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

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

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# TABLE OF CONTENTS

# FROM THE EDITOR

Every four years, as the presidential elections spiral into a partisan frenzy, the country reexamines every minutiae of daily life through politically tinted glasses. Seemingly innocuous banter takes on a new spin, somehow revealing the deep inner political slant of every American. Even without meaning to reach for the extremes, the contentious environment makes one latch onto the far outer marching orders of one's respective tribe.

In the practice of law, partisan stripes run particularly deep, even when presidential hopefuls aren't crisscrossing the globe for votes. However, in the False Claims Act arena, where the pantheon of political champions includes respected members from both parties, it is refreshing to work in our own apolitical oasis, largely free of political ill will. Sure, over the years opponents have tried to paint the Act as being a tool of the far left or merely a "get rich quick scheme" for trial lawyers, but the misplaced labels just don't stick. Somehow the fraudfeasors have had a hard time publicizing the "Lincoln Law" or the subsequent "Reagan Amendments" as being the brainchild of a left-wing Liberal. On the other side of the fence, opponents have scratched their head when it comes to the free market principles driving the engine of *qui tam* actions.

Perhaps the False Claims Act is most aptly described as the unicorn of the legal world. It certainly has its own unique characteristics that are quite different from the other laws on the books, but, somehow, it looks strangely familiar. The Act is also difficult to corral into one particular area of the law, and it tends to carry a certain mystique that is hard to ignore. Its allure draws people from the four corners of the legal world, enticed by the chance to strike that allusive balance of doing well while doing good.

However, for those of us who track the Act on a daily basis, its mystery is no mystery at all: Fighting fraud is a bipartisan issue, period. The basic tenets of the Right and the Left agree that fraud against the American tax dollar places our country and the citizenry at risk. Whether the viewpoint centers on corporate responsibility for wrongdoing or ensuring that every tax dollar is spent appropriately, the end game is the same. Perhaps this was best illustrated recently in New Jersey, the home state for the world's largest pharmaceutical companies. There, despite the protestations of numerous liars for hire, *every single member* of the New Jersey Legislature, both Republicans and Democrats, voted to pass the State False Claims Act. Yes, the state that has been recently crippled with fraud decided to look beyond the politics of the moment and to catch its FCA unicorn.

Sincerely,

Jeb White
jwhite@taf.org

# Recent False Claims Act & *Qui Tam* Decisions

**NOVEMBER 1–DECEMBER 31, 2007**

# STATUTORY INTERPRETATIONS

## A. Section 3729(A)(7) Calculating Damages

### *U.S. ex rel. Purcell v. MWI Corporation*, 2007 WL 3287443 (D.D.C. Nov. 6, 2007)

**A *qui tam* relator brought an FCA action against his former employer-company. Later, eight years after the last allegedly false claim was submitted, the government intervened in the action and added claims against the company's president. The defendants filed summary judgment motions. The court, in granting the president's motion, found that the government could not take advantage of the § 3731(b)(2) tolling provision, for the relator's complaint had put it "on notice" about the potential claims and the government failed to act within three years of being put on notice. However, the court denied the company's summary judgment motion, which had argued that there were no damages because the government had already been repaid. The court, instead, found that the company was liable for the full amount because the government had not received what it bargained for, namely a loan program free of fraud.**

In 1998, Robert Purcell brought an FCA *qui tam* action against his former employer Moving Water Industries, Inc. (MWI), a manufacturer of industrial pumps. In 2002, eight years after MWI submitted its last allegedly false claim, the government intervened, bringing suit on its own accord against MWI *and* its former president and majority shareholder, David Eller. The complaint alleged that the defendants failed to disclose irregular commissions paid to their Nigerian sales agent from 1992–1994, in contravention of certifications signed by the defendants to the United States Export-Import Bank (Ex-Im), which helped finance the pump sales. The defendants filed motions for summary judgment.

#### FCA Claims Against Individual Defendant Are Time Barred

Eller argued that the government's FCA claims against him were time barred because it failed to file a complaint for "[m]ore than 3 years after the date when facts material to the right of action are known or reasonably should have been known," as required by 31 U.S.C. 3731(b)(2).

The timeliness of a plaintiff's complaint under § 3731(b)(2) of the FCA depends on a determination of when the fraud at issue was known or reasonably should have been known. In the D.C. Circuit, the limitations period starts to run on "the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." *Loughlin v. United States*, 230 F. Supp. 2d 26, 40 (D.D.C. 2002) (quoting *Zeleznik v. United States*, 770 F.2d 20, 23 (3d Cir.1985)). In short, the court

had to determine at what point was the government on notice of the injury alleged in the complaint.

The government claimed that the relator's statement did not notify the government of a potential claim, because the statement failed to provide sufficient evidence that the certifications were "false"; i.e., the statement includes no information about the commissions paid by MWI.

The court rejected the government's argument, for the relator's complaint and statement of material evidence "provide[d] the government (specifically, the Department of Justice) with evidence supporting at least the beginnings of its current case against the defendant." According to the court, the government was on notice even though the extent and precise nature of an injury remained unclear. Accordingly, because the court decided that the government could not take advantage of the § 3731(b)(2) tolling provision, the court concluded that the claims against Eller were time barred.

## The Repayment of Loans In Full Does Not Nullify Damages Calculation

The defendants also claimed that because the government was repaid in full, it incurred no damages and, therefore, may only claim statutory penalties. The government responded that the defendants may be entitled to a credit equal to the amount that the United States has recouped, but only after the government's damages are trebled.

The court observed that in D.C. Circuit, damages are ultimately measured based on "what the government would have paid out had it known of the information that [the defendant] omitted."*United States v. TDC Mgmt. Corp., Inc.*, 288 F.3d 421, 428 (D.C.Cir.2002).

The defendants directed the court's attention to the case of *Ab-Tech Construction, Inc. v. United States*, in which a government contractor for a data processing facility violated eligibility criteria in its subcontracting work, misrepresenting that public funds were being expended to assist minority-owned enterprises. 31 Fed.Cl. 429, 434 (Fed. Cl.1994). The government sought as damages the entire amount it had paid Ab-Tech for the data processor, but the court denied this relief, finding that the government had offered "[n]o proof ... to show that [it] suffered any detriment to its contract interest because of Ab-Tech's falsehoods. Rather, the [g]overnment got essentially what it paid for."*Id.*

As an initial consideration, the court noted that *Ab-Tech* constitutes persuasive rather than controlling precedent. Instead, the court relied on precedent that instructs that causation is met where false statements are critical to eligibility for a loan or bear upon the likelihood of an applicant's meeting loan payments. *United States v. Hibbs*, 568 F.2d 347, 352 (3d Cir. 1977). According to the court, when these conditions are present, it is likely that the entire amount of federal funds expended on a program would not have been spent. *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 443 (E.D.N.Y. 1995); *U.S. ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995).

The defendants did not contest that compliance with Ex-Im's regulations was critical to eligibility for Ex-Im financing or that the payment of unnecessarily large commissions could bear upon the likelihood of a beneficiary repaying the loan in full. The court ruled that this alone rendered the defendants liable for the full loan amount. In fact, the court did not even need to distinguish *Ab-Tech* to reach this conclusion-because here the government did not "get essentially what it paid for." *Ab-Tech,* 31 Fed.Cl. at 434. Ex-Im's mission includes ensuring that government-sponsored export loans advance an international trading regime based on transparency, accountability and corruption-free economic exchange. The court observed that Ex-Im's benefit of the bargain was inextricably intertwined with the fulfillment of the terms and representations of the bargain. Because that is what the defendants denied to Ex-Im, the court held that damages were appropriate.

## B. Section 3729(C) Definition of "Claim"

### *U.S. ex rel. Goughnour v. REM Minnesota, Inc.*, 2007 WL 4179354 (D. Minn. Nov. 20, 2007)

**A relator brought an action against a home health care agency, alleging that it fraudulently won a competitive bid to provide Medicaid-funded services by improperly shifting expenses on its budget sheet. Reading § 3729(c) to be an exclusive list of allowable false "claims," a Minnesota district court ruled that the relator had failed to allege a "claim," for "internal accounting reports" are not listed in § 3729(c). The court also refused to allow the relator an opportunity to amend his complaint, for the government did not have a chance to review the additional information obtained during post-declination discovery.**

REM Minnesota, Inc. contracted with human service agencies in Minnesota counties to provide group home health care services. These Medicaid-funded contracts were awarded based on competitive bidding.

As a REM Minnesota regional director, Marshall Goughnour discovered that the company was improperly shifting expenses between regions so as to give the impression to the state that it had a balanced budget. After raising his concerns internally about its accounting practices and being fired, Goughnour field an FCA *qui tam* action solely under provision 3729(a)(2). After the government declined to intervene, REM Minnesota filed a motion to dismiss.

#### Relator Failed To Allege A "Claim"

FCA Section 3729(a)(2) imposes liability when a person "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid by government."

Targeting the language of § 3729(a)(2), REM Minnesota maintained that the complaint lacked particularity, for it failed to explain how the budgets caused the federal government to actually pay or approve any fraudulent "claims."

The court, viewing § 3729(c) definition of "claim" as an exclusive list, concluded that "internal accounting reports and budgets do not fit within the statutory definition." In turn, because Goughnour failed to allege a "claim," the court granted the defendant's motion to dismiss.

#### Relator Was Not Permitted To Amend His Complaint

The court also refused to allow Goughnour an opportunity to amend his complaint. The court noted that discovery had continued during the pendency of the motion, and to allow Goughnour to amend his complaint based on this post-declination discovery would, according to the court, run counter to the FCA scheme. Specifically, the court quoted *U.S. ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552, 560 (8th Cir. 2006),

in concluding that permitting a relator to file another complaint after additional discovery would mean that the government was compelled to decide whether or not to intervene absent complete information about the relator's cause of action.

## C. Section 3730(b)(1) Government Consent for Dismissal

### *U.S. ex rel. Globe Composite Solutions, Ltd. v. Solar Construction, Inc.*, 2007 WL 4578300 (D. Mass. Dec. 19, 2007)

**Over the objections of the government, a *qui tam* relator and a defendant sought to dismiss an FCA action with prejudice as to the relator and the government. However, a Massachusetts district court, pointing to the language of § 3730(b)(1), refused to dismiss the government's claims with prejudice.**

Globe Composite Solutions brought an FCA *qui tam* action and a related action against its competitor Solar Construction, Inc. The defendant agreed to settle the related action, which was filed in another court, but only if the FCA action was voluntarily dismissed with prejudice as to the relator *and* the federal government. The government, however, objected and argued that such a dismissal was not permitted without the consent of the Attorney General.

In agreeing with the government, the court observed that § 3730(b)(1) unqualifiedly provides that a *qui tam* action "may be dismissed only if the court and Attorney General give written consent."

Accordingly, the court ruled that it did not have the authority to dismiss the action with prejudice as to the claims of the government, for the government had not consented to such a dismissal. In turn, the court dismissed the case with prejudice as to the relator and *without* prejudice as to the government.

## D. Section 3730(d)(1) Reasonable Attorneys' Fees

### *U.S. ex rel. Gonter v. Hunt Valve Company, Inc.*, 2007 WL 4386206 (6th Cir. Dec. 18, 2007)

**After settling an FCA *qui tam* case, a district court ordered the defendant to pay the relators' previous law firm a certain amount for the work it did on behalf of the relators in the case. The firm appealed the decision to the Sixth Circuit, arguing that the court abused its discretion by using lower, earlier rates and by not applying a 25-percent enhancement of the lodestar amount. The firm also argued that the court impermissively excluded the fees earned for litigating the fee petition. The Sixth Circuit, in affirming the use of the earlier rates, determined that the court gave a sufficiently "clear and concise" explanation. The court of appeals also agreed that this case was not one of the rare cases of "exceptional success" to warrant an enhancement. However, the court, in reversing part of the lower court's decision, held that "time spent in preparing, presenting, *and trying* attorney fee applications is compensable as part of the reasonable fee."**

Tina and William Gonter filed an FCA *qui tam* actions against several shipbuilders and Hunt Valve Company, a manufacturer of faulty valves used in U.S. Navy submarines and ships. The government ultimately intervened and settled the suit against Hunt Valve, but declined to intervene in the suit against the shipbuilders.

From 2001 until March 2005, the relators were represented by the law firm of Helmer, Martins, Rice & Popham Co., L.P.A. ("HMRP"). When the two HMRP attorneys overseeing the case joined another firm, Volkema Thomas LLP, the relators chose to conclude HMRP's representation and to continue with Volkema Thomas.

Subsequently, in March 2006, the relators reached a $12.5 million settlement with the shipbuilders. HMRP sought $2,758,748.12 in attorneys' fees and $124,498.29 in reimbursable expenses, for a total of $2,883,246.41. The shipbuilders' agreed that they owed HMRP for its work on the case, but argued that the amount should total $1,110,789.85, representing $1,019,953.21 in attorneys' fees and $90,836.14 in expenses. The lower court ultimately awarded HMRP fees of $1,749,245.80 and expenses of $122,500.60, for a total of $1,871,746.40. HMRP appealed the decision to the Sixth Circuit.

#### Lower Court Provided An Adequate Reason To Apply Earlier, Lower Rates

HMRP argued that the district court abused its discretion by using 2004 billing rates instead of the then-current 2005 rates. As an initial matter, the Sixth Circuit stressed that the starting point for determining a reasonable fee is lodestar, which is the product of the number of hours billed and a reasonable hourly rate.

The lower court reasoned that to award fees based on the then-current 2005 rate would be tantamount to a "windfall" for HMRP, for the bulk of the legal work occurred from 2001 to 2003. However, seeking to compensate HMRP for its long wait

in obtaining payment for 2001–2003 work, the court selected a middle ground of 2004 rates.

The Sixth Circuit, noting the district court's "clear and concise" explanation, ruled that the court did not abuse its discretion in applying 2004 rates.

## It Was Acceptable Not To Apply A Fee Enhancement

On appeal, HMRP argued that the district court abused its discretion by not applying a 25-percent enhancement of the lodestar.

The Sixth Circuit reiterated its earlier holding that fee enhancements are only permissible in rare cases of "exceptional success." *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005). Moreover, the U.S. Supreme Court has cited with approval a Fifth Circuit opinion, which enunciated several factors that a court may consider in determining whether a reasonable fee ought to include an augmentation. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).

HMRP pointed to a number of *Johnson* factors in support of its argument for an enhancement. In particular, HMRP highlighted that the $12.5 million settlement with the shipbuilders comprised over fifty percent of the yearly total for nonintervened FCA actions in 2006.

The district court agreed with HMRP that it was a "substantial sum," but it also observed that the relators originally alleged over $100 million in damages. More importantly, though, the court noted that the two former HMRP most involved in the settlement had not sought an enhancement. Consequently, the district court refused to apply an enhancement.

The Sixth Circuit noted that there was not a single case where a decision not to apply an enhancement was overturned as an abuse of discretion. The court of appeals, refusing to break new ground, affirmed the lower court's "adequately explained" decision for denying the enhancement.

## Time Spent Litigating A Fee Petition Is Compensable

Lastly, HMRP argued that the lower court abused its discretion by refusing to award attorneys' fees for litigation related to the fee petition itself. In its fee petition, HMRP sought $72,556 in compensation for the preparation and resolution of the dispute over the attorneys' fee award. The district court awarded only $30,083 for preparing the petition but zero for litigating the issue.

The Sixth Circuit previously addressed the issue in the context of Title VII in *Coulter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986). In *Coulter*, the Sixth Circuit held that "time spent in preparing, presenting, *and trying* attorney fee applications is compensable as part of the reasonable fee." *Id.* at 151 (emphasis added). However, the *Coulter* court limited compensable hours for preparing and "successfully" litigating a fee petition to three percent of the hours in the main case.

In turn, because the district court's decision excluded the time spent litigating the fee petition, the Sixth Circuit reversed this part of the decision and applied the three percent rule to the lower court's lodestar award of $1,749,245, yielding a product of $52,477 in attorneys' fees.

## E. Section 3730(d)(3) Relator's Share for Initiator of Fraud

### *U.S. ex rel. Marchese v. Cell Therapeutics, Inc.*, 2007 WL 4410255 (W.D. Wash. Dec. 14, 2007)

**After the government intervened and settled an FCA *qui tam* action, the government argued, under § 3730(d)(3), that the relator should not receive a relator's share, for he supposedly "initiated" and "planned" the fraudulent scheme. A Washington district court, in rejecting the government's argument, noted that he sought out the advice of the company's consultant and made an honest mistake in advancing the plan. However, because he did not act immediately to rectify the problem as soon as it became apparent, the court only awarded him the statutory minimum of fifteen percent.**

While employed as a Cell Therapeutics, Inc. (CTI) sales representative, James Marchese was assigned the "special project" of figuring out how CTI could get its cancer drug Trisenox's off-label indications listed in the compendia so those indications could be reimbursable by Medicare. Relying on the advice of CTI's consultant Documedics, Marchese erroneously believed that because the off-label indications had recently obtained "orphan drug status" from the FDA, they were automatically Medicare-reimbursable. Then, Marchese sought and obtained publication in an ACCC Bulletin wrongfully announcing the reimbursement "change" to the medical community.

Subsequently, after Marchese realized his mistake, he did not take immediate actions to rectify the situation. Instead, when he was passed over for a promotion, he informed his supervisors that CTI was benefiting from his actions and that he should be rewarded with a promotion. When CTI fired Marchese, he brought his fraud concerns to the federal government and later filed an FCA *qui tam* action against the company. With the assistance of Marchese, the government eventually intervened and settled the case for $10.5 million.

The government then balked at paying Marchese a relator's share. The government, citing 31 U.S.C. § 3730(d)(3), argued that his share should be reduced to zero, for he "planned and initiated" the fraud.

#### Relator Did Not "Plan" Or "Initiate" Fraud

In reviewing the government's motion, the court stressed that the government bears the burden of proving that the relator was the planner and initiator of the fraud. Here, while the court recognized Marchese's role in obtaining CTI's publication in the ACCC bulletins, it determined that his initial interpretation of the statute governing Medicare reimbursement was honest, albeit flawed. In particular, the court noted his efforts in seeking and obtaining advice from CTI's consultant about this very issue. In turn, the court determined that he did not "plan" or "initiate" the scheme, and thus the court could not apply § 3730(d)(3) to lower Marchese's relator share below the FCA minimum of fifteen percent.

However, in determining where his share fell within the acceptable 15- to 25-percent range for intervened actions, the court highlighted his delayed protestations to the company. This, on balance, led the court to award him the minimum amount available under the Act, fifteen percent, or $1,575,000.

# JURISDICTIONAL ISSUES

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

### *U.S. ex rel. Batty v. Amerigroup Illinois, Inc.*, 2007 WL 4557085 (N.D. Ill. Dec. 19, 2007)

**According to an Illinois district court, a second-filed FCA *qui tam* action raised substantially the same allegations as was addressed during the success jury trial of the first-filed, intervened FCA *qui tam* action. In turn, the court ruled that the Section 3730(b)(5) first-to-file bar precluded the relator from proceeding with her suit. Moreover, because the government had intervened in the earlier suit, the court also concluded that the Section 3730(e)(3) government-action bar also blocked the action. Lastly, the court, highlighting plaintiff-employee's compliance responsibilities, the court held that the defendant-employer was not put "on notice" that she was engaging in protected activity, as required to bring an actionable § 3730(h) anti-retaliation action.**

Colleen Batty, a former associate vice president of provider relations for Medicaid health maintenance organization (HMO) Amerigroup Illinois, Inc., brought an FCA *qui tam* action against the HMO and its parent company, alleging fraud in connection with Medicaid recipients in Illinois, and that she was discharged, in violation of 31 U.S.C. § 3730(h), for attempting to bring the HMO in compliance with its contract with the State of Illinois. Ultimately, the government declined to intervene in her suit. Subsequently, the government intervened in, and obtained a successful jury verdict in, an earlier filed *qui tam* suit that raised similar allegations against these same defendants. Then, the defendants filed a motion to dismiss Batty's suit, arguing that the court lacked jurisdiction over the FCA claims, for they were duplicative of claims raised in the jury trial. The defendants also encouraged the court to dismiss her § 3730(h) claims for failing to state an actionable claim.

#### First-To-File Bar Precluded Relator's Suit

The FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), provides: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." In this case, the court, after examining the two actions, found that the "facts underlying" the earlier filed *qui tam* action were sufficiently similar to the facts underlying Batty's *qui tam* suit as to block her case from proceeding. While the court conceded that her complaint provided "additional details," the court determined that her claims were based on the "same core facts and general conduct" alleged in the earlier action. Accordingly, the court concluded that the first-to-file bar barred her suit.

## Government-Action Bar Precluded Relator's Suit

Even if the first-to-file bar did not apply, the court found that the government-action bar presented an alternative ground for dismissing Batty's action. The government-action bar, 31 U.S.C. § 3730(e)(3), provides: "In no event may a person bring an action under [the *qui tam* provisions] which is based upon the allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already party." Here, because the government had intervened in the earlier filed *qui tam* suit, the court quickly found that the government was already a party, and based on the same comparison analysis applied under the first-to-file bar inquiry, Batty's complaint was based upon the same "allegations or transactions" as the earlier action. Accordingly, the court also ruled that Batty's claims were also barred under the government-action bar.

## Relator's Job Responsibilities Did Not Put His Employer "On Notice" That He Was Engaged In Protected Activity

In assessing whether Batty raised an actionable 31 U.S.C. § 3730(h) anti-retaliation claim, the court stressed that, under the controlling case law of the circuit, the relator must put the defendants "on notice" that she was engaged in protected activity when they fired her. Moreover, where the plaintiff's job responsibilities include issues of regulatory compliance, the courts apply an even stricter notice standard.

Here, the defendants argued that the relator did not adequately put them on notice that she was engaged in protected activity, especially since her job involved improving provider relations and dealing with provider payment issues. The court, agreeing with the defendants, found that she did not put them on notice when she merely informed her supervisors "that the Defendants were not, but must in fact, bring the Defendant into compliance with the settlement agreement and Medicaid contracts."

However, while the court ultimately granted the defendants' motion to dismiss Batty's anti-retaliation claim, the court allowed her an opportunity to amend, so she could provide additional information to satisfy this notice requirement.

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

### *U.S. ex rel. Glaser v. Wound Care Consultants, Inc.*, 2007 WL 4285367 (S.D. Ind. Dec. 3, 2007)

**Unbeknownst to a *qui tam* relator, a CMS audit was underway when she filed an FCA action alleging that the health care provider was submitting false claims to the government. An Indiana district, in dismissing the relator's complaint, held that a government audit triggers the FCA public disclosure bar, even when the results of the audit have not been released to the public. Finding that the relator failed to explain how he qualified for the original source exception, the court also concluded that the exception did not save his complaint from wrath of the public disclosure bar.**

Carol Glaser brought an FCA *qui tam* action against Wound Care Consultants, Inc., alleging that it violated Medicare and Medicaid billing rules by submitting claims for services performed by physician assistants "incident to" the services of a physician when no physician was physically present or had ever treated the patient. After the government declined to intervene in the suit, Wound Care filed a motion to dismiss, citing the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4). Specifically, Wound Care maintained that a government audit was under way prior to Glaser filing her action, so the public disclosure bar applied.

#### A Government Audit Constitutes A "Public Disclosure"

Interestingly, the court quickly agreed that a Centers for Medicare and Medicaid Services (CMS) audit was a § 3730(e)(4) "public disclosure," even though the results of the ongoing audit were not released to the public. Without then assessing whether Glaser's action was actually "based upon" this "public disclosure," the court addressed the question of whether she qualified for the bar's original source exception, § 3730(e)(4)(B).

#### Relator Failed To Prove Original Source Exception Status

Glaser maintained that her complaint was based solely on her personal knowledge and that she had no knowledge of the CMS audit. While the court seemed to agree that this satisfied the "independent" prong of the original source exception, the court found that she did not satisfy the "direct knowledge" prong. To qualify as having "direct knowledge," the court, citing *U.S. ex rel. Hafter v. Spectrum Emergency Care*, 190 F.3d 1156, 1162 (10th Cir. 1999), stressed that the knowledge imparted by the original source "must be marked by the absence of an intervening agency…[and] unmediated by anything but the [*qui tam* plaintiff's] own labor." The court noted in this case that the relator *might have* received the bulk of her knowledge about the underlying fraud

from her attorney. Notably, the court was not able to fully assess the source of the relator's knowledge, for the relator asserted that this information was protected by the attorney-client privilege.

Accordingly, because the court found that the public disclosure bar applied and the relator did not qualify for its original source exception, the court granted Wound Care's motion to dismiss.

## *U.S. ex rel. Brickman v. Business Loan Express, LLC*, 2007 WL 4553474 (N.D. Ga. Dec. 18, 2007)

**Using their knowledge to piece together public information, the relators filed an FCA *qui tam* action alleging that a lender fraudulently sought SBA reimbursement for default business loans. A Georgia district court, rummaging through the files, determined that the "public information" sufficiently detailed the "allegations" to trigger the FCA public disclosure bar. In addition, because the relators did not identify any facts that they obtained from nonpublic sources, the court ruled that they did not qualify for the bar's original source exception.**

James Brickman and Greenlight Capital filed an FCA *qui tam* action against Business Loan Express, LLC, a small business lender that made numerous loans to individuals for the purpose of purchasing and operating shrimp boats in the Gulf of Mexico. According to the relators, the defendant fraudulently sought Small Business Administration (SBA) reimbursement for default loans by falsely certifying that the loans had been closed, disbursed, and serviced in compliance with SBA regulations, and that each borrower had originally injected a specified amount of equity into the business.

After the government declined to intervene, the defendant filed a motion to dismiss, arguing that the FCA's public disclosure bar precluded the relators' suit.

### FCA Public Disclosure Bar Triggered By Use of "Public Information"

In first determining whether there had been a § 3730(e)(4)(A) "public disclosure," the court highlighted exactly how the information had been publicly disclosed, including in responses to a FOIA request, previous court filings, and magazine articles.

However, while conceding that most of the "information" in their complaint was publicly available, the relators maintained that the requisite "allegations or transactions" to trigger the bar had not been disclosed.

In asserting a distinction between "information" and "allegations or transactions," the relators relied on *U.S. ex rel. Springfield Terminal v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), which found that the bar is only triggered when the actual fraud has been disclosed or when all of the essential elements have been disclosed. The relators maintained that all of the essential elements had not been disclosed in this case, for they provided additional, undisclosed information about the *true* status of the loans.

The court, rejecting the relators' reliance on *Springfield Terminal*, interpreted Eleventh Circuit case law to more broadly interpret "public disclosure" to bar suits based

on publicly disclosed *information*, not just "allegations or transactions." However, the court found that the public disclosures in this case were sufficient to trigger the FCA public disclosure bar even under the *Springfield Terminal* analysis. In particular, the court highlighted that the true state of facts had, indeed, been revealed fully in prior litigation involving one of the loan applicants.

## Relator Does Not Qualify for Original Source Exception

After quickly determining that the relators' complaint was "based upon" the public disclosures, defined in the circuit as "supported by," the court just as quickly ruled that the relators did not qualify for the bar's original source exception, 31 U.S.C. § 3730(e)(4)(B). Dispositively for the court, the relators did not identify any facts that they obtained from their review of *nonpublic* materials.

Accordingly, the court found that it lacked subject matter jurisdiction over the relators' claims pursuant to § 3730(e)(4).

# FALSE CLAIMS ACT RETALIATION CLAIMS

## *Green v. City of St. Louis, Missouri*, 2007 WL 3225716 (8th Cir. Nov. 2, 2007)

**A plaintiff brought a § 3730(h) anti-retaliation claim. A district court, in dismissing a plaintiff's § 3730(h) anti-retaliation action, stressed that an actionable FCA claim must, at least, be possible before a plaintiff can claim that he was engaged in protected activity. The plaintiff appealed the decision to the Eighth Circuit after the district court concluded that the plaintiff had no reason to believe that a false or fraudulent claim was ever submitted to the federal government. In an unpublished *per curiam* decision, the court of appeals agreed with the lower court's rationale and decision.**

In 1993, Percy Green was named the director of the St. Louis Development Corporation, which administers the city's Women and Minority Business Enterprise Participation Program. One of the functions performed by the organization is to certify whether a business entity is truly a woman- and/or minority-owned business.

In 2001, under a new mayoral administration, the organization's certification responsibilities were transferred and consolidated with another municipal agency. Subsequently, Green gave an interview to a newspaper in which he protested about the city's new policy of granting reciprocal certification, in which businesses certified by other agencies would automatically qualify for certification from the St. Louis Development Corporation. A short time after this interview, the city decided not to rehire Green after his position was phased out.

Green brought an action against the city alleging, *inter alia*, that it had violated the FCA anti-retaliation provision, 31 U.S.C. § 3730(h). The defendant filed a motion to dismiss.

The district court, in dismissing Green's § 3730(h) claim, held that Green had failed to bring forward any evidence that he had engaged in activity protected by the Act, since he could not identify any particular grant applications that made false assertions about inclusion of women or minorities and he could not identify any reports submitted to the federal government that were based on false certifications. Green appealed the decision to the Eighth Circuit.

### No § 3730(h) Action Because There Was No Possibility Of A False Claim

An employee engages in activity protected under § 3730(h) if the employee undertakes acts in furtherance of an FCA *qui tam* suit and if the employee believes, and has reason to believe, that his or her employer might be committing fraud against the federal government. By extension, the Eighth Circuit ruled that if Green had no reason

to believe there was a false or fraudulent claim, he was not protected from retaliation under the Act.

The court dispositively noted that during a deposition, Green had disavowed having knowledge of any document that had been submitted to the federal government with false information. Moreover, none of the contemporaneous memoranda he drafted during the time detailed an actual fraudulent claim that was submitted to the federal government.

Without this federal government nexus, the Eighth Circuit agreed that Green's activities were not protected under the Act. Accordingly, the court affirmed the lower court's decision.

# COMMON DEFENSES TO FCA ALLEGATIONS

## A. Lack of Knowledge

### *U.S. ex rel. Roberts v. Aging Care Home Health, Inc.*, 2007 WL 4522465 (W.D. La. Dec. 18, 2007)

**After a Louisiana district court ruled that a defendant violated Stark II, the government filed a summary judgment motion, arguing that the defendant also violated the FCA by knowingly submitting Stark II-violative claims to the government. Noting the "extensive exhibits and testimony" evidencing the defendant's knowledge, the court granted the government's motion.**

In an intervened FCA *qui tam* action brought against home health care provider Aging Care, the government alleged that the company violated Stark II and the FCA when it established a sham advisory board to impermissively compensate five physicians for referring Medicare and Medicaid patients.

In an earlier ruling, the government successfully obtained summary judgment, finding that the defendant had violated Stark II. In this matter, the government sought summary judgment on the question of whether the defendant had also violated the FCA. The government maintained that there was undisputed evidence showing that the defendant's Stark II violations were made "knowingly" and thus also constituted FCA violations.

The court, after reviewing the "extensive exhibits and testimony," agreed that the *mens rea* requirement had been met. The court took particular note of the defendant's efforts to mask the true financial relationship with fabricated advisory board minutes.

Accordingly, the court granted the government's summary judgment motion and ordered the defendants to pay over $4.6 million.

## B. Lack of Falsity

### *U.S. ex rel. UNITE HERE v. Cintas Corporation*, 2007 WL 4557788 (N.D. Cal. Dec. 21, 2007)

**A relator filed an FCA *qui tam* action alleging that a service provider violated 29 government contracts by not abiding by the requirements of the Service Contract Act (SCA). A California district court emphasized that the SCA is only applicable if it is expressly included in the contract. Here, the court dismissed the complaint because the relator failed to identify a specific SCA-applicable contract. Despite the defendant's encouragement to also dismiss the complaint on § 3730(e)(4) public disclosure bar grounds, the court found that the lack of particularity prevented it from determining whether the bar applied.**

UNITE HERE, however, a labor organization that represents workers in the garment and textile manufacturing, retail garment, laundry, hotel, and food services industries, filed an FCA *qui tam* action against Cintas, a uniform rental and laundry service that has numerous customers, including many agencies of the federal government. UNITE HERE alleged that since 1999, Cintas entered into and violated at least 29 contracts with the federal government that required Cintas to comply with the Service Contract Act (SCA), 41 U.S.C. §§ 351. In particular, UNITE HERE alleged that Cintas falsely certified that it complied with the SCA provisions requiring "prevailing wages."

After the government declined to intervene, Cintas filed a motion to dismiss, arguing that the relator's complaint failed to satisfy the FRCP 9(b) particularity requirement and that the FCA public disclosure bar precluded the relator from proceeding with the suit.

#### Complaint Failed To Identify A SCA-Applicable Contract

The SCA applies to contracts with the federal government in excess of $2,500, "the purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. §§ 351(a). However, the court noted that the SCA only applies when the required clauses are included in the government contract.

Here, Cintas maintained that UNITE HERE had failed to identify any specific instances in which the required SCA clause was included in a Cintas-government contract. Instead, UNITE HERE alleged only in general terms that there were contracts between Cintas and the government, and that Cintas paid the workers less than it was supposed to.

The court, agreeing with Cintas's position, ruled that by failing to identify a specific SCA-applicable contract, the complaint failed to satisfy Rule 9(b). The court stressed that given the vagueness of the relator's complaint, Cintas could not know which contracts were at issue and how and when exactly it allegedly failed to pay wages as required under the SCA.

## Lack Of Particularity Prevented The Court's § 3730(e)(4) Analysis

Cintas also argued that the FCA public disclosure bar precluded the relator's suit. Cintas highlighted that the fact that it enters into contracts with the government and the type and amount of those contracts are matters known to the government and to interested members of the public with access to the Internet. For example, Cintas pointed out that its contact with the Veterans Administration is publicly available on the government Web site www.fdodaily.com.

UNITE HERE, however, countered that the government contracts at issue were not "publicly disclosed" within the meaning of the FCA public disclosure bar because, while the type and amount of the contracts were public information, the disclosure did not occur in one of the specific public *fora* listed in § 3730(e)(4)(A). UNITE HERE argued that the mere fact information about the existence of contracts was available on the Internet does not mean that they were "publicly disclosed." In addition, the relator argued, if it did qualify as being "publicly disclosed," there was not enough information to infer the fraud alleged in its complaint.

The court, in what appears to be a first for the FCA, said that information available over the Internet qualifies as § 3730(e)(4)(A) "news media." However, when it came to question of whether this "public disclosure" actually disclosed the allegations underlying the relator's complaint, the court took a pass. According to the court, the lack of specificity in the relator's complaint prevents it from determining whether the FCA public disclosure bar applies. Luckily for Cintas, the court was able to dismiss the complaint on the alternative grounds of failing to satisfy Rule 9(b).

## *U.S. ex rel. Kosenske v. Carlisle HMA, Inc.*, 2007 WL 3490537 (M.D. Pa. Nov. 14, 2007)

**A *qui tam* relator filed an action alleging that a hospital and a physicians group violated the FCA when it submitted Medicare reimbursement claims, for their financial relationship supposedly violated the Stark Act, 42 U.S.C. § 1395nn, and the Anti-Kickback Act, 42 U.S.C. § 1320a-7b. A Pennsylvania district court, after engaging in a factual inquiry into the relationship, determined that the relationship qualified for the statutes' "personal service" exceptions, which exempt compensation arrangements from the Acts "if the physician's only financial interest in the [entity] is receipt of agreed-upon compensation at or below 'fair market value' for 'reasonable and necessary' services." *Renal Physicians Ass'n v. U.S. Dep't of Health and Human Svcs.*, 489 F.3d 1267, 1269 (D.C.Cir.2007). Concluding that the defendants complied with the Stark and Anti-Kickback Acts, the court ruled that this necessarily resolved the FCA action in their favor.**

## C. Intracorporate Conspiracy Doctrine

### *U.S. ex rel. Fent v. L-3 Communications Aero Tech LLC*, 2007 WL 3283689 (N.D. Okla. Nov. 2, 2007)

**An Oklahoma district court dismissed an FCA *qui tam* relator under Rule 9(b), for the complaint failed to detail an actual claim that was presented to the government. The court also dismissed the relator's 3729(a)(3) conspiracy claims based on the intracorporate conspiracy doctrine, which provides that a corporation's employees cannot conspire with the corporation. However, the court permitted the relator to proceed with his § 3730(h) anti-retaliation claim, because his job responsibilities did not prevent him from putting the company on notice that he was engaged in protected activity.**

In March 2003, Clayton Fent worked in Kuwait as an administrative aide for government contractor L-3 Communications, where his primary responsibilities included completing and ensuring the accuracy of employee timesheets. After discovering that L-3 was subsequently manipulating the timesheets for the purpose of wrongfully obtaining additional funds from the government, he raised his concerns about fraud to his supervisors and was promptly fired. He responded by filing an FCA *qui tam* action against L-3, alleging violations of Sections 3729(a)(1), (a)(2), (a)(3), and a § 3730(h) action for retaliatory discharge. After the government declined to intervene, L-3 communications filed a motion to dismiss, arguing that the Section 3729(a)(1) and (a)(2) claims failed to satisfy Rule 9(b) and that the intracorporate conspiracy doctrine precluded Fent's Section 3729(a)(3) conspiracy claims. L-3 also sought to dismiss Fent's § 3730(h) anti-retaliation claims for failing to state an actionable claim under the Act.

#### FCA Complaint Dismissed Because It Failed To Detail An Actual Claim

Under controlling case law in the circuit, Rule 9(b) requires a relator to proffer "details that identify particular false claims for payment that were submitted to the government." *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006).

Here, because the relator failed to detail an *actual* claim that was submitted to the government, the court agreed to dismiss Fent's (a)(1) and (a)(2) claims on Rule 9(b) grounds.

By extension, the court dismissed Fent's (a)(3) conspiracy claims, for "a defendant cannot conspire to submit a false claim if no false claim has been shown to exist."

#### Intracorporate Conspiracy Doctrine Precluded Relator's (a)(3) Conspiracy Claims

The court also agreed that the intracorporate conspiracy doctrine blocked Fent's (a)(3) claims. The intracorporate conspiracy doctrine provides that a corporation's employ-

ees, acting as agents of the corporation, cannot conspire with the corporation. Here, Fent's allegations did not include players outside of L-3's organization chart.

## Relator Raised An Actionable § 3730(h) Claim

To state a claim for retaliatory discharge under § 3730(h), the Tenth Circuit requires two elements: (1) the employee acted in furtherance of an FCA suit, of which the employee had notice; and (2) the employee suffered an adverse employment action because of this protected conduct. *Ramseyer v. Century Healthcare Corporation*, 90 F.3d 1514 (10th Cir. 1996).

L-3 Communications argued that it was not put "on notice," for, as Fent concedes, his job responsibilities included "completing and ensuring the accuracy" of timesheets.

The court, however, observed that his responsibilities ended with the submission of the timesheets to the payroll department. In turn, the concerns raised by Fent about subsequent payments were outside of his command. Accordingly, the court refused to dismiss Fent's § 3730(h) anti-retaliation action.

## D. Not a Condition of Payment

### *U.S. ex rel. Landers v. Baptist Memorial Health Care Corporation*, 2007 WL 4380006 (W.D. Tenn. Dec. 17, 2007)

**A *qui tam* relator filed an FCA action, alleging that a hospital submitted false Medicare claims when it provided services that were violative of Medicare's conditions of participation. However, a Tennessee district court dismissed the case, for the conditions of participation, unlike conditions of payment, are merely "quality of care standards" that are not worthy of FCA protection.**

During her employment as a registered nurse at Baptist Memorial Hospital, Anne Landers observed various violations of Medicare's Conditions of Participation, 42 C.F.R. § 488, including the use of unqualified staff. When the hospital failed to remedy the problem, Landers filed an FCA *qui tam* action, alleging the facility knowingly submitted false Medicare claims for reimbursement.

After the government declined to intervene, the defendant ultimately filed a motion seeking summary judgment.

#### Violations of Conditions Of Participation Do Not Trigger FCA Liability

Reaching outside of the circuit to embrace *U.S. ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), the court distinguished violations of Medicare's Conditions of *Participation* from Conditions of *Payment*. The court determined that Conditions of Participation are merely "quality of care standards" directed towards an entity's continued ability to participate in the Medicare program, rather than a prerequisite to a particular payment. This parsing between "participation" and "payment" led the court to grant the defendant's summary judgment motion.

## E. Lack of Presentment

### *United States v. Cathedral Rock Corporation*, 2007 WL 4270784 (E.D. Mo. Nov. 30, 2007)

**The government brought an FCA action against a nursing home corporation for submitting false Medicare and Medicaid claims. The defendant argued that the complaint should be dismissed under the controversial *Totten* decision, which held that FCA liability only attaches when a false claim is actually presented to federal government employee. Noting the mechanics and government oversight of the Medicare and Medicaid system, a Missouri district court ruled that the presentation of false Medicare and Medicaid claims satisfies *Totten*, even though the claims are submitted to Medicare contractors and state Medicaid agencies.**

The federal government brought an FCA action against Cathedral Rock Corporation, a nursing home corporation, alleging that it submitted false Medicare and Medicaid claims, when it sought reimbursement for services that were worthless in that they were not provided, were deficient or inadequate, and were of a quality that failed to meet professionally recognized standards of health care.

Pointing to the "presentment requirement" embraced by the D.C. Circuit in *U.S. ex rel. Totten v. Bombardier*, 380 F.3d 488 (D.C. Cir. 2004), the defendants argued that FCA liability did not attach, for the claims were presented to state Medicaid agencies and Medicare Contractors and not to federal government employees or officials.

#### Totten Does Not Remove FCA Protection From Medicare And Medicaid *Claims*

The court, providing a long list of cases that have applied FCA liability to Medicare and Medicaid fraud, rejected the defendants' *Totten* argument. The court noted that while claims are submitted to state Medicaid agencies, the federal government reimburses states for a substantial portion of the funds allotted. For this reason, the court concluded that claims submitted to state Medicaid agencies are considered claims presented to the federal government and may give rise to FCA liability even under *Totten*. As for Medicare claims, the court highlighted the extensive regulation and enforcement authority that the federal government maintains over the Medicare system.

Accordingly, the court permitted the case to proceed.

## F. Counterclaims Against Relator & Government

### *U.S. ex rel. Lazar v. Worldwide Financial Services, Inc.*, 2007 WL 4180718 (E.D. Mich. Nov. 26 ,2007)

**The government intervened in an FCA *qui tam* action filed against a corporation and an individual defendant. The individual defendant subsequently filed counterclaims against the government and the relator, arguing that the parties violated his constitutional rights. The individual also brought a defamation action against the relator based on the "defamatory remarks" included in his *qui tam* complaint. A Michigan district court dismissed the constitutional claims, noting that the government is protected by sovereign immunity and the relator was not acting as a state actor. In addition, the court dismissed the defamation claim, for, under Michigan law, there is absolute immunity for comments placed in judicial filings.**

Walter Lazar brought an FCA *qui tam* action against Worldwide Financial Services, Inc. and Jack Wolfe, alleging that the defendants engaged in a fraudulent loan scheme that defrauded the federal government. The government subsequently intervened in the action. Wolfe then filed a counterclaim against the government and Lazar, accusing each of these defendants with violating his constitutional rights. In addition, Wolfe included a charge of defamation against Lazar. The government and Lazar filed motions to dismiss the counterclaims.

#### Constitutional Claims Are Dismissed

The court quickly dispensed with his constitutional claims, finding that the government was protected by sovereign immunity and that Lazar was not acting as a state actor, as required to implicate him in violating Wolfe's 14th Amendment rights.

#### Defamation Claims Are Dismissed

The court then turned to Wolfe's defamation claim. Specifically, Wolfe maintained that Lazar published certain defamatory comments about him in his *qui tam* complaint, all of which caused him to sustain injuries to his general reputation. However, the court noted that under Michigan law, statements that are made during the course of a judicial proceeding are entitled to absolute privilege. *See, e.g., Couch v. Schulz*, 193 Mich. App. 292, 294, 483 N.W.2d 684 (1992). Here, because the only allegedly defamatory statements at issue appeared in Lazar's *qui tam* complaint, the court dismissed Wolfe's defamation claim.

# FEDERAL RULES OF CIVIL PROCEDURE

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

### *U.S. ex rel. Rost v. Pfizer, Inc.*, 2007 WL 3379842 (1st Cir. Nov. 15, 2007)

**The First Circuit vacated and remanded a Massachusetts district court's dismissal of an FCA *qui tam* action, which had alleged that, by illegally off-label marketing its human growth hormone drug, the defendant-pharmaceutical companies had knowingly caused doctors to submit false Medicare claims. While agreeing that the complaint failed to satisfy Rule 9(b), the court of appeals remanded the case, for the district court neglected to rule whether the relator was entitled to an opportunity to amend its complaint. The First Circuit, embracing the lower court's holding, held that confidential disclosures made by the defendants to the government did not constitute "public" disclosure under the FCA public disclosure bar provision. The court stressed that a Section 3730(e)(4) "public disclosure" requires that there be some act of disclosure to the public outside of the government.**

As Vice President of Marketing in Pharmacia's endocrine care unit, Peter Rost discovered that the pharmaceutical company was engaged in various illegal marketing schemes, including off-label promotions of its human growth hormone. Rost raised his concerns with his employer and with the management of Pfizer, Inc., a competitor pharmaceutical company that purchased Pharmacia in 2003. Feeling that his fraud concerns were not adequately addressed, Rost decided to file an FCA *qui tam* action against the companies. However, just days before Rost filed his suit, the companies confidentially disclosed the fraud to federal government officials.

Subsequently, the defendants agreed to pay the government $34.7 million and entered into a deferred prosecution agreement for one criminal count of violating the Food, Drug & Cosmetic Act. After the government declined to intervene in his *qui tam* action, the defendants filed a motion to dismiss, arguing that the complaint failed to satisfy the particularity requirements of FRCP 9(b) and that the FCA public disclosure bar precluded the relator from proceeding with the suit.

The district court held that while a "public disclosure" had not occurred, the complaint did not satisfy FRCP 9(b), for Rost failed to identify a claim that was actually submitted to the government. In turn, the court dismissed the case with prejudice, without addressing whether Rost was entitled to an opportunity to amend his complaint.

Rost, appealing the decision to the First Circuit, maintained that the complaint satisfied FRCP 9(b). Alternatively, he argued that the court should have given him an opportunity to amend his complaint. The defendants filed a cross appeal, urging the First Circuit to apply the FCA public disclosure bar when a defendant discloses the fraud to a government official.

## Defendants' Disclosures to Government Officials Do NOT Trigger FCA Public Disclosure Bar

The First Circuit first addressed the jurisdictional question of whether a private party's self-disclosure to government agencies without further disclosure qualifies as a "public disclosure" under the FCA public disclosure bar. At the urging of relator's counsel and *amicus curiae* Justice Department, the court held that a "public disclosure" requires that there be some act of disclosure to the public *outside of the government*. (Of particular interest, the court did not reach the issue of *how many* members of the public must receive or have access to the disclosure.)

In turn, the court rejected the interpretation offered by defendants' counsel and *amicus curiae* PhRMA, which, according to the court, would have reinstated the "government knowledge" bar that plagued the FCA prior to the 1986 FCA Amendments. The court also noted that, with the exception of the Seventh Circuit decision in *U.S. ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), courts have consistently rejected such a broad reading of the public disclosure bar provision.

Accordingly, because the defendants disclosed the fraud to the government without further disclosing it to the public, the First Circuit ruled that a Section 3730(e)(4)(A) "public disclosure" had not occurred.

## "Inference" of Fraud May Satisfy FRCP 9(b) When Alleging *Indirect* Submissions of False Claims

In *U.S. ex rel. Karvelas v. Melrose-Wakefield Hospital*, 260 F.3d 220 (1st Cir. 2004), the First Circuit held that in the context of a defendant that submits a claim <u>*directly*</u> to government programs, FRCP 9(b) requires a relator to provide details that identifies a *particular* false claim that was *actually* submitted to the government. However, the First Circuit in *Rost* agreed that this case fell into a "different category," for he alleged that the defendants *caused* false claims to be submitted to government programs.

According to the court, while a "test of flexibility" can be applied to this "category" of cases, FRCP 9(b) still requires a strong "inference" that fraud on the government occurred.

## Complaint Failed to Satisfy Relaxed FRCP 9(b) Test

Even under this relaxed standard, the First Circuit agreed that Rost's complaint failed to satisfy FRCP 9(b). The court noted that while the criminal information against the defendants acknowledged that the defendants "earned millions of dollars for off-label uses," it also stated that "[i]n most, if not all, instances, patients…paid…out-of-pocket without reimbursement from any public or private third-party payors." The court found that this dispositively undercut the "inference" that fraud on the government had in fact occurred. Notably, the court concluded that while the complaint raised facts that suggested fraud was "possible," it did not contain "factual or statistical evidence to strengthen the inference of fraud beyond possibility."

## Case Remanded to Rule on Request to Amend Complaint

Even though the First Circuit ultimately affirmed the Rule 9(b) dismissal, the court vacated and remanded the decision, for the district court never ruled on Rost's request to amend his complaint to allege fraud with particularity. The court stressed that the district court should make this initial FRCP 15(a) determination, particularly since the relator's actions did not "clearly fall into one of the usual grounds for denying such a request (e.g., undue delay, bad faith, dilatory motive of the requesting party, repeated deficiencies, futility of amendment.)

## *U.S. ex rel. Cericola v. Federal National Mortgage Association*, 2007 WL 4643887 (C.D. Cal. Dec. 28, 2007)

**A *qui tam* relator filed an FCA action alleging that Fannie Mae knowingly submitted defective home loans to the government in order to obtain HUD insurance. A California district court, in dismissing the complaint, ruled that it did not satisfy the Rule 9(b) particularity requirements, where the only specific defective loans detailed in the complaint were settled in a different action against a different defendant. However, the court, in refusing to declare that the claims untimely, stressed that the lack of particularity did not negate the use of the relation back doctrine.**

Karen Cericola brought an FCA *qui tam* action against several lenders including her former employer Ben Franklin Bank (BFB), alleging that the lenders were defrauding Fannie Mae and, by extension, the federal government by concealing and failing to disclose that home loans were being sold to Fannie Mae which had not been properly underwritten and were at risk of default. In May 2003, Cericola filed an amended complaint under seal adding, for the first time, allegations against Fannie Mae. In early 2004, BFB settled with the federal government and Cericola, and admitted to allegations involving 81 fraudulent loan applications.

In the action against Fannie Mae, Cericola alleged that it sought to mitigate its losses on default home loans by submitting knowingly defective loans to the government to seek reimbursement from HUD insurance proceeds. After the government declined to intervene, the court issued a September 2005 order lifting the seal on the amended complaint. Fannie Mae filed a motion to dismiss, arguing that the allegations did not satisfy Rule 9(b) and that they were untimely.

## Complaint Failed To Satisfy Rule 9(b)

As an initial matter, the court observed that Cericola's claims against Fannie Mae supposedly did not relate to the 81 allegedly fraudulent loans that BFB settled in 2004. However, upon closer inspection, the court determined that the individual loans identified by Cericola were identical to the loans that she had previously claimed BFB had submitted to HUD for insurance. According to the court, except for these "settled" claim-allegations, the only specific allegations remaining in the complaint approximat-

ed that 70 percent of the loans that originated in the 1995–98 period were ineligible for HUD insurance.

According to the court, the description of the "general scheme to defraud the government" did not satisfy Rule 9(b), for the complaint did not describe an *actual* loan that was submitted to the government. In turn, the court dismissed the suit, but granted Cericola leave to amend her complaint.

## Pleading Failures Do Not Negate The Relation Back Doctrine

The court also addressed Fannie Mae's argument that the suit was untimely, for the complaint was not "particular enough" to receive the benefit of the relation back doctrine.

FRCP 15(c)(1)(B) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—*or attempted to be set out*—in the original pleading . . ." (emphasis added).

The court ruled that while the complaint failed to satisfy Rule 9(b), the fraudulent nature of the claim was nonetheless apparent from the pleading. Moreover, the court observed that nothing in the rule suggests that a pleading failure negates the relation back doctrine.

## "Outlier" *Baylor* Is Not Applicable Because The Government Did Not Intervene

The court, then, turned its attention to Fannie Mae's next argument that because FCA complaints are filed under seal, they are fundamentally incompatible with the relation back doctrine, for they do not impart fair notice upon the defendant. For support, Fannie Mae pointed to *United States v. Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006), in which the Second Circuit concluded that the application of the FCA's statute of limitations provision to the government's complaint-in-intervention does not relate back to the filing date of the relator's original *qui tam* complaint.

The court quickly disregarded the *Baylor* decision as a wayward "outlier." In addition, the court easily distinguished the case at bar, for the government had not intervened in Cericola's action against Fannie Mae.

Accordingly, the court refused to rule, through application of the relation back doctrine, that the claims were untimely.

## *U.S. ex rel. Lusby v. Rolls-Royce Corporation*, 2007 WL 4557773 (S.D. Ind. Dec. 20, 2007)

**According to an Indiana district court, a *qui tam* relator's complaint was "profuse with particular details" about a defendant-engine makers faulty manufacture of government airplane engines. However, because the relator was unable to identify an actual claim for payment that submitted to the government, the court ruled that the complaint failed to satisfy the Rule 9(b) particularity requirement.**

Curtis Lusby brought an FCA *qui tam* action against his former employer Rolls-Royce Corporation, alleging that it submitted false claims and made false statements to the government in relation to contracts for the manufacture of engine turbine blades, vanes, and nozzles. According to the complaint, it engaged in improper, faulty, and/or unreliable manufacturing and inspection processes that resulted in the delivery of T56 engines and parts to the government that did not conform to the specifications of its contract.

After the government declined to intervene, Rolls-Royce filed a motion to dismiss, arguing that the complaint failed to satisfy Rule 9(b).

## Complaint Failed To Satisfy Rule 9(b)

Borrowing from the Eleventh Circuit's *Clausen* decision, the district court held that to satisfy Rule 9(b), an FCA complaint must specifically identify actual false claims that were submitted to the government. *See U.S. ex rel. Clausen v. Laboratory Corporation of America, Inc.*, 290 F.3d 1301 (11th Cir. 2002).

In this case, the court determined that the complaint failed to meet this *Clausen* "requirement," even though the complaint was "profuse with particular details" about the underlying inadequacies of the manufacturing and inspection processes.

Accordingly, the court granted Rolls-Royce's motion to dismiss.

# LITIGATION DEVELOPMENTS

## A. Impermissible Inferences

### *U.S. ex rel. Heath v. Dallas-Fort Worth International Airport Board*, 2007 WL 4561140 (5th Cir. Dec. 27, 2007)

**After a relator lost a jury trial, she appealed the decision to the Fifth Circuit, arguing that the lower court abused its discretion by permitting the defendants to make impermissible references about the government's nonintervention decision. The court of appeals, affirming the decision in an unpublished *per curiam* decision, held that even if court abused its discretion by permitting the "vague references," it did not prejudice the case, for the relator had ample opportunity to rebut the argument.**

Susan Heath brought an FCA *qui tam* action against the Dallas-Fort Worth International Airport Board, alleging that the Board made false statements about its environmental practices in order to obtain FAA funding for various airport projects. After the government declined to intervene, the suit ultimately went to trial, where a jury found against Heath and the court entered judgment in favor of the Board.

Heath appealed the decision to the Fifth Circuit, arguing that the court abused its discretion by allowing the Board to make impermissible references to the jury about the government's nonintervention decision.

The Board maintained on appeal that it never raised this argument to the jury and that it merely highlighted that the FAA never asked the Board to repay the allegedly ill-received government funds.

After reviewing the record, the Fifth Circuit concluded that, at best, the Board only "vaguely referenced" the government's nonintervention decision. However, the court held that, even if the district court abused its discretion in permitting the "reference," it did not prejudice the case, for the relator had ample opportunity to rebut the argument.

Accordingly, in an unpublished *per curiam* decision, the Fifth Circuit affirmed the lower court's decision.

## B. Attorneys' Fees for Prevailing Party

### *U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 2007 WL 4270622 (E.D. Pa. Dec. 3, 2007)

**After a relator had his FCA case dismissed by the court because of a lack of jurisdiction, the clerk taxed him $28,275.99 for costs incurred by the defendant under authority of FRCP 54(b)(1) and 28 U.S.C. § 1920. However, a Pennsylvania district court, after dissecting the language of the rule and the statute, concluded that they did not grant the *clerk* authority to tax costs in this case. Accordingly, the court vacated the order taxing the costs against the relator.**

### *U.S. ex rel. Atkisson v. Pennsylvania Shipbuilding Co.*, 2007 WL 4233471 (E.D. Pa. Dec. 3, 2007)

**After a relator lost a long-fought battle in the Third Circuit on public disclosure bar grounds, the defendant sought attorneys' fees and expenses under 31 U.S.C. § 3730(d)(4). Over the relator's objections, a Pennsylvania district court ruled that it retained jurisdiction to hear this motion, even though the public disclosure bar ruling held that the court did not have "jurisdiction" over his case. The court also held that the defendant was a "prevailing party" for the purposes of the motion, even though it did not win on the merits of the case. However, the court denied the defendant's motion, for this case, which included several novel issues of first impression, was not "frivolous."**

For more than thirteen years, Paul Atkisson battled Pennsylvania Shipbuilding Company in a nonintervened FCA *qui tam* action, alleging that it conspired with a lender to defraud the government in the manufacture of U.S. Navy ships. Ultimately, the Third Circuit dismissed the case for lack of jurisdiction, because the FCA public disclosure bar precluded Atkisson from proceeding with the action. Subsequently, the defendants filed a motion to recover attorneys' fees and expenses under 31 U.S.C. § 3730(d)(4).

#### Court Has Jurisdiction Over § 3730(d)(4) Motion

Section 3730(d)(4) provides that a successful FCA defendant may obtain attorneys' fees and expenses if "the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

The relator argued that the court did not have jurisdiction to grant the motion, for the Third Circuit had dismissed the case for lack of subject matter jurisdiction. The court, in rejecting the relator's argument, cited persuasive authority from other jurisdictions, which have held that the court retained jurisdiction over the defendant's § 3730(d)(4) motion for attorney fees and expenses because "courts that lack jurisdiction with respect to one kind of decision may have it with respect to another." *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051–54, 1056 (10th Cir. 2004) (citing *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000)). Agreeing with *Grynberg*, the court concluded that it retained jurisdiction for the purpose of this motion.

## Defendant Is A "Prevailing Party"

Atkisson also argued that the Third Circuit's decision dismissing the case on jurisdictional grounds under § 3730(e)(4) precluded the defendant from claiming prevailing party status, for the decision was not a ruling on the factual merits of the underlying FCA action.

The court, in rejecting Atkisson's argument, stressed that his argument hinged too much on the *factual* merits of his case; the proper analysis, according to the court, was whether § 3730(e)(4) "materially alters the legal relationship between the parties." Once again quoting *Grynberg*, the court noted that the Tenth Circuit concluded that a § 3730(e)(4) dismissal "materially changed the legal relationship" between the parties. Parroting this decision, the court ruled that the defendant was a "prevailing party," so it could seek compensation under § 3730(e)(4).

## Case With Novel Legal Issues Was Not "Frivolous"

Having concluded that the court had jurisdiction under § 3730(d)(4) to award attorney fees and expenses and that the defendant was a prevailing party, the court then turned to the question of whether the action was "clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment." Here, because the underlying case involved some issues of first legal impression for the circuit, the court concluded that although not meritorious in hindsight, it was not so unfounded as to meet the high standard required to award attorney fees and expenses under § 3730(d)(4). Accordingly, the court denied the defendant's motion.

## C. Circumstantial Evidence of A Claim

### *U.S. ex rel. El-Amin v. George Washington University*, 2007 WL 4112202 (D.D.C. Nov. 20, 2007)

**A relator filed an FCA *qui tam* action against a hospital for submitting false Medicare claims. The hospital filed a partial summary judgment motion, seeking to limit the scope of the relator's case to the fifty actual claims the relators possessed. A District of Columbia district court, however, noted that the language of the Act does not explicitly require the relator to possess and present to the factfinder the actual claim forms. Instead, the court, in denying the defendant's motion, found that circumstantial evidence is sufficient evidence.**

Over a decade ago, Shelia El-Amin and several of her coworkers filed an FCA *qui tam* action against George Washington University, alleging that the hospital submitted numerous Medicare reimbursement claims that wrongfully claimed that an anesthesiologist had performed the services when, in reality, the work was done by a certified register nurse anesthesiologist (CRNA). The relators conceded that they only have copies of 50 claims that were actually submitted to the government, even though both parties agree that several more claims were submitted during the relevant time period.

In the present matter, the defendant filed a partial summary judgment motion seeking to limit the scope of the case to the 50 claims.

#### Circumstantial Evidence Is Sufficient

The court observed that while it is evident the FCA requires relators to prove the existence of a "false or fraudulent claim," nothing in the language requires the relators to possess and present to the factfinder the *actual* claim form submitted to the government. Moreover, a recent district court decision recognized that Medicare billing documentation, specifically an EOMB form, may serve as circumstantial evidence that a claims was submitted to Medicare. *See U.S. ex rel. Magid v. Wilderman*, 2004 U.S. Dist. LEXIS 8459 (E.D. Pa. 2004). The court agreed with this principle.

Here, the court noted that the relators had collected a mountain of circumstantial evidence that a claim was submitted to Medicare. The court concluded that this was sufficient to create a genuine issue of material fact as to whether the defendant submitted claims to Medicare.

#### Best Evidence Rule Exception Applies

The "best evidence rule," FRE 1002, provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."

The defendant, pointing to this rule, argued that it requires the court to reject "any evidence the relators might try to offer in order to prove the existence, contents, presentment and falsity of the individual claims, other than the claims themselves."

The relators, on the other hand, maintained that the best evidence rule was not applicable, for "the fact to be prove[n] [at trial] . . . [wa]s the *submission* of the claim to the Government," not the contents of the claim.

The court disagreed with both parties. First, the court stressed that to show a claim was false, the relators would need to "prove the content" of the claim. However, the court highlighted that there were a number of exceptions to the best evidence rule, including Rule 1004(2), which provides that an exception when an original writing cannot be obtained by available judicial process or procedure.

In this case, the relators subpoenaed, to no avail, the claim forms from the federal government. They also hired numerous temporary staff to dig through "millions of pages and thousands of boxes of Medicare records." This led the court to conclude, under Rule 1004(2), that the relators had made a "reasonable effort" to locate the claim forms. In addition, given the reliability of electronic copies, the court saw little reason to strictly emboss this case with the best evidence rule.

Accordingly, the court rejected the defendant's partial summary judgment motion.

## D. Liability for Parent Corporation

### *U.S. ex rel. Fent v. L-3 Communications Aero Tech L.L.C.*, 2007 WL 3485395 (N.D. Okla. Nov. 8, 2007)

**A *qui tam* relator brought an FCA action against his employer and his employer's parent company. In dismissing the case against the parent corporation, an Oklahoma district court held that a parent corporation cannot be held liable solely because it owns a fraudfeasing subsidiary.**

In March 2003, Clayton Fent worked in Kuwait as an administrative aide for government contractor L-3 Communications, where his primary responsibilities included completing and ensuring the accuracy of employee timesheets. After discovering that L-3 was subsequently manipulating the timesheets for the purpose of wrongfully obtaining additional funds from the government, he raised his concerns to his supervisors and was promptly fired. He responded by filing an FCA *qui tam* action and a § 3730(h) action against L-3 and its parent company Raytheon. After the government declined to intervene, Raytheon filed a motion to dismiss, arguing that it could not be held liable under the FCA for the actions of L-3 Communications simply because it owned 26.3 percent of the company.

The court agreed that a parent corporation cannot be liable merely because a plaintiff alleges that its subsidiary violated the FCA. Instead, the court stressed that the relator must show either that the parent corporation is liable under a veil piercing or alter ego theory, or that it is directly liable for its own role in the submission of false claims.

In order to pierce the corporate veil under an "alter ego theory," the court adopted a two-part test: (1) whether such unity of interest and disregard for the separate corporate identity exists that the personalities and assets of the two entities are indistinct; and (2) whether adherence to the corporate fiction would "sanction a fraud, promote injustice, or lead to an evasion of legal obligations."

Here, the court assessed the particulars of the Raytheon-L3 corporate structure and concluded that it could not pierce Raytheon's corporate veil.

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

# Judgments & Settlements

**NOVEMBER 1–DECEMBER 31, 2007**

## National Air Cargo Settlement—October 25, 2007

National Air Cargo, Inc. pled guilty to the felony charge of making material false statements to the government, and will pay a total of $28 million to the U.S. including an $8.8 million criminal fine. The guilty plea settles a multi-agency investigation into National Air Cargo's billing and shipping practices. Of the $28 million, approximately $7.4 million will be paid to settle a related *qui tam* action and another $7.4 million to settle a related civil forfeiture claim. National Air Cargo, which entered contracts with the Department of Defense to transport freight, admitted to falsifying documents claiming that it delivered shipments "on time" to the government, when the shipments were actually delivered late. Additionally, National Air Cargo also admitted to billing the government for air-rate shipping, when in fact ground shipping was used. The investigation was conducted by the Defense Criminal Investigative Service, along with Special Agents of the Army Criminal Investigative Command, investigative auditors of Defense Contract Audit Agency, and the FBI.

## Arizona Heart Hospital Settlement—November 8, 2007

Arizona Heart Hospital (AHH) in Phoenix, Arizona agreed to pay $5.8 million to the U.S. to settle allegations that it defrauded Medicare by billing Medicare for non-reimbursable procedures. The settlement arose from a DOJ investigation of reimbursement claims submitted by AHH to Medicare for physicians' services related to the implantation of endoluminal graft devices used to treat aneurysms from 1998 to 2002. Because these devices had not received final marketing approval from the Food and Drug Administration at the time they were implanted by AHH, they were not reimbursable under Medicare guidelines. As part of the settlement, AAH agreed to enter into a five-year corporate integrity agreement with the Office of the Inspector General of the U.S. Department of Health and Human Services and to maintain its current corporate compliance program. AHH is one of eleven hospitals partially owned by the healthcare provider, MedCath Corporation. AHH did not admit any wrongdoing and offered no admission of liability in its settlement agreement with the United States. Its settlement will release it from any civil or monetary liability under the Department of Justice's investigation. Lon R. Leavitt, the Assistant U.S. Attorney of the District of Arizona, represented the U.S.

## Physiotherapy Associates Inc. Settlement—November 14, 2007

Medical technology corporation Stryker and its former division, Physiotherapy Associates Inc., agreed to pay $16.6 million to the federal government to settle allegations that it defrauded the United States by submitting false claims to Medicare, state Medicaid programs, and the Department of Defense's TRICARE program. According to allegations made in two separate *qui tam* suits, Physiotherapy fraudulently billed for services not covered under the programs and retained the excess payments made by the programs. Two former employees of Physiotherapy Associates initiated the suits

which led to the recovery. Relators Kerry Deering and Wendy Whitcomb will receive close to $3 million as their share of the recovery. Physiotherapy also agreed to enter into a Corporate Integrity Agreement with the Office of the Inspector General of the Department of Health and Human Services. Stryker sold Physiotherapy to a private equity firm in June.

## Kinder Morgan Settlement—November 28, 2007

Three Kinder Morgan limited partnerships reached a settlement with the United States and the Tennessee Valley Authority (TVA), a government corporation, to settle an alleged violation of the False Claims Act. Under the settlement, Kinder Morgan will pay more than $25 million to the U.S., the Tennessee Valley Authority, and several private companies. Kinder Morgan, which provides energy transportation and distribution services, contracted with the TVA and several private companies to transport coal from the Western U.S. to its Illinois and Kentucky plants to be handled and shipped to TVA terminals in Kentucky, Tennessee, and Alabama. Allegedly, Kinder Morgan weighed the coal at two different locations: once using a certified scale for the coal coming to its plants, and another 'barge scale' used for outgoing coal from its Illinois terminal. Because coal weighed using the barge scale method weighed two to three percent more than the certified scale, Kinder Morgan was able to keep the "excess" coal and sell it under the private label of 'Red Lightning Coal'. By exploiting the weight differential, Kinder Morgan was able to take almost 259,000 tons of coal from the TVA which amounted to a loss of approximately $6.6 million. Under the settlement, Kinder Morgan will pay three times this amount to the U.S. and the TVA and an additional $5.2 million to private customers. Almost $8 million of the recovery will go to the TVA, with almost $12 million going to the U.S. Treasury. Assistant U.S. Attorneys Gerald M. Burke and Stephen Clarke handled the case. The case was investigated by the TVA in conjunction with the FBI.

## State of California ex rel. Lockyer v. Hanson Building Materials Settlement (December 10, 2007)

Hanson Building Materials, a multinational mining corporation, agreed to pay $42.2 million to the State of California to settle allegations that it improperly sold more than two million cubic yards of sand from the Suisan Bay that it mined without paying royalties to the State of California. Hanson Building Materials had entered into leases with the California State Lands Commission to dredge sand and gravel in exchange for royalty payments. According to allegations made in a *qui tam* complaint brought under the California False Claims Act by relator Kevin Bartoo in 2001, Hanson Building Materials knowingly dredged sand that was outside of its lease boundaries, and subsequently sold the sand to concrete companies for large profits. Hanson Building Materials additionally submitted false claims to the State of California, underreporting the amount of sand it sold and the amount of royalties owed to the State. A complaint in intervention was then filed in 2003 by the State Attorney General, lead-

ing to the settlement. For his share in the recovery, relator Kevin Bartoo will receive $10 million. TAF member Wayne T. Lamprey and Francine T. Radford of Goodin, McBride, Squeri, Day, & Lamprey LLP represented Bartoo.

## U.S. v. Greybor Medical Transportation Inc. (C.D. Cal. December 10, 2007)

Boris Shpirt, the owner and operator of Los Angeles ambulance company, Greybor Medical Transportation, agreed to pay $6 million to the federal government to settle a civil suit brought under the False Claims Act alleging that Shpirt fraudulently submitted false claims for payment to Medicare. In addition to the $6 million, Shpirt will also relinquish a further $1 million in scheduled payments from Medicare. The settlement arose from a civil suit brought by the government under the False Claims Act, after a grand jury indicted Shpirt and his wife of criminal fraud charges. Shpirt was found guilty of multiple counts of fraud and was sentenced to 9 years in prison and is currently serving his sentence. His wife was sentenced to 18 months. Additionally, Shpirt and Greybor were required to pay $2.4 million in criminal restitution. According to the False Claims Act suit, Shpirt and Greybor submitted claims for reimbursement to Medicare, claiming that certain patients using their ambulance transport were 'bed-confined' even when they were not. Under this scheme, Shpirt was able to submit reimbursement claims for patients who were ineligible for Medicare reimbursement, since Medicare only reimburses for patients who are bed-confined and have no other means of transportation. Additionally, Boris Shpirt and Greybor also billed Medicare for patients individually, even when the patients used the ambulance at a single time. Assistant U.S. Attorney Abraham Meltzer of the U.S. Attorney's Office of the Central District of California represented the U.S. The Civil Division of the Central District of California collected almost $1.2 billion in civil recoveries in FY2006, including over $1 billion under the False Claims Act.

## U.S. ex rel. Roederer v. Gohmann Asphalt and Construction Co. (W.D. Ky. December 10, 2007)

Gohmann Asphalt and Construction Company agreed to pay more than $8.2 million to settle federal and state claims that it committed fraud by falsifying the quality of the asphalt used in federally and state funded road contracts in the States of Kentucky and Indiana. Relator Paul Roederer, a former asphalt crew supervisor with Gohmann Asphalt, filed a complaint in 2003, alleging that between 1997 and 2006, Gohmann used fraudulent measures to determine the density of the asphalt in order to receive a higher compensation from its contracts. Since asphalt is reimbursed on the basis of its density, Gohmann deliberately engaged in a process known as "core swapping" in which it swapped samples believed to be of a higher density for asphalt samples of a failing density in order to receive a higher compensation than it would have otherwise received. Because the contract was funded partially by the Federal Highway Administration, the result was a loss to the United States as well as to Kentucky and

Indiana. Of the settlement, $6.69 million will be paid to the federal government, $1.1 million to the State of Kentucky, and $362,165 to the State of Indiana. As his share of the recovery, Paul Roederer will receive $1.2 million including attorney's fees. TAF member C. Dean Furman of Furman & Nilsen represented Roederer. Assistant U.S. Attorney David Huber of the Western District of Kentucky represented the U.S. The settlement includes a repayment of a $5.3 million bonus Kentucky and the U.S. paid to Gohmann for early completion of a 2001 road contract.

## Warren Hospital Settlement—December 10, 2007

Warren Hospital of Philipsburg, New Jersey, agreed to pay $7.5 million to the U.S. government to settle claims that it fraudulently inflated charges for inpatient and outpatient services to receive a higher reimbursement from Medicare. Because Medicare's reimbursement system allows for supplemental or outlier payments to healthcare providers for unusually high healthcare costs, Warren Hospital allegedly inflated charges to receive these outlier payments. Additionally, Warren Hospital settled charges that it violated the Stark anti-self-referral statute, which prohibits a physician from referring Medicare or Medicaid patients to another healthcare provider with whom the physician has a financial relationship. The settlement arose out allegations made in a *qui tam* lawsuit filed by relators Peter Salvatori and Sara Iveson in 2002 and another *qui tam* lawsuit filed in 2005 by Anthony Kite. For their role in the settlement, Iveson and Salvatori will share $1.2 million. A separate agreement was reached between Kite, Salvatori, and Iverson concerning Kite's share of the settlement. Warren Hospital also entered into a Corporate Integrity Agreement with the U.S. Department of Health and Human Services. Assistant U.S. Attorney Stuart A. Minkowitz represented the U.S. John E. Riley of Vaira & Riley P.C. represented relators Salvatori and Iveson. TAF members Erika Kelton and Larry Zoglin of Phillips and Cohen L.L.P. represented Anthony Kite along with Jonathan S. Berck of Jonathan S. Berck L.L.C. The investigation and settlement was coordinated by the Commercial Litigation Branch of the Civil Division of the Justice Department, U.S. Attorney's Office for the District of New Jersey, the U.S. Department of Health and Human Services, the U.S. Attorney's Office for the Eastern District of Pennsylvania, the Centers for Medicare and Medicaid Services, and the FBI.

## Harris Methodist HEB Hospital Settlement—December 10, 2007

Harris Methodist HEB Hospital, an acute care facility in Bedford, Texas, agreed to pay more than $1.9 million to the State of Texas and the U.S. to settle claims that it submitted false claims to Medicare and Texas Medicaid for items and services related to orthopedics. The settlement arose from a self-disclosure made by the parent company of Harris Methodist to the Office of the Inspector General of the Department of Health and Human Services (OIG) that alleged that a physician-lease agreement made by Harris Methodist potentially violated federal law. After the OIG and the FBI investigated the case, it was discovered that Harris Methodist had unlawfully received

payments from Medicare and Medicaid for orthopedic related services and items for patients who were referred by a physician's group that received free rent from Harris Methodist. As part of the settlement, Harris Methodist also entered into a three year Corporate Integrity Agreement with the OIG of the Department of Health and Human Services. Assistant U.S. Attorney Sean McKenna handled the case for the U.S.

### HealthSouth Corporation Settlement—December 14, 2007

HealthSouth Corporation and two physicians agreed to pay the U.S. $14.9 million to settle allegations that HealthSouth submitted false claims to Medicare and violated the anti-kickback statute by paying unlawful kickbacks to physicians who referred patients to its hospitals, rehabilitation clinics, and ambulatory surgery centers. The settlement arose from disclosures made by HealthSouth in 2004 and 2005 to the U.S. Attorney for the Northern District of Alabama and the Office of the Inspector General for the Department of Health and Human Services (OIG) during a management change and an internal investigation. According to the disclosure, HealthSouth was involved in illegal financial relationships with the Alabama Sports Medicine and Orthopedic Center, the American Sports Medicine Institute, and two physicians—James Andrews and Lawrence Lemak—to whom kickback payments were made to induce referrals to HealthSouth facilities. HealthSouth will pay $14.2 million and the two physicians, James Andrews and Lawrence Lemak, will pay a total of $700,000. As part of the settlement HealthSouth will enter into a Corporate Integrity Agreement with the OIG of the Department of Health and Human Services. The case was investigated by the U.S. Attorney's Office for the Northern District of Alabama, the U.S. Attorney's Office for the Central District of California, the Civil Division of the U.S. Department of Justice, the OIG of the Department of Health and Human Services, and the FBI.

### U.S. ex rel. Kenner and Elshaug v. The Spirit Lake Tribe and Sioux Manufacturing Corporation (D.N.D. January 18, 2007)

Sioux Manufacturing Corporation (SMC), a tribal corporation owned by The Spirit Lake Tribe of Fort Totten, North Dakota, agreed to pay $1,935,000 to the U.S. government to settle claims that it knowingly supplied non-compliant Kevlar material to the government to be used in the manufacturing of combat helmets for military personnel in Iraq and Afghanistan. The settlement arose from a qui tam complaint filed in 2006 by two former employees of SMC, Jeff Kenner and Tamra Elshaug. In their complaint, Kenner and Elshaug allege that from 1994 to 2006, SMC knowingly supplied Kevlar cloth to the government corporation UNICOR-Federal Prison Industries, which did not meet the required military specifications for Kevlar material. Specifically, SMC provided material that did not meet the necessary weaving density or "thread count", which is crucial in protecting a soldier from the impact of a bullet or other projectile. As their share of the recovery, the relators will share $406,350. TAF member Andrew Campanelli of Perry & Campanelli LLP represented the relators. The investigation and settlement was handled by the U.S. Attorney's Office for the

District of North Dakota, with assistance from the Civil Division's Commercial Litigation Branch, the Department of Justice Office of the Inspector General, the Defense Criminal Investigative Service, the Army Criminal Investigative Command, and the Air Force Office of Special Investigations.

### Community Memorial Health System Settlement—December 19, 2007

Community Memorial Health System (CMHS) agreed to pay $1.52 million to the federal government to settle allegations that it violated the False Claims Act by submitting claims to Medicare which were prohibited under the Stark law. According to self-disclosures made by CMHS to the federal government, CMHS had entered into unlawful financial arrangements with physicians in which monetary gifts were exchanged for referrals. These monetary gifts took the form of interest-free loans, below market rents, gifts, and employment arrangements with the physicians' family members. Such arrangements violate the Stark 'anti-referral' law and as such, claims submitted to Medicare as a result of such arrangements are not reimbursable. The investigation and settlement was handled by the U.S. Attorney's Office for the Central District of California. CMHS did not admit any wrongdoing. Assistant U.S. Attorney Wendy Weiss represented the U.S.

### Orange County California Settlement—December 20, 2007

Orange County, California, agreed to pay $7 million to settle claims that its Health Care Agency violated the False Claims Act by billing Medicare for psychiatric evaluations that did not meet federal reimbursement requirements. The settlement arose from an investigation by the federal government of the Behavioral Health Services Division of Orange County's Health Care Agency (OCHCA). The investigation found that between 1990 and 1999, OCHCA billed Medicare for self-administered methadone treatment for drug addicted patients—a practice not covered by Medicare. Additionally, OCHCA allegedly upcoded short office visits to more extensive office visits to receive a higher reimbursement from Medicare. As part of the settlement, OCHCA will enter into a Corporate Integrity Agreement with the Office of the Inspector General of the Department of Health and Human Services.

### U.S. ex rel. Ramsey v. St. Joseph's Hospital of Atlanta (N.D. Ga. December 28, 2007)

St. Joseph's Hospital of Atlanta and St. Joseph's Health System agreed to pay $26 million to the U.S. to settle allegations that it violated the False Claims Act by improperly billing Medicare for inpatient admissions and various other services. The allegations arose from a *qui tam* complaint filed by Tami Ramsey, a nurse and former employee at St. Joseph's. In her complaint, Ms. Ramsey alleged that from 2000 to 2005, St. Joseph's had improperly billed 'outpatient visits' as 'inpatient admissions' which are billed at a higher rate. Additionally, St. Joseph's allegedly billed Medicare for inpatient admissions related to carotid artery tests which are not covered by Medicare. The investigation of

St. Joseph's was conducted by the U.S. Attorney's Office of the Northern District of Georgia, the Office of the Inspector General of the Department of Health and Human Services, and the Commercial Litigation Branch of the Department of Justice's Civil Division. As her share of the recovery, Ms. Ramsey will receive $4.94 million. TAF members Marlan Wilbanks of Harlan, Smith, Bridges, and Wilbanks LLP and James T. Ratner of the Law Office of James T. Ratner represented Tami Ramsey. Assistant U.S. Attorney Mina Rhee handled the case for the U.S.

# Spotlight

**Allison Engine Company, Inc., et al., v.**
**United States ex rel. Roger L. Sanders and Roger L. Thacker**

No. 07-214

In The
# Supreme Court of the United States

Allison Engine Company, Inc., et al.,
*Petitioners,*

v.

United States ex rel. Roger L. Sanders
and Roger L. Thacker,
*Respondents.*

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

## BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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January 22, 2008

## QUESTION PRESENTED

Whether United States Navy subcontractors that make false claims for federal Government money can be liable under 31 U.S.C. § 3729(a)(2) or (a)(3) of the False Claims Act, even if the subcontractors' false claims were not presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States.

## INTEREST OF *AMICUS CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective antifraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

## INTRODUCTION

Since its enactment in 1863, the False Claims Act ("FCA") has been the Government's primary tool for ensuring that federal funds are not misused or diverted from their intended purpose, thereby protecting the public from the unnecessary costs of government expenditures for inflated construction costs, defective military materiel, and improper health care reimbursements. Petitioners and their *amici* argue, however, that the FCA has the strictly delimited purpose of protecting the federal treasury only when fraudulent claims are submitted directly to the Government and that the FCA has no role in protecting federal funds spent through an intermediary to accomplish their intended public purpose. In this case, petitioners and their *amici* assert that the Government and the public are not defrauded within the meaning of the FCA when a skilled nursing facility receives substandard supplies purchased with federal Medicare dollars (Chamber Br. 12); that the Government and the public are not defrauded when a hospital has to provide a lower quality of care to its Medicare patients because a vendor overcharges the hospital for services paid out of a fixed amount of federal funds (*id.*); and that the Government and the public are not defrauded when federal dollars are used to pay for defective components of *Arleigh Burke* class guided missile destroyers built for the United States Navy (Pet. Br. 34–35).

1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of respondents to the filing of this brief has been filed with the Clerk.

The dismissive characterization of such conduct as "fraud perpetrated by one private party against another" (Pet. Br. 33; *see also* Chamber Br. 5, 18) ignores the substantial harm that the Government and the public suffer when waste and abuse reduce the quantity and quality of products and services that taxpayers' funds can provide. Once the Government distributes funds to contractors and grantees, it maintains a strong interest in ensuring that the funds are spent for their intended purpose. The Government does not transfer money or property to contractors and grantees just for the sake of transferring funds. The FCA not only sensibly protects the formalistic transfer of funds from the federal Government to a direct recipient but also provides a remedy and deterrent when a subcontractor of that recipient commits fraud in the use of federal funds.

## SUMMARY OF ARGUMENT

The 1986 amendments to the False Claims Act ("FCA") explicitly clarify that the FCA encompasses frauds perpetrated indirectly against the Government by recipients of funds from federally funded contracts and programs. The FCA's broad coverage of frauds committed against recipients of federal funds is confirmed by its plain language, structure, statutory origins, legislative history, and purpose. The Sixth Circuit correctly applied the FCA in holding that presentment of a claim to the Government is not required to violate the FCA, and the decision below should accordingly be affirmed. A contrary result would undermine the 1986 amendments and allow substantial amounts of fraud involving federal funds to go unchecked.

The plain language of Section 3729(c), which was added to the FCA in 1986, evinces Congress's intent to include fraud committed by subcontractors and other downstream recipients of federal funds, regardless of whether the subcontractors' claims are ultimately presented to the Government. Section 3729(c) defines "claim" to include claims for money or property made "to a contractor, grantee, or other recipient" of federal funds where "any portion" of the requested money or property comes from the Government. 31 U.S.C. § 3729(c). Requiring a claim to be presented directly to the Government would be inconsistent with Section 3729(c)'s explicit inclusion of claims submitted to a "recipient" of federal money.

Nor does the plain language of either Section 3729(a)(2) or (a)(3) contain any presentment requirement. The absence of a presentment requirement in subsections (a)(2) and (a)(3) is significant in light of the explicit inclusion of a presentment requirement in Section 3729(a)(1). *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (noting significance of disparate inclusion and exclusion of statutory language in different sections of same act).

Moreover, the lack of a presentment requirement in Sections 3729(a)(2) and (a)(3) is complemented by the structure of the FCA and the statutory origins of those sections. Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would conflict with the addition of Section 3729(c) to the FCA and violate this Court's "car-

dinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted). That contextual understanding gains support from the statutory history of the FCA, which establishes that predecessor versions of Sections 3729(a)(2) and (a)(3) did not contain a presentment requirement either.

Although the plain language, structure, and statutory history of the Act suffice to demonstrate the lack of a presentment requirement, the legislative history of the 1986 amendments to the FCA also squarely supports the Sixth Circuit's decision that presentment to the federal Government is not required. Congress intended to abrogate decisions that interpreted the FCA too restrictively by requiring the presentment of a claim to the Government or by requiring monetary loss to the Government. *See* S. Rep. No. 99-345, at 21–22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. Congress also expressed its approval of cases such as *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976), in which the court held that "false claims submitted to a state Medicaid program, such as MediCal, are claims against the United States within the meaning of the False Claims Act," *id.* at 1149. *See* S. Rep. No. 99-345, at 22.

Finally, Congress enacted the 1986 amendments against the backdrop of an inexorable shift in federal spending from direct expenditures by the Government to indirect expenditures through block grants and other transfers of federal funds to state and local governments and private entities. In giving greater flexibility for such funds to be expended without precise federal mandates or a direct relationship between the ultimate recipient of the funds and the Government, Congress did not intend to insulate those transactions from the FCA's purview. As even petitioners' *amici* acknowledge, "[t]he federal Government pours hundreds of billions of dollars into the economy each year through contracts and grants." Chamber Br. 6. Removing such a vast amount of federal funds from the protection of the FCA would substantially weaken the FCA and make it a much less effective tool to combat fraud and to ensure the proper use of federal funds. Congress amended the FCA in 1986 precisely to avoid that result.

## ARGUMENT

### I. THE PLAIN LANGUAGE, STRUCTURE, AND STATUTORY ORIGINS OF THE FALSE CLAIMS ACT DEMONSTRATE THAT PRESENTMENT OF A CLAIM TO THE GOVERNMENT IS NOT REQUIRED

The addition of Section 3729(c) to the False Claims Act ("FCA") in 1986 clearly demonstrates that Congress did not intend for presentment to the Government to be a condition of liability under Sections 3729(a)(2) and (a)(3). Because Section 3729(c) is key to understanding that Sections 3729(a)(2) and (a)(3) contain no presentment requirement, our analysis of the plain language of the FCA begins with Section 3729(c)—the FCA's expansive definition of the term "claim"—and then considers the plain language of Sections 3729(a)(2) and (a)(3). The absence of any presentment

requirement in the text of Sections 3729(a)(2), (a)(3), and (c) is further supported by the statutory structure of the FCA and its legislative origins.

## A. The Plain Language Of The Statute Does Not Require Presentment

### 1. Section 3729(c) clearly demonstrates congressional intent not to require presentment

In 1986, Congress added Section 3729(c) to the FCA to clarify that presentment of a claim to the Government is not required to trigger liability under Sections 3729(a)(2) and (a)(3) of the FCA. Rather, Section 3729(c) ensures that the FCA also covers claims that are submitted to any recipient of federal funds. Section 3729(c) provides in its entirety:

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

31 U.S.C. § 3729(c). By the language it chose, Congress intended for that definition to be additive and not exhaustive. The term "includes" denotes an expansive definition. *See* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 152 (5th ed. 1992) (noting that the term "includes" is a term of enlargement and conveys the conclusion that other items not enumerated are includable). Although Congress could have limited the definition of a "claim" to the situation in which a prime contractor submits a request for payment directly to the Government, it chose not to limit the definition in that way.[2] The plain language therefore evinces the intent for Section 3729(c) to ensure that the FCA covers not just the straightforward case of a prime contractor's direct submission of a claim to the Government but also a subcontractor's request or demand to a prime contractor, as long as "any portion of the money or property which is requested or demanded" comes from the federal Government.

Section 3729(c) contains a logical and necessary limiting requirement that some portion of the requested money or property come from the federal Government. The FCA is not intended to cover frauds that do not involve federal funds or property. Claims made to contractors, grantees, or other recipients come within the Act's ambit "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contrac-

2. The statute's definition of "claim" does not even cover a prime contractor's direct submission of a claim to the Government, providing further evidence that Section 3729(c)'s definition of "claim" is an enlarging rather than exhaustive definition.

tor, grantee, or other recipient for any portion of the money or property." 31 U.S.C. § 3729(c). That provision establishes the required nexus between the claim made to, *e.g.*, a contractor and the federal funds used by the contractor to pay the claim. But the plain language of subsection (c) contains no requirement that a claim be presented to the federal Government. Such a requirement would be antithetical to the very purpose of adding subsection (c) to clarify that the FCA covers claims that are presented to recipients of federal funds.

Congress's use of the phrases "if the United States Government provides" and "if the Government will reimburse" in Section 3729(c) does not constitute a presentment requirement. Congress's use of different verb tenses in these two clauses is significant. *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). Here, the use of different verb tenses indicates that Section 3729(c) covers two different situations: (1) the situation where the "contractor, grantee, or other recipient" of federal funds to whom a false claim is submitted has already received from the Government some portion of the money requested by the false claimant; and (2) the situation where the "contractor, grantee, or other recipient" will be reimbursed by the Government at a later point in time for some portion of the money requested by the false claimant.[3]

That interpretation of Section 3729(c) also is consistent with a common-sense reading of the statute based on the use of words in common parlance. *See United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 582 (1991) (explaining that a "common-sense reading of the statutory language best comport[ed] with the purpose" of the statute at issue); *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207–08 (1997) (relying on word's use in "common parlance" to interpret statutory language). The word "provides" commonly identifies something's source. Consider the example of a student researching a federally funded highway construction project being built by a state transportation department. If the student asked the project manager, "Who provides the funding for this project?," the project manager's answer would not hinge on whether the federal Government had already transferred all of the federal funds for the project to the state or whether it continued to pay out funds to the state on an ongoing basis. Either way, the correct, and common-sense, answer to the question would be, "the federal Government."

3. In attempting to reconcile Section 3729(c) with Section 3729(a)(1)—which is not at issue in this case and which, unlike Sections 3729(a)(2) and (a)(3), contains an explicit presentment requirement (*see infra* p. 10)—the D.C. Circuit focused on the use of the present-tense form of the verb "provides" in Section 3729(c), explaining that "False Claims Act liability will attach if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government." *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004). That reading, however, functionally converts Congress's use of the present tense in the statute to the future tense, making liability contingent upon some event transpiring at a later point in time. *Totten* thus disregards its own recognition "of the Supreme Court's admonition that 'Congress' use of a verb tense is significant in construing statutes.'" *Id.* (quoting *Wilson*, 503 U.S. at 333). If Congress had intended for liability to be contingent on a future payment of money or property by the federal Government, it would have drafted Section 3729(c) to read, "if the United States Government *will* provide any portion of the money . . . ," just as it drafted the immediately following clause to read, "if the Government *will* reimburse," 31 U.S.C. § 3729(c) (emphasis added).

**2. The plain language of Section 3729(a)(2) contains no presentment requirement**

The plain language of Section 3729(a)(2) contains no presentment requirement. Section 3729(a)(2), which was created when the FCA was recodified in 1982, makes any person liable under the FCA who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2).[4] The absence of a presentment requirement in that subsection stands in stark contrast to subsection (a)(1), which makes any person liable who "knowingly presents, or causes to be presented," a false claim to the Government. *Id.* § 3729(a)(1). Congress's exclusion of a presentment requirement from subsection (a)(2) is significant in the face of its inclusion of a presentment requirement in subsection (a)(1). *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). Congress clearly knew how to include a presentment requirement when it wanted to, but chose not to do so in Section 3729(a)(2).

Nor did the addition of the phrase "by the Government" at the end of Section 3729(a)(2) in 1986 add a presentment requirement to subsection (a)(2). Rather, the addition of that phrase cured a jurisdictional defect in subsection (a)(2) that Congress inadvertently introduced when it recodified the FCA in 1982. Without the phrase "by the Government," subsection (a)(2) contained no limitation whatsoever on what kind of claims were covered by the FCA. Because subsection (a)(2) made any person liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved," 31 U.S.C. § 3729(a)(2) (1982), the absence of a definition of claim in the FCA meant that even purely private claims would have been covered by the plain language of the statute. When Congress added an inclusive rather than exhaustive definition of the term "claim" to the FCA in 1986, *see supra* pp. 6–7, its addition of the phrase "by the Government" to Section 3729(a)(2) cured the federal jurisdictional defect in the version of that subsection that existed from 1982 to 1986.

The *Totten* court concluded that Congress must have added the words "by the Government" for the purpose of "referring back to the presentment requirement of Section 3729(a)(1)." 380 F.3d at 499. *Totten* based its conclusion on the principles of statutory construction that (1) where avoidable, "'no clause, sentence, or word shall be superfluous, void, or insignificant,'" *id.* (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004)), and (2) "'when Congress acts to

4. The phrase "by the Government" was added in 1986. As discussed below, this phrase does not introduce a presentment requirement. Rather, the jurisdictional phrase was added to remedy an inadvertent defect in the pre-1986 version, which failed to provide any limitation of the scope of subsection (a)(2) to federal frauds.

amend a statute, we presume it intends its amendment to have real and substantial effect,'" *id.* (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)) (alteration omitted). The *Totten* court failed to recognize that Congress needed to add the words "by the Government" to cure the jurisdictional defect in Section 3729(a)(2), thus addressing both preceding principles of statutory construction about which the *Totten* court professed concern. Had it recognized that the phrase was added to cure the jurisdictional defect in subsection (a)(2) that existed from 1982 to 1986, the *Totten* court presumably would not have had to develop the less persuasive explanation that Congress intended the phrase to refer back to subsection (a)(1)'s presentment requirement.[5]

### 3. Section 3729(a)(3)'s broad conspiracy provision contains no presentment requirement

The plain language of the FCA's broad conspiracy provision does not contain a presentment requirement either. Section 3729(a)(3), in its entirety, makes any person liable who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). The plain language of that subsection could not be clearer, and notably subsection (a)(3) cannot be read to require presentment of a claim to the Government. Section 3729(c)'s explicit definition of "claim" to include any request to a "contractor, grantee, or other recipient" of federal funds simply provides further support for the conclusion that Congress did not intend Section 3729(a)(3) to contain a presentment requirement.

Petitioners and their *amici* understandably shy away from Section 3729(a)(3)'s plain language. Instead, they attempt to assert that scope of liability under subsection (a)(3) is "defined by the scope of liability under Sections 3729(a)(1) and (a)(2)." Pet. Br. 29. But that is not how Congress drafted subsection (a)(3). Had Congress wished to limit subsection (a)(3) in that way, it simply would have drafted the conspiracy provision to make any person liable who "conspires to violate paragraph (1) or (2) of this section." *See, e.g.*, 18 U.S.C. § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

## B. The Statutory Structure of the FCA Confirms the Lack of a Presentment Requirement in This Case

The FCA's structure confirms that, consistent with their plain language, Sections 3729(a)(2) and (a)(3) do not impose a requirement that a claim be presented to the federal Government to be covered by the FCA.

5. If Congress had intended to add a presentment requirement to Section 3729(a)(2), it likely would have done so in a much less cryptic manner by tracking the straightforward language used in subsection (a)(1), making any person liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim *presented to the Government* for payment or approval."

### 1. Section 3729(a)(1) logically contains a presentment requirement while Section 3729(a)(2) does not

The statutory structure of the FCA supports the inclusion of a presentment clause in subsection (a)(1) but not in subsection (a)(2). Subsection (a)(1) intends to cover the kind of false document, such as an invoice, that either might be presented directly to the Government by a contractor[6] or might be forwarded without change from a prime contractor to the Government for payment after the prime contractor receives the invoice from a subcontractor.[7] Subsection (a)(2) covers the kind of false document that a subcontractor might submit for payment to a prime contractor that does not simply forward the false document to the Government without change. Rather, the prime contractor either pays the subcontractor using federal funds the contractor has already received or incorporates the subcontractor's false information into an invoice that the contractor submits to the Government for reimbursement. Sections 3729(a)(1) and (a)(2) thus cover both the situation in which a false claim is presented to the Government and the situation in which a false document is used by a subcontractor to induce a recipient of federal funds to pay the subcontractor. Such a reading explains why subsection (a)(1) contains a presentment clause while subsection (a)(2) does not, and it gives effect to the plain language of Sections 3729(a)(1) and (a)(2) without conflicting with Section 3729(c).

### 2. Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would conflict with Section 3729(c)'s inclusive definition of "claim"

Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) of the FCA would conflict with Section 3729(c)'s inclusive definition of "claim" that includes claims submitted to a "contractor, grantee, or other recipient" of federal funds. This Court has consistently followed the "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citation omitted). Rather than focusing on a single section in isolation to interpret a statute, the Court should "adopt that sense of [the] words which best harmonizes with [the] context and promotes [the] policy and objectives of [the] legislature." *Id.* at 221 n.10 (citing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868)); *see also Richards v. United States*, 369 U.S. 1, 11 (1962) ("[W]e must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy.") (internal quotation marks and alteration omitted); 2A Singer, *Statutes and Statutory Construction* § 46.05, at 103 (noting need to construe each section in connection with other sections). Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would undermine the 1986 addition of Section 3729(c)'s inclusive definition of "claim" to the

6. The contractor "knowingly presents" the false claim to the Government.

7. The subcontractor "causes [the false claim] to be presented" to the Government by the contractor.

FCA. Such an interpretation is contrary to the plain language of Sections 3729(a)(2) and (a)(3) and would conflict with the FCA's overall objective to apply broadly to frauds involving federal money or property, even when a claim is presented to a "contractor, grantee, or other recipient" of federal funds. 31 U.S.C. § 3729(c).

## C. The FCA's Statutory History Is Consistent With The Lack Of A Presentment Requirement In Sections 3729(a)(2) And (a)(3)

The lack of a presentment requirement in the plain language of current Sections 3729(a)(2) and (a)(3) is consistent with prior versions of the FCA. Before Sections 3729(a)(1) and (a)(2) were broken out into separate sections in 1982, they were part of the same section. In relevant part, that section made any person liable

> [1] who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any *claim upon or against the Government of the United States, or any department or officer thereof*, knowing *such claim* to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses, or causes to be made or used, any false bill, receipt, voucher . . . ."

31 U.S.C. § 231 (1976) (emphases and enumeration added). The first reference to "claim" is unambiguously modified immediately thereafter by the words "upon or against the Government of the United States, or any department or officer thereof." Subsequent references to such claim clearly refer back to a claim upon or against the United States or one of its departments, *i.e.*, a claim for federal funds.[8] As in the current version of Sections 3729(a)(1) and (a)(2), the explicit inclusion of a presentment requirement in the first clause of Section 231 makes the omission of a presentment requirement in the second clause significant. *See Barnhart*, 534 U.S. at 452.

Similarly, prior to the 1982 recodification, the FCA's conspiracy provision did not contain a presentment requirement. The conspiracy clause of Section 231 made any person liable "who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." 31

8. Petitioners argue for a far more unnatural reading that "such claim" refers to a claim that "'would be presented or caused to be presented to the United States.'" Pet. Br. 21 (quoting *Totten*, 380 F.3d at 500). In arguing against the *Totten* dissent's straightforward reading, the majority stated that it failed "to see how the dissent's reading is any different from our own: a claim could not be upon or against the Government unless it was presented to the Government." 380 F.3d at 500 n.7. The majority opinion thus appears to take the position that the phrase "present or cause to be presented" in Section 231 does the same work as the phrase "upon or against the Government," even though both phrases appear in the same clause. That explanation, however, is inconsistent with the *Totten* majority's own invocation of the "'cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Id.* at 499 (quoting *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 489 n.13).

U.S.C. § 231 (1976). Accordingly, the precursor of neither current Section 3729(a)(2) nor Section 3729(a)(3) contained a presentment requirement even before the 1982 recodification of the FCA.

## II. CONSTRUING THE FALSE CLAIMS ACT NOT TO CONTAIN A PRESENTMENT REQUIREMENT ENSURES THAT VAST AMOUNTS OF FRAUD REMAIN WITHIN THE SCOPE OF THE ACT

### A. Congress Intended The 1986 Amendments To Overrule Cases That Limited The FCA's Scope Of Coverage And To Approve Broad Judicial Interpretations Of The FCA

The legislative history of the 1986 amendments complements the plain language and structure of the statute and confirms that Congress amended the FCA in 1986 to ensure that presentment of a claim to the federal Government is not required to trigger liability under the FCA. Congress specifically intended for Section 3729(c) to overrule by statute such decisions as *United States ex rel. Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D.N.Y. 1938), and *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). *See* S. Rep. No. 99-345, at 21–22 (1986) (discussing addition of Section 3729(c)), *reprinted in* 1986 U.S.C.C.A.N. 5266.[9] Reading a presentment requirement into the FCA would conflict with Congress's goal of abrogating those decisions.

In *Salzman*, the court dismissed the plaintiff's FCA suit against a defendant that had allegedly presented false claims to the Red Cross. Although the Red Cross received "a donation from the government and administered it for the purpose specified," the court concluded that the complaint did not state a cause of action under the FCA because the Red Cross was not part of the Government and the false claims had therefore not been presented to a department of the Government. *See* 41 F. Supp. at 197. The Senate Judiciary Committee, which had principal responsibility for the bill that became the 1986 amendments, cited *Salzman* with disfavor as an example of cases in which courts found the FCA to be inapplicable. It explained that "[s]ome courts have concluded that once the United States has made the grant to the State, local government unit, or other institution, it substantially relinquishes all control over the disposition of the money or commodities." S. Rep. No. 99-345, at 21. The Committee then noted that "the judicial determination may follow that a fraud against the grantee does not constitute a fraud against the Government of the United States with the result that the False Claims Act is inapplicable." *Id.* In summarizing its reasons for adding Section 3729(c) to the FCA, the Committee clearly and unambiguously indicated its intention to overrule such "cases which have limited the ability of the United States to

9. The Senate Report's section-by-section analysis of the provision now codified at 31 U.S.C. § 3729(c) refers to "subsection (d)" due to Congress's intervening elimination of an unrelated, proposed subsection (b) dealing with consequential damages. *See* S. Rep. No. 99-345, at 20, 21. Subsection (d) of the version of the bill analyzed in the Senate Report became the subsection that was ultimately enacted as Section 3729(c).

use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." *Id*. at 22. Consequently, under the amended FCA, the allegedly fraudulent claims presented to the Red Cross in *Salzman* would have been actionable, even though the claims were not presented to the Government.

Section 3729(c) also was intended to overrule *Azzarelli*. *See id*. *Azzarelli* involved false claims submitted to a highway project in Illinois for which the federal Government provided 70 percent of the funds, through the State of Illinois. *See* 647 F.2d at 758. The federal Government's contribution of highway funds to the State of Illinois was a fixed sum each year. The federal Government was thus insulated from any risk of loss resulting from overcharges related to the submission of false claims to the highway project. *See id*. at 761. Because the federal contribution was a fixed sum and the federal Government consequently did not suffer any financial injury, the *Azzarelli* court affirmed the district court's dismissal of the FCA complaint. *See id*. at 762.

Congress's intention to overrule *Azzarelli*, therefore, disproves petitioners' suggestion that Congress intended for Section 3729(c) to apply only when the payment of a false claim made to a party other than the Government would ultimately result in a loss to the Government. *See* Pet. Br. 28. *Azzarelli* presented a situation in which no loss could have resulted to the federal Government due to the fixed nature of the Government's contribution to the State of Illinois. By adding Section 3729(c) to overrule *Azzarelli*, Congress clearly intended for the FCA to apply even when no loss would result to the federal Government. Accordingly, it makes no difference under Section 3729(c) whether the Government has already provided the funds to the "contractor, grantee, or other recipient" or whether it "will reimburse such contractor, grantee, or other recipient" at some later date. *See supra* pp. 6–10.

The Sixth Circuit's interpretation of the FCA not only is consistent with Congress's intent to overrule cases like *Salzman* and *Azzarelli* but also gives effect to legislative approval of the decision in *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976). The Senate Report approvingly discussed *Davis* in some detail. *See* S. Rep. No. 99-345, at 22. In *Davis*, the plaintiff alleged that the defendants submitted numerous false claims to California's MediCal program, which was approximately 50 percent funded by the federal Government. *See* 411 F. Supp. at 1145. The precise question presented in *Davis* was "whether *claims presented to a state agency* in accord with the Federal Medicaid program . . . are claims against the United States government within the meaning of the Federal False Claims Act." *Id*. at 1144 (emphasis added). The court rejected the defendants' argument "that the mere fact that federal funds are advanced for a state program is insufficient to warrant a characterization of fraudulent claims under that program as claims against the United States government." *Id*. at 1146. Instead, *Davis* concluded that "claims filed under the state program should be considered claims against the United States within the meaning of the False Claims Act." *Id*. at 1147.

In its approving discussion of *Davis*, the Senate Report focused on the fact that *Davis* held that "claims submitted to MediCal" came within the scope of the FCA. S. Rep. No. 99-345, at 22. Moreover, the Report concluded its discussion of *Davis* by indicating that "[s]imilar reasoning should apply in other circumstances where claims are submitted to State, local, or private programs funded in part by the United States." *Id.* Consistent with the plain language of Section 3729(c), the legislative history of the 1986 amendments discusses both the cases that Congress sought to overrule and those it approved. That explanatory history demonstrates Congress's intent for Section 3729(c) to ensure that narrow judicial readings of the FCA would not unduly limit its scope.[10]

The opening and concluding sentences of the Senate Report's "section-by-section analysis" of subsection (c) perhaps best explain congressional intent in adding Section 3729(c): (1) "New subsection ([c]) clarifies that the statute permits the Government to sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of Federal funds," *id.* at 21 (opening sentence); and (2) "Thus, the Committee intends the new subsection ([c]) to overrule *Azzarelli* and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds," *id.* at 22 (concluding sentence). Upholding the Sixth Circuit's decision would promote the clear purpose of Section 3729(c) as articulated by Congress, whereas a contrary decision would substantially limit the FCA's ability to reach fraud perpetrated on recipients of federal funds.

## B. Accepting Petitioners' Interpretation Would Remove Vast Amounts of Fraud From the FCA's Reach

### 1. The 1986 amendments ensure that the FCA protects federal funds broadly even when those funds are spent through grants and contracts

The correct interpretation of the FCA, set forth above, ensures that the Act continues to function as an effective tool for combating fraud involving federal funds. On the other hand, accepting petitioners' construction could result in vast amounts and categories of fraud involving federal funds falling outside the coverage of the protective umbrella provided by the FCA. Between this Court's 1943 decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), and Congress's amendment of the FCA in 1986, federal spending in the form of grant payments alone increased from $900

10. In *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff'd on other grounds*, 470 F.3d 1350 (11th Cir. 2006), the court dismissed an FCA case involving allegedly false claims submitted by the defendants to the Alabama Medicaid Agency. The court noted that 70 percent of the Alabama Medicaid Agency's costs were borne by the United States. *See id.* at 1304. However, because the Alabama Medicaid Agency's rules did not require the subsequent submission of the claim to the federal Government, the court embraced *Totten*'s logic and dismissed the complaint, "finding no basis in the FCA for a relator to pursue recovery on behalf of the United States for fraud of the kind allegedly perpetrated upon . . . the Alabama Medicaid Agency." *Id.* at 1304, 1306. Such a result is inconsistent with Congress's approval of *Davis*.

million to more than $112 billion. Even measured as a percentage of total federal government outlays, grant spending increased tenfold from 1.1 percent in 1943 to 11.4 percent in 1986. *See Budget of the United States Government: Historical Tables Fiscal Year 2008*, Table 6.1—Composition of Outlays: 1940–2012 (2007), *available at* http://www.gpoaccess.gov/usbudget/fy08/hist.html. Congress thus added Section 3729(c) to the FCA in 1986 against the backdrop of a dramatic shift in the deployment of federal funds from direct spending to spending through grantees and other recipients of federal funds.

Congress added Section 3729(c) in 1986 to ensure that, notwithstanding the changing nature of federal spending, federal funds would continue to be protected by the FCA by virtue of subsection (c)'s enlargement of the definition of "claim" to include claims made to contractors, grantees, and other recipients of federal funds. The Senate Report explicitly identified the purpose of the 1986 amendments as "mak[ing] the statute a more useful tool against fraud in modern times." S. Rep. No. 99-345, at 2. Petitioners and their *amici* attempt to portray Congress's successful protection of federal funds through the FCA as a parade of horribles resulting in the potential applicability of the Act to "billions of dollars' worth" of transactions. Chamber Br. 13; *see also* Pet. Br. 33–35. But providing broad protection of federal funds is exactly what Congress intended the FCA to do and is consistent with how this Court has directed that the FCA should be interpreted. *See United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *Marcus*, 317 U.S. at 541–42 & n.5. Petitioners' attempt to remove billions of dollars of federal expenditures from the FCA's coverage cannot be squared with the clear language and purpose of the FCA.

Contrary to petitioners' and their *amici*'s arguments, the FCA protects the federal Government and the public from the harm caused by fraud more broadly than when there is an "immediate financial detriment to the Federal Treasury." WLF Br. 6; *see also* Pet. Br. 28 (emphasizing need for payment of false claim to result in loss to the United States). That argument is inconsistent with Congress's explicit statement of its intent to overrule *Azzarelli*. *See* S. Rep. No. 99-345, at 22. And it cannot be reconciled with the Senate Report's plain but powerful statement that "[t]he cost of fraud cannot always be measured in dollars and cents." *Id.* at 3. The Senate Judiciary Committee's example of how "fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs" is particularly fitting in the context of the defective generator sets built for the Navy destroyers in this case:

> Even in the cases where there is no dollar loss—for example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scen[a]rio exists where in the above example the part *is* defective and causes not only a serious threat to human life, but also to national security.

*Id.* Congress clearly intends for the FCA to protect the use of federal funds for their intended purpose, not just the formalistic transfer of those funds from the federal treasury to the contractors, grantees, and other recipients that are responsible for spending the money entrusted to them by the Government.

Even where the federal treasury does not suffer an immediate financial loss, the FCA acts as more than just "a purely punitive statute" as claimed by *amicus* Washington Legal Foundation. WLF Br. 26. It acts of course as the strong deterrent against fraud intended by Congress. *See* S. Rep. No. 99-345, at 4 (describing FCA as a "powerful tool in deterring fraud"); *see also* Chamber Br. 17 (recognizing powerful deterrent effect of FCA lawsuits).[11] Moreover, the FCA's damages provision does not result in "a windfall" to the Government in such circumstances. WLF Br. 26. Rather, the damages that "the Government sustains," 31 U.S.C. § 3729(a), would be no different than damages in a product substitution case where a party contracts for a particular product but receives a lower quality product instead. The Government's damages would compensate it for the difference in the quality of the product it should have received compared to the product it did receive, enabling the Government to procure replacement products if necessary. *Amicus*'s argument that Section 3729(a)'s damages provision requires presentment of a claim to the Government under the FCA is thus unavailing. *See* WLF Br. 24–25.

The federal Government spends more than $900 billion a year through contracts and grants. *See* USASpending.gov, http://www.usaspending.gov (chart listing contracts and grants for fiscal year 2006 totalling $905.8 billion). The FCA protects those funds from fraud by expansively defining "claim" to include any request or demand for those funds, even when the request is made to one of the contractors, grantees, or other recipients of that federal largesse rather than to the federal Government itself. The Sixth Circuit's accurate interpretation of the FCA protects the integrity of those expenditures. A contrary interpretation, however, would fail to give effect to Congress's 1986 amendments to the FCA in recognition of the changing landscape of federal spending, and it would potentially remove billions of dollars of federal funds from the FCA's coverage.

### 2. The FCA's reach is limited to frauds involving federal funds

Petitioners' concerns about the potentially boundless reach of the FCA do not provide a basis for reversing the Sixth Circuit's decision. Contrary to the specter raised by petitioners, the FCA would not "apply to *any* claim for payment submitted to *any* entity that receives federal funding." Pet. Br. 34. For liability to attach under Section

11. Contrary to the arguments of *amici* Chamber of Commerce, American Hospital Association, and American Health Care Association, private parties involved in federal projects do not "have every incentive to investigate and resolve claims of contract noncompliance." Chamber Br. 18. Rather, prime contractors actually may have a disincentive to ferret out fraud in many circumstances. By remaining ignorant of their subcontractors' deficient performance or substitution of lower quality parts, prime contractors can avoid any financial detriment to themselves, avoid liability under the FCA, and simultaneously avoid protracted disputes with their subcontractors to remedy the subcontractors' defective performance.

3729(c), some portion of the money requested by the false claimant from the contractor, grantee, or other recipient of federal funds must have been either provided by the federal Government or later reimbursed to the contractor, grantee, or other recipient by the federal Government. *See* 31 U.S.C. § 3729(c). It therefore remains an essential element of FCA liability to establish a nexus between some portion of the requested money or property and its federal source. That requirement imposes a practical limitation on the FCA's reach.

Moreover, the FCA's broad protection of federal funds is a product of the plain language of Section 3729(c). Congress ensured that the FCA would extend broadly to frauds involving federal funds by imposing liability for claims submitted to recipients of federal funds as long as "*any* portion" of the funds requested or demanded comes from the federal Government. *Id.* (emphasis added). Congress could have chosen to impose a more restrictive requirement, such as requiring that at least half (or even all) of the funds requested come from the federal Government, but it did not do so. Petitioners' discontent with the reach of the statute should thus be addressed to Congress rather than the Court.

Petitioners' purported concern that the Sixth Circuit's interpretation of the FCA will "vastly complicate the task of trying FCA cases" (Pet. Br. 35) also is misplaced. Plaintiffs have the burden of establishing the federal origin of some portion of the money or property requested, and, to the extent they cannot do so, they will be unable to bring successful cases under the FCA. Petitioners' suggestion that "discovery and trial in FCA actions will be immeasurably complicated by efforts to trace the origin of funds used by federal grantees" (*id.* at 35–36) is similarly unavailing. Such tracing efforts are routine in the federal Government's myriad prosecutions for money laundering offenses, for example. *See* 18 U.S.C. § 1956(a)(1) (requiring proof that a prohibited financial transaction involve the proceeds of a specified unlawful activity); *id.* § 1957(a) (requiring proof of a "monetary transaction in criminally derived property").

In interpreting prior versions of the FCA, this Court has previously explained that it is a remedial statute whose provisions should be construed broadly. In *Neifert-White*, this Court explained why "claim" should be given an expansive reading: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil." 390 U.S. at 232. Since the Court decided *Neifert-White*, Congress has added Section 3729(c)'s expansive definition of the term "claim," which further emphasizes Congress's intent for the FCA to apply broadly and to overrule decisions that interpreted it narrowly. Accordingly, consistent with the plain language of the FCA, its structure, legislative history, and purpose, as well as the Court's own admonition against reading the FCA restrictively, the Court should not read a presentment requirement into Sections 3729(a)(2) and (a)(3).

## CONCLUSION

The Sixth Circuit's decision should be affirmed.

Respectfully submitted,

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January 22, 2008

# Legislative Update

**False Claims Act Corrections Act of 2007,**
H.B. 4854

110th CONGRESS
1st Session

# H.R. 4854

To amend the provisions of title 31, United States Code, relating to false claims to clarify and make technical amendments to those provisions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

*December 19, 2007*

Mr. BERMAN (for himself and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the provisions of title 31, United States Code, relating to false claims to clarify and make technical amendments to those provisions, and for other purposes.

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

## SECTION 1. SHORT TITLE.

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

## SEC. 2. LIABILITY FOR FALSE CLAIMS.

Section 3729 of title 31, United States Code, is amended to read as follows:

### `Sec. 3729. False claims

`(a) Liability for Certain Acts-

`(1) IN GENERAL- Any person who—

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

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

`(C) has possession, custody, or control of Government money or property and, intending to—

`(i) defraud the Government,

`(ii) retain a known overpayment, or

`(iii) knowingly convert the money or property, permanently or temporarily, to an unauthorized use,

fails to deliver or return, or fails to cause the return or delivery of, the money or property, or delivers, returns, or causes to be delivered or returned less money or property than the amount due or owed,

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

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

`(F) 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, or

`(G) conspires to commit any violation set forth in any of subparagraphs (A) through (F),

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government or its administrative beneficiary sustains because of the act of that person, subject to paragraphs (2) and (3).

`(2) LESSER PENALTY IF DEFENDANT COOPERATES WITH INVESTIGATION- In an action brought for a violation under paragraph (1), the court may assess not less than 2 times the amount of damages which the Government or its administrative beneficiary sustains because of the act of the person committing the violation if the court finds that—

`(A) such person provided to those officials of the United States who are responsible for investigating false claims violations, all information known to the person about the violation within 30 days after the date on which the person first obtained the information;

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

`(C) at the time such person provided to the United States the information about the violation under subparagraph (A), no criminal prosecu-

tion, civil action, or administrative action had commenced with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.

`(3) ASSESSMENT OF COSTS- A person violating paragraph (1) shall, in addition to a penalty or damages assessed under paragraph (1) or (2), be liable to the United States Government for the costs of a civil action brought to recover such penalty or damages.

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

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

`(A) has actual knowledge of the information,

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

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

and no proof of specific intent to defraud is required;

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

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

`(B) money or property that—

`(i) the United States Government provides or has provided to a contractor, grantee, agent, or other recipient, or for which the United States Government will reimburse a contractor, grantee, agent, or other recipient; and

`(ii) is to be spent or used on the Government's behalf or to advance a Government program; and

`(C) money or property that the United States holds in trust or administers for any administrative beneficiary;

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

`(4) the term 'administrative beneficiary' means any entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, serves as custodian or trustee of money or property owned by that entity.

`(c) Statutory Cause of Action- Liability under this section is a statutory cause of action all elements of which are set forth in this section. No proof of any additional element of common law fraud or other cause of action is implied or required for liability to exist for a violation of these provisions.

`(d) Exemption From Disclosure- Any information that a person provides pursuant to subparagraphs (A) through (C) of subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

`(e) Exclusion- This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986'.

## SEC. 3. CIVIL ACTIONS FOR FALSE CLAIMS.

(a) Actions by Private Persons Generally- Section 3730(b) of title 31, United States Code, is amended—

(1) in paragraph (1), by striking the last sentence and inserting the following: 'The action may be dismissed only with the consent of the court and the Attorney General.';

(2) in paragraph (2), by inserting after the second sentence the following: 'In the absence of a showing of extraordinary need, the written disclosure of any material evidence and information, and any other attorney work product, that the person bringing the action provides to the Government shall not be subject to discovery.';

(3) in paragraph (4), by striking subparagraph (B) and inserting the following:

`(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action, and, within 45 days after the Government provides such notice, shall either—

`(i) move to dismiss the action without prejudice, or

`(ii) notify the court of the person's intention to proceed with the action and move the court to unseal the complaint, and any amendments thereto, so as to permit service on the defendant and litigation of the action in a public forum.

A person who elects to proceed with the action under subparagraph (B)(ii) shall serve the complaint within 120 days after the person's complaint is unsealed under such subparagraph.'; and

(4) by amending paragraph (5) to read as follows:

`(5) When a person brings an action under this subsection, no person other than the Government may join or intervene in the action, except with the consent of the person who brought the action. In addition, when a person brings an action that is pled in accordance with this subsection and section 3731(e), no other person may bring a separate action under this subsection based on the facts underlying a cause of action in the pending action.'.

(b) Rights of the Parties to Qui Tam Actions- Section 3730(c)(5) of title 31, United States Code, is amended by striking the second sentence and inserting the following: 'An alternate remedy includes—

`(A) anything of value received by the Government from the defendant, whether funds, credits, or in-kind goods or services, in exchange for an agreement by the Government either to release claims brought in, or to decline to intervene in or investigate the action initiated under subsection (b); and

`(B) anything of value received by the Government based on the claims alleged by the person initiating the action, if that person subsequently prevails on the claims.

If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section, except that the person initiating the action may not obtain an award calculated on more than the total amount of damages, plus any fines or penalties, that could be recovered by the United States under section 3729(a).'.

(c) Award to Qui Tam Plaintiff- Section 3730(d) of title 31, United States Code, is amended—

(1) in paragraph (1)—

(A) in the first sentence, by inserting 'an award of' after 'receive';

(B) by striking the second and third sentences and inserting the following: 'Any payment to a person under this paragraph or under paragraph (2) or (3) shall be made from the proceeds, and shall accrue interest, at the underpayment rate under section 6621 of the Internal Revenue Code of 1986, beginning 30 days after the date the proceeds are paid to the United States, and continuing until payment is made to the person by the United States.'; and

(C) in the last sentence, by striking 'necessarily';

(2) in paragraph (2)—

(A) in the second sentence, by striking 'and shall be paid out of such proceeds'; and

(B) in the third sentence, by striking 'necessarily'; and

(3) by amending paragraph (3) to read as follows:

`(3)(A) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who either—

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

`(ii) derived his or her knowledge of the action primarily from specific information relating to allegations or transactions (other than information provided by the person bringing the action) that the Government publicly disclosed, within the meaning of subsection (e)(4)(A), or that it disclosed privately to the person bringing the action in the course of its investigation into potential violations of section 3729,

then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. The court shall direct the defendant to pay any such person an amount for reasonable expenses that the court finds to have been incurred, plus reasonable attorneys' fees and costs.

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

(d) Certain Actions Barred- Paragraph (4) of section 3730(e) of title 31, United States Code, is amended to read as follows:

`(4)(A) Upon timely motion of the Attorney General of the United States, a court shall dismiss an action or claim brought by a person under subsection (b) if the allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure of allegations or transactions in a Federal criminal,

civil, or administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media.

`(B) For purposes of this paragraph, a 'public disclosure' includes only disclosures that are made on the public record or have otherwise been disseminated broadly to the general public. An action or claim is 'based on' a public disclosure only if the person bringing the action derived the person's knowledge of all essential elements of liability of the action or claim alleged in the complaint from the public disclosure. The person bringing the action does not create a public disclosure by obtaining information from a request for information made under section 552 of title 5 or from exchanges of information with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed under this paragraph'..

(e) Relief From Retaliatory Actions- Subsection (h) of section 3730 of title 31, United States Code, is amended to read as follows:

`(h) Relief From Retaliatory Action- Any person who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of employment, or is materially hindered in obtaining new employment or other business opportunities, by any other person because of lawful acts done by the person discriminated against or others associated with that person—

`(1) in furtherance of an actual or potential action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, or

`(2) in furtherance of other efforts to stop one or more violations of section 3729,

shall be entitled to all relief necessary to make the person whole. Such relief shall include reinstatement with the same seniority status such person would have had but for the discrimination, 2 times the amount of back pay or business loss, interest on the back pay or business loss, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection'..

(f) Relief to Administrative Beneficiaries- Section 3730 of title 31, United States Code, is amended by adding at the end the following new subsection:

`(i) Damages Collected for Financial Loses Suffered by Administra-

tive Beneficiaries- After paying any awards due one or more persons who brought an action under subsection (b), the Government shall pay from the proceeds of the action to any administrative beneficiary, as defined in section 3729(b), all amounts that the Government has collected in the action for financial losses suffered by such administrative beneficiary. Any remaining proceeds collected by the Government shall be treated in the same manner as proceeds collected by the Government for direct losses the Government suffers from violations of section 3729. Nothing in section 3729 or this section precludes administrative beneficiaries from pursuing any alternate remedies available to them for losses or other harm suffered for them that are not pursued or recovered in an action under this section, except that if such alternate remedy proceedings are initiated after a person has initiated an action under subsection (b), such person shall be entitled to have such alternative remedies considered in determining any award in the action under subsection (b) to the same extent that such person would be entitled under subsection (c)(5) with respect to any alternate remedy pursued by the Government.'.

## SEC. 4. FALSE CLAIMS PROCEDURE.

(a) Statute of Limitations; Intervention by the Government- Subsection (b) of section 3731 of title 31, United States Code, is amended to read as follows:

`(b) Statute of Limitations; Intervention by the Government-

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

`(2) INTERVENTION- If the Government elects to intervene and proceed with the action under section 3730, the Government may file its own complaint, or amend the complaint of a person who brought the action under section 3730(b), to clarify or add detail to the claims in which it is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For purposes of paragraph (1), any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action to the extent that the Government's claim arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the person's prior complaint'.

(b) Standard of Proof- Section 3731(c) of title 31, United States Code, is amended—

(1) by striking '(c) In' and inserting '(c) Standard of Proof- In'; and

(2) by striking 'United States' and inserting 'plaintiff'.

(c) Notice of Claims; Void Contracts, Agreements, and Conditions of Employment- Section 3731 of title 31, United States Code, is amended by adding at the end the following new subsections:

`(e) Notice of Claims- In pleading an action brought under section 3730(b), a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made.

`(f) Void Contract, Agreements, and Conditions of Employment-

`(1) IN GENERAL- Any contract, private agreement, or private term or condition of employment that has the purpose or effect of limiting or circumventing the rights of a person to take otherwise lawful steps to initiate, prosecute, or support an action under section 3730, or to limit or circumvent the rights or remedies provided to persons bringing actions under section 3730(b) and other cooperating persons under section 3729 shall be void to the full extent of such purpose or effect.

`(2) EXCEPTION- Paragraph (1) shall not preclude a contract or private agreement that is entered into—

`(A) with the United States and a person bringing an action under section 3730(b) who would be affected by such contract or agreement specifically to settle claims of the United States and the person under section 3730; or

`(B) specifically to settle any discrimination claim under section 3730(h) of a person affected by such contract or agreement.'.

(d) Conforming Amendments- Section 3731 of title 31, United States Code, is amended—

(1) in subsection (a), by striking '(a) A subpena' and inserting '(a) Service of Subpoenas- A subpoena'; and

(2) in subsection (d), by striking '(d) Notwithstanding' and inserting '(d) Estoppel- Notwithstanding'.

## SEC. 5. FALSE CLAIMS JURISDICTION.

Section 3732 of title 31, United States Code, is amended by adding at the end the following new subsection:

> `(c) Service on State or Local Authorities- With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments.'.

## SEC. 6. CIVIL INVESTIGATIVE DEMANDS.

(a) Civil Investigative Demands- Section 3733(a)(1) of title 31, United State Code, is amended—

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

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

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

(B) adding at the end the following: 'Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any a person bringing an action under section 3730(b) if the Attorney General or the designee determines that it is necessary as part of any false claims law investigation.'.

(b) Procedures- Section 3733(i)(3) of title 31, United States Code, is amended to read as follows:

`(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN FALSE CLAIMS ACTIONS AND OTHER PROCEEDINGS- Whenever any attorney of the Department of Justice has been designated to handle any false claims law investigation or proceeding, or any other administrative, civil, or

criminal investigation, case, or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such investigation, case, or proceeding as such attorney determines to be required. Upon the completion of any such investigation, case, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of a court, grand jury, or agency through introduction into the record of such case or proceeding.'.

(c) Definitions- Section 3733(l) of title 31, United States Code, is amended—

(1) in paragraph (6), by striking 'and' after the semicolon;

(2) in paragraph (7), by striking the period at the end and inserting '; and'; and

(3) by adding at the end the following:

`(8) the term 'official use' means all lawful, reasonable uses in furtherance of an investigation, case, or proceeding, such as disclosures in connection with interviews of fact witnesses, settlement discussions, coordination of an investigation with a State Medicaid Fraud Control Unit or other government personnel, consultation with experts, and use in court pleadings and hearings.'.

## SEC. 7. GOVERNMENT RIGHT TO DISMISS CERTAIN ACTIONS.

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

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

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

`(ii) subject to subparagraph (B), the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States.

`(B) In the case of a person to whom subparagraph (A)(ii) applies—

`(i) if the employing agency has an Inspector General and the person, before bringing the action—

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

`(II) notified in writing the person's supervisor and the Attorney General of the disclosure under subclause (I), or

`(ii) if the employing agency does not have an Inspector General and the person, before bringing the action—

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

`(II) notified in writing the person's supervisor of the disclosure under subclause (I),

the motion under subparagraph (A) may be brought only after a period of 12 months (and any extension under subparagraph (C)) has elapsed since the disclosure of information and notification under clause (i) or (ii) was made, and only if the Attorney General has filed an action under this section based on such information.

`(C) Before the end of the 12-month period described under subparagraph (B), and upon notice to the person who has disclosed information and provided notice under subparagraph (B)(i) or (ii), the Attorney General may file a motion seeking an extension of that 12-month period. The court may extend that 12-month period for an additional period of not more than 12 months upon a showing by the Government that the additional period is necessary for the Government to decide whether or not to file an action under this section based on the information. Any such motion may be filed in camera and may be supported by affidavits or other submissions in camera.

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

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

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

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

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

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

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

`(ii) subject to discovery by the defendant.

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

`(H) Not later than 6 months after the date of the enactment of this paragraph, and every 6 months thereafter, the Attorney General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on—

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

`(ii) the outcome of such motions; and

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

## SEC. 8. EFFECTIVE DATE.

The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any case pending on, or filed on or after, that date.

# The Government's View of the Public Disclosure Bar

***U.S. ex rel. Rost v. Pfizer, Inc.*, (1st Cir. 2007)**
***Amicus Curiae* Brief of United States of America**

No. 06-2627

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA, ex rel. PETER ROST,
Plaintiff-Appellant,

v.

PFIZER, INC.; PHARMACIA CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**Statutes:**



**Rules:**



**Legislative Materials:**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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## INTEREST OF AMICUS CURIAE

This is a *qui tam* suit filed by relator Peter Rost under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–3733. Defendants moved to dismiss the action under one of the FCA's jurisdictional bars, 31 U.S.C. § 3730(e)(4), and under Fed. R. Civ. P. 9(b). The district court rejected defendants' argument as to the jurisdictional bar but agreed that the complaint failed to meet Fed. R. Civ. P. 9(b), and dismissed the suit.

The United States files this brief pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29(a) because it is the real party in interest in FCA cases, *United States ex rel. Karvelas v. Melrose-Wakefield Hospital*, 360 F.3d 220, 231 (1st Cir.), *cert. denied*, 543 U.S. 820 (2004), and has a significant interest in ensuring that the FCA is properly interpreted.

The United States was not a party below and did not participate in the development of the record, and therefore takes no position on any factual questions at issue in the case. We file to make certain legal points relating to one of the FCA's jurisdictional bars, 31 U.S.C. § 3730(e)(4), and to respond to appellant's arguments relating to Fed. R. Civ. P. 9(b).

## STATEMENT OF THE ISSUES

1. Whether defendants' self-disclosure of information to the government prior to the relator's filing of the *qui tam* action qualifies as a public disclosure under the False Claims Act (FCA), 31 U.S.C. § 3730(e)(4).

2. Whether an action is "based upon" a public disclosure when a relator's allegations are similar to those that have been publicly disclosed regardless of where the relator obtained his information.

3. Whether to qualify as an original source, a relator must provide his information to the government prior to the public disclosure.

4. Whether the court applied the proper standard in dismissing the complaint pursuant to Fed. R. Civ. P. 9(b).

## THE FALSE CLAIMS ACT

### A. Statutory Framework.

The FCA creates various causes of action to address fraudulent attempts to cause the government to pay out sums of money. 31 U.S.C. § 3729(a). Violators are liable for treble damages and civil penalties. *Id.* Both the Department of Justice and private persons may bring suits to collect statutory damages and penalties. Id. at 3730(a),(b). In a private action, known as a *qui tam* suit, the Department must decide whether to intervene and prosecute the suit itself, or to decline to intervene. *Id.* at 3730(b)(2). If the government intervenes, it has primary responsibility for the case. *Id.* at 3730(c)(1). If the government declines, the private plaintiff, known as a "relator," may proceed with the action. *Id.* At 3730(b)(4)(B). If a *qui tam* action yields a recovery, it is divided between the government and the relator. *Id.* at 3730(d).

The Act contains several jurisdictional bars; the one at issue here states that, where the action is "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media," the action is jurisdictionally barred "unless the action is brought by the Attorney General or the person bringing the action is an original source of information." *Id.* At 3730(e)(4)(A). An "original source" is a person who, among other things, has voluntarily provided the information to the Government before filing his *qui tam* action. *Id.* at 3730(e)(4)(B). The determination of whether a relator's complaint should be dismissed on this ground requires a three-step inquiry: (1) whether the allegations or transactions in the complaint have been publicly disclosed in a manner provided by the statute; (2) if so, whether the relator's suit is "based upon" those allegations or transactions; and (3) if the answer to both of those questions is affirmative, whether the relator falls within the "original source" exception to the jurisdictional bar. *United States ex rel. O'Keefe v. Sverdup Corp.*, 131 F. Supp.2d 87, 91 (D. Mass. 2001).

### B. The History, Structure, and Purpose of the FCA.

When the FCA was enacted during the Civil War, its primary purpose was to help the government fight fraud by providing incentives for individuals to blow the whistle on

fraudulent conduct. Relators were entitled to one-half of the government's recovery regardless of where they learned the information on which their actions were based and whether the information they provided was useful to the government. *See United States ex rel. Prawer & Co. v. Fleet Bank of Maine, et al.,* 24 F.3d 320,324 (1st Cir. 1994); *United States ex rel. Findley* v. *FPC-Boron Employees' Club,* 105 F.3d 675,679–80 (D.C. Cir.), *cert. denied,* 522 U.S. 865 (1997). With no bar in place to sort out the individuals who sounded the alarm from those that merely echoed it, *qui tam* cases surged, affording a bounty to all comers. *Prawer,* 24 F.3d at 324–25; *see, e.g., United States ex rel. Marcus* v. *Hess,* 317 U.S. 537 (1943).

In 1943, Congress sought to fix that loophole and amended the statute to bar *qui tam* suits that were "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." *Findley,* 105 F.3d at 680; *see Prawer,* 24 F.3d at 325.[1] Thus, the amendments barred all *qui tam* actions when the government had evidence of the fraud, with the presumption that the government would be, in fact, investigating it. *United States ex rel. Cantekin v. University of Pittsburgh,* 192 F.3d 402,408 (3d Cir. 1999), *cert. denied,* 531 U.S. 880 (2000). Thereafter, the number of *qui tam* suits dwindled, and even relators that were the source of the government's information were barred because of the "government knowledge" provision contained in the 1943 amendments. *Prawer,* 24 F.3d at 325; *see, e.g., United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100 (7th Cir. 1984).

In 1986, Congress again amended the FCA, and specifically eliminated the "government knowledge" bar. It did so for two overarching reasons. First, fraud in government contracting was sufficiently widespread and growing at an alarming rate leading Congress to conclude that simply because the government had information in its possession about fraud in a particular matter did not necessarily mean that the government was acting on it or in a position to do so. Second, Congress wanted to rectify those situations in which a relator was blocked even though he might have been the original source of the information to the government. *Prawer,* 24 F.3d at 326; *Cantekin,* 192 F.3d at 408; *United States ex rel. Springfield Terminal Railway v. Quinn,* 14 F.3d 645,650 (D.C. Cir. 1994). In crafting the amendments, Congress did not want to return to the pre-1943 days in which there were no limits on the circumstances in which a *qui tam* action could be brought or who qualified as a relator. *Springfield Terminal,* 14 F.3d at 651. Thus, Congress struck a compromise and adopted a "public disclosure" jurisdictional bar that had an exception for "original sources."

> The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistleblowing and discouraging opportunistic behavior. The 1986 amendments inevitably reflect the long process of trial and error that engendered them. They must be analyzed in the context of these twin goals of rejecting suits which the government is capable of pursuing

1. As noted in *Prawer,* as recodified, the provision read, "based on evidence or information the government had when the action was brought."

> itself, while promoting those which the government is not equipped to bring on its own.

*Prawer,* 24 F.3d at 326 (*quoting Springfield Terminal,* 14F.3d at 651).

Unfortunately, the congressional attempts to amend the statute to comport with those competing goals resulted in a public disclosure bar that is less than a model of clarity. *Rockwell Internat'l Corp. et al. v. United States et al.*, 127 S. Ct. 1397, 1408 (Mar. 27, 2007) (noting textual ambiguities in original source provision); *Findley,* 105 F.3d at 681 ("Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing, however: the language of the statute is not so plain as to clearly describe the cases Congress intended to bar."); *cf Prawer,* 24 F.3d at 320 (noting ambiguity of section (e)(3)'s jurisdictional bar). Because of the textual ambiguity of the public disclosure bar, courts often have looked not only to the language, but also to the structure, history, and purpose of the provision in applying it. *See, e.g., Findley,* 105 F.3d at 675; *cf Prawer,* 24 F.3d at 327.

## STATEMENT OF FACTS AND PROCEEDINGS BELOW

1. On June 5, 2003, relator Peter Rost, a former vice president of Pharmacia Corporation (Pharmacia), filed a *qui tam* complaint alleging that Pharmacia promoted its drug, Genotropin, a recombinant human growth hormone, for off-label uses in violation of the Food, Drug & Cosmetic Act, 21 U.S.C. § 333(f). Relator also alleged that Pharmacia paid kickbacks to doctors to induce them to prescribe Genotropin, in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a–7b(b). *United States ex rel. Rost v. Pfizer, Inc. et al.*, 446 F. Supp.2d 6, 9–11 (D. Mass. 2006).

Pfizer, Inc. acquired Pharmacia in April 2003. *Id.* at 10. At that time, Pfizer engaged in a review of Genotropin, based, at least in part, on prior complaints about off-label promotion of Genotropin raised by Rost. *Id.* On May 16, 2003, Pfizer contacted the Office of Inspector General of HHS (HHS-OIG) and the Food and Drug Administration (FDA) about its investigation, and on May 19, 2003, it sent a letter to the FDA disclosing its off-label marketing activities. *Id.* at 10–11. On May 21, Pfizer met with representatives from HHS-OIG, including an HHSOIG agent. *Id.* at 11.

On June 3, 2003, Pfizer sent a letter to HHS-OIG requesting treatment under that office's voluntary disclosure protocol, with a copy to the Department of Justice, Civil Division. *Id.* Also on that date, counsel for Rost called the United States Attorney's Office (USAO) in Massachusetts to advise that Rost intended to file a *qui tam* action against Pfizer. *Id.* On June 4, counsel sent the USAO a copy of Rost's complaint, which was filed on June 5 under seal in the District of Massachusetts. *Id.*

In November 2005, the United States notified the district court that it declined to intervene in the action. *Id.*

2. Defendants moved to dismiss the complaint. Regarding the jurisdictional bar, defendants argued that their self-disclosure to the government prior to relator's filing of the *qui tam* action constituted a public disclosure under the Act. *Id.* at 15. To argue

that the disclosure to the government was sufficient to qualify as a "public" disclosure, defendants heavily relied on *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), which held that a disclosure of information to a competent government official can be a public disclosure under the Act. *Id.* at 16. Defendants further argued that relator's complaint was "based upon" the public disclosure and that relator did not qualify as an original source under the Act because he did not provide his information to the government prior to the public disclosure. *Id.* at 19, 22.

Finally, defendants argued that relator's complaint failed to meet the particularity requirements of Fed. R. Civ. P. 9(b), relying on the standard set forth by this court in *Karvelas*. *Id.* at 25. This Court held there that, in addition to pleading with particularity the underlying scheme and wrongful conduct by defendants, plaintiffs also must plead with particularity "the actual false claims submitted to the government that constitute the essential element of an FCA *qui tam* action." *Karvelas*, 360 F.3d at 232.

3. The district court conducted a lengthy analysis of the public disclosure bar and the original source requirements under section 3730(e)(4). First, the court rejected the defendants' argument that its self-disclosure to the government prior to the filing of the *qui tam* action constituted a public disclosure. The court held that a public disclosure is information that had been exposed or at least made accessible "to all members of the community, or in other words, the general public." *Id.* at 17. The court also found that defendants' interpretation conflicted with the legislative history of the FCA and the policy underlying the bar which, the court stated, was intended "to prohibit only those truly parasitic lawsuits." *Id.* at 18. The court further found that defendants' disclosures to the government failed to qualify as a covered disclosure because they had not occurred during a government investigation. *Id.*

Second, the court adopted the minority view that, in order for the public disclosure bar to apply, the relator's allegations had to be "derived from" the public disclosure as opposed to being only "similar to" the public disclosure. The court reasoned that the minority view was consistent with the plain meaning of the words "based upon." *Id.* at 20. Again citing what it believed to be the policies behind the 1986 amendments, the court rejected the majority view, observing that allegations "similar to" those that have been publicly disclosed are not necessarily parasitic. *Id.* In considering whether its view of the words "based upon" might render the original source exception (requiring direct and independent knowledge) superfluous, the court reasoned that "[t]he burden falls on Congress, not the judiciary, to correct perceived errors in statutory texts." *Id.* at 21. It further reasoned that, because "[t]he exact boundaries of the 'derived from' standard are not fully delineated," it was possible that construing "based upon" to mean "derived from" would not eclipse the original source exception. *Id.*

Third, the court rejected the defendants' argument that, to qualify as an original source, relator had to provide the information to the government prior to the public disclosure, and instead held that the relator need only provide information to the government prior to filing his *qui tam* complaint. The court found that the plain language

of the FCA dictated the court's conclusion and declined to evaluate the rationales that other courts had offered to support a different result. *Id.* at 23–24.

Nonetheless, the district court dismissed relator's claims for failure to plead his allegations with particularity under Fed. R. Civ. P. 9(b), relying on *Karvelas*. *Id.* at 17. Acknowledging that relator's complaint alleged in great detail the framework of defendants' illegal marketing scheme, the court found that the complaint fell short because it did not identify actual false claims submitted to the government. *Id.* at 28 ("No matter how likely the existence of false claims, this court cannot speculate that such claims inevitably flowed from Defendants' activities.")

## SUMMARY OF ARGUMENT

As to the jurisdictional issue, the district court correctly concluded that the defendants' disclosures to the government did not constitute "public" disclosures, but went too far in suggesting that a "public" disclosure needed to be made to the public generally, as opposed to a single member of the public. If this court reaches the remaining inquiries under the public disclosure bar, we urge the court to adopt the majority position on the meaning of "based upon" and to require a relator to disclose his information prior to the public disclosure in order to qualify as an original source.

As to the Rule 9(b) issue, although it is our view that it is possible for a relator (or the government) in an FCA action to describe an alleged fraudulent scheme with sufficient specificity to satisfy Rule 9(b)'s particularity requirement without identifying specific false claims, we do not agree with relator's contention in his opening brief that he need not allege anything other than the existence of a false statement to allege a violation of section 3729(a)(2).

## ARGUMENT

### I. THE SELF-DISCLOSURE BY DEFENDANTS DOES NOT CONSTITUTE A "PUBLIC DISCLOSURE" UNDER THE ACT.

The threshold jurisdictional issue in this matter presents a narrow question: does the series of disclosures that defendants made to government officials constitute a qualifying "public disclosure" under the Act? We believe that the district court properly rejected defendants' argument below that it did, but for somewhat different reasons.

First and foremost, an ordinary understanding of the word "public" means something apart from the government itself. As the district court stated, "the general public is an entity that is distinct, separate from, [and] independent of the government. Although the government does represent the general public, it does not become the public itself." *Id.* at 17. The terms are not naturally interchangeable; indeed, the only way to construe the term "public" to mean "government" in this context requires that government be defined as "an entity authorized to act for or represent the public," which in and of itself implies a distinction between the two bodies. Surely if Congress had meant for

the term "public disclosure" to be read to encompass disclosures made to the government as a representative of the body public, it would have done so more directly.

Courts evaluating whether a disclosure is sufficiently "public" to trigger the bar have construed the term "public" to mean, at a minimum, a disclosure outside and apart from the government itself. *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) ("the government is not the equivalent of the public domain"); *see also Springfield Terminal*, 14 F.3d at 654 (evaluating disclosures in the "public domain"). Indeed, even in cases in which the start of a government investigation clearly pre-dated the filing of the *qui tam* complaint, courts have looked to whether there was an adequate disclosure *outside* the government to determine whether the bar was triggered. *See United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376, 383–84 & n.3 (3d Cir.), *cert. denied*, 529 U.S. 1018 (1999) (bar triggered by act of production in response to FOIA request, not FOIA investigation itself); *United States ex rel. Schumer v. Hughes*, 63 F.3d 1512, 1518–20 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 93 (1997) (bar would have been triggered by disclosure of government audit in response to FOIA request, but not before); *United States ex rel. Doe v. Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992) (bar triggered by disclosures to witnesses during investigation).

For similar reasons, courts have rejected the idea that a report or investigation by a government-employee-turned-relator that was not disclosed outside the government can constitute a "public" disclosure. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 n.11 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (government employee does not have dual status in which he can publicly disclose a report to himself).

We agree with the district court's observation that, aside from being inconsistent with the statutory language requiring that the disclosure be "public," defendants' arguments below are inconsistent with the 1986 amendments to the FCA, which eliminated the government knowledge bar in the statute. *Prawer*, 24 F.3d at 329. Those amendments resulted in an important shift in the focus of the bar: whereas the previous government knowledge bar was primarily concerned with what information other people released to the government, the public disclosure bar added by the amendments has a substantial emphasis on information released by the government. *Cantekin*, 192 F.3d at 410; *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996). Because the *Farmington* decision, relied on by defendants below, concluded that a disclosure to a competent government official was sufficient, its reasoning is directly contrary to the history and structure of the Act.

We do agree with defendants' arguments below that the significance of requiring a public disclosure is that it can evidence that the Government is actually pursuing the matter, making the *qui tam* suit unnecessary. But even if defendants' disclosures to the government served an overall purpose behind the jurisdictional bar—to bar suits in which the government may already be acting on the information—Congress saw fit

to impose the bar only when the disclosure was public and outside the government, and even then only in enumerated circumstances. *Williams*, 931 F.2d at 1499–1500; *LeBlanc*, 913 F.2d at 20. Even if defendants' unilateral submissions to the government were considered "public," defendants offer no explanation for how that could have occurred "in a criminal, civil, or administrative hearing . . . or investigation"—as the statute requires—when the disclosure itself was presumably what triggered the government's investigation.

Defendants' interpretation of "public disclosure" also runs afoul of the application of the jurisdictional bar as a whole. Under defendants' rationale, if their disclosure to the government constituted a public disclosure, then a disclosure by someone else, like a relator, to the government must qualify as well. The Tenth Circuit has rejected the idea that such a disclosure by a relator is a "public disclosure." *Comstock*, 363 F.3d at 1043. Taking defendants' reasoning to its necessary conclusion, a relator who brings potential fraud to the government's attention prior to filing a *qui tam* suit would necessarily trigger the public disclosure bar, with the result that such a relator would be barred unless he qualified for the original source exception. Clearly there is no logical reason for Congress to craft a public disclosure bar that creates a disincentive for relators to tip the government off to potential fraud as soon as possible. Moreover, in light of the cases holding that a relator must provide his information *prior to* the public disclosure to qualify as an original source (a position that defendants urged the court below to adopt and that the government supports, *see infra*), defendants' construction of the "public disclosure" provision would make it impossible for any such relator ever to qualify under the Act.[2]

To be sure, courts have not always been in agreement about "how far into the public domain the allegations must seep" before the disclosure may trigger the bar. *Doe*, 960 F.2d at 322; *see Springfield Terminal*, 14 F.3d at 652–53. But with the exception of *Farmington*, we have found no case affirmatively embracing the idea that a disclosure that was not made to anyone outside of the government is sufficient to trigger the jurisdictional bar.[3] *See generally Ramseyer*, 90 F.3d at 1520 (requiring "positive act" of disclosure by the government). It is undisputed that, in this case, there was no disclosure by the government to any member of the public in any context at all. Thus, the court need not tackle the question of how "public" a disclosure must be to trigger the bar.

Not only was it unnecessary for the court below to reach this question, but we submit it went too far when it found that, for a disclosure to be public, it needed to be to "all members of the community, or in other words, the general public." 446 F. Supp.2d at 17. Several courts have held exactly the opposite, finding that a disclosure

2. Defendants erroneously argued below that the United States previously endorsed the *Farmington* rationale, holding that a disclosure to a competent government official could qualify as a public disclosure. The brief cited by defendants, however, states the government's disagreement with the *Farmington* court's interpretation of the public disclosure bar. Our view then, as it is now, is that it was not the disclosures to the government that triggered the bar, but the affirmative steps that the government took by interviewing members of the public, which demonstrated that the government was acting on the information. In any event, we fail to see why defendants think a brief the government filed seven years ago before a different district court that was bound by *Farmington* carries any weight here.

3. At least one other court has rejected *Farmington* for reasons similar to those elucidated by the district court. *United States ex rel. Brennan v. The Devereux Foundation*, 2003 WL 715750 (B.D. Pa. 2003).

even to just a few members of the public is sufficient. *See, e.g., Comstock,* 363 F.3d at 1043 ("[T]here is no requirement that a certain number of people read or receive the information" for there to be a public disclosure); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1005–06 (10th cir. 1996); *Doe,* 960 F.2d at 323; *United States ex rel. Stinson v. Prudential Insurance Co.,* 944 F.2d 1149, 1158 (3d Cir. 1991). Some of these courts also have imposed the additional requirement that the disclosure must be made not only to an individual outside of the government but also to someone who is a "stranger to the fraud." *See, e.g., Fine,* 99 F.3d at 1005; *Doe,* 960 F.2d at 323. The United States submits that imposing such an additional requirement is unnecessary because the relationship between the members of the public who are interviewed and their role in the fraud is irrelevant as it is the act of the disclosure to a member of the public (and not to whom the disclosure was made) that evidences government action. As noted, however, we do not believe this Court need reach this specific issue.

Thus, the district court correctly concluded that the defendants' disclosures to the government did not constitute "public" disclosures, but the district court went too far in suggesting that a "public" disclosure needed to be to the public generally.

## II. AN ACTION IS "BASED UPON" A PUBLIC DISCLOSURE WHEN A RELATOR'S ALLEGATIONS ARE SIMILAR TO THOSE THAT HAVE BEEN PUBLICLY DISCLOSED.

The Act provides that no court shall have jurisdiction over an action "based upon" the public disclosure of the allegations or transactions in one of the ways set forth in the statute. As has been held by the majority of courts to have considered the issue, we believe that a *qui tam* suit may qualify as being "based upon" a covered public disclosure when the allegations are "similar to" or share an "identity" with those that have been publicly disclosed. The district court adopted the minority view, construing the term "based upon" to mean "derived from."

This court has not squarely addressed the "based upon" language, and district court decisions in this circuit have been split on the issue. *Compare O'Keefe,* 131 F. Supp. 2d at 92 (adopting majority view) *with Rost,* 446 F. Supp. 2d at 19 (adopting minority view).

A reading of the statute that puts separate emphasis on the words "based upon" to mean "derived from" essentially renders the original source exception meaningless. If the bar is construed to prevent only those suits that are "derived from" the public disclosure, then there is no reason for Congress to have given such relators an opportunity to show that they had "direct and independent" knowledge of the information on which their allegations were based, as is required to qualify as an original source. *Findley,* 105 F.3d at 683; *United States ex rel. Jones v. Horizon Healthcare Corp.,* 160 F.3d 326, 332 n.4 (6th Cir. 1998). Rather, it is far more logical to conclude that "[t]he threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis," which was designed to weed out the opportunists from the insiders. *United States ex rel. Precision Co. v. Koch Industries,* 971 F.2d 548,552 (l0th Cir.), *cert. denied,* 507 U.S. 951 (1992). In addition, the district court's interpretation

would lower the bar so much that relators could easily step over it merely by adding counts or insignificant details to their complaints to argue that only part of their allegations were "derived from" the public disclosure. *Id.*

As far as the statutory text,[4] a related section of the jurisdictional bar, section 3730(e)(3), prohibits actions that are "based upon" allegations or transactions that are the subject of a suit in which the government is already a party. From a practical standpoint, the term "based upon" in this provision cannot possibly be construed to mean "derived from." If that were the case, a *qui tam* suit containing exactly the same allegations as a suit that the government already was litigating could proceed so long as the relator did not "derive" his information from the government's lawsuit. In one of the few decisions applying section (e)(3), this court rightly construed actions that are "based upon" the subject of the government's suit to bar suits that share an "identity" with the government's suit, and not simply those that were completely derivative of the prior action. *Prawer,* 24 F.3d at 327–28.

The first-to-file bar of the *qui tam* provisions supports a similar interpretation of the term "based upon." 31 U.S.C. § 3730(b)(5). Section (b)(5) provides that, once a *qui tam* action is filed, no other person may bring a related action "based on the facts underlying the pending action." *Id. Qui tam* suits are filed under seal and typically stay under seal until the government makes an election regarding intervention. Thus, under this provision, the second relator is barred not because his information was "derived from" an earlier-filed, sealed *qui tam* action of which he could not possibly be aware, but because his allegations are "similar to" those of the first-filed action.

Significantly, in *Prawer,* this court found it helpful to inquire as to whether the *qui tam* suit was receiving an advantage from the government's suit "'without giving any useful or proper return' to the government (or at least having the potential to do so)." 24 F.3d at 327–28. That analysis should be applied to section (e)(4) as well, because consistent with the purpose of both provisions, it weighs whether the *qui tam* suit makes a contribution to the government's fraud efforts versus merely siphoning funds away from the government's potential recovery. *See United States ex rel. McKenzie v. Bellsouth Telecommunications Inc.*, 123 F.3d 935,940 (6th Cir. 1997), *cert. denied,* 522 U.S. 1077 (1998); *Precision,* 971 F.2d at 552.

Moreover, we think the majority view that "based upon" means "similar to" is correct, given the use of the term "based upon" over time in the statute. As it stood in 1943, the FCA barred cases "based upon evidence or information in the possession of the United States" at the time such suit was brought. *United States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr. University,* 161 F.3d 533, 538 (9th Cir.), *cert. denied,* 161 F.3d 533 (1998); *see Prawer,* 24 F.3d at 325 (citing recodified version). Because information in the government's possession would not be publicly known, the term "based upon" in the 1943 Act can only be construed to mean "similar to." When the FCA was amended in 1986, the bar was altered to prohibit those actions "based

4. Both the majority view and the minority view claim support in the plain meaning of the term "based upon." *Compare Precision,* 971 F.2d at 552 *with United States ex ret. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1349 (4th Cir.), *cert. denied,* 513 U.S. 928 (1994).

upon" certain kinds of public disclosures that, among other things, evidenced that the government was on the trail of the fraud. Because the 1943 and 1986 provisions used the same term ("based upon") and in the 1943 provision the term must have meant "similar to," that is the meaning that should be ascribed to the term in the 1986 amendments. *Biddle*, 161 F.3d at 538.

As part of its rationale for construing "based upon" to mean "derived from," the district court stated that the purpose of the public disclosure bar was to prohibit "only those truly parasitic lawsuits," so that only suits that actually relied on public information should be barred. 446 F. Supp.2d at 17. In so doing, the district court ascribed a meaning to the term "parasitic" that is inconsistent with that adopted by this Court in *Prawer*. Moreover, the district court's reasoning gives undue emphasis to only one of the several policy reasons for the 1986 amendments, instead of examining the amendments as a whole. *Findley*, 105 F.3d at 685 ("[T]he blocking of freeloading relators who copy their complaints directly from public disclosures is not the FCA's only concern."). Rather, "[f]rom its inception, the *qui tam* provisions of the FCA were designed to inspire whistleblowers to come forward promptly with information concerning fraud so that the government can stop it and recover ill-gotten gains. Once the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds." *Id.* Finally, if the purpose of the *qui tam* provisions was to prevent "only truly parasitic lawsuits," then Congress could have accomplished that by barring suits that relied on any public disclosure at all. Instead, the bar applies only when certain qualifying disclosures have occurred.

Thus, if the court reaches this issue, we urge the court to adopt the majority view and find that "based upon" should be construed to mean "similar to."

## III. TO QUALIFY AS AN ORIGINAL SOURCE, A RELATOR MUST PROVIDE HIS INFORMATION TO THE GOVERNMENT PRIOR TO THE PUBLIC DISCLOSURE.

The FCA provides that a relator who seeks to avoid the jurisdictional bar must show that he is an "original source of the information." 31 U.S.C. § 3730(e)(4)(A). Among other things, to qualify as an original source, a relator must have "provided the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4)(B).

The circuits are split on the question of *when* a relator must provide his information to the government in order to qualify as an original source, and this Court has not yet addressed the issue. The D.C. and Sixth circuits hold the view that, to qualify as an original source, a relator must provide his information to the government prior to the public disclosure. *See Findley*, 105 F.3d at 690; *McKenzie*, 123 F.3d at 942. The Fourth Circuit (and the district court here) held that a relator need only provide his information to the government before filing his *qui tam* complaint to qualify. *See Siller*, 21 F.3d at 1355.[5]

5. Two additional circuits, the Ninth and the Second, have held that, to be an original source, the relator must have made a disclosure to someone prior to the public disclosure, by requiring the relator to be the source of the public disclosure. *See United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418–19 (9th Cir. *1992); United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990).

We believe that the language, structure, and purposes of the public disclosure and original source provisions most strongly support the D.C. and Sixth Circuits' view. To start with, a "source" is defined as "one that initiates" or "supplies information." Webster's New Collegiate Dictionary (1974); *see also Findley* 105 F.3d at 690; *McKenzie* 123 F.3d at 942. To qualify as an "original source," the statute says that the relator must "provide" the information to the government. This language assumes that the government does not have the information in the first instance and that it is the relator that "provides" it, acting as a "source" to the government. Only in this situation is it appropriate for a relator who would otherwise be barred by the fact that a public disclosure has occurred prior to the filing of the *qui tam* complaint nevertheless be entitled to share in the large bounties awarded under the *qui tam* statute.

Absent a requirement of a prior disclosure to the government, the statute would lead to absurd results. For example, even if there is a long-active government investigation resulting in public disclosures, any relator with some of his own knowledge could qualify by giving the government information long after a public disclosure has occurred. Indeed, such a relator could simply provide his information a day before filing his complaint and qualify as an "original source." This would be true even if the government was on the verge of settling the FCA matter or about to initiate its own lawsuit. It makes far more sense to construe the provision to require that the relator be a true source with direct and independent knowledge who tipped the government off to the fraud before the allegations were in the public domain. *McKenzie*, 123 F.3d at 942–43.

The requirement that the relator come forward prior to a public disclosure clearly serves to promote the FCA's mission to alert the government to potential fraud and to create incentives for relators to do so at the earliest possible time. *Id*. Individuals who provide their information to the government after that information already has been publicly disclosed, even when they obtained their information independently of the public disclosure, do little to assist the government in identifying fraud, and *qui tam* cases filed by such individuals are unnecessary. *Id*.

As a final matter, the legislative history of the 1986 amendment adding the "original source" exception demonstrates that the relators Congress wanted to protect were those who were the source of the information in the possession of the government, who had previously been treated poorly by court decisions. *Springfield Terminal*, 14 F.3d at 651.

Thus, if the Court reaches this issue, we urge it to hold that, to qualify as an original source, a relator must disclose his information to the government prior to the public disclosure.

## IV. EXISTING PRECEDENT OF THIS COURT CONTROLS THE APPLICATION OF FED. R. CIV. P. 9(b) TO THIS CASE.

Relator claims that the district court erred in dismissing his claims under 31 U.S.C. § 3729(a)(2) because, he argues, he need not allege anything other than the existence of a false statement in order to satisfy the pleading requirements of 31 U.S.C. §3729(a)(2).[6] That provision states that a person is liable if he "knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2).

Relator relies on *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610,616–17 (6th Cir. 2006) in support. *Sanders* did not hold that a relator need not prove the existence of a false claim. *Sanders* stands for the proposition that section (a)(2) does not require proof of presentment of a claim to the United States, and that liability may exist so long as a claim was presented to a grantee that received federal funding. *Sanders*, 471 F.3d at 615. We agree with relator to the extent he argues that section (a)(2) does not require proof of presentment to the government, but there is no support in *Sanders* for his additional argument that the provision requires no nexus to a false claim at all. In fact, *Sanders* held that section (a)(2) required proof that a claim be paid. We think the Sixth Circuit erred in that respect, and several circuits have held that the statute does not require proof of actual damages and the legislative history provides no support for that requirement either. *See, e.g., Varljen v. Cleveland Gear Co.*, 250 F.3d 426,429 (6th Cir. 2001); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 n.7 (4th Cir. 1999); *see* S. Rep. 99-345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

At a minimum, section (a)(2) should be read to require that the false statement be made in order to get a false claim paid, whether or not a false claim was submitted or paid. Such an interpretation not only is consistent with the plain language, but with the decisions from other courts that the FCA requires a material connection between the defendant's conduct and the government's payment decision. *See, e.g., Harrison*, 176 F.3d at 785; *United States ex rel. Bahrani v. Conagra*, 465 F.3d 1189, 1204 (10th Cir. 2006). The Court need not decide for purposes of this case whether section (a)(2) further requires submission or payment of a claim for liability to lie.

Relator also argues that his complaint contains sufficient "indicia of reliability" that the fraudulent scheme he has alleged resulted in false claims, making the pleading of specific information about a particular false claim unnecessary. Other circuits have held that Rule 9(b) may be satisfied in such circumstances, *see, e.g., United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005). Although the United States holds the view that it is possible for a relator (or the government) in an FCA action to describe the alleged fraudulent scheme with sufficient specificity to satisfy Rule 9(b)'s particularity requirement even without identifying specific false claims, we acknowledge that *Karvelas*, relied on by the district court, is binding precedent here.

6. This argument was not raised below.

## CONCLUSION

For the foregoing reasons, the court should affirm the result reached by the district court.

Respectfully submitted,

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