' *qui tam* action, in contrast to these earlier proceedings, alleged overbilling subsequent to the initial contract, and named the United States rather than Greece as the victim. Yannacopoulos alleged that GD submitted hundreds of millions of dollars of direct and reverse false claims to the Government in connection with the F-16 sales. The defendants moved to dismiss, arguing that the relator failed to plead fraud with particularity as required by Rule 9(b), and that the court lacked jurisdiction pursuant to the FCA's public disclosure bar.

Complaint Satisfied Rule 9(b)

The court denied the motion. The defendants argued that the relator failed to plead the "who, what, when, where, and how" of the alleged fraud claims, and thus failed to satisfy Rule 9(b)'s requirement that fraud be pleaded with particularity. With regard to the "who," the defendants noted that the relator failed to identify the specific employees of Lockheed or GD responsible for inflating claims. However, because those details were in the exclusive possession of the defendants, the court ruled that the relator need not allege them. The defendants argued that the relator failed to plead "what" fraudulent activity occurred, because the relator failed to point to actual false claims. However, the court observed that each of the relator's seven courts alleged that the defendants overbilled the Government, which was enough to support an inference of fraud. The defendants also complained that the relator failed to identify specific dates "when" the false claims were submitted. However, the court observed that the relator alleged specific dates of contract submissions and modifications, and specific time frames within which the defendants allegedly submitted fraudulent quarterly invoices. The court ruled that this was enough to inform the defendants when the alleged fraud occurred, and greater specificity of claim dates was not required. The defendants also argued that the relator insufficiently alleged "where" the false claims were made. The relator stated that the false claims were made in GD's various facilities, as well as Greek and U.S. government facilities (including the Defense Security Assistance Agency). The court ruled that this satisfied Rule 9(b), which does not require length and grueling exaction. If anything, the court ruled, the relator's complaint was longer

and more detailed than anything Rule 9(b) required. Any greater specificity would undermine the notice pleading standard of Rule 8.

Action Was Not Based Upon Public Disclosures

The court also rejected the defendants' public disclosure argument, ruling that the action was not based on public disclosures. As an initial matter, the court noted that the FCA's public disclosure bar is substantive, not jurisdictional. The court had subject matter jurisdiction over the dispute, but under § 3730(e)(4) a *qui tam* relator would not be entitled to represent the Government in the suit if it were based upon allegations of which he was not the original source. Furthermore, because the defendants had attached numerous exhibits to their motion containing matters outside the pleadings that could not be considered in a motion to dismiss, the court, with the consent of the parties, converted it into a motion for summary judgment. Ultimately, the court denied this motion because the defendants failed to show that there was no genuine issue of material fact regarding whether there had been public disclosures. Moreover, the court ruled, even if the relator had based his action on public disclosures, there was a genuine issue of fact as to whether the relator was an original source.

Foreign Proceedings Were Not Public Disclosures

The defendants argued that the Greek proceedings were public disclosures of the allegations or transactions upon which the *qui tam* claims in the case at bar were based. The court disagreed. Although the question of whether foreign proceedings can be "public disclosures" under the FCA was one of first impression, the court observed that § 3730(e)(4)(A) does not include such proceedings in the exclusive statutory list. Moreover, the list refers, other than the news media, exclusively to federal sources of information. To interpret the statute to cover foreign proceedings (and by extension any foreign "report, hearing, audit or investigation") would create too large a shield for multinational corporations accused of defrauding the U.S. Government. Not only could accused corporations avoid FCA prosecution by arguing that a foreign government investigated the matter, but foreign governments whose interest may be adverse to the United States would be allowed unduly to affect its rule of law. The court also pointed to language barriers as an additional reason why the Greek proceedings could not reasonably be a public disclosure of information. Furthermore, the Greek proceedings were conducted under seal, rendering any information divulged therein unavailable even to Greek-speaking U.S. citizens or government officials.

Furthermore, the court observed, the Greek proceedings involved only allegations that the Greek government was defrauded, and did not disclose the critical allegations of fraud against the U.S. Government that were the basis of the *qui tam* action at bar. Therefore, the court ruled, even if the Greek proceedings constituted a public disclosure (which they did not), there was still a disputed issue of fact whether the Greek proceedings were public disclosures of the allegations or transactions in the case at bar.

Media Reports Did Not Disclose Allegations Underlying *Qui Tam* Case

The defendants argued that various news articles in the Greek and U.S. press that reported on the Greek proceedings and the underlying F-16 contract constituted public disclosures of the

allegations or transactions in the case at bar. Most of these articles were Greek language reports published in Greece. Although the question of whether foreign news articles are included in the "news media" for purposes of the list of sources of public disclosures in § 3730(e)(4)(A) was one of first impression, the court reasoned that because that list excludes foreign proceedings, the same exclusion should apply to foreign news media, or at the very least foreign-language news media. Thus, the court ruled that there is no public for FCA purposes if the information is divulged in a foreign publication, especially if published in a foreign language.

Moreover, the court ruled, even if the Greek articles had been public disclosures, neither the Greek nor the U.S. articles discussed the allegations or transactions at issue in the case at bar. The allegations reported in those articles pertained to the alleged bait and switch scheme to defraud the Government of Greece, not the alleged overbilling of the U.S. Government that was at issue in the *qui tam* action.

Information Obtained Through FOIA Requests Was Not Publicly Disclosed

The court also rejected the defendants' contention that information that the relator obtained about the Greek proceedings pursuant to FOIA requests during *Yannacopoulos I* were public disclosures of the allegations or transactions at issue in the case at bar. The court noted that the majority of appellate courts have held that information divulged in a FOIA request becomes public upon receipt of the information by the requesting party. However, the glaring flaw in this dominant view, according to the district court, is that the public is not informed of the contents of the FOIA material by transmission to a private party. Thus, the court found persuasive the minority view, most recently adopted by the Fourth Circuit in an unpublished opinion, that FOIA information is not necessarily a public disclosure. *See United States ex rel. Bondy v. Consumer Health Foundation*, 2001 WL 1397852 at *3 n.2 (4th Cir. Nov. 9, 2001), 25 TAF QR 18 (Jan. 2002). The Seventh Circuit has not yet ruled on this issue. Although it affirmed a district court decision that had held that FOIA requests are public disclosures, it did so on the alternate ground that public disclosure occurred in the news media, avoiding the FOIA disclosure issue. *See United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971 (E.D. Wis. 1998), 13 TAF QR 3 (Apr. 1998), *aff'd on other grounds*, 168 F.3d 1013 (7th Cir. 1999), 16 TAF QR 7 (Apr. 1999).

The court observed that the 1986 amendments to the FCA replaced the previous government knowledge bar with the current public disclosure bar to shift the focus from what the Government knew to what the public knew. Because only the requesting party knows of material obtained from a FOIA request, it is not public in a meaningful sense. Thus, the majority view that FOIA disclosures are public is a throwback to the pre-1986 approach, and would destroy the incentive for a person to investigate fraud against the Government. If receipt of FOIA material would bar a relator's claim, the court observed, then every corporation would be well advised to request as much FOIA material as possible. IF the corporation was later named a defendant, then under the majority approach it could insulate itself from liability for anything disclosed through its own FOIA requests, a result certainly not intended by Congress.

Accordingly, the court held that an FCA action based on FOIA material is not barred unless the material has actually been disclosed to the public. Mere disclosure to the requesting party, the court held, is not public disclosure. Moreover, the court observed that FOIA disclosures are not included in the exclusive list of public disclosures in § 3730(e)(4)(A). This

was an additional reason supporting the court's ruling that the FOIA material was not publicly disclosed.

Moreover, even if the FOIA material had been a public disclosure, the court was unpersuaded that it revealed the essential elements of the relator's fraud allegations. State Department documents obtained by the relator under FOIA referred only to the bait and switch allegations of the Greek proceedings, and did not disclose the overbilling allegations or false claims transactions at issue in the *qui tam* action at bar.

Prior U.S. Civil Proceedings Did Not Disclose *Qui Tam* Allegations

Finally, the court rejected the defendants' argument that Yannacopoulos' *qui tam* action was based upon allegations or transactions publicly disclosed in *Yannacopoulos I*. Although *Yannacopoulos I* was clearly a "civil hearing" within the meaning of § 3730(e)(4)(A), and anything filed therein was therefore publicly disclosed, the court found that none of these disclosures referred to the essential allegations and transactions in the *qui tam* action. Rather, like the other alleged disclosures, they referred only to the alleged fraud against the Greek government that was the subject of the Greek proceedings. Therefore, the court ruled, they did not disclose the essential allegations and transactions at issue in the case at bar.

Relator Was Arguably Original Source

Moreover, the court ruled, even if the relator had based his action upon public disclosures, there were contested issues of fact whether he was an original source of the information upon which his allegations were based. The defendants argued that the relator's relationship with GD ended in 1983, and that he subsequently obtained his information through various public disclosures. However, the court ruled, an independent investigation can form the basis of "direct and independent" knowledge required by the original source exception, § 3730(e)(4)(B). The court noted that the Seventh Circuit has stated: "in an exceptionally or unusually complicated allegation of fraud each piece of information may be disclosed, yet the fraud itself may remain hidden until some perspicacious plaintiff puts it into perspective. We acknowledge that in such a case, a plaintiff may be an original source even though her knowledge of every isolated element of the fraud is based upon public disclosures." *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999), 16 TAF QR 5 (Apr. 1999). The court noted that fraud alleged in the case at bar was quite complex, involving various international schemes stretching over a period of four decades. Moreover, the alleged public disclosures did not allege fraud against the United States. Thus, even if the relator had based his complaint on public information, a trier of fact could reasonably conclude that he was an original source because he discovered and synthesized that information during an independent investigation. Accordingly, the court denied the defendants' motions to dismiss and for summary judgment.

***U.S. ex rel. Gross v. AIDS Research Alliance-Chicago*, 2004 WL 905952 (N.D. Ill. Apr. 27, 2004)**

An Illinois district court granted a defendants' motion to dismiss a *qui tam* action pursuant to the FCA's public disclosure bar. The court observed that the relator's allegations

were identical to warnings detailed in a previously released FDA letter, and the relator did not demonstrate that he was an original source of this information.

Beginning in 1998, Sanford Gross was a voluntary participant in a study sponsored by the National Institutes of Health (NIH) to determine the effectiveness of certain medication in HIV-positive patients. He subsequently brought this action against the AIDS Research Alliance-Chicago and participating physicians, alleging that they made false claims to the NIH in order to receive funding. Gross alleged that participating doctors prescribed medication that reduced the effectiveness of other drugs used in the study, failed to obtain informed consent, misplaced or lost patient files or records, and failed to inform patients when their viral loads increased, in violation of various federal regulations. He argued that the defendants falsely certified their compliance with applicable regulations, and that NIH would not have funded the study had it know of the regulatory noncompliance. In November 2003, the court granted the defendants' motion to dismiss, ruling that Gross failed to plead his allegations of fraud with specificity as required by Fed. R. Civ. P. 9(b). *See Gross v. Ashcroft*, 2003 WL 22508153 (N.D. Ill. Nov. 3, 2003), 33 TAF QR 19 (Jan. 2004). The court found that Gross failed to allege specific facts concerning the dates claims were submitted, the persons who committed regulatory violations, and nature and dates of such violations. The court also ruled that Gross had failed to plead sufficient facts to demonstrate that the defendants had a motive to deceive the Government when they allegedly made false certifications.

However, the dismissal was without prejudice, and Gross subsequently filed a second amended complaint in an attempt to address the deficiencies identified by the court. The defendants again moved to dismiss, arguing that Gross' second amended complaint should be dismissed for lack of subject matter jurisdiction pursuant to the FCA's public disclosure bar.

Similarly, the court dismissed Gross' claim against Roberta Luskin-Hawk, the principal investigator of the study. Although Gross alleged that Luskin-Hawk falsely certified compliance with the study's regulations, he failed to allege facts showing that Luskin-Hawk was actually in noncompliance with a particular regulation. Moreover, the court ruled that, without evidence that Luskin-Hawk had a motive to deceive the Government, Luskin-Hawk's alleged regulatory violations would not give rise to FCA liability. Accordingly, the court dismissed this claim.

As for the remaining defendants (the AIDS Research Alliance and the other individual defendants) the court observed that Gross did not cite to a particular regulation that they were violating when they certified compliance. Therefore, the court ruled, he could not show that they had a motive to deceive the Government and the FCA claim against them could not be sustained. The court also dismissed Gross' conspiracy claim for failure to plead the existence between the defendants and an overt act. The court was not persuaded by Gross' argument that refraining from whistle blowing is an overt act. Accordingly, the court dismissed Gross' second amended complaint in its entirety, with prejudice.

Finally, the court denied the defendants' request for attorneys' fees pursuant to § 3730. The court did not find that Gross' claim was frivolous or vexatious, and noted that it had granted him leave to file his second amended complaint.

U.S. ex rel. Munerlyn v. Career Planning Center, Inc., No. CV 02-2043 (C.D. Cal. May 3, 2004)

In an unpublished decision, a California district court granted in part and denied in part the defendant's motion for partial summary judgment in a *qui tam* action. The court granted summary judgment to the defendant on the relator's allegation that they defrauded the Food Stamp Program. However, the court denied the defendant's motion in all other respects, rejecting its contentions that it was entitled to summary judgment based on the FCA's public discourse bar and the doctrine of judicial estoppel.

Victoria Munerlyn was employed with the Career Planning Center, Inc. (CPC) from 1995 to 2001. On June 5, 2000, allegations of fraud at CPC were made in an unsigned letter addressed to the Los Angeles County Board of Supervisors. About a week later, Munerlyn contacted the office of County Supervisor Michael Antonovick, allegedly identified herself as the author of the letter, and spoke with Raine Ritchie about the complaints in the letter. On June 16, Munerlyn wrote a letter to Antonovich, claiming that her work environment was racist and hostile, but not referring to fraudulent activity at CPC. Local newspapers reported the allegations of fraud on and after July 22, 2000.

In June or July 2000, CPC's chief executive officer Eleanor Hoskins held a staff meeting and announced that she wanted to know who wrote the June 5 letter. On July 7, Munerlyn was laid off.

The Los Angeles County Auditor-Controller investigated the allegations of fraud at CPC and reported the findings in a report dated August 29, 2000. The report found that a number of allegations of fraud were true. It stated that CPC claimed credit for fictitious job placements as well as for placements for ineligible individuals or for individuals who actually received no services from CPC.

On August 10, 2000, Munerlyn filed a complaint with EEOC alleging that she was subjected to a hostile work environment because of race. On March 9, 2001, she filed a second complaint with the EEOC, alleging that she suffered retaliation and termination of employment because of her prior complaints to the EEOC of racial discrimination. On September 2, 2001, the EEOC issued a determination in Munerlyn's favor on her March 12, 2001 claim.

In 2002, Munerlyn filed a *qui tam* action against CPC, alleging that it falsely certified that it had given job training and placement assistance to persons who had never received such training and assistance in order to obtain federal payments under the Welfare to Work Program, the Work Investment Act, and the Economic Dislocation Worker Assistance Act. She also alleged that CPC obtained additional bonuses by falsely claiming that some clients were eligible for Food Stamps, and caused the Government to wrongfully pay Food Stamp benefits. In addition to her federal FCA *qui tam* claim, Munerlyn also asserted claims for violation of the California FCA, for retaliation in violation of the federal and California FCAs, and wrongful termination in violation of public policy.

CPC moved for partial summary judgment, arguing that Munerlyn's federal *qui tam* claim failed because it was based upon public disclosures of information of which she was not an original source, and also because CPC received fixed allocated cost reimbursement pursuant to the job training programs. It also argued that Munerlyn's allegations of false claims against the Food Stamp program failed because it made no certification under that program. Finally,

it argued that Munerlyn's retaliation and wrongful termination claims were barred by the doctrine of judicial estoppel.

Relator Raised Triable Issue Whether She Was an Original Source

The court granted summary judgment to the defendants on the Food Stamp claims, but denied the defendant's motion in all other respects. It was undisputed that newspaper articles publicly disclosed the allegations of fraud upon which Munerlyn's complaint was based. However, the parties disputed whether Munerlyn was the author of the June 5 letter, and therefore, whether she was an original source of the information upon which her allegations were based. CPC argued that Ritchie's deposition testimony only established that Ritchie assumed Munerlyn wrote the June 5 letter, and noted that Munerlyn testified that she did not discuss the contents of the letter between June 5 and August 15, 2000. However, Munerlyn asserted that she did write the letter. She also observed that Ritchie testified that the letter indicated that someone would follow up within seven to ten days, that Munerlyn (and no one else) did actually call within that time, and that when she called she stated that she was following up on the letter. Based on this evidence, the court ruled, a reasonable jury could conclude that Munerlyn was the author of the letter. Accordingly, ruling that Munerlyn had raised a triable issue whether she was an original source, the court denied the defendant's motion for summary judgment based on the public disclosure bar.

Relator Stated Claim for Falsification of Costs

The court also rejected the defendant's argument that it was entitled to summary judgment because it received fixed allocated cost reimbursement pursuant to the job-training program. The court found that the relator had presented evidence that employees were directed to falsify timesheets. Furthermore, the relator alleged that CPC was effectively reimbursed for each client serviced and was able to increase its reimbursement by falsely certifying that it had provided training and placement assistance to fictitious clients. Therefore, the court ruled that the relator had raised a triable issue as to whether CPC's claims were based on actual costs expended, and therefore whether it submitted false claims.

REPRESENTATION CONCERNS

A. Section 3730(d)(1) Attorneys' Fees

U.S. ex rel. Barajas v. Northrop Corp., CV 87-7288 (C.D. Cal. Aug. 18, 2004)

In an unpublished decision, a California district court granted the relator's motion for order establishing entitlement to recover attorneys' fees from defendant pursuant to 31 U.S.C. § 3730(c)(5). The court ruled that the relator was entitled to attorneys' fees incurred in pursuing a case in which the Government obtained an "alternative remedy," for the plain language and legislative history of the FCA allows the relator to retain the same rights as if the Government had not pursued an "alternative remedy." The court also ruled that the relator had not contractually waived his rights to recover attorneys' fees when he settled an earlier *qui tam* action against the same defendant.

In June 1991, Leocadio Barajas brought an earlier action against defendant Northrop Corporation, in which the Government and the defendant had reached a settlement agreement. Later, Barajas brought a second *qui tam* action against the same defendant, raising additional allegations. Eventually, after years of legal battles and motions practice, the Government chose not to intervene in the second *qui tam* action, instead pursuing suspension and debarment proceedings against the defendant and ultimately entering into a settlement agreement.

In *United States ex rel. Barajas v. Northrop Corp.*, 258 F.3d 1004 (9th Cir. 2001) (*Barajas III*), 24 TAF QR 12 (Oct. 2001), the Ninth Circuit ruled that, by not intervening, the Government had, for the purposes of the FCA, pursued and achieved an "alternative remedy." *Id.* at 1012-13. In the matter at bar, Barajas moved for a judicial determination that, pursuant to Section 3730(c)(5) of the FCA, he was entitled to recover attorneys' fees he incurred while litigating the matter. Specifically, Barajas was seeking payment for expenses incurred during the time period between the first settlement agreement and the Ninth Circuit's ruling in *Barajas III*.

Plain Language and Legislative History of FCA Support Awarding Attorneys' Fees

The district court granted the plaintiff's motion. The first issue that the court faced in reaching its decision was whether a *qui tam* plaintiff is entitled to attorneys' fees incurred in pursuing a case in which the Government does not intervene, but instead pursues and ultimately obtains an "alternative remedy." The court answered this issue of first impression in the affirmative.

The relator argued that, according to the plain language of § 3830(c)(5) and the legislative history of the FCA, when the Government seeks an "alternative remedy," the relator retains the same rights he would have had if the Government had not pursued an "alternative remedy." Barajas argued that these retained rights included the right to recover attorneys' fees pursuant to § 3730(d).

Northrop, challenging Barajas' understanding of the FCA and the legislative history, argued that the rights preserved by § 3730(c)(5) are limited to those outlined in § 3730(c), and do not extend to rights delineated in other subsections of § 3730. Northrop also argued that the legislative history underlying § 3730(c)(5) was primarily motivated to allow relators to participate in administrative hearings to recover false claims, not to secure reimbursement for additional attorneys' fees.

The court, rejecting the defendant's arguments, interpreted the plain language and the legislative history of the FCA to support awarding attorneys' fees to relators when the Government pursues an "alternative remedy." First, the court noted that § 3730(c)(5) explicitly states that the relator retains the "same rights" as when the Government does not pursue an "alternative remedy," and that the Statute does not explicitly limit these retained rights to those listed in § 3730(c). The court also observed that the legislative history of the FCA reflects a legislative goal of creating financial incentives for relators to file *qui tam* complaints.

The court pointed out that the very logic underlying *Barajas III*, that the settlement agreement was an "alternative remedy" of which the relator was entitled to recover a relator's share, precluded the defendant's argument that the "rights" retained by a relator do not include the rights enumerated in § 3730(d). Finally, echoing the Ninth Circuit's concern for the policy considerations behind the FCA, the district court determined that the best support for these concerns would be allowing Barajas to recover attorneys' fees for his efforts in litigating the second FCA action. Accordingly, the court found that Barajas was entitled to recover some amount of attorneys' fees related to litigating the second *qui tam* action.

Relator Entitled to Attorneys' Fees from Two Phases of the Litigation

The court was then faced with the next issue of which particular phases of the second suit was Barajas entitled to recover fees. The court determined that Barajas was entitled to fees for the portion of the second action that led to the execution of the settlement agreement, and he was entitled to recovery for the phase of the litigation in which he established that he was the "original source" of the allegations.

Here, unlike *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1995), in which the Sixth Circuit held that the defendant was not required to pay attorneys' fees for collateral disputes between the relator and the Government involving the size of the relator's share, the defendant was actively involved in litigating whether the relator was the "original source." Accordingly, the court determined that the defendant was also liable for the attorneys' fees incurred during this phase of the litigation.

Relator Had Not Contractually Waived Rights to Recover Attorneys' Fees

The court rejected the defendant's argument that the relator contractually waived his rights to recover attorneys' fees when he settled the first FCA action in 1991. After reviewing the 1991 settlement agreement, the court specifically pointed to the preamble of the agreement, which explicitly stated that the Government and the defendant might settle the remaining allegations in an "alternative remedy" in which the Barajas would share, and that Barajas was not waiving his rights to share in that settlement. In turn, the court ruled that Barajas had not contractually waived his rights to recover attorneys' fees in the second *qui tam* action, as the defendants had argued.

Accordingly, the court granted the relator's motion and found that he was entitled to recover reasonable attorneys' fees incurred between June 1991 and August 1991, as well as reasonable fees incurred thereafter related to establishing that he was the "original source" of information in the second suit.

B. *Pro Se* Representation in FCA Suits

U.S. ex rel. Lu v. Ou, 368 F.3d 773 (7th Cir. May 18, 2004)

The Seventh Circuit affirmed a district court's grant of dismissal with prejudice in a *qui tam* action. The court held that a relator could not prosecute a *qui tam* action *pro se* because he would be acting as attorney for the Government. The court also ruled that the notice of appeal in a *qui tam* suit in which the Government has not appeared must be filed within sixty days.

Friedrich Lu, a former employee of a veterans hospital, brought a *qui tam* action against Dr. David Ou, a state university pathology professor who had been Lu's faculty advisor when Lu was a doctoral candidate at the University of Illinois at Chicago, and fourteen of Ou's colleagues, alleging that they collaborated to publish scholarly articles based on fabricated medical research and to use these publications to defraud the Veterans Administration. Lu also alleged that the defendants allowed researchers free use of the veterans hospital's laboratory equipment in exchange for being credited as joint authors of the researchers' articles.

Initially, the district court dismissed Lu's suit without prejudice because the court was "unable to discern any claims actionable under the False Claims Act." The district court converted the dismissal into one with prejudice when Lu failed to file an amended complaint. Lu appealed the district court's ruling.

Relator Has Sixty Days to File Notice of Appeal

The Seventh Circuit affirmed. Forty-five days after the entry of the district court's final judgment, Lu filed his notice of appeal. Noting that Lu never served the Government his initial complaint, the court addressed a different issue of whether the notice of appeal in *qui tam* suit in which the Government has not appeared must be filed within 60 days, the deadline in suits to which the Government is a party, or 30 days, the deadline in private suits.

Highlighting this issue as a matter of first impression, the Seventh Circuit outlined the existing disagreement between the circuit courts. The Tenth Circuit had previously held that even though the Government is a named party, once the Government refused to intervene its role in the suit is "merely a statutory formality," and thus the shorter appellate deadline typically applies. However, the Fifth and Ninth Circuits took the opposite view, holding that even if the Government declines to participate in the *qui tam* suit, the 60-day appeal window should apply. The latter circuits placed added emphasis on the fact that the Government receives a high percentage of the recovery regardless of who conducts the litigation. In the end, the Seventh Circuit agreed that the 60-day deadline was applicable, for the United States remained a party, however tangential. Thus, Lu's notice of appeal, which was filed on the forty-fifth day, was within the 60-day time limit.

The Seventh Circuit also addressed the threshold issue of whether Lu could even bring a *qui tam* action *pro se*. Borrowing from the Eighth Circuit's reasoning in *United States v. Onan*, 190 F.2d 1 (8th Cir. 1951), the court held that a relator could not bring such an action because the relator was, in actuality, acting as an attorney for the Government. The court was particularly concerned that the monetary motives of the relator, an "attorney" the Government didn't even hire, might conflict with the long-term objectives of the Government. Citing to *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001), 23 TAF QR 1 (July 2001), the court warned: "A relator may make sweeping allegations that, while true, he is unable effectively to litigate, but which nonetheless bind the government, via *res judicata*." Accordingly, the court ruled that Lu could not represent himself on behalf of the Government.

Relator Not Entitled to Opportunity to Find Lawyer

The last issue that confronted the Seventh Circuit was whether, rather than affirm the dismissal of the suit with prejudice, to remand the case to give the relator an opportunity to find an attorney. Agreeing with the district court, the circuit court found the relator's complaint "incoherent, even crazy." Not able to envision a "reputable lawyer being interested in taking the case on a contingent basis," the court dismissed the case without allowing Lu an opportunity to find a lawyer.

TAXABILITY OF RELATOR'S SHARE

Brooks v. United States, **2004 WL 2008189 (6th Cir. Sept. 10, 2004)**

The Sixth Circuit, affirming a Kentucky district court's decision to grant summary judgment to the Government, held that no part of a *qui tam* relator's award granted under Section 3730(d) of the FCA is excludable from gross income under Internal Revenue Code § 104(a)(2), for the award does not constitute "damages received . . . on account of personal injuries" as § 104(a)(2) requires.

Dr. Hilton Brooks, working as a member of the Pineville Community Hospital's quality assurance committee in Pineville, Kentucky, discovered numerous billing improprieties by the hospital. After being pressured to stop investigating the hospital's billing practices, Brooks filed a *qui tam* action alleging that the hospital and two of its doctors had submitted false claims to Medicare for payment. While the Government initially declined to intervene, it did eventually intervene in the matter after Brooks had litigated the action through discovery. The defendants then agreed to settle the action and pay a total of $2.5 million.

The district court approved the agreement and granted Brooks a relator's share of twenty-five percent of the net settlement remaining after payment of attorney fees and reimbursable costs. In turn, Brooks was awarded $210,067, which resulted in income tax of $78,607. Brooks included the relator's award in his gross income and timely paid the $78,607 income tax. Thereafter, Brooks, claiming a refund on the tax he paid on the relator's award, argued that the award could be excludable from income under 26 U.S.C. § 104(a)(2) as damages received on account of personal injuries. After the IRS disallowed his claim, Brooks filed suit in district court seeking a refund of the income tax. The district court ruled in favor of the Government, and Brooks appealed.

Relator's Share Not Covered by § 104(a)(2) of the Tax Code

The court of appeals affirmed the district court's decision. In assessing the relator's argument, the court of appeals highlighted the Supreme Court's warning that "exclusions from income must be narrowly construed." *United States v. Burke*, 504 U.S. 229, 248 (1995) (Souter, J., concurring in judgment). Therefore, citing to the Supreme Court, the relator's award must be considered gross income unless it is "expressly excepted by another provision in the Tax Code." *Id.*

The relator pointed to § 104(a)(2) of the Tax Code, arguing that the award should be exempted from gross income. This particular section provides that gross income does not include "the amount of any damages received on account of personal injuries or sickness." Relying again on *Schleier*, the court, promoting a two-pronged test, ruled that the taxpayer must (1) "demonstrate that the underlying cause of action giving rise to the recovery is based upon tort or tort type rights," and (2) "show that the damages were received on account of personal injuries or sickness." 515 U.S. at 337.

In support of his reading of § 104(a)(2), Brooks pointed out that the court, in determining a relator's share, is influenced by whether the relator suffered personal sickness or injuries in

prosecuting the FCA action. In turn, Brooks argued that the award compensates, in effect, the relator for the personal injuries suffered while bringing the suit.

Relator's Cause of Action Failed the Two-Pronged *Schleier* Test

Assessing Brooks' case against the two-pronged *Schleier* test, the court ruled that Brooks failed to show that his cause of action was based upon a tort or tort-type rights. Because the primary objective of the FCA is to recover funds falsely taken from the Government, the court determined that the underlying cause of action that gives rise to a relator's award is based upon contract fraud, not a tort. The court of appeals also pointed to the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000), in which the Supreme Court highlighted the fact that the injury that is redressed under the FCA is an injury to the Government. Furthermore, the Sixth Circuit observed that any wrong done specifically to the relator could be separately compensated for under the FCA's "whistleblower" provision, 31 U.S.C. § 3730(h).

The Sixth Circuit also determined that Brooks had failed the second prong of the *Schleier* test, maintaining that Brooks failed to establish that the award was received because of personal injuries or sickness.

Brooks, relying primarily upon *United States v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1994), argued that his award was received, at least in part, because of personal injuries or sickness. In *NEC*, faced with the issue of whether a *qui tam* action survived the relator's death, the court first considered whether the action was remedial or penal with respect to the relator. The *NEC* court concluded that the FCA also redresses individual wrongs suffered by the relator, for the relator may suffer emotional strain because he must choose between "keeping silent about the fraud . . . or reporting the fraud and suffering repercussions." *Id.* at 138.

The court, rejecting the relator's argument, ruled that it is the nature of the underlying claim itself that determines whether the plaintiff has received compensation on account of personal injuries under § 104(a)(2). Under the FCA, the court pointed out, the fact that the relator receives anything is because of his decision to bring the *qui tam* action, not because of any personal injuries inflicted upon him. Accordingly, the court affirmed the district court's ruling that the relator's award was not excludable from gross income under § 104(a)(2).

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Hunt v. Merck-Medco Managed Care, L.L.C., 2004 WL 2137355 (E.D. Pa. Sept. 23, 2004)

See "Statutory Interpretations: Section 3729(a)(1) Presentment Requirement" *above at page 19.*

U.S. ex rel. Vosika v. Starkey Laboratories, Inc., 2004 WL 2065127 (D. Minn. Sept. 8, 2004)

See "Statutory Interpretations: Section 3731(b) Statute of Limitations" *above at page 51.*

U.S. ex rel. Yannacopoulos v. General Dynamics, 2004 WL 911746 (N.D. Ill. Apr. 27, 2004)

See "Statutory Interpretations: Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" *above at page 66.*

Jarl v. Apria Health, 2004 WL 2075119 (N.D. Ill. Sept. 13, 2004)

An Illinois district court, in granting a defendant's Rule 9(b) motion, ruled that the relator failed to sufficiently identify the party that allegedly perpetrated the fraud. The court also ruled that the relator failed to raise an actionable claim under the FCA, for the relator merely alleged that the defendant submitted "improper" bills, not "false" or "fraudulent."

Xandra Jarl, while working at Defendant Apria Health's billing center, discovered that the defendant was billing "various insurance companies, including Medicaid and Medicare" without having the patients sign off on the appropriate forms. Despite the absence of these signatures, Jarl noticed that the defendant's computer records still showed that signed forms were being received from these patients. Further, Jarl alleged that the defendant received payment for these patients.

Jarl maintained that she notified several management-level employees about the improper billing practices, but none of the employees took action to rectify the problem. Jarl was subsequently demoted, received a dramatic pay decrease, and consequently suffered clinical depression and anxiety. Jarl stated that she was eventually forced to resign.

Jarl brought suit against the defendant seeking damages and other relief pursuant to the FCA. She alleged that the defendant submitted false claims for payment to Medicare and retaliated against her in violation of the FCA retaliation provision, 31 U.S.C. 3730(h).

Apria Health filed a Rule 9(b) and 12(b)(6) motion, arguing that the relator failed to state a claim upon which relief could be granted. The relator opposed the defendant's motion, but

she requested, alternatively, for leave of court to file an amended complaint should the court grant the defendant's motion.

Relator Failed to Plead Fraud With Particularity

The court granted the defendant's Rule 9(b) motion. The court ruled that the relator failed to sufficiently identify the party that allegedly perpetrated the fraud. While the relator stated that "employees of defendant's St. Louis facilitate (sic) were manipulating defendant's computer system," the court noted that the relator did not in any way identify the employees.

The court ruled that, while the relator may not know the specific identity of the employees, the relator must at least outline the role of the employees engaged in the fraud. In the case at bar, however, the relator claimed that she knew of "65 individuals whose insurance companies were improperly billed" and "there [were] hundreds, if not thousands more instances of improper billing."

The court recognized that pleadings based on information and belief may be acceptable if the complaint adduces "specific facts supporting a strong inference of fraud" or the conclusion that a fraud has been perpetrated is a reasonable inference from the specific facts pleaded. *See U.S. ex rel. Robinson v. Northrop Corp.*, 149 F.R.D. 142, 146 (1993), citing *U.S. ex rel. Stinson Lyons, Gerlin & Bustamante v. Blue Cross*, 755 F. Supp. 1055, 1052 (S.D. Ga.1990).

In this case, however, the court ruled that the relator failed to plead sufficient facts to identify the circumstances of the fraud. Jarl had noted that she became aware of the fraud in "approximately June of 2003," but the court noted that Jarl did not allege when the alleged fraudulent activity occurred. In support of their ruling, the court explained that while "[r]ule 9(b) does not require a plaintiff to provide precise dates and times, down to the nanosecond .... [s]imply saying that conduct occurred before or after a specified date is not enough." *See also ABC-NACO, Inc. v. DeRuyter,* 1999 WL 521171 (N.D. Ill. 1999). Accordingly, the court ruled that the relator failed to meet the Rule 9(b) standard.

Relator Failed to Raise an Actionable FCA Claim

The court also ruled that Jarl failed to state a claim upon which relief could be granted pursuant to Rule 12(b)(6). The court noted that the relator merely alleged that the defendant submitted "improper" bills to Medicaid, not "false" or "fraudulent" as required by the FCA. Accordingly, the court granted the defendant's motion to dismiss. The court gave the relator twenty-one days to file an amended complaint. As for the FCA retaliation claims, the relator conceded during oral arguments that these allegations should be dismissed.

***U.S. ex rel. Tyson v. Amerigroup Illinois, Inc.*, 2004 WL 2066888 (N.D. Ill. Sept. 13, 2004)**

An Illinois district court denied the defendant's motion to dismiss a *qui tam* action. The court ruled that the relator had sufficiently pled the "who, what, when and where" of the fraud as required under Rule 9(b). The court also determined that, under the relator's version of the facts, the complaint raised an actionable claim under Rule 12(b)(6), even though there was a "slightly tenuous" connection between the facts and the statutory elements of an FCA claim.

Defendant Amerigroup Illinois, Inc., an Illinois health maintenance organization (HMO), signed a contract with the State of Illinois to provide health services to Medicaid beneficiaries. Cleveland Tyson, while working for Amerigroup Illinois, allegedly discovered that the defendant was committing fraud against the federal and state Medicaid programs. Tyson filed a *qui tam* action against Amerigroup Illinois, alleging that the defendant took proactive steps to ensure that "only the healthiest of Medicaid eligible individuals" participated in the defendant's managed care program. Because the defendant was paid a predetermined amount based on the number of enrollees and not the number of office visits, the defendant was allegedly able to lower its costs and increase its profits by only targeting the healthiest beneficiaries.

Tyson's complaint outlined a number of strategies that the defendant allegedly adopted to increase its profit margins. Specifically, Amerigroup supposedly refused to enroll pregnant women, discouraged potential enrollees who required specialized medical care, and retroactively disenrolled prematurely born infants. In turn, Tyson argued that the defendant submitted false quarterly certifications, stating, "to its knowledge, there was no fraud, abuse, or misconduct occurring on the part of its employees, providers, or representatives." Tyson pointed out that the contractual agreement between the defendant and the State defined "abuse" as "a manner of operation that results in excessive or unreasonable costs to the Federal and/or State health care programs."

Amerigroup moved to dismiss Tyson's complaint for failing to plead the elements of fraud with particularity as required by Rule 9(b), and for failing to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

Relator Pled Fraud With Particularity

The district court denied the defendant's Rule 9(b) motion. In reaching its decision, the court observed that the relator must plead the "who, what, when and where of the fraud." *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003), 30 TAF QR 25 (July 2003).

In support of his argument that the defendant submitted false quarterly certifications to the State of Illinois, the relator attached four quarterly certifications, each signed by the CEO of the company. The relator maintained that these certifications were false because the enrollment procedures of the defendant constituted abuse under the contract.

The court, in dismissing the defendant's Rule 9(b) motion, ruled that the relator sufficiently pled the facts of the fraud in his complaint. Applying the Rule 9(b) inquiry adopted in *Garst*, the court noted that the "who" of the fraud was the CEO of the company; the "what" of the fraud was the defendant certifying that there was no abuse occurring when the defendant was actually engaging in fraudulent enrollment practices; the "when" of the fraud was period covered by the four attached certifications; and the "where" of the fraud was the defendant's office, where the alleged impermissible practices were planned and implemented.

Relator Raised an Actionable FCA Claim

The court, dismissing the defendant's Rule 12(b)(6) motion, ruled that the relator's complaint raised allegations that were sufficient to state a claim upon which relief could be granted. The district court observed that an FCA relator must establish three elements: "(1) the defendant

made a record or statement in order to get the government to pay money; (2) the record or statement was false or fraudulent; and (3) the defendant knew it was false or fraudulent." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (construing 31 U.S.C. § 3729(a)(2)).

While the district court quickly ruled that the relator's complaint satisfied the second and third elements of the *Lamers* test, the court, observing a "slightly tenuous" connection between the false certifications and the payment of money, reluctantly recognized the existence of the first element. However, because the court had to accept the facts in the relator's complaint as true, the court agreed that the certifications to the State were a precondition of payment. In turn, the district court ruled that the relator's allegations were sufficient to state a claim upon which relief can be granted. Accordingly, the district court denied the defendant's motion to dismiss.

***U.S. ex rel. Taylor v. Gabelli*, 2004 WL 1719357 (S.D.N.Y. July 29, 2004)**

A New York district court granted in part and denied in part the defendants' motion to dismiss a *qui tam* action pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). The court ruled that under Rule 9(b) the particular contents of allegedly false statements did not have to be specifically identified when the alleged fraudulent scheme centered on the actual submission of the claims, not the particular wording of the claims. The court observed that such a complaint still provided the defendants with adequate notice as to the claims asserted against them. The court also ruled that because the bids of *un*successful bidders who falsely certified their compliance with FCC regulations did not, by their very nature, request or demand payment from the Government, an actionable claim was not raised under 12(b)(6). Conversely, in the case of the successful bid applicants, the court maintained that the false statements of compliance constituted claims for Government funds, thereby falling under the ambit of the FCA, for the defendants actually sought payment from the Government in the form of bidding credits.

R.C. Taylor brought this *qui tam* action under the False Claims Act against Mario Gabelli and several telecommunications corporations operating under the control of Gabelli. Taylor accused the defendants of conspiring to defraud the Government by abusing the Federal Communication Commission's (FCC) public bidding procedure. Taylor alleges that, beginning in 1995, Gabelli and the Gabelli-controlled entities incorporated several smaller companies to bid on wireless telecommunications licenses. These companies, according to Taylor, were established to "acquire federally discounted licenses as investments to be later sold for profit in the after-market," and not for the legitimate business of "develop[ing] or offer[ing] spectrum services under the acquired licenses, or to operate actual business operations." The complaint asserted that the FCA applies to the facts of this case because the defendants fraudulently claimed and certified that these corporate entities satisfied the compliance requirements of the FCC's bidding regulations. The defendants moved to dismiss, contending that the *qui tam* allegations failed to satisfy Fed. R. Civ. P. 9(b) for failure to plead with particularity and Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Relator Pled Fraud With Particularity

The court granted in part and denied in part the defendants' motion. The court ruled that Rule 9(b) applies to FCA claims, and thus an FCA claimant must allege the "who, what, when, where, and how" of his claims. In this case, Taylor alleged that the defendants submitted false records in their bidding applications, but Taylor, the defendants argued, did not identify the particular false statements or tie the specific statements to a particular defendant.

The court, rejecting the defendants' argument that Taylor failed to comport with the heightened pleading requirements of Rule 9(b), instead found that the complaint adequately provided the defendants with notice as to the claims asserted against them. In particular, the "who" and the "what" were the successful bidders who presented false certifications of eligibility in this application process. The "where" and "when" were the location and time that these false records were filed. Lastly, the court ruled that Taylor adequately detailed the "how" by outlining the defendants' scheme of certifying and submitting false records of small business status and eligibility under the FCC's bidding requirements.

No FCA Liability for Unsuccessful Bid Applications That Were Falsely Certified

The court granted the unsuccessful bidders' motion to dismiss. The court, agreeing with the defendants' contention, ruled that the relator failed to state a claim under the FCA. The defendants argued that the relator could not raise an actionable FCA claim against those who unsuccessfully bid for the FCC licenses. The court agreed that the mere submission of a false application in a bidding contest, without more, does not rise to the level of seeking payment from the Government, and thus the court dismissed the FCA claims against the unsuccessful bidders.

Actionable FCA Claim for Falsely Certified Bid Applications That Secured FCC Licenses

Conversely, the court rejected the Rule 12(b)(6) motion of the successful bidders who actually secured wireless telecommunications licenses. While the defendants argued that the allegations merely amounted to differences in the "legal determination . . . as to the issue of *de facto* control" of these smaller corporate entities, the court, accepting the factual allegations in the complaint as true, determined that the defendants deliberately violated the FCC's bidding requirements. Even though the FCC required detailed disclosure statements about a particular bidder's eligibility, the court determined that the defendants actively concealed relevant corporate relationships and falsely certified their eligibility status. The court ruled that these allegations were sufficient to satisfy the "false or fraudulent statement" element of the FCA, thereby establishing an actionable claim against the successful bidder defendants. The court also determined that these false disclosure statements "caused" the Government to pay these defendants.

***U.S. ex rel. Gear v. Emergency Medical Associates of Illinois, Inc.*, 2004 WL 1433601 (N.D. Ill. June 25, 2004)**

An Illinois district court denied the defendants' motion to dismiss a *qui tam* action. The court ruled that the defendants improperly raised jurisdictional issues under Fed. R. Civ. P. Rule 12(b)(1) and 31 U.S.C. § 3730(e)(4), when the issues should have been addressed under the standards of either a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. The court also found that the relator's *qui tam* allegations satisfied the particularity requirements of Rule 9(b) so as to give the defendants adequate notice of the specific activities constituting the alleged fraud.

Dr. Brent Gear, working as medical resident in Midwestern University's residency program from June 1997 to June 2000, discovered that Emergency Medical Associates of Illinois (EmCare), a corporation that provided medical staffing services to various hospitals, was allegedly improperly billing Medicare. In February 2000, Gear filed a *qui tam* action against EmCare. The Government declined to intervene. In response, EmCare filed a motion to dismiss Gear's complaint. On December 1, 2003, the court granted Gear permission to leave to filed his amended complaint. Subsequently, Gear filed his amended complaint, which alleged that the Emcare overbilled Medicare for emergency room services performed by student physicians. In particular, Dr. Gear alleged that EmCare billed Medicare for attending physician services that were actually conducted by unsupervised medical residents. Furthermore, because the residents' salaries were already covered under Medicare Part A funds, Medicare was actually paying twice for their services. In February 2004, EmCare moved to dismiss Gear's amended complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and 31 U.S.C. § 3730(e)(4), and for failure to plead fraud with particularity pursuant to Rule 9(b).

Court Had Subject Matter Jurisdiction Over Relator's FCA Claims

The district court denied the motion to dismiss. The court, in construing 31 U.S.C. §§ 3730(e)(4)(A) and (B), observed that jurisdiction cannot be exerted over an FCA claim based on public information, unless the relator is the original source of the information. However, deferring to the Supreme Court's ruling in *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950-51 (1997), 10 TAF QR 1 (July 1997), the district court interpreted the term "jurisdiction" in § 3730(e)(4) to raise an issue of substantive law, not just a question of jurisdictional law.

EmCare had argued that Gear had not met his burden of establishing subject matter jurisdiction. In particular, EmCare asserted that Gear had not satisfy the requirements of § 3730(e)(4), in that Gear's suit was allegedly based on public disclosures and Gear was not the original source. In support of their position, EmCare submitted additional documentation that detailed some of the supposed public disclosures. EmCare raised this issue under Rule 12(b)(1), which allows the court to look to at extraneous evidence submitted by the parties if a factual question surfaces as to whether the court has subject matter jurisdiction. Gear argued that Emcare improperly raised this jurisdictional argument under Rule 12(b)(1).

The court, borrowing from the Seventh Circuit's rationale in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 529, 532 (7th Cir. 1998), ruled that when the court's subject matter jurisdiction is based upon the same statute that provides the substantive claim, the

jurisdictional issue is necessarily intertwined with the merits of the case, and the court should assume jurisdiction and deal with the merits. Accordingly, because the court determined that the jurisdictional issue of § 3730(e)(4)(A) public disclosure is necessarily intertwined with the merits of the case at bar, the court ruled that it had jurisdiction over these FCA claims. The court noted that EmCare should have raised this jurisdictional issue in a motion to dismiss under Rule 12(b)(6) or a motion to dismiss for summary judgment under Rule 56, and not in a motion to dismiss under Rule 12(b)(1).

Relator Pled Fraud With Particularity

The court also declined EmCare's Rule 9(b) motion to dismiss. The court noted that the Seventh Circuit has applied Rule 9(b)'s heightened pleading standard to allegations of fraud made under the FCA. *See United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003), 30 TAF QR 25 (July 2003). In the case at bar, the court found that the complaint met this heightened standard. In addition to outlining the allegedly fraudulent scheme, the complaint also identified the particular hospitals involved, the particular university involved, and the specific Medicare regulations that were allegedly violated. The court ruled that this information gave Emcare adequate notice of the specific activities constituting the alleged fraud.

Accordingly, EmCare's motion to dismiss Gear's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and the public disclosure bar, and for failure to plead fraud with particularity pursuant to Rule 9(b) was denied.

***In re Cardiac Devices Qui Tam Litigation*, 221 F.R.D. 318 (D. Conn. May 12, 2004)**

A Connecticut district court denied the defendants' motions to dismiss an FCA action pursuant to the FCA statute of limitations provision and the Federal Rules of Civil Procedure 9(b), 12(b)(6), and 41(b). The court found that the Government's complaint satisfied the particularity requirements of Rule 9(b) so as to provide the defendants with fair notice of the allegations. The court also ruled that the Government's allegations that Defendant-hospitals knowingly submitted claims for Medicare payment for noncovered services provided in connection with investigatory medical devices that were not "reasonable and necessary" within the meaning of Medicare manual provisions were sufficient to state an actionable claim under Fed. R. Civ. P. Rule 12(b)(6). The court also determined that the action was not barred by the FCA statute of limitations provision. Similarly, the court found that the Government had not violated Rule 41(b) by failing to prosecute the matter with due diligence.

In March 1994, Kevin Cosens, a former sales representative for cardiovascular device manufacturers, filed a *qui tam action* in a Washington district court against 132 clinical trial hospitals, alleging that these hospitals violated the FCA by submitting Medicare claims for hospital services provided to patients who elected to participate in clinical trials involving investigational cardiac devices that had not been approved for marketing by the Food and Drug Administration (FDA). Cosens maintained that these subsequent reimbursements violated the 1986 Medicare Manual provision stating that payment for such services would not be paid because these services were not considered "reasonable and necessary."

Over the next eight years, the Government sought and was granted sixteen enlargements of time by the Washington district court to allow time to investigate Cosens' claims and to determine whether to intervene in the matter. During this time, several of the defendants unsuccessfully sought to have the Manual provision declared invalid because, as the defendants argued, the provision was a substantive rule promulgated in violation of the notice-and-comment rule-making requirements of the Administrative Procedures Act (APA), 5 U.S.C. § 553.

In June 1999, the district court, with the relator's concurrence, granted several of the Government's motions for transfer of venue, allowing the Government to transfer to the judicial district where the particular hospitals were located. The Government eventually reached settlement agreements with all but the forty remaining hospitals that made up the defendants in the Multidistict Litigation (MDL) suit at bar. In September 2003, the Government and Cosens filed a joint motion with the United States Judicial Panel on Multidistrict Litigation, seeking to transfer all of the cases to one district court for pretrial proceedings. The panel granted the motion and assigned the cases to the District of Connecticut. The defendants filed motions to dismiss the actions based on the FCA statute of limitations provision and the Fed. R. Civ. P 9(b), 12(b)(6), and 41(b).

Government Pled Fraud With Particularity

The court dismissed the defendants' motion to dismiss for failure to plead fraud with particularity. As an initial matter, the court observed that it was well-settled that Rule 9(b) applies to claims under the False Claims Act. The defendants argued that the Government's complaint merely alleged a "per se" fraud theory that did not specify a particular fraudulent activity. The defendants also asserted that the complaints failed to identify any specific false claims.

The Government, on the other hand, argued that the complaints provided sufficient detail under Rule 9(b). The Government pointed out that all of the claims outlined in the complaint came directly from the defendants' patients list and, therefore, the defendants had knowledge of these specific claims.

As an initial matter, the court, in outlining the appropriate standard, highlighted *United States ex rel. Harris v. Bernad*, 275 F. Supp. 2d 1 (D.D.C. 2003), 32 TAF QR 33 (Oct. 2003), a similar case in which that court held that a complaint alleging that the defendants violated the FCA by upcoding their Medicare claims during a six-year time period, had met the Rule 9(b) pleading standard even though the complaint only listed a span of time. In reaching its conclusion, the *Harris* court noted that the complaint only provided a sampling from the defendant's files that depicted the alleged fraud, and it used a statistical analysis to calculate the damages caused by the fraud. In the case at bar, the court also noted that other courts have applied a less stringent Rule 9(b) standard when the information is peculiarly within the defendant's control. *See, e.g., United States ex rel. Hill v. Morehouse Med. Assocs.*, 2003 WL 22019936 (11th Cir. Aug. 15, 2003), 32 TAF QR 36 (Oct. 2003).

The defendants initially asserted that the complaint merely alleged a "per se" fraud that equated fraud with an alleged violation of a Medicare manual provision, and did not allege any particular fraudulent conduct. In support of their position, the defendants cited to *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), 25 TAF QR 6 (Jan. 2002) (holding that the defendants' claims for reimbursement were not legally false merely because the services failed to comply with a regulation that was only tangential to the services), *United States ex rel. Clausen v. Labo-*

ratory Corporation of America, Inc., 290 F.3d 1301 (11th Cir. 2002), 26 TAF QR 14 (Apr. 2002) (holding that the relator's failure to allege that any specific improper claims were actually submitted to the Government was fatal to his complaints), and *United States v. Southland Management Corp.*, 326 F.3d 669 (5th Cir. 2003), 26 TAF QR 7 (Apr. 2002) (holding that FCA liability does not attach for a false statement unless the statement is used to get a false claim paid).

The court rejected the defendants' reliance on these three particular cases. First, the court observed that, unlike the plaintiffs in *Mikes*, the Government was not challenging whether the devices were used in accordance with applicable medical standards. Second, the court noted that, unlike the claims in *Southland Management*, the Government was not arguing that the procedures were performed in an unsafe manner. Third, the court argued that, unlike the complaint in *Clausen*, the Government listed the allegedly improper claims that were actually submitted to the Government. While the defendants argued that the list was not in the complaint itself but in a separate spreadsheet, the court ruled that, given the concerns over patient confidentiality, the Government was justified in listing the names in this manner, especially given the large number of procedures involved. Based on this ruling, the court found that the complaint met the requirements of Rule 9(b), for the complaint satisfied the "who, what, where, when, and how" requirements of Rule 9(b) by sufficiently identifying the submission of specific false claims. Accordingly, the court denied the defendants' Rule 9(b) motion to dismiss for failure to plead fraud with particularity.

Actionable FCA Suit for Submitting Medicare Claims for Noncovered Services

The court also denied the defendants' motion to dismiss the complaints pursuant to Rule 12(b)(6). Rejecting the defendants' argument that the complaint failed to allege a false or fraudulent claim, the court utilized the Second Circuit's five-factor test from *Mikes*, in which the Government must show that the defendants (1) made a claim, (2) to the Government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury. *Mikes*, 274 F.3d at 695.

The court ruled that the defendants' submission of Medicare reimbursement forms clearly constituted the submission of a "claim" to the Government for these requests for reimbursement were for services provided to Medicare beneficiaries. In addition, the court also ruled that the defendants' submission of annual cost reports, which included a certification of veracity, also qualified as "claims" under the FCA.

The defendants contended that, because the cost reports merely listed the payments actually received, the submissions of these particular forms should not qualify under the FCA's definition of "claim." The Government, on the other hand, argued that these forms should fall under the definitional ambit of an FCA "claim," for a year-end adjustment could be made on the annual cost reports, and were not merely a tabulation of payments received. The court sided with the Government, ruling that because the cost reports were subject to certification, and because the Second Circuit had interpreted the term "claim" broadly, the annual cost reports constituted "claims" within the meaning of the FCA.

The court also determined that the Government had sufficiently alleged that the claims were false or fraudulent. The court, relying on the holding from *Mikes*, observed that a claim

cannot be determined to be false or fraudulent unless the Government would not have paid the claim if the actual facts had been known. *See Mikes*, 274 F.3d at 696. In the case at bar, the Government maintained that it would not have reimbursed the defendants for these claims if they known that these claims were for devices not approved for marketing by the FDA.

While the court remained undecided over whether the claims were factually false, the court did find that the claims were at the very least legally false. Again relying on the Second Circuit's ruling in *Mikes*, the court observed that the Medicare Act, 42 U.S.C. § 1395(a)(1)(A), contained an express condition of payment that "explicitly link[ed] each Medicare *payment* to the requirement that the particular item or service be 'reasonable and necessary.'" *Mikes*, 274 F.3d at 700 (emphasis added by the court). In turn, the district court found that in submitting these forms, the defendants were implicitly certifying compliance with the Medicare Act, in that they were seeking payment for "reasonable and necessary" services. Thus, to the extent that the annual cost reports or reimbursement forms included requests for noncovered devices, this rendered their certifications false. Accordingly, the court ruled that the Government had adequately alleged that the defendants submitted false or fraudulent claims for the purpose of stating an actionable FCA claim.

Alternatively, the defendants argued that they were not liable under the FCA because the relevant provisions of the Medicare Provider Reimbursement Manual, which prohibited reimbursement for noncovered items, were not valid. Specifically, the defendants argued that, if they were bound by the manual provisions, then the provisions must be considered legislative rules subject to the notice-and-comment rule-making requirements of the APA, which requires that when an agency engages in rule-making, it must provide notice of the proposed agency rules, followed by a period for public comment. *See* I5 U.S.C. § 553(b). The defendants pointed out that, in promulgating these particular manual provisions, the Government did not comply with the APA. On the other hand, if the provisions are merely interpretative, then the provisions are not binding and, therefore, cannot form the basis of FCA liability.

The Government argued that the provision is not subject to the APA rule-making requirements, for the provision is an interpretive rule. Moreover, even if the provision was invalid, the defendants could not simply ignore the provision by submitting claims for noncovered items, argued the Government.

Echoing the finding of other court decisions, including the Supreme Court's decision in *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), the district court characterized the manual provisions as interpretive rules, and thus exempt from the notice-and-comment requirements of the APA. Accordingly, the district court ruled that these provisions are not invalid.

In the alternative, the defendants argued that the provisions were non-binding; therefore, the defendants cannot be liable under the FCA based on violations of the Medicare manual provisions. Conversely, the Government asserted that, instead of secretly violating the provisions, the defendants should have, and could have, challenged the provisions through an administrative process.

While the defendants cited to several cases in support of their position, the court noted that none of these cases stood for the proposition that the hospitals were free to ignore the manual provisions simply because they were interpretive rules. In striking down the defendants' argument, the court cited to *United States v. Yuzary*, 55 F.3d 47 (2d Cir. 1995), in which the Second Circuit upheld a defendant's criminal conviction based upon his violation of an interpretive rule. In turn, the case at bar rejected the defendants' position that an interpretive rule

cannot for the basis of an actionable FCA claim. Accordingly, the court denied the defendants' motion to dismiss for failure to state a claim upon which relief may be granted.

Action Properly Filed Within the FCA Statute of Limitations

The court also denied the defendants' motion to dismiss the complaint as barred by the statute of limitations. Rejecting the defendants' argument, the court analyzed the temporal limitations of Section 3731(b)(2) of the FCA and the applicability of the "relate back" mechanisms of Rule 15(c)(2).

The defendants argued that the alleged FCA claims were barred by the six-year statute of limitations applicable to claims under the FCA, 31 U.S.C. § 3731(b)(2). Rebutting the defendants' argument, the Government maintained that the important date for the purposes of the FCA statute of limitations provision is the date when the relator filed his complaint, not the date on which the Government intervened in the matter.

The Government further asserted that, for the purposes of determining the statute of limitations, the complaint relates back to the filing of the original *qui tam* complaint pursuant to Rule 15(c)(2). The Government argued that Rule 15(c)(2) applies to the given facts because the Government's complaint and the original *qui tam* complaint were based on the same transactions or occurrences. Furthermore, the Government pointed out that Section 3731(b)(2) also allows an action to be brought within three years of when the Government learns of the possible action, but in no event, not more than ten years after the violation. Thus, the Government argued that, because the Government did not know about the relator's complaint in the three years before the *qui tam* complaint was filed, the Government could recover for any claims that arose within the ten years of the date that relator filed his complaint. Under this interpretation of the FCA, all of the claims in the case at bar would have fallen within the statute of limitations.

The defendants, in attacking the Government's application of Rule 15, argued that Rule 15(c)(2) only applied to amended complaints, and the Government had not filed an "amended" complaint. Furthermore, the defendants' contended that the Government's complaint could not "relate back" because they were never given notice of the original *qui tam* complaint.

The court observed that there is an identity of interest between an FCA relator and the Government. Based on this observation, the court held that Rule 15(c)(2) might apply to a Government's filing of a complaint-in-intervention, even though it is not actually an amended complaint by the original plaintiff.

The court stressed the more critical issue under Rule 15(c)(2) of whether "the claim or defense asserted arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The court quickly reached the conclusion that, while the Government's complaint outlined alternative theories of the law, the complaint still arose out of the same conduct as the relator's complaint. Accordingly, the court held that Rule 15(c)(2) applied to allow the Government's claims asserted in its complaint to relate back to the filing of the relator's original complaint. Similarly, the court, finding that the Government was not aware of the relator's claims more than three years prior to when the suit was originally filed, ruled that the Government's action reached all claims filed by the defendants ten years prior to the original filing date. Therefore, the court determined that Government's complaint-in-intervention was timely filed as to all of the allegedly false claims.

Government Did Not Violate Rule 41(b) for Failure to Prosecute

The district court also rejected the defendants' argument that the Government's complaint should have been dismissed pursuant to Rule 41(b) for failure to prosecute. The defendants had argued that the Government abused the FCA seal process, allowing the Government to litigate the case *ex parte* for eight years, prejudicing the defendants' ability to prepare a defense, and even preventing the defendants from engaging in discovery.

The Government countered that the Government's repeated extension requests were explicitly allowed by FCA Section 3730(b)(3). Furthermore, the Government pointed out that these extensions were granted by ten district judges, who had found "good cause" to grant the requested extensions. As such, these decisions, the Government argued, became the law of the case.

In weighing the opposing arguments, the court applied the "law of the case doctrine," which the Second Circuit described as mandating "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *See Liona Corp. v. PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991). According to the *Liona* decision, the grounds that justifying a reexamination of the "law of the case" are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. *Id*. Determining that there had not been any intervening changes in the law, the court chose not to revisit the prior decisions in the case. Accordingly, the court denied the defendants' motion to dismiss for failure to prosecute with due diligence.

B. Rule 41(b) Failure to Prosecute

U.S. ex rel. Drake v. Norden Systems, Inc., 375 F.3d 248 (2d Cir. July 14, 2004)

The Second Circuit affirmed in part, reversed in part, and remanded a district court's decision to dismiss a *qui tam* action under Fed. R. Civ. P. 41(b) for failure to prosecute. The court of appeals ruled that the district court had abused its discretion in dismissing those claims that the relator had already adequately pled, but the district court had not abused its discretion in dismissing those claims that the relator had never pled with specificity.

Walter Drake, a former accountant for the defendant Norden Systems, Inc. and its parent company, defendant United Technologies Corporation, uncovered allegedly questionable billing and accounting practices in Norden's finance department. In June 1994, Drake filed the underlying *qui tam* action against Norden and United Technologies, leveling two counts of FCA violations against Norden, one count against United Technologies, and one count against Norden and Technologies together. In 1997, after the Government had conducted a three-year investigation and had refused to intervene in the matter, the complaint was unsealed and served on the defendants. The relator amended his complaint twice over the next year, alleging that the defendants submitted false claims to the Government, including unallowable property tax costs; the depreciation costs of assets that either did not exist, had been sold or written off, or were unrelated to government contracts; the depreciation costs of assets that were not capitalized according to Norden's written policy; and certain costs that were inaccurately categorized as relating to research and development.

In January 1998, the defendants moved to dismiss the complaint for failure to state a claim on which relief could be granted and failure to plead fraud with sufficient specificity. On August 24, 2000, the district court dismissed some of Drake's claims with prejudice but the court also dismissed some of the claims without prejudice, leaving open the possibility that Drake could replead them with greater specificity. The district court ordered Drake to file an amended complaint within sixty days.

Contrary to the court's mandate, Drake, citing an "inexcusable mistake on the part of Drake's then-counsel," did not file an amended complaint within sixty days. Nine months later, ruling on motions for partial summary judgment, the court dismissed Drake's claims that relied on allegations of Norden failing to follow its own written policy on the capitalization of fixed assets. The court, however, stated that Drake still had other viable claims, even though Drake had not amended his complaint by the 60-day deadline.

In January 2002, fifteen months after the 60-day deadline, the district court's clerk notified Drake that, because no action had taken place over the last six months, the case would be subject to dismissal unless Drake submitted a satisfactory explanation for the delay within twenty days. Drake submitted a third amended complaint and a timely explanation that explained that the delay was caused by the complexity of the case and the large amount of discovery involved in the matter.

Defendants moved to strike the third amended complaint and to dismiss the case for failure to prosecute under Fed. R. Civ. P. 41(b). The district court granted the motion, and Drake appealed the case to the Second Circuit.

District Court Abused its Discretion in Dismissing the Relator's Entire Complaint

The Second Circuit affirmed in part and reversed in part. The court, in assessing whether the district court had abused its discretion in dismissing this case, reviewed the decision to determine whether: (1) the relator's failure to prosecute caused a delay of significant duration; (2) relator was given notice that further delay would result in the dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against relator's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions. Noting that no one factor was dispositive and ultimately reviewing the dismissal in light of the record as a whole, the Second Circuit determined that the district court had abused its discretion in dismissing Drake's entire complaint.

While the court of appeals noted that the case had been delayed seventeen months, the court nevertheless ruled that the circumstances of the delay did not rise to the level needed to justify an outright dismissal. In particular, the court noted that the case was initially delayed by nearly three years while the Government investigated the case. Furthermore, the court itself had taken nine months to rule on a pending summary judgment motion. Also, the court maintained that the relator had not deliberately delayed the court process, or ignored repeated warnings about deadlines. In fact, the Second Circuit credited the relator for filing his amended complaint as soon as he was warned that it was past due. Based on these circumstances, the court of appeals ruled that the district court abused its discretion.

The defendants, on the other hand, argued that the entire case should have been dismissed because the Government, not the relator, was the real party in interest, and thus the relator was not entitled to his day in court. The Second Circuit disagreed, pointing out that Congress had statutorily granted private parties the authority to bring actions on behalf of the Government under the FCA. The court refused to add any additional constraints on the relators other than the limits specifically outlined in the FCA.

The Second Circuit did affirm the district court's decision to dismiss those claims that the relator never pled with sufficient specificity. These claims, which the lower court had originally dismissed with prejudice, provided the defendants with inadequate notice of what those claims were, and thus the court of appeals agreed to dismiss these particular allegations.

Therefore, the Second Circuit allowed Drake to move forward with those claims that he had already pled with sufficient specificity; however, the court affirmed the district court's decision to strike from Drake's complaint those claims that never met this hurdle. Accordingly, the court of appeals, in assessing whether the district court had abused its discretion in dismissing this case, affirmed in part, reversed in part, and remanded.

LITIGATION DEVELOPMENTS

***U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 2004 WL 2095442 (E.D. Pa. Sept. 16, 2004)**

A Pennsylvania district court denied a relator's motion for reconsideration of a grant of summary judgment. The district court ruled that because the Movants' proffer of evidence did not constitute "newly discovered evidence," reconsideration was not warranted.

On July 28, 2004, the district court had granted the defendants' motion for summary judgment, ruling that the relator failed to offer any evidence that would have enabled a reasonable juror to find that the defendants violated the FCA. *See United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 2004 WL 1686958 (E.D. Pa. July 28, 2004). In the present matter, the relator moved for reconsideration and requested permission to conduct additional discovery.

The district court, borrowing from the Third Circuit, ruled that reconsideration is only proper on three grounds: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985).

In the matter at bar, the relator made a motion for reconsideration on the theory of newly discovered evidence. Specifically, the relator argued that he received documents from the defendants in October 2003 that contained new evidence of a conspiracy. The relator also argued that a late "document dump" of 20,000 documents also revealed additional evidence of a conspiratorial agreement. Based on this newly discovered evidence, the relator argued that a reasonable juror could now find ample evidence of a conspiracy. In addition, the relator claimed that this new evidence could not have been reasonably known prior to the original hearing.

Quoting from the Third Circuit, the district court noted that it may "refuse to consider evidence presented in a motion for reconsideration when the evidence was available prior to summary judgment." *Bailey v. United Airlines*, 279 F.3d 194, 201 (3d Cir. 2002) (citing *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)). In the case at bar, the court observed that the relator received these particular document in October 2003, well before summary judgment motions were filed on December 15, 2003. The court also noted that the relator failed to explain why the documents could not have been obtained earlier during the discovery process. Lastly, the court observed that the relator failed to supplement the record before the decision was filed in July 2004. After assessing the timeline of events and the actions of the relator, the court ruled that the relator's proffered evidence did not constituted "newly discovered evidence" that warranted a reconsideration of the court's grant of summary judgment. Accordingly, the court denied the relator's motion.

***U.S. ex rel. Magid v. Wilderman, P.C.*, 2004 WL 1987219 (E.D. Pa. Aug. 18, 2004)**

In August 2004, a Pennsylvania district court granted a defense motion *in limine* to exclude from evidence EOMB forms that the relator had secured pursuant to a subpoena to

the United States, which had asserted it was unable to produce the defendants' original HCFA-1500 claim forms. In 1996, Deborah Riva Magid, Ph.D., M.D., filed a *qui tam* action in the Eastern District of Pennsylvania against Wilderman, P.C., a corporation that was the sole provider of anesthesia-related services for a patients at a suburban Philadelphia hospital, and against individual anesthesiologists employed by Wilderman, P.C., alleging that they violated the FCA by submitting false claims to Medicare for reimbursement. In January 1997, the Government refused to intervene.

Arguing that the relator never reviewed the actual HCFA-1500 claim forms that the defendant submitted to Medicare, the defendants moved for summary judgment in December of 2002. Indeed, the relator's experts determined that the defendants submitted false claims only by examining the Explanation of Medicare Benefits forms (EOMBs) that the defendants received from Medicare after they had submitted claims for reimbursement. The court, noting that the defendants had not argued that the court could not consider the EOMBs in assessing whether Magid raised a genuine issue of fact, denied the defendants' motion for summary judgment.

In the case at bar, the defendants filed a motion *in limine* to exclude the EOMBs from trial, arguing that, pursuant to Fed. R. Evid. 1002, the forms were not the best evidence of the claims submitted to Medicare. They also argued that Magid did not use reasonable means to locate the original claims as required by Fed. R. Evid. 1004(1) & (2).

The court granted the defendants' motion. In assessing the relator's efforts to obtain the original documents, the court noted the Rule 1004 exceptions to the Rule 1002 best evidence rule. According to the existing case law that clarifies these exceptions, the party seeking to admit a secondary writing as evidence of the original must persuade the court that he made a reasonable, diligent, and unsuccessful search for the original. *See, e.g.*, *Burt Rigid Box, Inc. v. Travelers Prop. & Cas. Corp.*, 302 F.3d 83, 91-92 (2d Cir. 2002). Accordingly, the court reviewed the relator's efforts to determine whether Magid acted reasonably and with diligence.

In reviewing the timeline of the relator's efforts, the court noted that on August 12, 1998, Magid served a subpoena on the Government requesting the original HCFA-1500 claim forms. The Government informed Magid that the forms would not be available until June 2000. The court could find no evidence that the relator ever followed up with the Government after June 2000. In December 2002, the defendants moved for summary judgment. By the time the relator followed up with the Government in July 2004, the Government was unable to produce the forms in time for the August 23, 2004 trial.

The court ruled that, based on the defendants' motion, Magid should have been on notice that the defendants would object to the admissibility of the EOMBs based on the best evidence rule. In turn, Magid should have, according to the court, followed up with the court earlier to obtain the original HCFA-1500 claim forms. Because Magid failed to take such action, the court ruled that the relator's efforts to obtain the original claim forms were not reasonable or diligent, and thus falling below the Rule 1004 standard. Accordingly, in ruling that the EOMBs were not admissible under Rule 1004(2), the court granted the defendants' motion.

***U.S. ex rel. Cantrell v. New York University*, 2004 WL 1348882 (S.D.N.Y. June 16, 2004)**

In a June 2004 *in limine* hearing, a New York district court ruled that each allegedly false invoice, not each line item on an invoice, could qualify as a potential claim under the False

Claims Act. Additionally, the court ruled that each subsequent amendment or periodic report to a grant application could also qualify as a claim under the FCA.

Physician Stephen Cantrell filed a *qui tam* action against New York University (NYU) alleging that the University's school of medicine and its medical centers fraudulently billed Medicare. Specifically, Cantrell alleged that NYU charged Medicare under a billing code that corresponds to an extended patient visit of 40-60 minutes. In reality, the patients typically visited the facilities for 5-10 minutes, the time necessary to administer an experimental vaccine. NYU would then submit the invoice to Medicare for payment, with each invoice itemizing the expense of several patient visits.

False Invoice with Several Line Items is One FCA "Claim"

Mirroring the findings of the D.C. Circuit in *United States v. Krizek*, 11 F.3d 934, 938-40 (D.C. Cir. 1997), 10 TAF QR 5 (July 1997), the district court, in an earlier hearing, had ruled that one invoice constituted one false claim under the FCA, even if a particular invoice documents numerous entries for payment. In the matter at bar, the parties requested the court to rule *in limme* on the additional issue of whether the absence of "program income" on subsequent reports also constituted false claims under the FCA.

Reporting Obligations Attach FCA Liability at Time of Submission

The relator argued that each undocumented receipt of an item of "program income" resulted in a separate false claim. The defendant, on the other hand, maintained that periodic reporting mandated the disclosure of "program income," and thus receipt of an item of "program income," in of itself, did not trigger a new reporting obligation.

The court, after reviewing the regulatory definitions and regular reporting requirements of "program income," reached the conclusion that each separate financial report that NYU submitted to the Government that failed to report "program income" could support a separate FCA claim against NYU. The court tied this obligation to the grant application, itself, and any subsequent amendment or report.

No Financial Link Between the Private Insurers and the Government

The relator also argued that each claim to a third-party insurer constituted a separate false claim under the FCA. Cantrell argued that, because the Government funded the clinical trials, each time a patient's private insurer was billed, it was a claim subject to the FCA. The court, however, rejected Cantrell's argument, pointing out that the relator made no claim that any of the insurers were provided with government funds or were reimbursed by the Government.

The relator argued that because the Government will reimburse NYU for that which is the subject of the request for payment from the insurer, the request for payment to the *insurer* is also a "claim" under the FCA. Again, the court disagreed with the relator's position, reading 31 U.S.C. § 3729(c) to mean that if a demand for payment is "made to . . . a recipient [of government funding]" and the federal government "provides any portion of the money," then an FCA claim exists. Thus, the court, under the "will reimburse" portion, found that an FCA claim could be based upon a submission to a private party to whom the Government "provides"

no funding but expects reimbursement from the Government. Here, on the other hand, the court observed that the party submitting the allegedly false claim is one receiving government funding. The court refused to extend the 3729(c) definition of "claim" to cover these facts. Accordingly, the court ruled that neither claims, reimbursements to NYU by a private insurer or requests by NYU for reimbursement made to a private insurer, are actionable FCA claims.

***U.S. ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.*, 2004 WL 868271 (E.D. Pa. Apr. 21, 2004)**

A Pennsylvania district court denied the defendants' motion to compel production of the relators' disclosure statements in a *qui tam* action. The court ruled that these materials were protected under the work product doctrine, and the defendants failed to establish that they had a substantial need for the materials, nor could they show that they were unable to obtain the substantial equivalent of the materials by other means.

George Bradford Hunt, Walter Gauger, and Joseph Piacentile brought this *qui tam* action against Merck-Medco Managed Care, L.L.C. and related defendants. During discovery, the defendants moved to compel production of the § 3730(b)(2) disclosure statements that the relators provided to the Government before filing the suit. The relators and the Government jointly opposed the defendants' motion.

Disclosure Statements Protected Under Work Product Doctrine

The court denied the defendants' motion. The work product doctrine protects from discovery materials prepared by a party or attorney in anticipation of litigation or for use at trial. Opinion work product (that is, work product that includes an attorney's mental impressions, conclusions, opinions or legal theories) is accorded an almost absolute protection from discovery, while factual work product is entitled only to qualified immunity, such that it is discoverable "only upon the showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable to without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3).

There was no question that the disclosure statements were work product. They were prepared in anticipation of litigation by the relators' attorneys after the drafting of the relators' complaints. Although the parties disagreed over whether the statements were opinion or factual work product, the court found no need to resolve this issue, for the defendants failed to show that they were entitled to discovery even under the more lenient standard applicable to factual work product.

The court observed that the parties had engaged in significant discovery, but trial was many months away and the defendants were only beginning to depose the relators. Therefore, the factual bases of the relators' claims were already known, or should certainly become known as discovery proceeded. Under such circumstances, the court ruled, compelling production of the disclosure statements would be premature, at best. Accordingly, the court concluded that the defendants failed to establish substantial need for the disclosure statements, or that they were unable to obtain the substantial equivalent without undue hardship. Accordingly, the court denied the defendants' motion to compel.

Interventions and Suits Filed/Unsealed

APRIL 1–SEPTEMBER 30, 2004

***U.S. ex rel. Robinson v. Northrop Grumman*, 89-CV-6111 (N.D. Ill.)**

In April 2004, the complaint was unsealed in a *qui tam* action filed in June 1989 by Rex Robinson and James Holzrichter, former employees at Northrop Grumman's facility in Rolling Meadows, Illinois. The Government intervened in 2001. The complaint alleges that the defense contractor lied about problems with a radar-jamming system and submitted fraudulent bills for material costs and employee services not provided. The Government seeks $369 million in damages. Michael Behn of Futterman & Howard (Chicago) represents the relator.

***Rainmaker Financial v. Garrard County*, (E.D. Ky.)**

In April 2004, the complaint was unsealed in a *qui tam* action filed by Rainmaker Financial against Garrard County Memorial Hospital and Long Term Care Facility. Rainmaker, the company under contract to run the county's hospital and nursing home, alleges that the defendants conspired to file false reimbursement claims to Medicare in 2002. The Government declined to pursue the matter. Richard Clay of Woodward, Hobson, & Fulton (Louisville) represents Rainmaker.

***U.S. v. Logan Pain Management Center*, (W.D. Ky.)**

In April 2004, the DOJ announced it had filed a complaint against Michael Stevens, Jody Stevens, Logan Pain Management Center, Inc., Edward Bailey and Judith Bailey for civil health care fraud. The Government is alleging the defendants, who operated a pain management clinic, submitted false claims to Medicaid, Medicare, and Tricare. The Government alleges that, between December 1997 and July 2003, the defendants billed for approximately $3 million of pain management services that were not performed or did not reflect the true amount of time patients were actually treated. The Government further alleges that employees of the Clinic were instructed to alter patient files, so patient admissions and discharge times would support the fraudulent billing. HHS OIG, the FBI, and the Kentucky Medicaid Fraud Control Unit have investigated the matter. Assistant U.S. Attorney Benjamin Schecter is handling the case for the Government.

***Ediger v. Gold Banc Corporation, Inc.*, (W.D. Okla.)**

In June 2004, the court partially unsealed a *qui tam* suit filed by Roger Ediger, a borrower from People First Bank, a predecessor of Gold Bank-Oklahoma. The judge ordered the partial lifting of the seal to permit plaintiff's counsel to disclose to Gold Banc the existence of the lawsuit and amended pleading. The Government has not yet determined whether it will intervene.

***U.S. ex rel. Lovelace v. Morrison-Knudsen Corp.*, (N.D. Okla.)**

In June 2004, the court partially unsealed a *qui tam* suit filed by seven former employees of Morrison-Knudsen Corp. The suit alleges that Morrison-Knudsen engaged in questionable and illegal practices to drive up the costs of remediation work and to collect bonuses on a $12.1 million U.S. Environmental Protection Agency contract for the replacement of lead-contaminated soil in residential yards, school grounds, and other public-access areas. These practices included falsifying time slips, billing for unrelated equipment, falsifying accident reports, and improperly installing barrier mats. The relators are represented by Joel McNatt of McKinney & Stringer (Tulsa).

***U.S. ex rel. Smith v. Western Sales and Testing of Amarillo, Inc.*, (N.D. Tex.)**

In June 2004, the Government intervened in an FCA suit against a contractor responsible for testing compressed-gas cylinders owned and maintained by the Federal Government. The suit was filed in November 2002. The Government originally chose not to intervene when it was unsealed in August 2003, but reconsidered after further investigation. The complaint alleges that the defendants knowingly failed to comply with their contractual obligations to perform a series of pressure tests on Government owned compressed-gas cylinders. The relator is represented by Philip Russ (Amarillo, Texas).

***U.S. v. Larkin Community Hospital*, (D. Fla)**

In July 2004, the DOJ filed a complaint against Larkin Community Hospital and several individuals for kickback schemes to defraud Medicare. The Government alleged that Larkin was paying kickbacks to doctors in return for sending patients from long-term-care facilities to the hospital for medically unnecessary treatments.

***Becton, Dickinson & Co.* (D. NJ)**

In August 2004, the medical technology company Becton, Dickinson & Co. announced it was informed by the DOJ Civil Division that it faces a *qui tam* suit alleging violations of the False Claims Act.

***Medtronic Inc.*, (W.D. Tenn.)**

In September 2004, a second *qui tam* action was filed in a federal investigation into possible illegal kickbacks to physicians in Medtronic's spinal business. The DOJ is investigating the allegations while the case remains under seal.

***Mississippi Baptist Health Systems, Inc.*, (D. Miss)**

In September 2004, the DOJ announced it had intervened in an FCA suit and filed a complaint alleging civil health care fraud against Mississippi Baptist Health Systems, Inc. and Drs. William Causey, Samuel Peeples, John Long, and Fred McDonnell. The Government is alleging that from 1994 to 2001, Baptist Health paid kickbacks to area doctors in exchange for 34,854 claims made following illegal patient referrals. The scheme helped the Jackson hospital to illegally obtain $38.6 million from Medicaid, Medicare, and other federal sources. The suit was filed under the FCA in 2001 by a former executive whose name remains under seal.

***U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, CV-04-199-A (E.D. Va.)**

In October 2004, the court unsealed a complaint filed by DRC, Inc., Robert Isakson and William Baldwin against security contractor Custer Battles, LLC and its owners. The complaint alleges that Custer Battles, a subcontractor hired to provide additional security forces in Iraq to protect Baghdad airport, falsely billed the U.S. Army Corps of Engineers, USAID, the Coalition Provisional Authority of Iraq, the Iraqi Currency Exchange, Washington Group International, and Bearing Point, Inc. by claiming payment for services not actually performed and equipment not actually provided. The DOJ has declined to intervene in the suit.

Judgments and Settlements

APRIL 1–SEPTEMBER 30, 2004

***U.S. ex rel. Erickson v. University of Washington Physicians*, No. C99-1261 (W.D. Wash.)**

In April 2004, the DOJ announced that the University of Washington Physicians, Children's University Medical Group, and Association of University Physicians had agreed to pay $**35 million** to settle allegations of Medicare fraud. The Government alleged that University of Washington Medical system doctors falsely claimed to have been present at tests that were actually conducted by residents. Then, the doctors destroyed evidence of the fraud and rewrote audit reports to receive increased Medicare funding. Mark Erickson, a former auditor, filed this *qui tam* suit in 1999. The relator's share was approximately 20 percent, or $7.5 million. Steve Berman and Jeffrey Sprung of Hagens-Berman (Seattle) represented the relator. HHS OIG, DCIS, the FBI, and the Washington Medicaid Fraud Control Unit investigated the matter. U.S. Attorney John Mackay, Assistant U.S. Attorneys Susan Loitz and Robert Westinghouse, and Patricia Hanower of the DOJ Civil Fraud Division represented the Government.

[Editor's Note: During the course of the investigation, two University physicians pled guilty to criminal health care fraud charges.]

***U.S. ex rel. Jenkins v. Health Line Clinical Laboratories*, Civ. No. C-98-0358 (N.D. Cal.)**

In April 2004, the DOJ announced that Health Line Clinical Laboratories (HLCL), Aramis Paronyan, and Natella Lalabekyan had agreed to pay **$10 million** to settle claims of Medicare and Medicaid fraud by federal and state governments. The Government alleged that HLCL and its employees defrauded Medicare by performing medically unnecessary blood tests from 1996 to 2003. Kim Jenkins and Timothy Mills, former HLCL salesmen, filed this *qui tam* lawsuit in 1998. The relators' share was 20 percent, or $2 million. Wayne Lamprey of Goodin, McBride, Squeri, Ritchie & Day, LLP (San Francisco) represented the relators. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorney Joann Swanson and Robert McAuliffe of the DOJ Civil Division represented the Federal Government. Deputy Attorney General Eliseo Sisneros represented the California state government. As part of the settlement, HLCL entered into a Corporate Integrity Agreement with HHS to ensure ongoing compliance.

***U.S. ex rel. Hayes v. CMC Electronics*, Civ. No. 01-33 (D.N.J.)**

In April 2004, the DOJ announced that CMC Electronics (CMCE) had agreed to pay **$9.6 million** to settle allegations that it improperly sold the Government used and surplus parts for the Patriot missile program in 1991. The Government alleged that CMCE sold radio communication sets to the U.S. Army at Fort Monmouth, charging for "newly manufactured" equipment that was in fact used or surplus. Russell Hayes, a former project manager, filed this *qui tam* action in 2001. The relator's share was approximately 16 percent, or $1.5 million. Joseph Black and James Moody of The Cullen Law Firm, PLLC (Washington, D.C.) represented the relator. DCIS and the Defense Contract Audit Agency investigated this matter. Assistant U.S. Attorney James Clark represented the Government.

U.S. v. Highmark, Inc., (E.D. Pa)

In April 2004, the DOJ announced that insurance company Highmark, Inc. had agreed to pay **$1.5 million** to settle allegations of Medicare fraud. The Government alleged that employees of the company's Veritus division, a Medicare contractor, tampered with and altered Medicare files and claims information in an effort to improve the division's scores on Medicare evaluations. The allegations arose out of findings from an internal investigation conducted in response to a separate DOJ complaint filed last year.

U.S. ex rel. Stacy v. Eastridge Health Systems, No. 3:99-CV-44 (N.D. W.Va)

In April 2004, Eastridge Health Systems reportedly agreed to pay **$500,000** to settle allegations that it made false claims to Medicare and Medicaid from 1995 to 1999. The Government alleged that Eastridge submitted claims for services to be performed by a physician that were actually performed by social workers. Valerie Stacy, a former employee in the billing department, filed this *qui tam* action in 1999. The relator's share was approximately 20 percent, or $75,000. David Hammer of Hammer, Ferretti, & Schiavoni (Martinsburg, WV) represented the relator. HHS OIG, DOD, the FBI, and the West Virginia Department of Health and Human Resources investigated the matter. Assistant U.S. Attorney Rita Valdrini represented the Government.

U.S. ex rel. Franklin v. Warner-Lambert, (D. Mass.)

In May 2004, Warner-Lambert reportedly agreed to pay **$83.6 million** to settle allegations of illegally promoting the epilepsy drug Neurontin for conditions not approved or tested. The Government alleged Warner-Lambert promoted Neurontin to doctors for the off-label purposes of treating epilepsy and bipolar disorder, despite studies showing it was not effective for either. David Franklin, a former Warner-Lambert medical liaison, filed this *qui tam* action in 1996. The relator's share was approximately 29 percent or $24.6 million. Thomas Greene of Greene & Hoffman (Boston) represented the relator. HHS OIG, the FDA Office of Criminal Investigations, the Veteran's Administration's Office of Criminal Investigations, and the FBI investigated the matter. Assistant U.S. Attorneys Thomas Kanwit and Sara Bloom, and Stanley Alderson of the DOJ Civil Division represented the Government. In addition to the federal FCA settlement, Warner-Lambert agreed to pay $68.4 million to settle its civil liabilities to the fifty states and the District of Columbia, as well as a $240 million criminal fine for violating the FDA branding standards. Pfizer, Warner-Lambert's parent company since 2000, has agreed to enter into a Corporate Integrity Program with HHS to ensure ongoing compliance.

U.S. ex rel. Russo v. WorldCom Inc. and MCI Group, Civ. No. 03-822-SVW (C.D. Cal.)

In May 2004, the DOJ announced that Worldcom, Inc. and MCI Group had agreed to pay **$27 million** to settle allegations that they defrauded General Services Administration from 1999 to 2004. The Government alleged that the telecom companies passed costs and fees for Presubscribed Interexchange Carrier Charges on to the Government in excess of those allowed under an existing contract. John Russo, a former telecommunications specialist, filed

this *qui tam* action. The relator's share was 16 percent or $4.2 million. Don Warren and Phil Benson of the Warren-Benson Law Group (Los Angeles) represented the relator. The GSA investigated the matter. Assistant U.S. Attorney Lisa Palombo and Andy Mao of the DOJ Civil Division represented the Government. As part of the settlement, the Government will receive $670,000 in credits from MCI.

***U.S. ex rel. San Francisco Unified School Dist. v. Nippon Elec. Co. Bus. Network Solutions*, (N.D. Cal)**

In May 2004, the DOJ announced that Nippon Electronic Co. Business Network Solutions (NEC) agreed to pay **$10.3 million** to resolve allegations of fraud against a government-funded program for schools and libraries. The Government alleged that NEC submitted false claims to the Federal Communications Commission's E-Rate program by engaging in non-competitive bidding practices and paying marketing fees to entities involved in the selection of E-Rate program vendors. The San Francisco Unified School District (SFUSD) filed this *qui tam* action in 2003. Louise Renne, the SFUSD General Counsel, and Eric Havian of Phillips & Cohen LLP (San Francisco) represented the relator. FCC OIG, the FBI, and the DOJ Antitrust Division investigated the matter. Assistant U.S. Attorneys Sara Winslow and Alicia Bentley of the DOJ Civil Division represented the Government. In addition to the settlement, NEC will pay a $4.7 million criminal fine and provide $5.6 million in goods and services to a number of California school districts. As part of the settlement, NEC has entered into a comprehensive Corporate Compliance Program with the Government.

***U.S. ex rel. Moczulski v. Kidspeace*, Civ. No. 02-1846 (E.D. Pa)**

In May 2004, the DOJ announced that Kidspeace Corporation had agreed to pay **$1.8 million** to settle allegations of Medicare reimbursement fraud. The Government alleged Kidspeace billed Medicare for mental health services when children were not even present and billed Medicare for strictly recreational activities. James Moczulski, a former patient accounts manager, filed this *qui tam* action in 2002. The relator's share was approximately 9 percent or $168,855. Jeanne Damirgian (Philadelphia) and Brian Kenney (Philadelphia) represented the relator. HHS OIG and the Pennsylvania Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorneys Margaret Hutchinson and Virginia Gibson represented the Government. As part of the settlement, Kidspeace entered into a Corporate Integrity Agreement with HHS to ensure ongoing compliance.

***U.S. v. Regency Health Services*, (D. Md.)**

In May 2004, the DOJ announced that Regency Health Services agreed to pay **$232,000** to resolve allegations of Medicare fraud. The Government alleged that Robert Bristol, owner of Regency Health Services, submitted false cost reports to Medicare for what were actually salaries and personal expenses. HHS OIG investigated the matter. Assistant U.S. Attorney Roann Nichols represented the Government. As part of the settlement, Bristol and Regency Health Services have agreed to accept a five-year exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

U.S. ex rel. Friedman v. Rite Aid Corp., 97-CV-7889 (E.D. Pa.)

In June 2004, the DOJ announced that Rite Aid Corporation agreed to pay **$7 million** to the United States and participating states to settle allegations that the company submitted false prescription claims to government health insurance programs. The Government alleged that Rite Aid billed Medicaid, Tricare Management Activity, and the Federal Employee Health Benefits Program for drugs that were never delivered to beneficiaries of the government health care programs and were later returned to stock. Larry Friedman, a former pharmacist, and Marion Altman, Jr. filed their respective *qui tam* complaints in 1996. Friedman will receive $1 million, and Altman will receive $55,000. Ross Begelman and Marc Orlow of Begelman & Orlow (Cherry Hill, NJ) represented relator Friedman. HHS OIG, DOD and the U.S. Office of Personnel Management investigated the matter. Assistant U.S. Attorneys K.T. Newton and Allie Pang of the DOJ Civil Division represented the Government.

[Editor's Note: Mr. Friedman's complaint was filed in the Eastern District of Pennsylvania; Mr. Altman's was filed in the District of South Carolina.]

U.S. ex rel. Altman v. Wal-Mart Corporation, No. 2-96-1005-2 (D. S.C.)

In June 2004, the DOJ announced that Wal-Mart agreed to pay **$2.87 million** to settle allegations of Medicaid fraud. The Government alleged that Wal-Mart billed Medicaid for partially filled prescriptions as if they were full prescriptions when only partially filled prescriptions were dispensed. The undispensed portions of the prescriptions were then re-stocked into inventory without extending credit to Medicare. Marion Altman Jr., a former Wal-Mart employee, filed this *qui tam* action in 1996. The relator's share was $95,766. HHS OIG investigated the matter. Allie Pang of the DOJ Civil Division and Laurel Gillespie of DOD represented the Government. As part of the settlement agreement, Wal-Mart entered into a Corporate Integrity Agreement with HHS OIG.

U.S. ex rel. Evans v. Banner Health Systems, 01-CV-1033-B (D. Wyo.)

In June 2004, the DOJ announced that Banner Health agreed to pay **$ 6.1 million** to settle allegations of Medicare reimbursement fraud. The Government alleged that Banner filed claims that were not reasonable or necessary, or for which the amount, frequency, and duration of services were not reasonable or necessary. Debbie Evans, a former Banner employee, filed this *qui tam* action in 2001. The relator's share was approximately 16 percent, or $1 million. R. Michael Shickich (Casper, WY) represented the relator. HHS OIG investigated the matter. Assistant U.S. Attorney Tom Roberts and Elizabeth Rinaldo of the DOJ Civil Fraud Division represented the Government.

U.S. ex rel. Schumacher v. Stephens, CV 98-30-GF-DWM (D. Mont.)

In June 2004, the DOJ announced that Robert Stephens, Jr. agreed to pay **$4.25 million** to settle allegations of farm subsidy fraud. The Government alleged that Stephens set up three shell companies using employees and family members as nominee owners. Those owners had no real interest in the farm operation, but were able to make Stephens eligible to collect additional farm subsidies from the Department of Agriculture. Gary Schumacher and Barbara Darrow,

Stephens' former neighbors, filed this *qui tam* action in 1998. The relator's share was 19 percent or $829,000. Stuart Lewin (Great Falls, MT) represented the relator. The Farm Service Agency investigated the matter. Assistant U.S. Attorney Leif Johnson represented the Government.

***U.S. ex rel. Walker v. Radiology Regional Center*, (D. Fla.)**

In June 2004, the DOJ announced that Radiology Regional Center (RRC) agreed to pay **$ 2.53 million** to settle allegations of Medicare reimbursement fraud. The Government alleged that RRC billed Medicare for ultrasound procedures, reconstruction procedures, and MRI's not ordered by the patients' treating physicians. Suzan Walker, a former RRC employee, filed this *qui tam* action in 2000. The relator's share was approximately 18 percent or $443,378. Joseph Pappacoda (Fort Lauderdale) represented the relator. HHS OIG investigated the matter. Assistant U.S. Attorneys Mark Steinbeck and Carol Wallack of the DOJ Civil Division represented the Government. As part of the settlement, RRC has entered into a Corporate Integrity Agreement with HHS OIG.

***U.S. ex rel. Trombetta v. EMSCO Billing Services, Inc.*, (N.D. Ill.)**

In June 2004, DOJ announced that EMSCO Billing Services, Inc., National Emergency Services, Inc. and NES Holdings, Inc. agreed to pay **$1.1 million** to settle allegations of Medicare and Medicaid fraud. The Government alleged that the emergency room staffing and billing services over-billed Medicare and Medicaid by falsely claiming a higher level of services provided to patients at more than a half-dozen Chicago area hospitals. Linda Trombetta, a former EMSCO billing supervisor, filed this *qui tam* action in 1996. Three years later, another former billing supervisor, Linda Freeman, filed a similar suit and the court consolidated the cases. The relators' share is 18 percent or $214,980. Steven Cohen and Randy Berlin of the Cohen Law Group, PC (Chicago) represented relator Trombetta. Norman Hafron of Rosenfeld, Rotenberg, Hafron & Shapiro (Chicago) and Barry Rosen of Sachnoff & Weaver (Chicago) represented relator Freeman. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorneys Patrick Johnson and Carole Ryczek represented the Government.

***U.S. ex rel. Covington v. Educators Mutual Insurance Association of Utah*, (D. Utah)**

In July 2004, it was reported that the Educators Mutual Insurance Association of Utah (EMIA) agreed to pay **$2.9 million** to settle allegations that its coverage violated Medicare laws. The Government alleged that EMIA's coverage for patients with end stage renal disease violated Medicare laws by making it the secondary rather than primary payer on kidney transplants and dialysis services. Mary Covington, founder and president of Claims Management Inc., filed this *qui tam* suit in 2002. The relator's share was 16 percent or $457,600. Brian King (Salt Lake City) represented the relator. HHS OIG investigated the matter.

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

In July 2004, Ernst & Young agreed to pay **$1.5 million** to settle allegations of helping to conceal illegal Medicare billing practices at nine hospitals. The Government alleged that Ernst & Young recommended billing practices to nine of its client hospitals that caused Medicare

to pay $900,000 for unnecessary laboratory tests. U.S. Attorneys Patrick Meehan and Mark Tuohey III represented the United States.

U.S. ex rel. Alcorn v. Schering-Plough Corp., (E.D. Pa.)

In August 2004, the DOJ announced that Schering-Plough Corp. agreed to pay **$345 million** to the Federal Government and the fifty states to settle allegations of criminal and civil Medicare fraud. The Government alleged that Schering-Plough failed to account for significant discounts to its two largest Managed Care customers in its reported "best price" for Claritin from 1998-2002. That discrepancy forced the Medicaid program and all PHS entities to grant excessive reimbursements. Charles Alcorn, Beatrice Manning, and Raymond Pironti Jr., former employees of Schering-Plough subsidiary ITG, filed this *qui tam* action in 1999. The relators' share was $31,662,173. The relators were represented by Steven Engelmyer and Neil Mullin of Kleinbard, Bell & Brecker LLP (Philadelphia). The National Association of Medicaid Fraud Control Units represented the fifty states. HHS OIG and USPS Postal Inspection Service investigated the matter. Assistant U.S. Attorneys Marilyn May and Margaret Hutchinson handled the civil case with the assistance of Andy Mao of the DOJ Civil Division. Assistant U.S. Attorneys Marilyn May and Michael Levy handled the criminal case for the Government. As part of the agreement, Schering-Plough pled guilty to violating the Anti-Kickback Act, paid a fine of $52.5 million, and Schering-Plough's marketing division was excluded from all federal health care programs for at least five years. In addition, Schering-Plough has entered into a Corporate Integrity Agreement with HHS.

U.S. ex rel. Eastmond v. Vortec Corp, No. 00-cv-6458 (E.D. Pa.)

In August 2004, Vortec Corp. reportedly agreed to pay **$4.5 million** to settle allegations of defrauding the Department of Energy. The Government alleged that Vortec and its officers had submitted reimbursement forms for personal expenses and for equipment never purchased. Donald Eastmond, a former employee, filed this *qui tam* suit in 2000. The relator's share was approximately 24 percent or $1.08 million. Marc Raspanti and Michael Morse of Miller, Alfano & Raspanti (Philadelphia) represented the relator. DOE investigated the matter. Assistant U.S. Attorney Cedric Bullock represented the Government.

U.S. ex rel. Ediger v. Gold Banc, (W.D. Okla.)

In August 2004, the DOJ reported that Gold Banc had agreed to pay **$16 million** to settle allegations that it defrauded the Farm Service Agency (FSA). The Government alleged that Gold Banc submitted false certifications and claims to the FSA and charged excessive interest rates and fees on agricultural loans. Roger Ediger, a former borrower, filed this *qui tam* suit in 2002.

U.S. ex rel. Klimasewiski v. Travelers Insurance Co., (S.D.N.Y.)

In August 2004, the DOJ announced that Citigroup Inc.'s Travelers Insurance Co. and United Health care Insurance Co. agreed to pay **$20.6 million** to settle allegations of Medicare fraud. The Government alleged that Travelers and United Health care received excessive reimbursements by over-billing Medicare in order to get performance-incentive payments. United Health care allegedly continued the improper billing practices after assuming Travelers' con-

tracts. Under the settlement, Travelers will pay $10.9 million and United Health care will pay $9.7 million. Robert Klimasewiski, a former employee, brought this *qui tam* action in 1999. HHS OIG investigated the matter. Assistant U.S. Attorney Jeffrey Oestericher represented the Government.

***U.S. v. Farallon Fixed Income Associates*, (D. Mass.)**

In August 2004, the DOJ announced that Farallon Fixed Income Associates (FFIA) had agreed to pay **$1.5 million** to settle allegations of defrauding the U.S. Agency for International Development (USAID). The Government alleged that FFIA misused the resources, staff, and influence of Harvard University's USAID funded Russia project to pursue investments in Russia. The FBI and the USAID OIG investigated this matter. Assistant U.S. Attorneys Sara Bloom and Nancy Rue in the Massachusetts Civil Division and Alicia Bentley and Sara McLean of the DOJ's Commercial Litigation branch represented the Government.

***U.S. v. Boeing Co.*, (D. Mo.)**

In September 2004, The Boeing Co. reportedly agreed to pay **$6 million** to settle allegations of delivering substandard equipment under a defense contract. The Government alleged that Boeing delivered military C-17, F-15, and F/A-18 aircraft containing parts made of Russian-melted titanium rather than domestically processed titanium, as specified in the contract. As part of the settlement, Boeing will provide free aircraft parts valued at $1.4 million to the Government. The Defense Contract Management Agency, Air Force Office of Special Investigations, DCIS, NCIS, and the Defense Contract Auditing Agency investigated the matter.

***U.S. v. Cushman & Wakefield*, (N.D. Tex.)**

In September 2004, Cushman & Wakefield, Interior Systems, Inc. (ISI) and ISI's Vice-President reportedly agreed to pay **$8.4 million** to settle allegations of postage fraud. The Government alleged that the companies underpaid the postage due involving a mail pre-sort business they operated in Dallas from 1997-2000. The U.S. Postal Inspection Service investigated the matter.

***U.S. ex rel. Parks v. L.S. Starrett Co.*, (D. Mass.)**

In September 2004, L.S. Starrett reportedly agreed to pay **$500,000** to settle allegations of using substandard parts in coordinate measuring machines sold to the DOD, the USPS, and NASA. The Government alleged that Starrett rushed substandard measuring equipment and parts in "Rapid Check" machines despite prior malfunctions. Richard Parks, a troubleshooter working on one of Starrett's products filed this *qui tam* action in 2002. DCIS, the US Postal Inspection Service, and NASA investigated the matter.

Legislative Update

APRIL 1–SEPTEMBER 30, 2004

President Bush Signs Civil Rights Tax Relief Act into Law

On October 22, 2004, President Bush signed the Civil Rights Tax Relief Act, ending a major financial hurdle for *qui tam* relators. Prior to passage of the Act, False Claims Act whistleblowers and litigants in Civil Rights cases were required to pay taxes on "phantom income" that actually went to their lawyers and which was then taxed a second time. As outlined in the below press release, Sen. Charles Grassley (R-IA) lead the charge to end this double taxation, noting that it reduced settlements so significantly that whistleblowers sometimes got little or no reward for their efforts.

For Immediate Release
Wednesday, Oct. 6, 2004

GRASSLEY ADVANCES CIVIL RIGHTS TAX REFORM

WASHINGTON – Sen. Chuck Grassley, chairman of the Committee on Finance, today won near-final passage of reforms to end unfair taxation in civil rights cases.

"Tax relief gets the headlines, but part of tax relief is tax fairness," Grassley said. "It's clearly a fairness issue to make sure people don't have to pay income taxes on income that was never theirs in the first place. That's common sense."

Grassley was the lead Senate negotiator working on a House-Senate conference committee to reconcile differences between each chamber's manufacturing tax and trade bill. Today, the conference committee is close to finishing its work. By 5 p.m., the conferees will finish voting on the final conference report. If they approve it, as expected, their action will clear the conference report for consideration in each chamber later this week. Grassley secured the inclusion of the civil rights provision in the conference report, which can't be amended.

Grassley has long worked to end a tax law fluke that forces plaintiffs who win settlements in civil rights cases and other lawsuits to pay income taxes on parts of the settlements they never see—in some cases even owing thousands of dollars more than they win. Several Iowa lawyers have written to Grassley out of concern for their clients in these cases.

The Grassley provision will, in effect, exclude from a plaintiff's taxable income legal fees in certain civil rights suits, including those alleging job-related discrimination, and other lawsuits.

"If we don't fix this law, it could have a chilling effect on discrimination cases," Grassley said. "Legitimately wronged people could have little recourse. An out-of-whack tax system is in danger of negating the value of discrimination lawsuits."