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False Claims Act and *Qui Tam* Quarterly Review

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

TAF is a nonprofit public interest 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). TAF's mission is both activist and educational. Established in 1986, TAF serves to: (1) collect and evaluate evidence of fraud against the Federal Government and facilitate the filing of meritorious FCA *qui tam* suits; (2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to effectively prosecute *qui tam* suits; (3) inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions; and (4) advance public, legislative, and government support for *qui tam*.

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

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Constitutionality of FCA

***U.S. ex rel. Battle v. Board of Regents*, No. 1:00-CV-1637 (N.D. Ga. May 8, 2002)**

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FCA Liability of Government Entities

***U.S. ex rel Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002), cert. granted, 70 U.S.L.W. 3670 (U.S. June 28, 2002)**

The U.S. Supreme Court granted a writ of certiorari to the Seventh Circuit in a case where the court of appeals held that the False Claims Act authorizes *qui tam* suits against local governments. The Supreme Court's decision in this case is expected to resolve a conflict between the Seventh Circuit, which permits such suits, and the Third and Fifth Circuits, which forbid them.

In June 2002, the Supreme Court granted certiorari in *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002), 26 TAF QR 1 (Apr. 2002). In *Chandler*, the Seventh Circuit reversed a district court decision dismissing a *qui tam* action against Cook County on the ground that counties are immune from the FCA's treble damages. The Seventh Circuit held that despite the presumption against the imposition of punitive damages on municipalities, Congress, in enacting the 1986 amendments, made a conscious choice to increase recoverable damages while in no way indicating that it wished to exempt municipalities. The court noted that municipalities are not sovereigns and thus, unlike states, they are presumptively "persons" subject to suit.

The Seventh Circuit's ruling on this point created a conflict with the Fifth Circuit's decision in *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001), 22 TAF QR (Apr. 2001), *cert. denied*, 122 S. Ct. 808 (2002). The *Garibaldi* court ruled that municipalities are not "persons" subject to *qui tam* liability. A week after the Seventh Circuit's ruling in *Chandler*, the Third Circuit issued a decision that followed the approach of *Garibaldi* and made no mention of *Chandler*. *See United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002), 26 TAF QR 4 (Apr. 2002). The Supreme Court's decision in this case is expected to resolve the split among the courts of appeals on this issue.

***U.S. ex rel. Wood v. American Institute in Taiwan*, 286 F.3d 526 (D.C. Cir. Apr. 16, 2002)**

The D.C. Circuit upheld the dismissal of a *qui tam* action against the American Institute in Taiwan on sovereign immunity grounds. The court ruled that the Institute is an agency or instrumentality of the Government, and that Congress did not waive the Institute's sovereign immunity.

The American Institute in Taiwan is a nonprofit District of Columbia corporation created by the Taiwan Relations Act of 1979. After the United States recognized the People's Republic of China as the sole legal government of China, Congress created the American Institute in order to maintain relations with Taiwan that would not be unacceptable to the People's Republic. The Institute carries on relations between the U.S. Government and Taiwan and performs consular functions in Taiwan. The Secretary of State has the power to appoint and remove the Trustees of the Institute at any time, with or without cause. Approximately half of the Institute's revenue comes from a contract with the State Department, while most of the remainder comes from visa processing fees and contracts with other federal agencies.

James Wood served as the Institute's Managing Director and chaired its Board of Trustees from 1995 to 1997. Wood alleged that during this time the Institute defrauded the Government by making false claims worth $5.3 million to the State Department. According to Wood, Institute personnel embezzled visa processing fees and offset the embezzled amount by drawing additional funds from the State Department contract. Wood claimed that when he reported the alleged fraud to the State Department, the Department and the Trustees of the Institute retaliated against him, ultimately forcing him to resign.

Wood then filed a *qui tam* suit against the Institute. The Government declined to intervene, and moved on behalf of the Institute to dismiss on the grounds of sovereign immunity. The district court denied Wood's motion for discovery and an evidentiary hearing on the issue. Concluding that the Institute is an arm of the sovereign, the court dismissed the complaint. Wood appealed, challenging the district court's sovereign immunity determination and its denial of discovery.

American Institute in Taiwan Enjoys Sovereign Immunity

The D.C. Circuit ruled that the Institute is an agency or instrumentality of the U.S. Government, and not, as Wood contended, a private corporation (analogous to Radio Free Europe/Radio Liberty, the American National Red Cross, and Amtrak) providing services to the Government. Although the Institute's nonprofit corporate status was relevant to the issue of sovereign immunity, the court ruled, it was hardly dispositive. The Institute is not technically an embassy, but it functions like one. It carries out U.S. foreign policy, and is required under the Taiwan Relations Act to do so "in the manner and to the extent directed by the President." Therefore, the court of appeals ruled, the Institute differs fundamentally from such entities as Radio Free Europe/Radio Liberty and the Red Cross, which are independent of direct government control. The court similarly distinguished Amtrak, whose authorizing statute declares that it "will not be an agency or establishment of the United States Government."

The court noted that any judgment against the Institute would effectively deplete the resources of the U.S. Treasury. Wood argued that some of the Institute's funds come from outside sources (visa fees and funds generated from trade shows), but the court disagreed. The revenues from visa fees and trade shows offset funds the Institute would otherwise have to pay to fulfill its statutory and contractual obligations to promote commercial and cultural relations between the United States and Taiwan. Therefore, the court ruled, whether a damages award is paid out of visa and trade show revenues or State Department funds, the effect on the Treasury is essentially the same.

Wood also contended that Congress waived sovereign immunity because under D.C. law nonprofit corporations have the power "to sue and be sued." However, the court noted, a waiver of federal sovereign immunity must be unequivocally expressed in the statutory text, and in cases of ambiguity a finding of waiver must be rejected. The Taiwan Relations Act contains a preemption clause that bars the application of any provision of D.C. law that "impedes or otherwise interferes with the [Institute's] performance." Because this clause can plausibly be read to preempt the D.C. Code's sue-and-be-sued clause, the court held that Congress had not waived the Institute's sovereign immunity.

District Court Did Not Err in Denying Discovery

The court of appeals found no error in the district court's decision to deny Wood's motion for discovery relating to the sources of the Institute's funding and the precise extent of government control over the Institute's operations. The court of appeals noted that discovery should be carefully limited to avoid burdening a sovereign that proves to be immune from suit. The district court had no need to rely on disputed factual issues, and was entitled to rely, as the court of appeals did, on the Taiwan Relations Act and the Institute's articles of incorporation and bylaws, "which themselves insure virtually total executive branch control." Thus even if, as Wood sought to demonstrate, the Institute exercises day-to-day control over its business and financial affairs, it nonetheless remains part of the U.S. Government.

<u>U.S. ex rel. Battle v. Board of Regents</u>, No. 1:00-CV-1637 (N.D. Ga. May 8, 2002)

A Georgia district court held that a *qui tam* action may be brought against state officials in their individual capacities regardless of whether the officials acted outside the scope of their employment or personally benefited from the fraudulent conduct. The court also upheld the constitutionality of the FCA under the Take Care and Appointments Clauses of Article II.

In June 2000, Lillie Battle filed this *qui tam* action against the Board of Regents of the State of Georgia and a number of individual defendants who were state employees. A month earlier, the Supreme Court ruled in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 539 U.S. 765 (2000), 19 TAF QR 1 (July 2000) that states are not "persons" subject to *qui tam* FCA liability. The Government declined to intervene in Battle's action, and the defendants moved to dismiss in light of *Stevens*. The relator then filed a voluntary dismissal as to the Board of Regents and all claims against the individual defendants in their official capacities. The court construed this filing as an abandonment of the relator's *qui tam* claims against the individual defendants. However, in a motion for reconsideration, the relator maintained that she did not abandon her *qui tam* claims against the individual defendants, and the court solicited briefs as to whether, in light of *Stevens*, *qui tam* claims may be brought against state officials in their individual capacities. The defendants argued that such claims may not be brought, and in addition contended that the FCA is unconstitutional.

In an unpublished order, the court granted the relator's motion for reconsideration and ruled that its previous decision dismissing claims against the individual defendants was in error. The court declined to follow the approach of the panel majority in *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001), 25 TAF QR 1 (Jan. 2002). In that case, the district court denied a motion to add a claim against a state official in his individual capacity, and a divided Eighth Circuit panel affirmed. The panel majority noted that the relator in that case had not alleged that the official in question had acted outside his official duties. Implicit in the majority's discussion was the conclusion that individual state officers may be sued in their individual capacities only for actions outside the scope of their official duties. However, Judge Gibson dissented, noting that natural persons are presumptively covered by the use of the term "person" in a statute, and arguing that the majority had provided no rationale to overcome that presumption.

At the urging of the relator and the Government, the district court in *Battle* rejected the approach of the panel majority in *Gaudineer & Comito*. The court noted that the FCA explicitly imposes liability on "[a]ny person" who submits a false claim to the Government, and held that state officials are responsible for their personal violations of the law, including the FCA. The court observed: "There is no FCA requirement that the individual act outside the scope of his employment or that the employee personally benefit from the fraudulent conduct." Therefore, the court granted the relator's motion for reconsideration.

Because it reinstated the individual state officials as defendants, the court next turned to the defendants' argument that the FCA violates the Take Care and Appointments Clauses of Article II of the Constitution. Without extended discussion, the court noted that every federal court of appeals to address such arguments has rejected them. Adopting the reasoning of the Fifth Circuit in *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc), 23 TAF QR 1 (July 2001), the court rejected the defendants' constitutional challenge.

FCA Liability of Amtrak Contractors

U.S. ex rel. Totten v. Bombardier Corp., *286 F.3d 542 (D.C. Cir. Apr. 16, 2002)*

The D.C. Circuit reversed a district court decision dismissing a *qui tam* action against contractors of Amtrak on the grounds that Amtrak is not "subject to" the FCA. The court of appeals ruled that imposing liability on Amtrak's contractors (rather than on Amtrak itself) does not make Amtrak "subject to" the FCA, and therefore there is no per se bar against *qui tam* actions premised on false claims implicating federal funds invested in Amtrak.

Edward Totten, a former Amtrak employee, brought this action against two companies that had contracted with Amtrak to supply improved toilet systems for new rail cars. Totten alleged that the contractors knowingly supplied toilets that did not comply with contractual specifications, and were so defective that they endangered the health of Amtrak passengers and employees.

The district court dismissed Totten's complaint on several grounds. *See* 139 F. Supp. 2d 50 (D.D.C. 2001). The court held that Totten's complaint failed because it did not specifically allege that the defendants had requested payment from Amtrak, and did not allege that Amtrak receives federal funds: therefore, in the court's view, Totten had failed to plead that the defendants submitted "claims" within the meaning of § 3729(c). The district court also ruled that Totten failed to state the time, place, and content of the defendants' alleged false statements. Ordinarily, the court would have allowed Totten to amend his complaint to cure these deficiencies, but it concluded that Amtrak's special legal status rendered its contractors immune from FCA liability, and that any amendment would therefore be futile. Totten appealed.

Amtrak Reform Act Does Not Exempt Contractors From FCA Liability

The D.C. Circuit reversed. At issue was a provision in the Amtrak Reform and Accountability Act of 1997 that Amtrak "shall not be subject to title 31." Because the FCA is included in title 31 of the U.S. Code, the district court concluded that an FCA suit against Amtrak's contractors would impermissibly make Amtrak "subject to" title 31. The court of appeals disagreed, noting that while "subject to" a statute can mean "affected by" the statute in a broad sense, it can also have the narrower legal meaning of "bound by, regulated by, or made answerable under" the statute. While the district court interpreted the phrase in the broad sense, the court of appeals noted that in typical legal usage the term has a narrower meaning. For example, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 n.13 (2000), the Supreme Court used the phrase "subject to the false claims law" to describe the category of persons who can be sued under the FCA.

Accordingly, the D.C. Circuit ruled, where "a plaintiff brings a *qui tam* action against a third party who has allegedly defrauded a federal grantee, common usage would suggest that the third party, and not the grantee, is being made 'subject to' the FCA." Because a damages award in such an action imposes no direct legal obligation on Amtrak, it does not make Amtrak "subject to" the FCA.

The court then scrutinized the legislative history of the Amtrak Reform Act for any evidence that Congress had a different meaning in mind. The legislative history indicates that in providing that Amtrak "shall not be subject to title 31," Congress intended only to remove Amtrak from the Government Corporations Act. The court found no indication that Congress envisioned "that the [Amtrak] Reform Act would result in a repeal of the False Claims Act as it applies to a private company doing business with Amtrak." Indeed, the court noted, such an outcome would have been "striking," for it would be odd for Congress to impose a significant obstacle to uprooting fraud against the very rail passenger system that it sought to protect in the Amtrak Reform Act. Absent some affirmative indicator, the court was "unwilling to place upon the text of the statute a gloss that would generate this surprising result."

The district court had also expressed the view that FCA liability for Amtrak contractors would be inappropriate because the purpose of the Reform Act was to require Amtrak to be treated as if it were self-sufficient and did not receive government funding. The court of appeals found no basis for this view in the legislative history. Rather, the court found that the goal and effect of the Reform Act was to ensure that Amtrak would be treated like any other private company that receives federal money. Thus, Amtrak's contractors are subject to FCA liability, just as the contractors of any private business would be subject to liability if they submitted false claims in connection with a government-funded project.

Relator Granted Leave to Amend

Although the D.C. Circuit concluded that the Reform Act does not bar FCA suits against Amtrak contractors, it noted that Totten's unamended complaint was deficient in several respects. First, Totten had merely alleged that the defendants delivered nonconforming goods to Amtrak, not that they made false "claims" (that is, actual demands for money or property) to Amtrak or anyone else. Second, even assuming that the defendants presented claims to Amtrak, Totten had failed to plead that the Federal Government provided any portion of the money requested. Third, the complaint apparently failed to satisfy Rule 9(b). The court rejected Totten's contention that Rule 9(b) did not apply because he alleged only that the defendants made "false" claims, not "fraudulent" claims. The court saw no reason to recognize the "hairsplitting distinction" that Totten sought to draw between false and fraudulent claims under Rule 9(b). The difference between false and fraudulent claims, in the court's view, is simply the degree of scienter involved, and this difference is entirely insignificant for the purposes of Rule 9(b), which specifically allows allegations of "intent, knowledge, and other condition of mind" to be averred generally. In contrast, the circumstances, including the time, place, and contents of the false representations, must be pleaded with specificity.

The defendants argued that these flaws were fatal, because Totten had waived his right to amend his complaint by failing to seek leave pursuant to Rule 15(a). However, the district court had made clear that a request for leave to amend would have been futile, and expressly indicated that it would have allowed Totten to amend had it not viewed the Amtrak Reform Act as an insurmountable obstacle to the suit. Having reversed the district court's error on the latter point, the court of appeals saw no reason to forbid what would have been permitted in the absence of that error. Accordingly, the court remanded with instructions that Totten be granted leave to amend.

In so doing, the court expressed "no opinion" on a question left open by its decision in *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 737-39 (D.C. Cir. 1998), 15 TAF QR 21 (Oct. 1998), namely, whether an FCA plaintiff may prevail against a defendant who submits a claim to a federal grantee (such as Amtrak) without presenting evidence that the claim was ever actually submitted to the Government. Depending how Totten crafted his amended complaint, the court noted, this issue might be avoided altogether. In a separate concurrence, however, Judge Randolph criticized the *Yesudian* court's discussion of this issue, and suggested that the FCA does not cover situations where a false claim is presented to a federal grantee but not actually turned over to the Government for reimbursement.

False Certification

U.S. ex rel. Augustine v. Century Health Services, Inc., 289 F.3d 409 (6th Cir. May 7, 2002)

The Sixth Circuit affirmed a district court FCA judgment against a corporate defendant that obtained HCFA payments as reimbursement for anticipated contributions to its Employee Stock Ownership Plan but subsequently withdrew the contributions for general corporate use. The court ruled that a claim need not be expressly false at the time it was submitted for FCA liability to attach, if the claimant violates a continuing duty to comply with the regulations on which the payment was conditioned.

Century Health Services, Inc. (CHS), a holding company for a number of home healthcare agencies, established an Employee Stock Ownership Plan (ESOP) in 1993. CHS submitted Medicare cost reports to HCFA in order to be reimbursed for the company's anticipated contributions to the ESOP as a component of employee expenses. Based on the cost reports, the Government paid CHS $2,540,715 in 1994 and 1995, and CHS used these payments to contribute over $2,760,000 to the ESOP. However, without informing government auditors, CHS promptly withdrew substantially all of these contributions and kept them for its general corporate use.

Edward Augustine filed a *qui tam* lawsuit against CHS and its top two officers, who were trustees of the ESOP, alleging that the defendants obtained and kept the Medicare funds in violation of the FCA. The Department of Justice intervened. In 1997, the Secretary of Labor also filed a complaint under ERISA against the same defendants, alleging that they had breached their fiduciary duties under the ESOP. The two cases were consolidated, and after a bench trial, the district court found that the defendants had violated the FCA, and awarded treble damages of $7.62 million and a civil penalty of $100,000. The defendants appealed, arguing that the claims they submitted were not false or fraudulent, that they did not act with the requisite level of knowledge, and that the remedies under the FCA and ERISA were inconsistent.

Claim Need Not Be Expressly False at Time of Submission for Liability to Attach

The Sixth Circuit affirmed the district court's judgment. The court of appeals rejected the defendants' contention that, in order for liability to attach under the FCA, a claim must be expressly false at the time it was submitted. Rather, the court held, a false implied certification may constitute a false or fraudulent claim even if the claim was not expressly false when it was filed. Liability can attach if the claimant violates a continuing duty to comply with the regulations on which payment is conditioned.

The district court concluded that in certifying the cost reports as "true, correct, and complete," the defendants represented that they would continue to comply with the Medicare regulations governing the allowability of ESOP expenses, including the requirement that they file an amended cost report if the expenses are subsequently determined to be unallowable. The Sixth Circuit concluded that the district court did not err in imposing liability based on the defendants' violation of their continuing duty to comply with these regulations.

Defendants Acted With Requisite Knowledge for Liability

The Sixth Circuit similarly rejected the defendants' argument that at the time the claims were submitted, the defendants did not know that they were false. The court noted that there was compelling evidence that the defendants exhibited reckless disregard of the truth or falsity of their implied certification requirements when they failed to file amended cost reports documenting their failure to replace the ESOP funds that they withdrew and used for general corporate purposes, and that they misled a government auditor about the status of the ESOP funds. Therefore, the district court did not err in concluding that the defendants acted "knowingly" for purposes of the FCA.

FCA and ERISA Remedies Are Not Inconsistent

Finally, the court of appeals ruled that the district court did not err in refusing to grant summary judgment on the ground that the Government was pursuing inconsistent remedies in the FCA and ERISA actions. The FCA and ERISA address separate injuries to different parties. The FCA action in this case asserted claims for injuries to the Medicare Trust Fund, while the ERISA action sought restitution to the ESOP for the defendants' breach of their fiduciary duties. The FCA action, which sought to recover funds for HCFA based on the defendants' false implied certification, could have been brought even if the defendants had eventually reimbursed the ESOP for the funds withdrawn. On the other hand, CHS's employees would have had grounds for an ERISA lawsuit even if CHS had not submitted any claims to HCFA. Therefore, although the two causes of action were interrelated, they arose independently. Thus the election-of-remedies doctrine, which prevents a double recovery based on two actions arising from the same wrong, was inapposite. Accordingly, the court of appeals affirmed the judgment of the district court.

***U.S. v. Southland Management Corp.*,**
288 F.3d 665 (5th Cir. Apr. 11, 2002)

The Fifth Circuit reversed a district court decision granting summary judgment to the defendants in an FCA action based on allegations that the defendant owners of federally subsidized apartments falsely certified to HUD that the apartments were in "decent, safe, and sanitary" condition. The court of appeals rejected the district court's conclusion that the certifications were not material to HUD's decision to pay the subsidies. The court of appeals ruled that when the Government conditions payment on certification of compliance with a contractual provision, false certification of

compliance is a false claim as a matter of law. The court also ruled that HUD's knowledge of the true condition of the apartments did not negate the defendants' knowledge of the falsity of the claim under § 3729(b).

The defendants in this action own an apartment complex in Jackson, Mississippi, and participated in the federally-funded Section 8 rent subsidy program, which provides housing to low-income tenants under the supervision of HUD. The defendants obtained a low-interest mortgage from HUD to renovate the complex in 1980, and entered into a Housing Assistance Payment (HAP) contract with HUD pursuant to Section 8. In order to receive monthly rent subsidies, the defendants submitted monthly HAP vouchers to HUD, each of which included a certification that the property was in "decent, safe, and sanitary" condition, and indicated that HUD has the right to prosecute false claims and seek civil penalties under the FCA.

Beginning in 1993, HUD inspections revealed significant maintenance and structural problems at the complex, and by 1996 a HUD review rated the complex as "unsatisfactory," which is the lowest possible rating. In accordance with its standard practice, after each inspection, HUD gave the defendants an opportunity to cure these defects, and requested a written response outlining corrective measures planned to remedy the problems identified. While the defendants provided a detailed and timely response in 1993, in subsequent years the process broke down, and the defendants' responses were increasingly less timely and more cursory.

Despite these problems, the defendants continued to submit monthly HAP vouchers with the required certifications, and HUD continued to disburse subsidy payments. However, in 1997 the defendants informed HUD that they would make no more payments on the mortgage. HUD foreclosed, and the complex was sold in 1998.

The Government then brought this FCA action, alleging that the defendants made false claims each time they certified that the complex was in decent, safe, and sanitary condition. The Government sought recovery only for claims made between 1995 (when cooperation between the defendants and HUD substantially broke down) and 1997.

The defendants moved for summary judgment on the grounds that (1) the HAP certifications were not material to HUD's decision to pay the subsidies and therefore could not give rise to false claims; (2) because HUD was aware of the condition of the complex when the claims were submitted, the defendants did not "knowingly" submit false claims; and (3) the "decent, safe and sanitary" language of the HAP certifications is too ambiguous to support FCA liability. The district court granted summary judgment to the defendants on the first two grounds. The Government appealed, arguing that the FCA contains no materiality requirement, and that there was a disputed issue of material fact as to whether the defendants "knowingly" submitted false claims.

False Certifications of Compliance Were Material

The Fifth Circuit reversed the district court's grant of summary judgment. The court noted that prior Fifth Circuit decisions had found that the FCA contains an implicit materiality requirement, and that materiality has been defined as a tendency to influence decision-making. (In a footnote, however, the court noted that it was not squarely faced with the question whether materiality is required under the FCA, and thus had no occasion to decide whether recent Supreme Court decisions might undermine Fifth Circuit precedent on this issue.) The Fifth Circuit has never clarified the precise nature of the materiality requirement. The court noted that some courts have adopted an "outcome materiality" requirement—i.e., to be material, the claim or falsehood must affect the Government's decision whether to remit funds. Other courts have adopted a "claim materiality" requirement—i.e., to be material, the falsehood must be relevant to the defendant's claim of right or entitlement to government funds. The Government adopted the latter position in this appeal, although it did not call this implicit requirement a "materiality" requirement.

The court found no need to resolve this controversy over the nature of the materiality requirement, because it held that regardless of the standard applied, the defendants' false certifications were material to HUD's decision to disburse payments. Under the law of the Fifth Circuit, when the Government conditions payment of a claim upon the claimant's certification of compliance with a statutory or regulatory condition, a knowingly false certification of compliance is a false claim as a matter of law.

The court rejected the defendants' contention that their certification could not have constituted a false claim because the Government knew that the certification was false when it remitted payment. The court ruled that "[a] lie does not become the truth simply because the person hearing it knows it is a lie." The defendants were in effect arguing that when the Government remits payment on a claim knowing that a certification contained therein is false, it waives its right to pursue an FCA action. The court found this position untenable for a number of reasons.

First, the court noted, the falsity of a claim is determined at the time of submission. Fortuities in the Government's subsequent decisionmaking process have no bearing on the truth or falsity of the claim or the claimant's potential FCA liability. Moreover, the defendants were in effect seeking to invoke estoppel against the Government, which is impermissible. The defendants did not even satisfy the requirements for estoppel against a private party, because they allegedly had knowledge of the relevant facts (i.e., that the complex was not in decent, safe, and sanitary condition as certified). In any case, the equitable doctrine of estoppel cannot appropriately be invoked to bar recovery of funds spent contrary to the will of Congress.

The defendants' argument that payment by the Government of a false claim with knowledge of its falsity forecloses any future false claims action assumes that, upon receiving a HAP voucher for a property that is not decent, safe, and sanitary, HUD must either immediately cease payments (effectively putting the tenants out on the street) or forfeit the right to pursue an FCA action in the future. The court found no basis for such an "election of remedies" requirement, and ruled that the Government's rights under the regulatory contract and the FCA are not mutually exclusive.

Government Knowledge of Falsity of Claims Is Not an Absolute Bar to Liability

The Fifth Circuit rejected the district court's conclusion that HUD's knowledge of the condition of the complex negated the possibility that the defendants "knowingly" submitted false claims. The court of appeals noted that there is nothing in the text or legislative history of the FCA to support such a conclusion. In some cases, a defendant's knowledge that the Government is aware of the falsity of a claim may be relevant to *mens rea* when it provides evidence that the defendant did not submit the claim with actual knowledge of its falsity or in deliberate ignorance or reckless disregard for the truth. However, the court ruled, in the context of a government-initiated FCA action (as opposed to a *qui tam* action), "the circumstances in which such knowledge is relevant are quite limited." In the context of government-initiated actions, the court would permit such a defense "primarily in the rare situation where the falsity of a claim is unclear and the evidence suggests that the defendant actually believed his claim was *not false* because the government approved and paid the claim with full knowledge of the relevant facts" (emphasis in original). In *qui tam* actions, on the other hand, the court suggested that such a defense might have a wider scope, because such actions can potentially interfere with government efforts to work informally with a defendant to achieve compliance.

In this case, evidence in the record suggested that the defendants had actual knowledge that the complex was not in decent, safe, and sanitary condition, and that thus their HAP certifications were false. Because there was a genuine issue of material fact regarding the defendants' knowledge, the district court erred in granting summary judgment on this issue.

Certification that Property is "Decent, Safe, and Sanitary" is Sufficiently Concrete to Support FCA Liability

The defendants also argued that the "decent, safe, and sanitary" standard in the HAP certification is inherently subjective, and because a jury cannot determine whether a certification of compliance with this standard is objectively true or false, such a certification cannot give rise to an FCA action. The Government replied that the standard is objective, and pointed to provisions in the Code of Federal Regulations and the published Housing Quality Standards that clarify its correct interpretation. The district court did not rule on this issue, but suggested that the defendants' position had "arguable merit." The court of appeals disagreed, and rejected the invitation to invoke this theory as an alternate basis for affirming the judgment below.

The court noted a number of decisions holding that the phrase "decent, safe, and sanitary" is too indefinite to create any legally cognizable rights for tenants of federally funded housing. However, the court ruled, these decisions are inapposite, because the question whether language is too indefinite to create a legally cognizable statutory right is entirely separate from the question whether that language can form the basis for an FCA action. The court found that the phrase "decent, safe, and sanitary" has a common-sense core of meaning that can be understood by a factfinder without additional definition. Although each individual's exact definition of the phrase might differ, the phrase nevertheless has a widely accepted ordinary meaning that is sufficiently definite that the discretion left to the jury is no more than that inherent in the jury system itself.

The court noted that the defendants willingly entered into a contract governed by the "decent, safe, and sanitary" standard, and repeatedly certified under penalty of fine or imprisonment that they satisfied the standard, without ever expressing uncertainty or inquiring about its meaning. The standard has been part of the statutory scheme governing public housing since the 1930s, and there are no reported cases challenging it on the grounds that it provides inadequate notice.

The defendants also apparently argued that even if the phrase "decent, safe, and sanitary" has an objectively ascertainable meaning, they could not be held liable under the FCA if their submission was grounded in a legitimate dispute about the correct legal interpretation of the phrase. One of the defendants testified that he understood the phrase to refer to housing "where [when] you walk in, you wouldn't fall through the floor," while another testified that it is housing that "[keeps] the weather out" and "[does not] have things falling on you." The court noted that this issue was insufficiently developed in the record and not directly addressed below, but commented that while a legitimate dispute about regulatory or contractual language might preclude liability, the

Government may prove the falsity of a claim by establishing that the defendant's interpretation was unreasonable.

Dissent Rejects Finding of Materiality Based on "Formulistic" Certification

In a scathing dissent, Judge Jones criticized the Government for seeking severe penalties from the owners of unprofitable low-income apartments because there were "(1) roaches (in the deep South, no less), (2) broken doors and windows (caused partly by tenants), and (3) crime (in a high-crime, crack-dealing neighborhood)." In Judge Jones' view, "HUD was complicit in any mismanagement that allowed the property to deteriorate." Quoting *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001), 25 TAF QR 6 (Jan. 2002), the dissent argued that "it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay."

The dissent disagreed with the majority's conclusion that when certification of compliance is an express prerequisite of a government benefit, false certification is material and renders the claim false as a matter of law. The dissent also chastised the majority for its "dalliance, in dicta, with an 'outcome materiality'/'claim materiality' dichotomy advocated by the government." In the dissent's view, the majority's "mischievous dicta" offered no valid legal argument to support the doctrine of "claim materiality," which "waters down materiality to a subjective or self-fulfilling concept: a representation becomes claim material if the government says so, since the government defines the representations made when filing a claim."

The dissent noted that the district court found undisputed evidence "that HUD, as a matter of policy and practice, admittedly routinely makes Section 8 housing assistance payments to owners of Section 8 property irrespective of whether the property is in a 'decent, safe, and sanitary' condition." Therefore, the dissent agreed with the lower court's conclusion that the certifications of compliance with that standard were most a purely formulistic, rather than an actual, prerequisite to payment. According to the dissent, the majority's decision threatened to transform the FCA into a weapon against mere breaches of contract, which will discourage many businesses from bidding for government contracts, and generate additional costly premiums.

<u>U.S. ex rel. Riley v. St. Luke's Episcopal Hospital</u>, 200 F. Supp. 2d 673 (S.D. Tex. Apr. 3, 2002)

A Texas district court dismissed for failure to state a claim upon which relief can be granted a *qui tam* action against a hospital that allegedly allowed an unlicensed physician to perform services and upgraded claims. The court rejected the relator's argument that the hospital was liable under an implied false certification theory, holding that the participation of an unlicensed physician was immaterial, and that the Government suffered no harm. The court also rejected the upgrading claims, apparently on the grounds that the decision to upgrade a patient's status is a matter of professional judgment that cannot be false as a matter of law.

Joyce Riley, a former nurse at St. Luke's Episcopal Hospital, brought this action against the hospital and seven other defendants alleging that the hospital defrauded the Government by allowing an unlicensed physician to perform services and unnecessarily upgrading services. She also alleged that the defendants conspired to defraud the Government in connection with the services provided by the unlicensed physician. The Government declined to intervene, and the defendants moved to dismiss on the grounds that the relator lacked standing under Article III of the Constitution. The district court granted the motion, and on appeal a divided panel of the Fifth Circuit affirmed the dismissal, but on the grounds that the FCA violates Article II of the Constitution. *See* 196 F.3d 514 (5th Cir. 1999). However, the en banc Fifth Circuit reversed and remanded to the district court. *See* 252 F.3d 391 (5th Cir. 2001) (en banc), 23 TAF QR 1 (Jul. 2001).

On remand, the hospital moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The hospital argued that the unlicensed physician's participation in patient care was immaterial, and that decisions to upgrade a patient's status are matters of professional judgment that cannot be false as a matter of law. It further argued that the conspiracy claim should be dismissed because Riley had failed to allege a specific agreement to defraud the Government.

Participation of Unlicensed Physician Does Not Render Claims False

The district court granted the hospital's motion. The court observed that claims for services rendered in violation of a statute are not necessarily false or fraudulent. The court also stated that "certification of general compliance, where hundreds if not thousands of regulations must be satisfied, are [sic] given less materiality weight in a fraud review, than a more particularized specific certification." The court cautioned that "the FCA is not a regulatory vehicle, and it's [sic] scope should not be broadened to include every instance where a claimant fails to comply with all applicable regulations."

The court noted that although the physician in question, Dr. Radovancevic, was not licensed to practice anywhere in the United States, he did have a medical degree from the University of Belgrade and worked under the supervision of a licensed physician, Dr. Frazier. It also observed that the Texas State Board of Medical Examiners examined the relationship between the two physicians and found no violation of the Texas Medical Practice Act. Furthermore, because Medicare billings were based on a patient's Diagnosis-Related Group rather than on the identity of the physician providing treatment, the court ruled, the participation of an unlicensed physician is "immaterial." The court found that there was no loss to the Government "because all funds paid were for services provided."

Upgrading and Conspiracy Claims Dismissed

The court also apparently dismissed Riley's claims of improper upgrades, although it did not address this issue in the "Analysis" section of its opinion. In its brief treatment of this issue in its discussion of the standard of review under the FCA, however, the court seemed to adopt the defendant's position that decisions to upgrade a patient's status are matters of professional judgment that cannot be false as a matter of law.

Finally, the court rejected Riley's claim that the hospital conspired with its staff to substitute the signature of Dr. Frazier on the medical orders of Dr. Radovancevic. The court ruled that the conspiracy claim failed because the underlying conduct was not fraudulent. The court observed that "when an employer engages in an otherwise legal activity, the fact that they [sic] cooperate in accomplishing their [sic] activities does not constitute conspiratorious [sic] conduct."

Public Disclosure Bar and Original Source Exception

U.S. ex rel. Kinney v. Stoltz, 2002 WL 523869 (D. Minn. Apr. 5, 2002)

A Minnesota district court dismissed a *qui tam* action for lack of subject matter jurisdiction pursuant to the public disclosure bar. The court ruled that the action was based upon publicly disclosed allegations or transactions, and that the relator was not an original source of the information upon which his allegations were based, because he did not have direct knowledge of the alleged violations, and did not make a voluntary disclosure to the Government before filing suit.

James Kinney worked as paramedic at the Hennepin County Medical Center (HCMC), a public hospital that operates an ambulance service. In 1997 Kinney filed a *qui tam* action, *United States ex rel. Kinney v. Hennepin County Medical Center* (*Kinney I*) alleging that HCMC and the Hennepin Faculty Associates (HFA), which staffed HCMC's emergency room, violated the FCA by submitting claims to Medicare and Medicaid for medically unnecessary ambulance transportation. In January 2001, the district court dismissed HCMC from the action, ruling that as a governmental entity, it was immune from the imposition of treble damages and was thus not a "person" subject to suit under the FCA. Kinney did not appeal from that judgment. *Kinney I* proceeded against HFA, and the parties filed cross-motions for summary judgment.

In July 2001, Kinney filed the present action, *Kinney II*, a second *qui tam* suit based on allegations of unnecessary ambulance transportation, against four current and former HCMC employees in their individual capacities. Meanwhile, in August the district court granted summary judgment to HFA in *Kinney I*, concluding that that action failed for lack of causation. *See* 2001 WL 964011 (D. Minn. 2001), 24 TAF QR 10 (Oct. 2001).

In September, the Government declined to intervene in *Kinney II*, and in October Kinney served his complaint on the defendants. Hennepin County offered to indemnify the individual defendants. The defendants moved to dismiss, arguing that the court lacked subject matter jurisdiction because *Kinney II* was based upon public disclosures in *Kinney I*, and that res judicata or collateral estoppel precluded the second action.

In November, without leave of court, Kinney delivered a "First Amended Complaint" to the defendants, which sought to add Hennepin County as an additional defendant on the grounds that the county's offer of indemnification to the individual defendants was tantamount to a waiver of its immunity from liability. The court ordered supplemental briefing on the effect of this document.

Supplemental Pleading Stricken

The court ordered Kinney's "First Amended Complaint" to be stricken from the file. Despite its title, the court ruled, this document was a supplemental pleading, not an amended pleading. Fed. R. Civ. P. 15 distinguishes between an amended pleading, which is designed to include matters occurring before the original filing but overlooked or not known at the time, and a supplemental pleading, which is designed to cover matters subsequently occurring but pertaining to the original cause. Because the "First Amended Complaint" sought to add Hennepin County based on its decision to offer the defendants indemnification after the original complaint was filed, it was a supplemental pleading. A party has the right under Rule 15 to amend once as a matter of course, but may supplement only with leave of court. Because Kenney did not obtain leave to supplement, the court ordered his supplemental pleading stricken.

Action Was Based Upon Public Disclosure in Prior Action

The court took judicial notice of the orders, pleadings, and motions filed in *Kinney I*, and ruled that *Kinney II* was based upon public disclosures occurring in the prior action. Kinney argued that the facts regarding HCMC's billing and claims submission practices obtained in discovery in *Kinney I* were mere "information" rather than "allegations or transactions" as required in the FCA's public disclosure provision. The court disagreed, and held that the summary judgment hearing in *Kinney I*, along with the documents filed in connection with it, constituted a public disclosure in a civil hearing of the allegations or transactions on which *Kinney II* was based. The court noted that the Eighth Circuit, in *Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1045-47 (8th Cir. 2002), 26 TAF QR 13 (Apr. 2002), adopted the majority rule that a *qui tam* suit is "based upon" a public disclosure whenever the allegations in the suit and the disclosure are the same, regardless of where the relator obtained his information.

Relator Was Not Original Source

Kinney was not an original source, the court ruled, because he did not have direct knowledge of the information on which his allegations were based. Kinney was neither involved in, nor a close observer of, the activities that constituted the alleged fraud, namely, HCMC's alleged manipulation of billing codes relating to ambulance transports. Rather, Kinney derived his information about these activities from the depositions of HCMC employees. Thus, he was a recipient of information and not a direct source.

Moreover, the court ruled, even if Kinney did have "direct and independent knowledge" of the information, he failed to establish that he voluntarily provided the information to the Government before filing suit. Although Kinney asserted that he made a voluntary disclosure to the Government before filing *Kinney I*, he had not shown that he made any voluntary disclosure relating to the allegations against the defendants in *Kinney II*. Therefore, the court ruled, Kinney was not an original source, and the court lacked subject matter jurisdiction over the action.

Individual Defendants Immune From Suit

In a footnote, the court added that even if the court had subject matter jurisdiction, the complaint would still be subject to dismissal under Rule 12(b)(6) for failure to state a claim. Kinney alleged claims against the defendants in their individual capacities, but did not allege that they personally benefited from the submission of false claims. Kinney's allegations, the court ruled, established that the defendants were acting as employees of HCMC at the time, and thus his suit against them was really a suit against their governmental employer. But because HCMC was immune, the court held, so were the *Kinney II* defendants in their official capacities.

Rule 9(b)

***U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. May 9, 2002)**

The Eleventh Circuit affirmed the dismissal of a *qui tam* action for failure to plead fraud with particularity as required by Rule 9(b). In his complaint alleging that the defendant billed the Government for medically unnecessary tests, the relator identified specific schemes under which the tests were performed, as well as specific patients and dates on which the

tests were performed. However, because the relator did not specify the exact amount of the claims and the dates on which they were submitted, the panel majority held that the complaint did not satisfy Rule 9(b).

Jeffrey Scott Clausen works in the medical testing industry. In 1997 Clausen filed a *qui tam* complaint against Laboratory Corporation of America (LabCorp), a competitor of his in that industry, alleging that LabCorp performed unauthorized and unnecessary tests on residents in long-term care facilities and knowingly billed government health insurance programs such as Medicaid, Medicare, and CHAMPUS for the tests.

In 2000, the Government declined to intervene. Clausen then amended his complaint and served it on the defendant. Clausen's first amended complaint identified several specific schemes, including self-referral (whereby standing orders for particular tests were established without regard to medical necessity); duplicative tests and other procedures; and unbundling of tests (whereby multiple tests were ordered when a single cheaper test that included all the separate tests could have been ordered). The complaint also identified specific patients and dates when the tests were performed, as well as specific descriptions and codes for the tests that formed the basis of the alleged false claims. LabCorp moved to dismiss for failure to plead with particularity as required by Fed. R. Civ. P. 9(b). The district court granted the motion, ruling that Clausen failed to satisfy Rule 9(b) because he did not allege specific facts regarding the submission and timing of the false claims themselves. However, the court granted Clausen leave to amend.

In late 2000, Clausen filed a second amended complaint, which discussed the alleged schemes in greater detail, and attached a blank HCFA 1500 claim form and a list of medical test codes. The second amended complaint also alleged that electronic versions of the Form 1500 were submitted "on the date of service or within a few days thereafter." However, Clausen did not provide any completed claim forms. LabCorp again moved to dismiss, and the district court again granted the motion. The court ruled that the second amended complaint suffered from the same defect as the first because it did not identify specific fraudulent claims with the exact date of filing and amount. Clausen appealed.

Rule 9(b) Applies to FCA Actions

A divided panel of the Eleventh Circuit affirmed. As a threshold matter, the court rejected Clausen's argument that Rule 9(b) does not apply to FCA actions because the Act creates liability for false, but not necessarily fraudulent, actions and does not require proof of specific intent to defraud. The court noted that it had applied Rule 9(b) to FCA cases before, and now clarified that Rule 9(b) does apply to FCA actions. The court observed that it has consistently recognized the Act as an anti-fraud statute, and has never required a precise overlap between common-law and statutory fraud in order to apply Rule 9(b) in parallel contexts such as securities and mail fraud.

Plaintiff Must Identify Specific False Claims Submitted

The court affirmed the district court's ruling that Clausen failed to provide specific information about actual false claims submitted to the Government. The submission of a claim, the court of appeals ruled, is not simply a ministerial act but rather the *sine qua non* of an FCA violation. Although Clausen described particular schemes in great detail and provided information about specific tests performed, he offered only conclusory allegations as to the plot's execution, stating merely that "these practices resulted in the submission of false claims for payment to the United States." No amounts of charges or actual dates were alleged; copies of actual bills and descriptions of billing policies were not provided. The court found this inadequate to satisfy the standard of Rule 9(b).

Clausen argued that his allegations gave the defendant enough information to formulate a defense, which is one of the principal purposes of Rule 9(b). However, the court ruled that the lack of specificity in Clausen's complaint violated another important purpose of the Rule, which is to protect defendants from frivolous suits that might harm their goodwill and reputation. The court was unwilling to allow Clausen to conduct discovery based on allegations that in the court's view may have been merely conjectural.

The court stated that it was "not unsympathetic" to Clausen's situation. Unlike the corporate insider who is the typical *qui tam* relator, Clausen was an outsider and thus may have had a harder time obtaining specific information about the defendant's billing practices. But the court declined to relax the pleading standard of Rule 9(b) on the grounds that evidence of the fraud was uniquely in the hands of the defendant. The court suggested that Clausen might obtain the necessary information from the Government, but indicated that even if this were not the case, "Clausen's conclusory statements are insufficient to justify relaxation."

Dissent Argues Complaint Satisfied Rule 9(b)

In a vigorous dissent, Judge Barkett maintained that the complaint adequately complied with the requirements of Rule 9(b). She observed that the majority found fault with the complaint for two reasons: failure to allege the specific dates or amounts of false claims submitted to the Government; and failure to provide a factual basis for the claim that bills were submitted to the Government "on or within a few days" of the dates on which LabCorp allegedly provided unnecessary or otherwise improper tests. Each of these concerns implicated separate legal issues.

The majority appeared to accept that Claussen's failure to allege specific dates and amounts would not frustrate one major purpose of Rule 9(b), which is to alert the defendants to the precise misconduct with which they are charged. The essence of the alleged fraud was the scheme to perform unnecessary tests, and Clausen had alleged this scheme with particularity. The majority's main concern appeared to be the second purpose of Rule 9(b): protecting defendants from harm to their goodwill and reputation caused by spurious charges of fraud.

In the dissent's view, however, Clausen's complaint adequately satisfied this second purpose as well as the first, because it established that Clausen had a reasonably precise basis for his allegations by laying out the circumstances of the fraud. The requirement that a plaintiff allege with particularity the fraudulent scheme does much to protect defendants against frivolous lawsuits. However, the dissent observed, while an additional requirement that the plaintiff identify the precise dates and amounts of the claims for payment may result in the dismissal of more lawsuits, there is no reason to think that the majority of the additional lawsuits dismissed will be frivolous. When an outsider like Clausen has no pre-discovery means of access to the exact dates and amounts, the lack of that information says nothing about the likelihood that the lawsuit is frivolous. Therefore, in the dissent's view, Clausen had overcome the bar erected by Rule 9(b) to prevent spurious charges or frivolous lawsuits.

The majority's second objection to Clausen's complaint was that his allegation that bills were submitted for the tests performed was "conclusory" and based on "mere conjecture." In the dissent's view, this allegation was conjectural "only if we are willing to attribute to LabCorp a highly unusual billing model that consisted in arranging for the systematic administration of medically unnecessary tests for which it never intended to be paid." The dissent saw nothing alarmingly conjectural in Clausen's allegation that LabCorp billed for the unnecessary tests that it methodically ordered.

According to the dissent, by requiring Clausen to provide copies of bills or payments, the majority was asking for proof, which is not required at the pleading stage. Because Clausen had no pre-discovery means of acquiring the information, the majority was asking the impossible. The majority's decision, Judge Barkett wrote, is "as likely to result in the dismissal of meritorious suits as it is to protect defendants from unwarranted litigation."

Section 3730(h) Retaliation Claims

__Storey v. Patient First Corp.__, 2002 WL 1331857 (E.D. Va. June 14, 2002)

A Virginia district court held that the six-year statute of limitations set forth in § 3731(b) applies to retaliation claims arising under § 3730(h). In so doing, the court adopted the reasoning of the Seventh Circuit, which has held that the FCA plainly provides a six-year limit on retaliation claims, and rejected the reasoning of the Ninth Circuit, which has held that the most closely analogous state statute of limitations applies to such claims.

Steven Storey, a former Chief Financial Officer of Patient First Corp., alleges that in early 1997 he expressed concerns to the company's CEO and Chairman of the Board of Directors, R.P. Sowers III, and its COO, George Morrison, that the company had improperly billed the Government $500,000 for medical services provided by moonlighting active-duty military doctors. According to Storey, Sowers and Morrison initially failed to take corrective action and continued to alter electronic medical records submitted to CHAMPUS for reimbursement. Storey accordingly undertook his own investigation into the company's billing practices and potential liability, and ultimately informed the Board of his concerns. The Board retained a law firm to conduct an audit.

However, according to Storey, before the firm was able to present its findings in writing, Sowers convened a meeting at which the Board voted to fire Storey, the law firm, and the auditor. Storey initially brought suit in state court, but took a nonsuit. He then sued Patient First, Sowers, and Morrison in federal court in 2001, and in 2002 he filed a first amended complaint. In his amended complaint, Storey asserted a claim for violation of the § 3730(h) anti-retaliation provision, as well as various common-law claims such as breach of contract, tortious interference, wrongful discharge, and breach of fiduciary duty. The defendants moved to dismiss many of these claims pursuant to Fed. R. Civ. P. 12(b)(6). In particular, the defendants moved to dismiss the § 3730(h) retaliation claim on the ground that it was barred by the applicable statute of limitations, which, they argued, is not found on the face of the False Claims Act but instead is determined according to state law.

The court denied the defendants' motion with respect to the § 3730(h) retaliation claim, and rejected the defendants' legal theory regarding the statute of limitations for retaliation claims. The court noted that decisional law on this issue is both "sparse and divergent." The defendants relied on the Ninth Circuit's decision in *United States ex rel. Lujan v. Hughes Aircraft*, 162 F.3d 1027 (9th Cir. 1998). In that case, the Ninth Circuit noted that the FCA's statute of limitation, § 3731(b), provides that "[a] civil action under section 3730 may not be brought— (1) more than 6 years after the date on which the violation of section 3729 is committed . . ." However, retaliation is violation of § 3730, not § 3729. The pre-1986 version of the FCA statute of limitations provided that "[a] civil action under section 3730 of this title may not be brought within 6 years from the date the violation is committed." In the 1986 amendments, Congress added both the retaliation provision of § 3730(h) and the current version of the statute of limitations providing that the six-year limit begins to run from the date of the violation of § 3729. The Ninth Circuit concluded that Congress, while adding the retaliation provision, intended to narrow the scope of the FCA statute of limitations to cover only violations of § 3729. Therefore, because it found no federal statute of limitations applicable to § 3730(h) claims, the Ninth Circuit ruled that the most closely analogous state statute of limitations applied.

This district court found the Ninth Circuit's reasoning in *Lujan* less persuasive than that of the Seventh Circuit in *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994). According to the *Neal* court, it is "both possible and desirable to read [the FCA's limitation provision] exactly as written." In providing that the statute of limitations on retaliation claims begins to run from the date of the false claim (rather than the date of the retaliation), Congress "opted for simplicity of administration." The Seventh Circuit noted that "[i]t is easier to determine the date of the false claim than to pin down the date of the retaliatory acts." Rejecting the defendant's argument that it would be absurd to read the statute so that the time to file suit may expire before the retaliation occurs, the *Neal* court noted that "[s]tatutes of repose, increasingly common in tort cases, have the potential to block litgation before the tort occurs."

The district court agreed with this analysis. The court held that the plain language of § 3731(b), which sets forth the limitations on a "civil action under section 3730," applies to retaliation actions brought under § 3730(h). The plain language of a statute governs unless there is a clearly expressed legislative intent to the contrary or a literal application would frustrate the statute's purpose or lead to an absurd result. The defendants argued that a literal reading did indeed produce an absurd result, but the district court, following *Neal*, rejected this argument. Like the *Neal* court, the district court found no absurdity in the possibility that a plaintiff might be barred from court before suffering an injury, especially where, as in the FCA, the limitations period is a long one. The court observed that it would be particularly imprudent to disregard the plain language of the FCA, which would not lead to an absurd result in this case, simply because it might lead to harsh or even "absurd" results in a hypothetical case not before the court.

Based on the allegations in the complaint, the statute of limitations began to run in 1997 at the earliest. Thus Storey's retaliation claim, filed in 2001, was well within the six-year limit provided by § 3731(b). Therefore, the court denied the defendants' motion to dismiss the retaliation claim.

U.S. ex rel. DeCalonne v. G.I. Consultants, Inc., 197 F. Supp. 2d 1126 (N.D. Ind. Apr. 10, 2002)

An Indiana district court denied a motion for summary judgment on a § 3730(h) retaliation claim. Criticizing language in a recent Seventh Circuit decision to the contrary, the court held that an employee need not report wrongdoing to someone outside his company in order to qualify for protection under the whistleblower provision.

Pierre DeCalonne brought this FCA retaliation claim in 2001 against his former employer, G.I.

Consultants. DeCalonne also brought a number of pendent state law claims. The defendant moved for summary judgment on all claims.

The court denied the motion with respect to the § 3730(h) retaliation claim. The defendant argued that DeCalonne did not engage in protected activity because he did not report the alleged wrongdoing to anyone outside the company. DeCalonne told the doctors with whom he worked that he was concerned about potential fraud and that he would cooperate with the Government if an investigation were initiated. He sought the involvement of his employer's legal counsel and raised the issue repeatedly with the board of directors. He also characterized the board's action as illegal, and sought the advice of an outside attorney.

The court noted that in *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002), 26 TAF QR 21 (Apr. 2002), the Seventh Circuit indicated that a plaintiff must report wrongdoing externally in order to qualify for protection under § 3730(h), stating that people "who choose to raise their concerns privately within their own company, rather than publicly, simply do not qualify for the FCA claim." The district court found that this language directly contradicts an earlier decision of the Seventh Circuit in *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), which held that a plaintiff-employee had engaged in protected activity by notifying her employer's legal counsel of potential fraud, and specifically rejected the argument that the plaintiff must communicate directly with the United States in order to qualify for whistleblower protection. The district court observed that one panel of the Seventh Circuit cannot overrule another implicitly, and that *Brandon* did not purport to overrule *Neal*, only to distinguish it.

Moreover, the district court held, the ground upon which *Brandon* sought to distinguish *Neal* was erroneous. The *Brandon* court stated that in *Neal* the plaintiff had provided information to the Government, but a careful reading of *Neal* shows that the plaintiff in that case only reported to her employer's legal counsel. Therefore, the district court declined to follow the language in *Brandon* requiring an employee to report wrongdoing externally in order to qualify for whistleblower protection.

The court noted that other courts considering the issue have held that internal activity can be enough to qualify for whistleblower protection. Such courts have held that recommending the involvement of the employer's legal counsel and characterizing the employer's acts as illegal or fraudulent are sufficient to trigger the whistleblower protections of § 3730(h). DeCalonne reported the alleged wrongdoing to his employer's counsel and board of directors, and repeatedly raised concerns that his employer's actions were illegal. Therefore, the court ruled, DeCalonne had submitted enough evidence to preclude summary judgment on the issue of whether he engaged in protected activity.

U.S. ex rel. Whipple v. Rockwell Space Operations Co., 2002 WL 864246 (S.D. Tex. Apr. 3, 2002)

In April 2002, a Texas district court granted the defendant's motion for judgment as a matter of law in a *qui tam* suit. William Whipple is a former employee of Omniplan, a subcontractor of Rockwell Space Operations Co. (RSOC) (now Boeing North America Space Operations Co.). RSOC provided engineering, ground support, and other services under contract to NASA, and Omniplan provided drafting and document support services to RSOC pursuant to the subcontract. Whipple filed a *qui tam* suit against RSOC and Omniplan in 1996, alleging that Omniplan artificially inflated labor and other charges to RSOC and that RSOC knowingly presented these false and inflated charges to the Government for reimbursement. The Government declined to intervene.

After a three-day bench trial, at the conclusion of the relator's case, the court granted the defendant's motion for judgment as a matter of law. Whipple alleged that Omniplan (1) charged excessive idle time as direct labor; (2) failed to complete correction timecards; (3) improperly billed meeting time; and (4) inflated charges by using certain inappropriate drafting procedures. The court found no credible evidence to support these claims. The court also found generally that the relator's testimony was not credible, and his expert's testimony on damages was unreliable because the expert failed to conduct an independent investigation. As a matter of law, the court also noted that the allegations involving drafting procedures failed because an allegation of inefficiency does not state a claim under the FCA.

Orell v. UMass Memorial Medical Center, 203 F. Supp. 2d 52 (D. Mass. Apr. 29, 2002)

In April 2002, a Massachusetts district court dismissed various claims, including a retaliation claim under § 3730(h), arising out of the termination of the employment of the plaintiff Patricia Orell. Orell sued her former employer, the UMass Memorial Medical Center (UMMC), two of her supervisors and another UMMC employee, as well as Implementation Specialists for Healthcare, Inc., an outside consulting firm, and Paul Corbett, an ISH employee who served as an interim director at UMMC, and gave Corbett her termination letter. In addition to her FCA retaliation claim, Orell asserted numerous other federal and state claims. ISH and Corbett moved to dismiss.

The court granted ISH's motion in its entirety, and granted Corbett's motion with regard to many (but not all) of the counts in the complaint, including the FCA retaliation count. The court noted that according to the allegations in the complaint, Corbett was acting as the agent of UMMC, not of ISH, and there was therefore no basis for a retaliation claim against ISH. As for the claim against Corbett, the court noted that a number of courts have held that § 3730(h) does not impose liability on individual supervisors but only on the corporate employer. Reasoning that Congress could have provided for liability for non-employers had it so intended, the court adopted the view that there is no liability for an individual who was not the plaintiff's employer and dismissed the retaliation claim against Corbett.

<u>Alexander v. Gilmore</u>, 202 F. Supp. 2d 478 (E.D. Va. Apr. 30, 2002)

In April 2002, Virginia district court dismissed an FCA claim filed pro se and in forma pauperis by Thomas Alexander, a Virginia state prisoner, and Keith DeBlasio, a former prisoner, alleging that the Virginia Department of Corrections (VDOC) falsely certified that it was following the manufacturer's instructions for drug testing instruments and discarding the urine in a sanitary manner. In addition to VDOC, the plaintiffs sued the state and various state employees in their official and individual capacities.

The court noted that under *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000), states, state agencies, and state officials acting in their official capacities are not persons for purposes of the FCA. Therefore, the plaintiffs' claims against the Commonwealth of Virginia, VDOC, and their employees in their official capacities were not viable. The court also dismissed the suit against the state employees in their individual capacities, noting that the mere incantation of the term "individual capacity" does not transform an official capacity action into an individual capacity action. The court found no factual allegation in the complaint that suggested that the defendants were acting outside their official capacities or that they converted funds to their personal use. Accordingly, the court dismissed the FCA claim.

<u>U.S. v. TDC Management Corp.</u>, 288 F.3d 421 (D.C. Cir. May 3, 2002)

In May 2002, the D.C. Circuit affirmed a grant of summary judgment to the Government in an FCA action based on allegations that the defendant TDC Management Corporation misrepresented its progress on a Department of Transportation program and concealed its noncompliance with the program's terms. In 1983 TDC entered into a cost-reimbursement contract with the Department's Urban Mass Transit Authority (UMTA) under which TDC was to identify private investors able to assist the UMTA's Demonstration Bonding Program in enabling minority enterprises to secure bonding for large transportation project bids. Under the terms of the program, TDC was to have no financial interest in the program's operations.

When the program failed to progress as expected, UMTA terminated the contract for convenience, disallowing nearly half of TDC's claimed expenses. TDC appealed to the Department of Transportation Board of Contract Appeals (Board). In 1989, before the Board rendered its decision, the Government sued TDC under the FCA for misrepresenting its actual progress in its monthly reports and concealing its plans to seek a financial interest in the program's operations.

The Board then ruled in TDC's favor and reversed the disallowances, finding that TDC had not breached the contract for nonperformance and that its monthly reports had notified UMTA of the subsequently disallowed expenses. Viewing its jurisdiction under the Contract Disputes Act as limited, the Board declined to consider UMTA's claim that TDC was entitled to no monies under the contract because of fraudulent omissions. The Federal Circuit affirmed.

Based on the collateral estoppel effect of the Board's findings, in 1991 TDC moved for summary judgment in the FCA action. In 1992 the district court granted the motion, but the D.C. Circuit reversed in part and remanded. On remand, the district court granted the

Government's motion for summary judgment in 2000. TDC appealed, arguing that the district court erred in applying the doctrine of collateral estoppel.

The D.C. Circuit affirmed. The court of appeals ruled that the district court did indeed err in applying the doctrine of collateral estoppel, but that TDC waived its argument on this point by failing to raise it in the district court. Far from challenging the district court's application of collateral estoppel in its liability determination, TDC suggested that the district court's invocation of the doctrine was appropriate, and never presented to the district court the argument that it now sought to raise on appeal.

The court of appeals found no exceptional circumstances to justify a discretionary departure from the general rule that an issue not raised in the district court will not be heard on appeal. The court of appeals found that no manifest injustice would result from the affirmance of the decision below, for three reasons. First, TDC did not contest that it withheld information that would have revealed that it was planning to seek a financial interest in the program's operations, and the undisputed evidence showed that the UMTA deemed these omissions to be material and would have immediately terminated the contract had it been aware of them. Second, the considerable delay in the litigation would create obvious prejudice to the Government at trial, especially since the UMTA Administrator during the relevant period in the mid-1980s was now dead. Third, TDC recovered its contract costs, and the judgment only subjected it to the relatively mild double damages and civil penalties of $2,000 per false claim available under the pre-1986 version of the FCA. Therefore, the court declined to exercise its discretion to address the collateral estoppel argument that TDC had waived.

The D.C. Circuit rejected TDC's contention that the Government's net damages were zero because it "got what it paid for" under TDC's agreement to use its "best efforts" to locate participants in the program. The court ruled that the evidence supported the conclusion that the value of TDC's "best efforts" was vitiated by its fraudulent concealment of its rent-seeking behavior. The court explained: "Once TDC deviated from its contractual role as impartial ombudsman by seeking a financial stake in joint ventures with private investors and by charging fees for the provision of services to minority entrepreneurs, the district court then could properly find that the Program no longer had any value to the government." TDC did not rebut the Government's contention that it relied on the monthly reports and would not have continued to make payments but for the omissions. Ruling that the district court did not err in adopting a "but for" measure of damages, the court of appeals affirmed the grant of summary judgment to the Government.

<u>Khan v. Chicago Housing Authority</u>, 2002 WL 849801 (N.D. Ill. May 3, 2002)

In May 2002, an Illinois district court granted summary judgment in an FCA action. In February 2001, Mushtaque Khan sued his former employer, the Chicago Housing Authority (CHA), alleging violations of the FCA and Title VII. The FCA claim was based on allegations that Khan's former supervisor awarded contracts to acquaintances rather than going through a bidding process in connection with a CHA building called the Fisher Apartments. The CHA moved for summary judgment.

The court granted the motion. Although the complaint was not entirely clear, Khan's later submissions indicated that in addition to his claim that CHA violated § 3729, he also alleged that CHA retaliated against him in violation of § 3730(h). However, the § 3729 claim was not viable because Khan did not file it as a *qui tam* action as the FCA requires. Khan brought the action in his own name, rather than that of the Government; he did not serve the complaint and his evidence on the Government; and thus he did not give the Government an opportunity to decide whether to intervene. Because Khan did not comply with the prerequisites for a *qui tam* action, the CHA was entitled to summary judgment on his § 3729 claim.

Khan's retaliation claim under § 3730(h) also failed. The court noted that in order to prove actionable retaliation under the FCA, the plaintiff must show (1) that he engaged in protected activity, (2) that his employer knew of the activity, and (3) that the employer retaliated against him because of the activity. There was some question whether Khan could satisfy the first requirement, the court ruled, and he was certainly unable to satisfy the second. In support of his claim that his employer was on notice that he was engaging in protected activity, Khan claimed that he contacted the press regarding problems at another CHA facility, the Robert Taylor Homes, and that CHA fired him because it learned of these contacts. The court noted fundamental vagueness and inconsistencies in Khan's testimony, and found no indication that Khan contacted the press in furtherance of his later FCA claim. In any event, Khan told no one of these contacts, and offered no evidence to support his claim that the CHA knew of them. Accordingly, the court granted summary judgment on the retaliation claim as well.

<u>U.S. ex rel. Donaldson v. Watkins</u>, 2002 WL 926994 (6th Cir. May 7, 2002)

In May 2002, the Sixth Circuit, in a very brief unpublished opinion, affirmed the dismissal of a *qui tam* action against federal employees. Mark Donaldson, the pro se plaintiff, sued several employees of the U.S. Department of Agriculture, claiming that they violated the FCA in their assignment of points to applicants who succeeded in obtaining rural business enterprise grants. The Government declined to intervene, and then, acting as defendant, moved to dismiss. The court granted the motion, and Donaldson appealed. Without discussion, the Sixth Circuit affirmed for the reasons stated in the district court's opinion.

<u>U.S. v. Safe Environment Corp.</u>, 2002 WL 976033 (N.D. Ill. May 10, 2002)

In May 2002, an Illinois district court granted summary judgment against Safe Environment Corp. (SECO) and its former president and principal shareholder Richard Lair in an FCA case based on kickback allegations. However, the court granted summary judgment in favor of a third defendant, John Giura, an employee and minority shareholder of SECO.

From 1991 to 1998, Amtrak carried out a project to improve Chicago's Union Station. Raymond Corcoran, Amtrak's project manager, was responsible for selecting and supervising contractors. SECO proposed to bid on an asbestos removal contract in connection with the project. On December 15, 1993 Corcoran telephoned SECO and left a message with Giura for Lair stating that Lair should include $9,700 for a "consultant" in SECO's bid. Later that day Lair submitted the bid. Corcoran approved it, and in 1994 SECO completed the contract and received payment.

In 1999, Corcoran pleaded guilty to five counts of mail fraud, admitting that he had solicited and accepted kickbacks from contractors on the Union Station project. In his plea agreement, he confessed that he had directed SECO to add $9,700 to its bid, that the "consultant" had done no work on the project, and that the billing for the consultant was simply a way to defraud Amtrak.

The Government filed an FCA action against SECO, Lair, and Giura. The Government moved for summary judgment against all defendants, and Giura cross-moved for summary judgment. In support of his motion, Giura stated that he did not know or communicate with Corcoran, except on the occasion of the December 15, 1993 telephone message, and that he did not know the meaning or context of that message. He conceded that he signed the check to the "consultant," but stated that he relied on Lair as to the propriety of the invoice. SECO and Lair did not respond to the Government's motion.

The court granted Giura's motion. It noted that the Government offered no evidence that Giura was involved in the preparation of SECO's bid to Amtrak, or in the preparation or submission of SECO's invoice for the work performed. Therefore, there was no evidence from which a reasonable jury could find that Giura participated in the presentation of a false claim to the Government. Giura's "involvement" boiled down to two facts: he passed on a message in which Corcoran told Lair to add a sum for an unknown consultant, and he later issued a check to a company that, he had reason to believe, had performed no services. The court ruled this evidence insufficient for FCA liability, because it did not demonstrate that Giura knowingly presented a false claim to Amtrak.

However, the court granted the Government's motion for summary judgment against SECO and Lair. Because they did not respond to the Government's motion, they were deemed to have conceded the Government's version of the facts. Those facts were sufficient to establish that Lair, acting as president of SECO, knowingly submitted a claim that was false in that it included a sum for a nonexistent consultant. Therefore, the court awarded judgment against SECO and Lair.

U.S. ex rel. Barmak v. Sutter Corp., 2002 WL 987109 (S.D.N.Y. May 14, 2002)

In May 2002, a New York district court dismissed a *qui tam* complaint, finding that it included claims barred by res judicata and failed to state the remaining claims with specificity as required by Fed. R. Civ. P. 9(b). David Barmak filed this action in 1995 against Sutter Corp. and its corporate parent, alleging that the defendants violated the FCA by waiving co-payments for sales of continuous passive motion exercisers, forging certificates of medical need, and paying kickbacks to hospitals and doctors for patient referrals.

In 2001, the Government intervened in the claims covering the waiver of co-payments only. In June the parties stipulated to a settlement under which the relator released the defendants from all claims arising out of the allegations of waiver of Medicare co-payments only submitted between 1992 and mid-1998. The stipulation reserved the relator's claims relating to submissions outside that time period, non-Medicare submissions, and attorneys' fees, costs, and expenses.

A few days later, the relator filed a second amended complaint. The defendants moved to dismiss based on the public disclosure bar, res judicata, and Rule 9(b).

The court granted the motion and dismissed the second amended complaint with leave to amend. The court found no merit in the defendants' public disclosure argument, noting that the relator's statutorily-mandated disclosure of his allegations to the Government in this action was not a public disclosure within the meaning of the FCA. However, the court found that the res judicata effect of the settlement did bar a number of the claims alleged in the second amended complaint. In addition, many of the allegations were so vague that it was impossible to identify whether they fell within the reservation in the settlement agreement or not.

The court also found that the complaint failed to satisfy Rule 9(b). The relator did not allege that the details of the fraud were exclusively within the defendants' knowledge. Therefore, the court held, at a minimum the relator was required to outline "the who, what, when and where of his allegations."

The court also dismissed the relator's claims for violations of the anti-kickback statute. The court noted that the anti-kickback statute is a criminal statute that provides for no private right of action, and that while some courts have permitted FCA actions premised on anti-kickback violations, this area of the law is "hotly disputed and controversial." Although the Second Circuit does not appear to have addressed this issue, the court noted that in *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001), 25 TAF QR 6 (Jan. 2002), the Second Circuit held that a false certification claim will lie only where the certification of compliance is a condition of government payment. Because the relator had alleged neither a causal relation between the alleged kickback violations and the submission of the claims for reimbursement, nor a certification of compliance with the anti-kickback statute, the court dismissed the relator's claims for kickback violations.

***U.S. ex rel. Stewart v. Louisiana Clinic*, 2002 WL 1066745 (E.D. La. May 28, 2002)**

In May 2002, a Louisiana district court granted in part and denied in part the defendants' motions to dismiss a *qui tam* complaint for failure to comply with Fed. R. Civ. P. 9(b). Because the relators had already had an opportunity to amend their complaint, the court denied any further leave to amend. The court also denied motions for reconsideration filed by two of the defendants.

Mary Jane Stewart Jr. and Margaret Catherine McGinity filed this action in 1999, alleging that the Louisiana Clinic and several of its doctors billed Medicaid and Medicare for unreasonable and unnecessary services and made false statements in connection with requests for payment. In 2001 the Government declined to intervene. The defendants each moved to dismiss on the grounds that the relators failed to plead fraud with particularity as required by Rule 9(b), and two defendants moved to dismiss certain claims pursuant to the public disclosure bar. In February 2002 the court rejected the public disclosure motion, but granted the Rule 9(b) motion in part, with leave to amend. *See* 2002 WL 257690 (E.D. La. Feb. 22, 2002), 26 TAF QR 35 (Apr. 2002).

In March 2002 the relators filed a Second Amended and Restated Complaint. The defendants again moved to dismiss, arguing that the Second Complaint cured none of the deficiencies identified by the court in its Feb. 22 order. Two defendants also moved for reconsideration of the Feb. 22 order, continuing to press the public disclosure argument and to challenge the court's earlier ruling on allegations of improper waiver of co-payments.

The court ruled that the relators had cured some, but not all, of the deficiencies identified in the Feb. 22 order. In that order, the court found that the relators' allegations of upcoding failed to specify how or why the codes submitted were false. The original complaint contained a chart of examples of upcoding including names, locations and dates, but no explanation as to why the codes submitted were false. In the Second Amended Complaint, the relators added to their chart of examples a new column entitled "Analysis," in which they summarized their reasons for believing that the codes submitted were inappropriate.

The court found that for the most part the summaries in the "Analysis" section of the chart adequately explained why the specific codes referred to were alleged to be false. The defendants urged that these summaries were inadequate because they were just an opinion produced by someone other than the treating physician. The court rejected this argument, noting that under the defendants' reasoning, no one other than the treating physician could ever state a claim for upcoding, at least not without attaching expert reports to the complaint. The court ruled that nothing in Rule 9(b) or the FCA requires such a result. However, the court did dismiss upcoding claims against those defendants for whom the relators had not provided specific examples of upcoded claims.

As in its Feb. 22 order, the court continued to uphold the relators' claims that one of the doctors engaged in "zoning" (i.e., submitting bills falsely describing the location of services in order to increase the level of reimbursement). However, the court dismissed zoning claims against the clinic itself and the other doctors, for whom the relators had failed to provide specific examples. Similarly, the court continued to uphold claims of "buying patients" (i.e., improperly waiving co-payments without any proof of financial hardship) against one doctor for whom specific examples were provided, but dismissed similar claims against the clinic and the other doctors.

Likewise, the court found new allegations in the Second Amended Complaint involving billing for unnecessary services sufficient as to only one of the defendant doctors. Similarly, the court found that the relators had provided a factual basis for claims that one of the doctors billed for services provided by medical assistants. The court dismissed the relators' remaining claims, which failed to pass scrutiny under Rule 9(b).

The court denied the relators further leave to amend, noting that the case had been pending nearly three years, and the relators had already had an opportunity to cure the deficiencies by amendments previously allowed. The court also denied motions by two of the defendants for reconsideration of its Feb. 22 rulings on the public disclosure jurisdictional bar and on the allegations of improper waiver of co-payments.

***U.S. v. Watkins*, 2002 WL 1263988 (N.D. Ill. June 5, 2002)**

In June 2002, an Illinois district court denied a motion to dismiss an FCA action for failure to exhaust administrative remedies under the Program Fraud Civil Remedies Act (PFCRA). The Government sued Viola Watkins and her son Ramon Reed, alleging that they provided false income information in order to receive federal student financial aid. The defendants moved to dismiss, arguing that the Government was required to exhaust its administrative remedies under the PFCRA before bringing suit under the FCA.

The court rejected the defendants' argument.

The court noted that the FCA applies to fraudulent applications for federal grants and loans, and therefore the Government's allegations that the defendants made false statements in their applications for financial aid were sufficient to support an FCA claim. The defendants were correct that the allegations against them also fell within the ambit of PFCRA, but the court saw no incompatibility between the two statutory schemes. As the Supreme Court stated in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000), 19 TAF QR 1 (July 2000), "there is no question that the PFCRA was designed to operate in tandem with the FCA."

The district court noted that repeals by implication are disfavored. Preemption by implication can be found where provisions in two statutes are in irreconcilable conflict, or where the later statute covers the whole subject area of the earlier one and is clearly intended as a substitute, but in either case the intent of Congress must be manifest. As the *Stevens* Court noted, there is no irreconcilable conflict between the FCA and the PFCRA. Moreover, the district court found no indication in the text or legislative history of the PFCRA that Congress intended to preempt the FCA. Rather, the procedure set forth under the PFCRA supports the conclusion that Congress intended to provide the Government with a choice of remedies. Therefore, the Government is not required to exhaust administrative procedures under the PFCRA before bringing an FCA claim. Accordingly, the court denied the defendants' motion to dismiss.

<u>U.S. ex rel. Alsaker v. CentraCare Health System, Inc.</u>, 2002 WL 1285089 (D. Minn. June 5, 2002)

In June 2002, a Minnesota district court struck certain allegations from an FCA complaint pursuant to Fed. R. Civ. P. 12(f) and Fed. R. Evid. 408, and dismissed the FCA allegations, with leave to amend, pursuant to Fed. R. Civ. P. 9(b). Julie Alsaker, a former employee of one of the defendants, and Luanne Caton, the daughter of a resident in one of the defendants' facilities, brought this *qui tam* action against CentraCare Health System, Inc. and St. Cloud Hospital in 1999. The relators alleged that the defendants submitted claims based on padded time records as well as claims for services that were purely custodial in nature or were provided by home health aides who were not properly trained or certified.

In 2001, the Government intervened and filed an amended complaint, alleging both FCA and common-law claims. The defendants moved to strike certain paragraphs from the Government's amended complaint on the grounds that they improperly described confidential settlement negotiations in violation of Fed. R. Evid. 408. The defendants also moved to dismiss the Government's FCA claims and the relators' complaint in its entirety for failure to satisfy Rule 9(b).

The court granted in part the motion to strike, noting that such motions are routinely granted when allegations in pleadings fall within the scope of Rule 408. The court therefore struck from the Government's amended complaint three paragraphs discussing statements made by the defendants' attorneys in compromise negotiations. However, the court declined to strike a paragraph recounting a status conference between the magistrate judge and counsel, because the court found that that paragraph provided context to the underlying action and was thus not completely immaterial.

The court also granted the defendants' motion to dismiss for failure to allege fraud with particularity as required by Rule 9(b). The defendants argued that the complaints of both the Government and the relators failed to specify the times and circumstances of the alleged fraudulent activity or the identities of the fraudulent agents. The Government contended that the particularity requirement should be relaxed because the case involved a complex scheme of fraud over an extended period of time, and the information in question was uniquely within the control of the defendants. The court noted that the plaintiffs did indeed allege an extensive pattern of fraud, and recognized that they should not be required to recite specifics for all 28,000 allegedly fraudulent transactions, but held that they must nevertheless provide some representative examples detailing "the specifics of who, where, and when." The court rejected the contention that such information was uniquely in the possession of the defendants, noting that Alsaker alleged that she witnessed fraudulent conduct, and that the Government enjoyed subpoena power.

Therefore, the Government granted the defendants' motion to dismiss the FCA claims. However, the court dismissed without prejudice in order to allow the Government to file a second amended complaint that complied with the requirements of Rule 9(b).

***U.S. ex rel. Rakow v. Pro Builders Corp.*, 2002 WL 1343210 (9th Cir. June 19, 2002)**

In June 2002, the Ninth Circuit affirmed a grant of summary judgment to the defendant in a *qui tam* suit based on allegations of false certifications of compliance with contractual provisions and federal labor law. Lee Rakow brought this suit against Pro Builders Corporation, alleging that the company failed to pay him prevailing wages on work on a project at Gallatin Airport in Montana pursuant to a government contract. The defendant moved for summary judgment, and the district court granted the motion on the grounds that (1) the defendant's certification of compliance was not a prerequisite to payment and (2) the relator presented no evidence that the defendant knowingly submitted false claims.

In an unpublished opinion, the Ninth Circuit affirmed the district court's decision on the latter ground. The court noted that the FCA's knowledge standard imposes liability for claims made in deliberate ignorance or reckless disregard of their truth or falsity, but not for gross negligence and innocent mistakes. The evidence in this case, the court ruled, conclusively demonstrated merely an isolated underpayment of wages resulting from a miscommunication between Pro Builders and one particular personnel subcontractor, Personnel Leasing. These wages constituted only 1.1% of the project's total costs; all of Pro Builder's other subcontractors paid prevailing wages.

Furthermore, the court noted, neither Rakow, Personnel Leasing, nor Pro Builders knew of a prevailing wage problem on the project until a Montana Labor Management Alliance investigator advised Rakow of it in 1996. Once Pro Builders learned of the problem, it promptly paid Rakow back wages due, and began paying him and the other laborers the prevailing wage. These facts, the court ruled, evinced an innocent mistake. Because Rakow failed to present evidence that the underpayment reflected purposeful misconduct, deliberate indifference, or reckless disregard of the truth, the court affirmed the grant of summary judgment to Pro Builders.

Judge McKeown concurred in the result, but on different grounds than the majority. He would have based the dismissal of the case on lack of jurisdiction under the public disclosure bar.

SPOTLIGHT

The Excessive Fines Clause of the Eighth Amendment and the Civil False Claims Act: To *United States v. Bajakajian* and Beyond

*Suzanne E. Durrell**

INTRODUCTION

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., amend. VIII

"There is moderation even in excess."

Benjamin Disraeli

In 1993, the Supreme Court held that the Excessive Fines Clause (the "Clause") of the Eighth Amendment applies not only to "fines" imposed in connection with criminal proceedings or under criminal statutes but also to "fines" imposed under or in connection with civil proceedings and laws, including *in rem* civil forfeitures. *See Austin v. United States*, 509 U.S. 602, 606-610 (1993). Under *Austin*, the test was not whether a forfeiture is "civil" or "criminal" but rather "whether it is a punishment." If so, it constitutes a "fine" for purposes of the Clause. *Id.* at 610. In *Austin*, the Court, drawing explicitly on the Double Jeopardy Clause analysis it adopted in *United States v. Halper*, 490 U.S. 435 (1989), for determining what constitutes a "punishment," held that an *in rem* civil forfeiture of real property used or intended for use in a drug crime was subject to the Clause. *Id.* at 621.

Four years after *Austin*, the Supreme Court "largely disavowed" the *Halper* method of determining what is "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment. Under *Halper* the key was to distinguish between "punitive" and "non-punitive" penalties. Finding this test "ill conceived" and "unworkable," the Court in *Hudson v. United States*, 522 U.S. 93 (1997), returned to the Court's pre-*Halper* method of

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analysis under which the Court evaluates the statute on its face using a multifactor test to determine if it provides for what amounts to a criminal sanction. *Compare Austin*, 509 U.S. at 610 n.6 (*Halper* is test, not prior cases) *with Hudson* (disavowing *Halper* and returning to earlier method of analysis).

Then, one year after *Hudson*, a sharply divided (5-4) Supreme Court held in *United States v. Bajakajian*, 524 U.S. 321 (1998), that a nominally civil *in rem* forfeiture of money mandated a criminal offense was a "punitive" rather than a "nonpunitive" or "remedial" forfeiture and thus was a "punishment" and a "fine" covered by the Excessive Fines Clause. In doing so, the Court explicitly relied on *Austin*, yet, at the same time, in the view of the four dissenters, the Court injected new factors that were "inconsistent with or at least in tension with *Austin*." 524 U.S. at 355 (Kennedy, J., dissenting). The Court also found the forfeiture in that case "excessive" because it was "grossly disproportional to the gravity of the offense."

Following the Court's decision in *Austin*, a few lower courts considered whether the Clause covers the damages and/or penalty portions of the False Claims Act and, if so, whether either or both are "excessive." After *Bajakajian*, however, the pace quickened. The Eighth Circuit considered and refused to decide an analogous issue regarding the Anti-Kickback Act in *United States v. Lippert*, 148 F.3d 974, 977-78 (8th Cir. 1998). In August of 2001, however, the Ninth Circuit was not so reluctant. In *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001), it held that both the treble damages *and* the civil penalty provisions of the False Claims Act constitute "punishments" and thus "fines" subject to review under the Excessive Fines Clause. It remanded the case to the district court to determine whether the damages and penalties were "excessive." The district court has not yet ruled on remand.

This article examines these and other cases and explores several important questions raised by the current state of the case law. These include:

- Does the Excessive Fines Clause apply to all or part of the multiple damages and/or civil penalty provisions of the False Claims Act (FCA)?
- If so, does it also apply when the case is brought and/or prosecuted not by the Government, but by a relator under the *qui tam* provisions of the FCA?
- In an FCA case, what factors will the lower courts deem relevant to the *Bajakajian* "gross disproportionality" test, and how much deference will the lower courts give to Congress' judgment?
- Who has the burden of proof in the lower courts?
- Do the lower courts have the discretion and authority to tailor the FCA's mandatory damages and penalties downward to bring them within the boundaries of the Excessive Fines Clause?
- Does the Clause protect corporations or only individuals?

DISCUSSION

The Supreme Court's Decision in *United States v. Bajakajian*

In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Supreme Court held in a 5-4 decision that a nominally civil *in rem* statutorily mandated forfeiture of all the money Bajakajian was trying to carry out of the United States without declaring it as required by federal criminal law violated the Excessive Fines Clause because: (1) the forfeiture was "punitive"; and (2) a full forfeiture "would be grossly disproportional to the gravity of [Bajakajian's] offense." *Id.* at 324, 334. Until this decision, "the Court had had little occasion to interpret, and [had] never actually applied, the Excessive Fines Clause." *Id.* at 327.

Citing its prior Excessive Fines Clause decisions in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal*, 492 U.S. 257 (1989), and *Austin v. United States*, 509 U.S. 602 (1993), the Court reasoned that since the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense,'" a forfeiture must be a "fine" if it constitutes punishment for an offense. 524 U.S. at 328 (internal citations omitted).

The Government argued that forfeiture of the currency after criminal conviction served "important remedial purposes" and was a civil *in rem* forfeiture, not a criminal *in personam* forfeiture, and thus was not a "punishment". The Court rejected this argument, concluding instead that this particular type of forfeiture: (1) was not a traditional *in rem* civil forfeiture (which was historically treated as "nonpunitive"), but rather was derived from and akin to *in personam* criminal forfeitures (which had historically been treated as "punitive"); (2) served *no* remedial purpose; and (3) was designed to punish the offender, and thus was a "punishment. *Id.* at 329-332. While emphasizing several times that the forfeiture in question served *no* remedial purpose, the Court reaffirmed the test adopted in *Austin*, where the Court "held that a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment *even in part*," regardless of how the proceeding is styled and regardless of whether it serves *some* remedial purpose. 524 U.S. at 329 n.4, 331 n.6 (emphasis added). *Cf. Austin*, 509 U.S. at 610, 621-22. At the same time, however, the Court seemingly contradicted its own rationale (derived from *Austin* and *Browning-Ferris*) when it recognized repeatedly that certain forfeitures that are punishments for an offense can nevertheless be classified as "nonpunitive" (and thus not "fines" subject to Eighth Amendment analysis) if they serve in part a remedial purpose. *Compare id.* at 329-333 and n.4, 340-344 *with* Justice Kennedy's dissenting opinion discussed below.

Having determined that the particular forfeiture in question was "punitive" and thus a "fine" subject to the Excessive Fines Clause, the Court next set forth the test for determining if a fine is "excessive." "The touchstone of the constitutional inquiry under the . . . Clause is the principle of proportionality: The amount of the forfeiture must bear *some* relationship to the gravity of the offense that it is designed to punish." *Id.* at 334 (emphasis added). With this in mind, the Court held that a fine is "excessive" if it is "grossly disproportional to the gravity of the defendant's offense." *Id.* Thus, "the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*, must compare the amount of the forfeiture to the gravity of the defendant's offense." *Id.* at 336-337. If they are in gross disproportion, the forfeiture is excessive and unconstitutional. *Id.* at 336-337 & n.10.

Finding little guidance in the language or the history of the Clause as to what would be considered "excessive" under this test, the Court identified two considerations that it found "particularly relevant." The first is that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature". Views on the "severity of punishment, . . . are peculiarly questions of legislative policy" and "Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Id.* at 336 (internal citations omitted). The second is "that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* at 334-337. "Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents." *Id.* at 336.

The district court had concluded that full forfeiture of the $357,144 Bajakajian had been carrying and failed to report would be excessive and instead had ordered forfeiture of $15,000 (in addition to three years' probation and the maximum fine of $5,000 under the Sentencing Guidelines). The Court of Appeals for the Ninth Circuit had affirmed. Rather than remand to either court, the Supreme Court applied its "gross disproportionality" standard itself. In holding that the forfeiture violated the Clause, the Court highlighted several facts, many of which the dissenters vigorously took issue with. These included: that the crime was solely a reporting offense—it was permissible to transport the currency out of the country so long as one reported it; that the violation was unrelated to any other illegal activities (e.g., drug trafficking, money laundering, tax evasion); that under the Sentencing Guidelines the maximum sentence was six months while the maximum fine was $5,000; that the defendant caused minimal harm, no loss to the public fisc, and no fraud on the United States; and that the forfeiture was larger than the $5,000 fine imposed by many orders of magnitude, and bore *no* "articulable correlation to *any* injury suffered by the Government." *Id.* at 337-340 (emphasis added).[1]

The Government argued that the "proportionality of full forfeiture was demonstrated by the fact that" numerous statutes authorizing full forfeitures existed or were enacted at roughly the same time as the Eighth Amendment. *Id.* at 340. The Court rejected this argument, declining to give any deference to such legislative judgments because

1 The Court did not decide whether a defendant's wealth or income or whether full forfeiture would deprive him of his livelihood were relevant factors. *Id.* at 340 n.15.

in its view those forfeitures were irrelevant to the case at hand. "[T]hey were not considered at the founding to be punishment for an offense . . . they therefore indicate nothing about the proportionality of the punitive forfeiture at issue here." *Id.* at 340-341 (emphasis added). Similarly, the Court noted that other monetary forfeitures were not considered punishments for criminal offenses, *id.*, because, for example, they were brought as civil actions and thus were distinguishable from the punitive criminal fine in *Bajakajian*, *id.* at 343 & n.18, or were entirely remedial because they "provide[d] a reasonable form of liquidated damages" to the Government and serve[d] to reimburse the Government for investigation and enforcement expenses," *id.* at 343-344 & n.19, *citing One Lot Emerald Cut Stones v. United States*, 409 U.S. 323, 237 (1972) (*per curiam*).

In a stinging dissent (Justice Kennedy, with the Chief Justice, and Justices O'Connor and Scalia), Justice Kennedy took issue with virtually every aspect of the majority's decision and reasoning:

> For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment. The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court's test, its decision portends serious disruption of a vast range of statutory fines. The Court all but says the offense is not serious anyway. This disdain for the statute is wrong as an empirical matter and disrespectful of the separation of powers. The irony of the case is that, in the end, it may stand for narrowing constitutional protection rather than enhancing it. *To make its rationale work, the Court appears to remove important classes of fines from any excessiveness inquiry at all.* This, too, is unsound.

Id. at 344 (emphasis added). The dissent pointed out what it considered to be the many anomalies in the majority's reasoning and opined that the majority's notion that *in rem* forfeitures (and perhaps most civil forfeitures) may not be fines at all, "is inconsistent with or at least in tension with *Austin*." *Id.* at 355. In conclusion, the dissent said:

> The majority's holding may not only jeopardize a vast range of fines but also leave countless others unchecked by the Constitution. Non-remedial fines may be subject to deference in theory but overbearing scrutiny in fact. *So-called remedial penalties, most in rem forfeitures, and perhaps civil fines may not be subject to scrutiny at all.* I would not create these exemptions from the Excessive Fines Clause. I would also accord genuine deference to Congress' judgments about the gravity of the offenses it creates.

Id. at 355-356 (emphasis added).

Does the Excessive Fines Clause Apply to the FCA's Damages or Penalty Provisions?

The threshold question of whether the Clause applies to civil proceedings at all, or is limited solely to criminal offenses, was answered in *Austin*, where the Court concluded that the Clause covers civil as well as criminal laws, and the test instead is whether a sanction is a "punishment" and thus a "fine" under the Clause. 509 U.S. at 606-610.[2] While seemingly clear on this question at the time, however, the *Austin* decision (which relied in part on *Halper*, a False Claims Act case) is now confused by, and possibly undermined by, the Court's subsequent decisions in *Bajakajian* and *Hudson v. United States.*

Nevertheless, it appears that whether one uses the approach of *Halper* or *Hudson* or *Austin* or *Bajakajian*, or some combination, the mere fact that a statute or sanction is denominated as, and even perhaps intended by the legislature to be, civil, will not be dispositive. Under any approach, the Court will proceed beyond that point to see if the sanction is "punitive". What is unclear, however, is what approach the Court would use to analyze a civil statute such as the FCA with its Congressionally mandated treble damages and mandatory civil penalties to determine if it is "punitive". The approach it uses could be critical to the outcome of the issue.

In *Hudson* (decided one year before *Bajakajian*), the Court largely disavowed the *Halper* method of determining what constitutes "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment (relied on in *Austin* for the Excessive Fines Clause analysis), which involved courts attempting to distinguish between "punitive" and "non-punitive" penalties. Instead, the Court returned to its pre-*Halper* method of analysis contained in such cases as *United States v. Ward*, 448 U.S. 242 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Under that line of cases, the Court considers the statute on its face, not as applied. It considers first the threshold question of whether the legislature intended the particular punishment to be "civil" or "criminal" in nature, *i.e.*, whether it either expressly or impliedly indicated a preference for one label or the other. *Hudson*, 522 U.S. at 99. Then, even where the legislature has indicated the penalty is civil, the court looks to see if a statute intended to be civil is actually so punitive as to transform it into a criminal penalty. To decide this question, the Court uses a multifactor test[3]; these

3 These factors include: "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." Hudson, 522 U.S. at 99-100 (internal citations and quotations omitted).

2 Since the Clause limits the government's power to extract payments "as punishment for some offense", citing Browning-Ferris, supra, and since "civil proceedings may advance punitive as well as remedial goals, and, conversely that both punitive and remedial goals may be served by criminal penalties," citing United States v. Halper, 490 U.S. 435, 447 (1989), the question is not, as the United States argued, whether a forfeiture is civil or criminal, but rather "whether it is punishment." Austin, 509 U.S. at 610. In Browning-Ferris, supra, the Court had left open the question of whether the Excessive Fines Clause could ever apply to a civil case, however, the dissent (Justices O'Connor and Stevens) concluded that it could apply to civil penalties such as punitive damages awarded in an antitrust suit between only private parties. Id. at 285-297.

factors are to be considered in relation to the statute on its face "and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99-100.

The *Hudson* Court criticized *Halper* for ignoring all but one or two of these factors:

> We believe that *Halper's* deviation from longstanding double jeopardy principles was ill considered . . . *Halper's* test . . . has proved unworkable. We have since recognized that all civil penalties have some deterrent effect. If a sanction must be 'solely' remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause. . . . [I]t should be noted that some of the ills at which *Halper* was directed are addressed by other constitutional provisions. The Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational. The Eighth Amendment protects against excessive civil fines... [citing *Austin*] The additional protection afforded by extending double jeopardy protections to proceedings [under the False Claims Act] heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between 'punitive' and 'nonpunitive' penalties.

Hudson, 522 U.S. at 101-103 (internal citations omitted).[4] The *Hudson* Court did not explicitly say how, if at all, its disavowal of *Halper* affected its Excessive Fines jurisprudence in cases such as *Austin*, which had relied so heavily on *Halper.*

Then in *Bajakajian*, one year later, the Court seemingly returned to the *Halper/Austin* concept of "punitive" and "non-punitive" penalties for purposes of Excessive Fines Clause analysis. *See, e.g.* 509 U.S. at 609-10 & n.6, 621-22 n.14. It was roundly criticized by the four dissenters (who had been in the majority in *Hudson*), but it is unclear if the dissenters' concern is that the test should still be that articulated in *Austin* and the majority did something to undermine that, or if they see the "unworkable" and "ill considered" *Halper* approach looming too large in the majority's foray into which forfeitures or penalties are "remedial" and which are "punitive" and thus "fines" under the Clause.

Regardless, despite its broad language in *Austin* and some other opinions, the only cases where the Court has to date actually decided that the Clause applies are for-

4 It is beyond the scope of this article to explore in any depth how, if at all, any Due Process or Equal Protection challenge such as noted in Hudson would fare if raised by an FCA defendant. Suffice it to say that it seems implausible that the Court would find a statutorily mandated civil remedy that has been on the books since the Civil War to be "downright irrational" unless it were applied in some completely absurd and unforeseeable way.

feiture cases where the forfeiture (whether civil *in rem*, criminal *in personam*, or however characterized) was directly related to a criminal proceeding/offense. *See Austin, supra* (*in rem* civil forfeiture of real property used or intended for use in a drug crime); *Alexander v. United States*, 509 U.S. 544 (1993) (*in personam* criminal forfeiture under RICO); *Bajakajian* (forfeiture mandated by a criminal statute for a currency reporting violation of federal criminal law).

The Court's cases leave open two fundamental questions. First, would its analysis of a given statute such as the FCA focus on the statute on its face and as a whole, or instead on the statute as applied in the particular case? It appears that it would use a facial approach. *See Austin* 409 U.S. at 621 n.14 (comparing *Halper* "as applied" approach to *Austin* "on its face" approach); *United States v. Ursery*, 518 U.S. 267, 287 (1996) (in Excessive Fines Clause cases, look at statute on its face and as a whole); *Hudson*, 522 U.S. at 103 (in Double Jeopardy cases, look at statute on its face and as a whole); *United States v. Lippert*, 148 F.3d 974, 977 n.2 (8th Cir. 1998)(noting uncertainty but concluding that "whether the Excessive Fines Clause applies to a type of civil penalty should be based on a facial evaluation of the statute.")

Second, what method would the Court use to determine whether the civil sanctions or remedies constitute "punishment" in light of *Halper, Austin, Hudson,* and *Bajakajian*? The dilemma posed by this second question is illustrated by the Eighth Circuit's ruminations in *U.S. v. Lippert*.[5] On the one hand,

> *Austin* relied heavily on the now discredited Double Jeopardy Clause analysis of *Halper*. We infer from the citation to *Austin* in *Bajakajian* that *Halper's* emphasis on punishment, while rejected as a basis for applying the Double Jeopardy Clause, remains appropriate for applying the Excessive Fines Clause. That inference is supported by the fact that the Court in *Hudson* commented 'some of the ills at which *Halper* was directed are addressed by other constitutional provisions', citing as example the Excessive Fines Clause as applied in *Austin*. . .. If we apply *Austin's* expansive test for identifying punishment, it seems apparent that the civil penalty [in the Anti-Kickback Act] is punitive because it is intended to serve in part as punishment . . .
>
> On the other hand, there is a strong conflicting signal from *Bajakajian*. . . . If the *Bajakajian* dissenters have properly construed the majority opinion,

5 Prior to *Bajakajian*, two reported district court opinions concluded the civil penalty provision of the FCA was subject to the Excessive Fines Clause, relying in part on *Austin*. *See United States v. Advance Tool Company*, 902 F. Supp. 1011 (W.D. Mo. 1995); *U.S. ex rel. Smith v. Gilbert Realty*, 840 F. Supp. 71 (E.D. Mich. 1993). Since *Bajakajian*, in one reported district court opinion, the court assumed, without deciding, that the FCA is subject to the Clause. *See U.S. v. Byrd*, 100 F. Supp. 2d 342 (E.D.N.C. 2000).

> then civil penalties imposed [under the Anti-Kickback Act] may not be subject to the Excessive Fines Clause at all, because like customs forfeitures they serve the remedial purpose of reimbursing the government for losses accruing from kickbacks.

148 F. 3d at 977-78 (citations omitted). Uncertain how the Supreme Court would resolve these seemingly inconsistent approaches, the Eighth Circuit decided "we need not hazard an answer" and instead decided that the civil penalty was not constitutionally excessive. *Id.* at 978.

Faced with this same issue in *United States v. Kruse*, 101 F. Supp. 2d 410 (E.D. Va. 2000), the court recognized that the *Lippert* court had refrained from ruling "in part because of the murkiness surrounding Supreme Court decisions in this area." *Id.* at 412. The district court's opinion reflects some of the same confusion, but the court appears to rely on *Bajakajian* in concluding that the Anti-Kickback Act *on its face may not* be subject to the Excessive Fines Clause "insofar as the penalties . . . reimburse the Government, if roughly." *Id.* at 413. The court then went on to conclude that one type of "civil penalty" in the statute, *as applied* in that case, passed constitutional muster, but that the second type of "civil penalty" did not. The penalty that passed muster essentially provides that the Government shall recover twice the amount of each kickback. The other "per occurrence" penalty failed. In reaching its decision, the court found persuasive evidence on the amount of the kickbacks as well as on the Government's investigative and audit costs and other costs.

The dilemma posed in *Lippert* also gave the Ninth Circuit little pause. In *United States v. Mackby*, 261 F.3d 821 (replacing 243 F.3d 1159) (9th Cir. 2001), the Ninth Circuit held that the treble damages *and* civil penalties provisions of the FCA fall within the scope of the Excessive Fines Clause. The Ninth Circuit's confident decision belies what appears to be the confused state of the law. While the court appears to construe the FCA on its face (an approach urged by the Government), it seemingly makes no attempt to reconcile the above Supreme Court precedents. Rather, it forges ahead and uses solely the *Austin/Halper* test for determining what constitutes "punishment" under the Excessive Fines Clause; it does not delve into the *Bajakajian* realm of "punitive" versus "non-punitive" penalties or the *Hudson* realm of considering multiple factors and then concluding that a statute the legislature intended to be civil is in fact "punitive" only if confronted with "the clearest proof" of such. *Cf. Myrie v. Commissioner*, 267 F.3d 251, 261-262 (3d Cir. 2001) (using *Hudson* test to conclude a surcharge is not subject to Excessive Fines Clause).

The court, finding references in FCA case law and legislative history to the deterrent and punitive purposes of the FCA, and noting that penalties are to be awarded even where there is no loss to the Government, concluded that "the civil sanctions provided by the False Claims Act are subject to analysis under the Excessive Fines Clause because the sanctions represent a payment to the government, at least in part, as punishment." *Id.* at 830.

The court then turned to the treble damage provision of the FCA. Again, using the *Austin/Halper* test, the court, citing to Supreme Court cases referring to treble damages as punishment in antitrust cases, and to the Court's recent statement in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-86 (2000), that FCA treble damages, at least in combination with the civil penalties, are "essentially punitive in nature," concluded that "the FCA's treble damages provision, at least in combination with the Act's statutory penalty provision, is not solely remedial and therefore is subject to an Excessive Fines Clause analysis." 261 F.3d at 830-31. *See also U.S. ex rel. Satalich v. City of Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Cal. 2001) (relying on *Stevens* and other cases, including *Mackby*, to conclude that City is not a "person" under the FCA and enjoys immunity from suit, because FCA damages and penalty provisions impose "punitive liability").

In doing so, the Ninth Circuit apparently never considered whether something less than trebles or the $10,000 civil penalty would not be "punishment." *See, e.g., Stevens, supra* at 784-786 (while the Court characterized the current version of the FCA as imposing damages that are essentially punitive in nature, it also noted that there was Supreme Court precedent that the damages and penalties under the pre-1986 FCA were remedial rather than punitive); *Halper*, 490 U.S. at 449 (in ordinary case, fixed penalty plus double damages provisions, as in the FCA, can be said to do no more than make the government whole and thus are remedial) and Kennedy, J., concurring at 452-53 ("Our rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages"); *United States v. Lippert*, 148 F.3d at 978.[6]

Nor did the Ninth Circuit even acknowledge that the four dissenters in *Bajakajian* construed the majority's opinion as treating many fines as "remedial" penalties, and thus not subject to the Excessive Fines Clause, "even though they far exceed the harm suffered . . . and even if they amount to many times the duties due on the goods." 524 U.S. at 344-345. According to the dissenters, the majority's approach means that the centuries old "*in personam* customs fines equal to one, two, three or even four times the value of the goods at issue," none of which depended on a compensable monetary loss to the Government, are now considered "non-punitive and thus not subject to the Excessive Fines Clause." *Id.* at 345-346. The Ninth Circuit did not explain why FCA civil penalties (or treble damages) are not "remedial" under this analysis. *See also Browning-Ferris*, 492 U.S. at 273-274 (awards of double or treble damages authorized by statute date back to the thirteenth century).

As demonstrated by the Eighth Circuit in *Lippert*, whether one uses the *Austin/Halper* approach, the *Hudson* or the *Bajakajian* approach may well determine

6 It could have failed to do because it was considering the FCA on its face and as a whole.

whether the FCA or Anti-Kickback Act penalties provisions fall within the Excessive Fines Clause. 148 F.3d at 977-78 (under *Austin's* expansive reading for identifying punishment it seems apparent the Anti-Kickback Act civil penalty is punitive, but if the *Bajakajian* dissenters have properly construed the majority opinion, the civil penalties may be remedial).

For example, there is ample support in FCA case law, statutory language, legislative history and historical context and underpinnings, and case law interpreting other civil penalty multiple damages statutes and their historical origins, to support the argument that the FCA, a clearly civil statute, is *on its face and as a whole* in essence remedial and the treble damages and penalties are both "remedial" not punitive. *See generally, Bajakajian; Halper*; S. Rep. No. 99-345 at 30-31 (indicating that FCA is civil and remedial, not penal, and provides for compensatory damages); 99th Cong., 2d Sess., Hearing Before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, February 5-6, 1986 (Statement of Rep. Glickman), *reprinted in* A&P FALSECLM Hearings (6) *158 (increase in civil penalties from $2,000 to $5,000-$10,000 did not serve a punitive purpose but rather was intended to adjust for inflation since the original FCA was passed in 1863). However, if all that must be shown is that the FCA damages and/or penalties on their face serve at least *in part* to punish (i.e. to deter), it may be hard to quarrel with the Ninth Circuit's decision in *Mackby*.

Applicability of the Excessive Fines Clause to FCA *Qui Tam* Actions

The Supreme Court has left open the question of whether an FCA *qui tam* action is subject to the Excessive Fines Clause. *See Browning-Ferris, supra* at 275-276 n.21 (In *Halper* "we left open the question whether a *qui tam* action . . . would implicate the Double Jeopardy Clause. We leave the same question open for purposes of the Eighth Amendment's Excessive Fines Clause.") (citation omitted), *and* O'Connor's dissent at pp. 298-299 (her general approach suggests that she would apply the Excessive Fines Clause to a *qui tam* action — if it applies to the FCA at all). *See also Austin*, 509 U.S. at 607 n.3 ("In *Browning-Ferris* we left open the question . . . we have no occasion to address that question here."); *Hays v. Hoffman*, 2001 WL 1141827 (D. Minn. Sept. 26, 2001) (in *qui tam* action in which Government declined to intervene, whether Excessive Fines Clause applies "is murky at best"); *U.S. ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74 (E.D. Mich. 1993) (concluding that FCA civil penalties in a *qui tam* action are subject to Excessive Fines Clause).

However, given the Court's language in *Browning-Ferris* and subsequent cases, and the language and purpose of the FCA, it seems very likely that should the Court conclude the Excessive Fines Clause applies to the FCA cases brought by the Government, it will also find it applies to *qui tam* actions, even ones in which the United States declines to intervene. In *Browning-Ferris*, the majority stated that the Clause does not apply "when the government has neither prosecuted the action nor has any right to recover a share of the damages awarded." 492 U.S. at 273. Clearly, in an FCA *qui tam* action, even one which is declined, the Government not only shares in the recovery, but is entitled to the bulk of the recovery. *See* 31 U.S.C. § 3730(d) (Where U.S. intervenes, relator's share is generally between 15%-25%; where U.S. declines to intervene, share is generally between 25%-30%). *See also Stevens*, 529 U.S. at 773 & n.4 ("relator is, in effect, suing as a *partial* assignee of the United States.").

Who has the Burden of Proving That the "Fine" is "Excessive"?

If the Clause applies at all, it appears that the burden of proving that the fine is excessive rests, in the first instance, at least, with the defendant. *See Bajakajian, 524 U.S.* at 348 (Kennedy, J., dissenting) ("the majority states the test: A defendant must prove a gross disproportion before a court will strike down a fine as excessive"); *U.S. v. Wagoner County Real Estate*, 278 F.3d 1091 (10th Cir. 2002); *U.S. v. Alexander*, 32 F.3d 1231, 1234-36 (8th Cir. 1994)(holding the defendant had the initial burden of showing gross disproportionality; if the defendant satisfies his burden, then the Government must show "just proportionality"). *See also U.S. v. Alexander*, 108 F.3d 853, 855 (8th Cir. 1997) (defendant failed to demonstrate disproportionality).

The Eighth Circuit has explicitly rejected the argument that placing this burden on the defendant violates due process. *See U.S. v. Alexander*, 108 F.3d 853, 858 (8th Cir. 1997). *See also United States ex rel. Smith v. Gilbert Realty Co.,* 840 F. Supp. 71, 73 (E.D. Mich. 1993) (rejecting FCA defendant's argument that because the fine is essentially punishment the standards of a criminal jury trial are required to impose the fine).

What Factors are Relevant to Determining "Excessiveness"?

The majority in *Bajakajian* gave some guidance on this point, listing several relevant considerations, and settling on a test that weighs "gross disproportionality" to the "gravity of the offense it is designed to punish." *See* discussion *supra*. The Eighth and Third Circuits have characterized "gross disproportionality" as requiring "disproportionality to reach such a level of excessiveness that in justice the punishment is more criminal that the crime." *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995) (internal citations and quotations omitted).

Among the factors highlighted in *Bajakajian* were: substantial deference to the legislature's judgment about the appropriate punishment, the gravity of the offense, the other penalties allowed under the statute, the nature of the offense, the harm caused by the offense, involvement in other illegal activity, and the "correlation" between the offense and the sanction imposed. 524 U.S. at 336-40.

Of particular interest in FCA cases should be deference to Congress' judgments, as generally noted by both the majority and the dissent in *Bajakajian*. Many statutes provide for heavy civil penalties, as an alternative to criminal punishment, to deter misconduct and to insure the Government is adequately and wholly compensated, and it is well-settled that Congress can calibrate a civil penalty or assessment that exceeds the amount of actual damages. *See, e.g., Chapman v. United States*, 821 F.2d 523, 528-29 (10th Cir. 1987). Numerous courts have held that Congress' judgment is critical under the doctrine of separation of powers, and that where Congress has exercised its judgment the court will defer to it and find that the penalty is not "grossly disproportional to the gravity of the offense" sought to be punished. *See, e.g., Balice v. Dept. of Agriculture*, 203 F.3d 684, 698 (9th Cir. 2000) (court deferred to Congress' judgement about administrative civil penalties); *Kelly v. Environmental Protection Agency*, 203 F.3d 519, 524 (7th Cir. 2000) (court deferred to Congress' judgment about appropriate penalties for violation of Clean Water Act); *United States v. Bieri*, 68 F.3d at 238 (where a fine is legislatively authorized, a successful Excessive Fines Clause challenge will be rare); *United States v. Byrd*, 100 F. Supp.2d 342, 345 (E.D.N.C. 2000)(in FCA Congress set forth penalties that appropriately reflect the frequency and extent of a defendant's false claims); *United States ex rel. Trice v. Westinghouse Hanford Company*, U.S. Dist. Ct. Lexis 8838 at *66-*68 (E.D. Wash. Mar. 1, 2000) ("Unlike the mere reporting violation in *Bajakajian*, a violation of the FCA involves scienter and an affirmative act, i.e., submission of a claim. A more severe remedy seems appropriate. Congress determined that this was the proper penalty, and [it] does not seem 'grossly disproportional' to defendant's violation.").

Fraud against the Government is a serious offense, which "could be costing taxpayers anywhere from $10 to $100 billion annually." S. Rep. No. 345 at 3. In addition to tangible financial loss, "fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs." *Id.* Fraud is easy to commit and difficult to detect. *E.g., Barren Island Marina, Inc. v. United States*, 44 Fed. Cl. 252, 257-258 (1999). While easy to commit, it can entail great investigative, audit, and prosecutorial resources and expense to find, prove, and rectify.

While deference to the legislature should be of prime concern, particularly in an FCA case, a review of decisions pre- and post-*Bajakajian* shows that the courts have also considered numerous other factors including the following:

- Whether the criminal activities were extensive and occurred over a substantial period of time, *Alexander v. U.S.*, 509 U.S. 544, 599 (1993) (in remanding to court of appeals in this criminal forfeiture case); *U.S. v. Emerson*, 107 F.3d 77, 80 (1st Cir. 1997) (defendant engaged in repeated highly culpable conduct), and the defendant's motive and culpability. *U.S. v. Alexander*, 32 F.3d at 1236-1237*; see also U.S. v. Alexander*, 108 F.3d at 855-858. *See also Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. 2002)($11,000 statutory penalty for continued and willful violation of the FCC's radio licensing requirement).

- The value or amount of property forfeited. *U.S. v. Alexander*, 32 F.3d at 1236-1237*; see also U.S. v. Alexander*, 108 F.3d at 855-858.
- The personal benefit reaped by the defendant. *U.S. v. Alexander*, 32 F.3d at 1236-1237*; see also U.S. v. Alexander*, 108 F.3d at 855-858.
- The extent that the defendant's interest and the enterprise itself are tainted by criminal conduct (*i.e.*, does the dollar amount of the fraud constitute a small fraction of the legitimate business of the enterprise?). *Id.*
- The value of forfeited property in relation to the total dollar volume of the criminal activity. *United States v. Bieri*, 68 F.3d 232, 237 (8th Cir. 1995); *U.S. v. One Parcel of Property*, 2000 WL 1336473 (D. Conn. July 31, 2000) (drugs sold were worth far more than the properties forfeited–Excessive Fines claim rejected).
- The defendant's ability to pay. *U.S. v. Lippert*, 148 F.3d at 978*; U.S. v. Emerson*, 107 F.3d 77, 81 (1st Cir. 1997); *Hays*, 2001 WL 1141827 at *3 n.6. *Cf. Bajakajian*, 524 U.S. at 340 n.15 (not reaching this issue).
- Whether a fine of the size sought is necessary to achieve the desired deterrence. *U.S. v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001); *U.S. v. Emerson*, 107 F.3d at 81 (size of penalty and continuing nature of defendant's obligation to pay "is a sobering reality that should discourage him (and deter others) from committing future violations.")
- The other monetary awards being made. *U.S. v. Mackby*, 261 F.3d at 831 ("the amount of the [FCA] civil penalty and the amount of treble damages need not be considered in isolation as if the other did not exist. To the contrary, the amount of one will no doubt bear upon the district court's excessive fines analysis with regard to the other").
- Loss to the Government or the attempted harm to the Government and/or the harm caused to a relator. *Compare Hays* (retaliation against relator, attempted harm to U.S., and government's lengthy audit process among factors considered in concluding defendant's conduct resulted in harm both real and substantial), *and Kruse* (Government's audit and investigative costs, and prosecution and judicial resources, costs of incarceration, and intangible/unquantifiable damages to the procurement system are all relevant factors) *with Austin*, 509 U.S. at 621 (*in rem* forfeiture of property at issue has "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law"), *and United States v. Advance Tool Company*, 902 F. Supp. 1011, 1018 (W.D. Missouri 1995) (finding FCA civil penalties excessive based upon the Government's "inability to prove actual damages at trial, . . . poor investigative procedures, and its confusing regulatory and contractual purchasing agreements which virtually encourage the type of conduct at issue here").
- The value of the property being forfeited in comparison to the Sentencing

Guidelines fines range. *See U.S. v. Sherman*, 262 F.3d 784, 794 (8th Cir. 2001) (forfeiture of defendants' $750,000 house not "grossly disproportional" when the Sentencing Guidelines permitted a fine of up to $4 million as to each defendant).

- Perhaps certain "intangible factors, including the property's character as a residence or the effect of forfeiture on innocent occupants and children" may be relevant in some cases, particularly civil *in rem* forfeitures where the owner has not been convicted of any crime. *See Bieri*, 68 F.3d at 237.

Tailoring the FCA Award to Avoid "Excessiveness"

Generally, under the FCA the courts have some discretion in what they count as a false "claim" subject to the civil penalty provision. *See*, *e.g., U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 552 (1943) (under circumstances of this case, each project can be counted separately, rather than every form submitted); *United States v. Bornstein*, 423 U.S. 303 (1976) (three shipments, not twenty-five separate invoices, constitute the number of false "claims"); *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001) (counting one Medicare claim per patient per year is within discretion); *United States v. Krizek*, 111 F.2d 934 (D.C. Cir. 1997) (count each HCFA 1500 claim form per patient, not each CPT code/statement on the claim form); *United States ex rel. Garibaldi v. Orleans Parish School Board*, 46 F. Supp.2d 546, 554-555 (E.D. La. 1999), *rev'd on other grounds*, 244 F.3d 486 (5th Cir. 2001) (defendant made a "claim" every time it requested money from the government — it is the number of applications for funds, not the number of coded items on each application, or the number of invoices generated, or the number of contracts); *United States ex rel. Augustine v. Century Health Services, Inc.*, 136 F. Supp. 2d 876, 895 (M.D. Tenn. 2000) (holding that each cost report, not each false statement on the reports, is a "claim"), *aff'd*, 289 F.3d 409 (6th Cir. 2002).

However, courts have generally held that they have no discretion not to award the mandated statutory civil penalties or to award less than the minimum per each such false "claim," unless doing so would run afoul of the Constitution. For example, in *United States v. Bieri*, the district court determined that forfeiture was discretionary under the statute and it ordered no forfeiture. The Eighth Circuit reversed, holding that there was no such discretion under the statute. However, the district court could order forfeiture of less than the whole if necessary to tailor the forfeiture to fit within the broad boundaries of constitutional proportionality under the Excessive Fines Clause of the Constitution. 68 F. 3d at 234-235. "To sustain a forfeiture of less than the whole on this circumstance, the Constitution imposes an additional layer of analysis." *Id.* at 235-236. *See also United States v. Killough*, 848 F.2d 1523, 1533-34 (11th Cir. 1988) (imposition of FCA statutory forfeitures is not discretionary, but is mandatory for each claim found to be false); *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975) (in case where district court limited penalties to 50 claims, instead of the 120 claims found false, court commented in *dicta* that it would not address the issue because Government had not cross appealed and, in any event, "the Government tacitly admits that the court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government. The forfeiture should reflect a fair ratio to the damages to insure that the Government completely recoups its losses."); *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74-75 (E.D. Mich. 1993) (where ratio of actual damages to civil penalty was 1:178, court reduced civil penalty by counting as a "claim" each of seven false certifications made by defendant directly to the housing authority rather than each of fifty-one separate rent checks endorsed by defendant and concluded that reduced penalty was not excessive under Excessive Fines Clause); *United States v. Advance Tool Company*, 902 F. Supp. 1011 (W.D. Mo. 1995) (court lacks discretion or coherent power under the FCA to award damages below the statutory range, but under Excessive Fines Clause, it may reduce penalty; court imposed a civil penalty for each of 73 different types of tools at issue, rather than for each invoice). *See generally Bajakajian*, 524 U.S. at 337 n.ll (court did not have before it the propriety of the district court's order of less than a full forfeiture of $357,144 as dictated by the statute; nor did the court address whether the reduced forfeiture of $15,000 would have suffered from "gross disproportion"); *Kruse* (in holding $10,000 "per occurrence" civil penalty under the Anti Kickback Act, which would have resulted in a $590,000 penalty, "excessive", the court never considered reducing the penalty so as to avoid running afoul of the Excessive Fines Clause).

Are Corporations Protected by the Excessive Fines Clause?

No court, including the Supreme Court, has held that the Clause applies to a corporation. In *Browning-Ferris*, the majority of the Supreme Court left the question open, 492 U.S. at 276 n.22, while the dissent (O'Connor, J. and Stevens, J.) concluded that it does apply to a corporation. *Id.* at 284-285.[7] *See also Hays v. Hoffman*, 2001 WL 1141827 (declining to reach question). *See generally Consolidated Edison Company of New York, Inc. v. Pataki*, 2002 WL 1207514 at *3-*6 (2d Cir. June 5, 2002) (in concluding that the constitutional provision against bills of attainder applies to corporations, the court discusses which constitutional amendments corporations have received protection under and what test(s) have been used to decide).

7 While the Court has held that the Due Process Clause of the Fourteenth Amendment applies to corporations, and protects them from excessive punitive damages awards, this constitutional protection should not be confused with the Eighth Amendment protection. For example, in *Watson v. Johnson Mobile Homes*, 282 F.3d 568, 572 (5th Cir. 2002), the court assumed that both Amendments apply, but as the Supreme Court cases show, only the Fourteenth Amendment is relevant in punitive damages cases. *See Pacific Mutual Life Insurance Co. v. Haslip, 499* U.S. 1 (1991) (recounting history of the Court rejecting the Eighth Amendment argument in punitive damages cases, and holding that the Fourteenth Amendment does apply). The Court does, however, use many of the same factors in determining whether there is "excessiveness" under each Amendment. *See, e.g.*, *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (using *Bajakajian* and Fourteenth Amendment cases to decide "grossly excessive" question in a Fourteenth Amendment case).

CONCLUSION

It remains unclear what standard or method of analysis the Supreme Court would use in determining whether the False Claims Act is subject to the Excessive Fines Clause. The approach it ultimately chooses may well be dispositive of the question. If the Clause does apply, it presumably will also apply to FCA *qui tam* actions. Defendants will bear the burden of proving "gross disproportionality", a burden that is likely to be extremely difficult to sustain given the relevant factors, including deference to Congress' judgment. The Government and the courts will have the authority and the discretion under the FCA to tailor the damages and/or penalties so as not to be "grossly disproportional." It remains to be seen whether any Excessive Fines Clause protections the Supreme Court places on the FCA will inure to the benefit of corporate defendants, or will benefit only individual defendants.

ALLEGATION: IMPROPER "COMMISSION" PAYMENTS

U.S. ex rel. Purcell v. MWI Corp.

In April 2002, DOJ reportedly intervened in a *qui tam* suit alleging that MWI Corp., a Florida water pump manufacturer, and its president J. David Eller violated the FCA by improperly using $28 million of a $74.3 million government loan to pay a "commission" to a Nigerian agent who in turn made payments to Nigerian officials. Nigeria obtained the loan from the federally-backed Export-Import Bank of the United States in order to purchase agricultural pumps from MWI. The water pumps were marketed in Nigeria for MWI by the Bush-El Trading Corp., a company formed by Eller in partnership with Florida Governor Jeb Bush. However, Bush sold his interest in the company in 1994 and accepted no commissions from the sales to Nigeria. Robert Purcell, a former vice president of MWI, filed this *qui tam* action in 1998. According to Purcell, many of the pumps purchased were never installed.

ALLEGATION: BILLING FOR EXPERIMENTAL DEVICES

U.S. ex rel. Cosens v. Duke University Medical Center, No. 1:99CV746 (M.D.N.C.)

In April 2002, DOJ intervened in a *qui tam* suit alleging that Duke University Medical Center violated the FCA by billing Medicare for nonreimbursable experimental cardiac devices. Kevin Cosens, a former medical device salesman, filed this action, which involves allegations of millions of dollars of false claims over the period from 1987 to 1994. The Government has already recovered more than $35 million in similar *qui tam* actions filed by Mr. Cosens. *See* 24 TAF QR 65 (Oct. 2001); *see also infra* p. 54. Assistant U.S. Attorney Cheryl Sloan is handling the case for the Government.

ALLEGATION: CLAIMS FOR NONREIMBURSABLE DRUGS

U.S. v. Erie County Medical Center, No. 02-CV-0305 (W.D.N.Y.)

In April 2002, the United States filed a False Claims Act suit against the Erie County Medical Center, alleging that the Buffalo hospital submitted claims for reimbursement of noncovered drugs. According to the complaint, the hospital defrauded the Government of approximately $125,000 by billing for drugs that are not reimbursable under Medicare guidelines. Assistant U.S. Attorney Robert Trusiak is handling the case for the Government.

INTERVENTION WITHDRAWN

U.S. ex rel. Manning v. HealthSouth Corp., No. CV-99-BE2150-S (N.D. Ala.)

In May 2002, DOJ withdrew its partial intervention in *U.S. ex rel. Manning v. HealthSouth Corp.* DOJ reportedly withdrew from the case because two *qui tam* suits filed previously in the Western District of Texas, brought by relators Epstein and Devage, as well as two filed in other jurisdictions, are based on similar allegations that HealthSouth submitted false claims in connection with outpatient physical therapy services. According to HealthSouth, the Government has taken the position that all five of these actions represent essentially a single case. Relators Manning and Epstein have reportedly consented to the dismissal of their actions. After withdrawing its intervention in Manning's case, the Government elected to intervene in Devage's *qui tam* action (see below).

ALLEGATION: CLAIMS FOR MEDICALLY UNNECESSARY SERVICES

U.S. ex rel. Devage v. HealthSouth Corp., No. 5:98cv00372 (W.D. Tex.)

In May 2002, DOJ intervened in a *qui tam* suit alleging that HealthSouth Corp. submitted false claims to Medicare for services purportedly rendered at its Texas outpatient rehabilitation facilities. James Devage filed this *qui tam* action. According to Devage's complaint, the company submitted claims for services that were medically unnecessary or never performed; falsified the location where services were performed in order to obtain higher rates; and submitted claims tainted by kickbacks and self-referrals. John Clark and Rand Riklin of Goode, Casseb, Jones, Riklin, Choate & Watson; Richard Tinsman and Sharon Savage of Tinsman & Houser, Inc.; and Glen Grossenbacher (all of San Antonio) are representing the relator. Assistant U.S. Attorneys Harold Brown and Michael Granston, DOJ Civil Division Commercial Litigation Branch Director Michael Hertz, and attorneys Laurence Freedman and John Henebery of the U.S. Attorney's office in Washington, D.C. are representing the Government.

ALLEGATION: KICKBACKS AND CLAIMS FOR UNNECESSARY SERVICES

U.S. v. Rogan, No. 02C3310 (N.D. Ill.)

In May 2002, the DOJ reportedly filed a civil FCA action against Peter Rogan, president of Bainbridge Management, alleging that he and his company submitted claims for services at Edgewater Hospital that were medically unnecessary or based on referrals obtained with illegal kickbacks. According to the Government, the defendants defrauded Medicare of $13.6 million and Medicaid of $4.5 million. In 2001 a federal grand jury returned a criminal indictment against Bainbridge Management as well as a hospital executive and several physicians, alleging that the hospital performed unnecessary and invasive cardiac procedures resulting in the deaths of two patients. Several physicians have entered guilty pleas in the criminal case, but Bainbridge Management has not and is scheduled for trial in August.

PacifiCare Health Systems

In April 2002, DOJ announced that PacifiCare Health Systems had agreed to pay **$87.3 million** to settle allegations that the Santa Ana, California-based health insurer and its predecessor companies submitted false claims to the Office of Personnel Management. The Government alleged that PacifiCare, through its subsidiaries, submitted inflated claims pursuant to contracts in effect between 1990 and 1997 under the Federal Health Benefits Program. PacifiCare allegedly violated applicable regulations by charging the Government higher rates than similarly situated commercial customers. In addition to resolving the Government's claims, this settlement also resolves the *qui tam* claim brought by whistleblower Valerie Fletcher, a former PacifiCare employee, in 1998. Ms. Fletcher will receive a relator's share of roughly $3.5 million. Bradley Weiss (Highland Park, Ill.) and Judson Miner of Miner, Barnhill & Galland, P.C. (Chicago) represented the relator. OPM OIG investigated the matter. Assistant U.S. Attorneys Rudolph Contreras and Doris Coles-Huff represented the Government, along with Daniel Spiro, Sondra Mills, and Sheryl Floyd of DOJ's Civil Division.

Mariner Post-Acute Network, Inc.

In April 2002, Mariner Post-Acute Network, Inc. reportedly agreed not to seek reimbursement of **$26 million** in administrative costs from CMS, in return for the Government's agreement to drop its FCA claim for the same amount. CMS owed Mariner $29 million for the administrative claims, but paid Mariner only $3 million pending resolution of the FCA matter. Mariner filed for bankruptcy under Chapter 11 in November 2001. Under the terms of the settlement, the company will enter a five-year corporate integrity agreement.

***U.S. ex rel. Moradi v. Community Health Ass'n*, No. 2:01-1282 (S.D.W.V.)**

In April 2002, Jackson General Hospital reportedly agreed to pay **$765,000** to settle a *qui tam* suit alleging that the West Virginia hospital submitted false claims to Medicare and Medicaid. According to the complaint, the hospital made payments for physician self-referrals in violation of the Stark and anti-kickback statutes, and submitted claims purportedly for physician services that were actually performed by unauthorized practitioners. The Government announced its intervention and the complaint was unsealed at the same time that the settlement agreement was filed with the court. Under the terms of the settlement, the hospital will enter a five-year corporate integrity agreement that is based on a previous compliance plan. Hamid Moradi, a former employee of the hospital, filed this *qui tam* action. The relator's share is $153,000 or 20%. Nancy Hill of Winter, Johnston & Hill (Charleston, W. Va.) represented the relator. Assistant U.S. Attorneys Carol Casto and Anna Crawford represented the Government.

***Lockheed Martin Services, Inc.* (E.D. Va.)**

In April 2002, Lockheed Martin Services, Inc. agreed to pay **$530,000** to settle allegations that it overcharged the Department of Defense. A government investigation determined that Lockheed billed the National Imagery and Mapping Agency (NIMA) for the work of approximately 23 employees who did not meet the minimum qualifications for their positions. Accordingly, the Government alleged, Lockheed billed for their services at a higher rate than was permitted. The DCIS, the FBI, and the NIMA OIG investigated the matter. Assistant U.S. Attorney Gerard Mene represented the Government.

***U.S. v. Alpine Aviation, Inc.*, No. 201CV775K (D. Utah)**

In April 2002, Alpine Air Express, Inc. of Provo, Utah reportedly agreed to pay **$112,800** to settle allegations that its subsidiary, Alpine Aviation, Inc., overcharged a government program that subsidizes air service to small communities nationwide. According to the Government, Alpine Aviation contracted to provide weekly nonstop flights between Salt Lake City and two smaller outlying cities on a twin engine Piper Cheyenne, but instead used the cheaper Piper Navajo, which is slower, noisier, and nonpressurized, on a quarter of its flights. Under the settlement, Alpine is barred from providing air service under the program for the next five years. Assistant U.S. Attorney Eric Overby represented the Government.

***U.S. ex rel. Hendricks v. Northwestern Human Services Inc.*, No. 97-4203 (E.D. Pa.)**

In May 2002, DOJ announced that Northwestern Human Services Inc. had agreed to pay **$7.8 million** to settle a *qui tam* suit alleging that the Pennsylvania mental health services provider submitted false claims to Medicaid and Medicare for partial hospitalization program services. According to the Government, Northwestern billed it for services that were recreational in nature or otherwise of no benefit for the patients involved, as well as for programs that were inadequately supervised or staffed. The Government also alleged that Northwestern padded bills by inflating time records. The alleged false billings spanned a period of approximately one year in 1996 and 1997. The settlement agreement states that Northwestern was executing a guilty plea agreement on behalf of its subsidiary, Northwest Center Inc., which was charged with concealing its noncompliance with Medicaid program requirements and submitting false cost reports. Northwestern has entered into a corporate integrity agreement under which it must submit to annual audits and monitoring. John Hendricks filed this *qui tam* action. The relator's share is $737,000. Jeanne Damirgian (Philadelphia) and Brian Kenney of Elliott, Reihner, Siedzikowski & Egan, P.C. (Blue Bell, Pa.) represented the relator. The FBI, HHS OIG, and the Pennsylvania Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorneys Margaret Hutchinson and Frank Costello Jr. represented the Government.

***U.S. ex rel. Miller v. Red Line HealthCare Corp.*, No. 4-95-698 (D. Minn)**

In May 2002, Red Line HealthCare Corp. (now known as McKesson Red Line Health Care Corp.) agreed to pay **$6.1 million** to settle a *qui tam* suit alleging that the company overcharged Medicare for durable medical equipment. According to the Government, the company submitted excessive claims for parenteral and external nutrition products; claims unsupported by certificates of medical necessity; and improper claims for urological supplies that resulted in overpayments. Robert Miller, a former Red Line accountant, filed this *qui tam* action in 1995. The relator's share will be approximately 15% or more than $900,000. Joe Nilan of Lang, Pauly, Gregerson & Rosow, Ltd. (Minneapolis) represented the relator. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorneys Joan Humes and Jerry Wilhelm represented the Government.

***U.S. ex rel. Kenner v. St. Joseph's Hospital Corp.*, No. 97-MK-813 (D. Colo.)**

In May 2002, DOJ announced that Marycrest Health System of Denver, Colorado agreed to pay **$3.75 million** to settle a *qui tam* suit alleging that UniMed Medical Center, a former Marycrest hospital in North Dakota, violated the FCA by paying kickbacks, engaging in self-referral, and inflating claims in Medicare and Medicaid cost reports. Gary Kenner, a former president and CEO of St. Joseph's Hospital Corporation, doing business as UniMed Medical Center, filed this *qui tam* action in 1997 against Marycrest, UniMed, and a number of other corporations and individuals. The relator's share is $1 million or approximately 26.7%. In addition, the defendants agreed to pay $500,00 to Mr. Kenner to settle his claim that he was improperly discharged. John Skowronek of Lamont & Skowronek (Minot, N.D.) represented the relator. Assistant U.S. Attorney Michael Theis represented the Government.

<u>DRS Photronics, Inc.</u> (E.D.N.Y)

In May 2002, DOJ announced that DRS Photronics, Inc. (Photronics) had agreed to pay **$2.5 million** to settle allegations that it concealed material facts in connection with the sale of equipment to the Army. Photronics, a wholly-owned subsidiary of DRS Technologies, Inc., was based in Hauppage, N.Y. until 1997, when it relocated to Oakland, N.J. Pleading guilty to criminal charges, Photronics admitted that it falsely certified that it had performed required testing on equipment used to align the gun and rocket launcher sights on Apache helicopters. The related civil settlement resolves allegations that through such fraudulent conduct, the company violated the FCA and breached its contract with the Army. DCIS and the FBI investigated the matter. Assistant U.S. Attorneys Edgardo Ramos and Richard Hayes are representing the Government.

<u>U.S. ex rel. Hamel v. Fresenius Medical Care North America</u>, No. 99 CV 12455 (D. Mass)

In May 2002, DOJ announced that Fresenius Medical Care North America had paid over **$1.6 million** to settle allegations that National Medical Care, Inc. (NMC) billed government health programs for a drug that had been provided free of charge for use in clinical trials. NMC had received the drug, Epoetin Alfa, which is commonly known as Epogen, free from its manufacturer, Amgen, Inc. NMC administered the Epogen to dialysis patients participating in a study on the outcomes of cardiac disease. According to the Government, NMC billed Medicare, Tricare, the Federal Employees Health Benefits Program, and Medicaid for the free drugs used in the experimental study, which lasted from 1993 to 1996. During that time W.R. Grace & Co. was NMC's parent company; Fresenius Medical Care North America was created in late 1996 and acquired NMC as part of a corporate reorganization between W.R. Grace and Fresenius AG, a German manufacturer of dialysis machines. In January 2000, Fresenius agreed to pay $486 million to settle false claims allegations against three NMC subsidiaries. *See* 18 TAF QR 26 (Apr. 2000). John Hamel, a former NMC employee, brought this *qui tam* action in 1999. The relator's share is $282,017 or 17%. Edward Fallman (Boston) represented the relator. HHS, the FBI, and the DCIS investigated the matter. Assistant U.S. Attorneys Suzanne Durrell and Patricia Connolly handled the case for the Government.

<u>Wilcox Memorial Hospital of Kauai</u> (D. Haw.)

In May 2002, DOJ announced that Wilcox Memorial Hospital of Kauai had paid more than **$1.52 million** to settle allegations that it overbilled Medicare for inpatient hospital services.

According to the Government, between 1995 and 1998 the hospital submitted claims to Medicare and Tricare that were not adequately supported by medical records and upcoded claims for the treatment of pneumonia. Under the settlement, the hospital entered into a three-year corporate integrity agreement. HHS, the FBI, and the DCIS investigated the matter. Assistant U.S. Attorney Mark Recktenwald represented the Government.

***U.S. ex rel. Semtner v. Medical Center Emergency Services*, No. Civ-98-0571 (C) (W.D. Okla.)**

In May 2002, DOJ announced that Medical Center Emergency Services, P.C. had agreed to pay $1.6 million to settle a *qui tam* suit alleging that the Michigan physician group submitted false claims to Medicare, Medicaid, TRICARE, and the Federal Employees Health Benefits Program through its billing company, Emergency Physicians Billing Services (EPBS) of Oklahoma City. Nearly **$1.4 million** of the total recovery will reportedly go to the Federal Government; some $200,000 will go to the State of Michigan. According to the Government, EPBS upcoded submitted claims on the physician group's behalf. This settlement resolves part of a *qui tam* action against EPBS and its clients originally filed in Oklahoma City by Theresa Semtner, a former EPBS employee. EPBS reached a settlement in this matter in 1999, and a number of other EPBS clients have also settled. Ms. Semtner's estate will receive a relator's share of $279,943, or approximately 17.5%. Rob Vogel of Vogel & Slade (Washington, D.C.) and Cheryl Vaught of Vaught & Connor (Oklahoma City) represented the relator. HHS OIG, OPM OIG, the FBI, the DCIS, and the Michigan Medicaid Fraud Control Unit investigated the matter. Rebecca Rohr and Laurie Oberembt of DOJ's Civil Division represented the Government.

***U.S. ex rel. Health Outcomes Technologies Inc. v. University Medical Center of Southern Nevada*, No. CV-S-01-538 (D. Nev.)**

In May 2002, DOJ announced that University Medical Center of Southern Nevada had agreed to pay **$1.16 million** to settle allegations that the Las Vegas hospital violated the FCA by upgrading pneumonia diagnosis codes. This settlement resolves a *qui tam* action filed in 1996 by Health Outcomes Technologies, Inc., a company that provides software to the health care industry. The relator's share is $162,888. Under the terms of the settlement, the hospital will enter a corporate integrity agreement. Michael Hertz, Director of the Commercial Litigation Branch, and Joyce Branda, Deputy Director of the Fraud Section of the Commercial Litigation Branch of DOJ's Civil Division, as well as Laurence Casper of DOJ's tax division, represented the Government.

***U.S. ex rel. Michel v. South Shore Hospital*, No. 99-CV-1332 (S.D. Fla.)**

In May 2002, DOJ announced that Geriatrics Service Complex Foundation, operating as South Shore Hospital and Medical Center of Miami Beach, had agreed to pay **$937,000** to settle a *qui tam* suit alleging that it charged Medicare for nonallowable costs between 1996 and 1999. Jack Michel, a physician associated with the hospital's Guardian Health Plan, brought this *qui tam* action alleging that the hospital paid for patient referrals in violation of the anti-kickback statute and charged for nonallowable costs in Medicare cost reports. The relator's share is 18% or approximately $169,000. Craig Brand of Brand & Fernandez (Miami) represented the relator. The Government intervened in the overcharging allegations only. The relator's kickback allegations are still awaiting resolution.

National Heritage Insurance Co. ***(S.D. Tex.)***

In May 2002, the National Heritage Insurance Co. (NHIC), which administers the Texas Medicaid program, reportedly settled a *qui tam* suit alleging that the company failed to recover money paid on claims for beneficiaries who had outside insurance coverage. Remarkably, the Government received **no recovery** under the settlement. NHIC agreed to pay almost $1 million in legal fees to the relator's counsel, including $150,000 to the relator, but only for his work as an attorney on the case, not as a relator's share. James Churchill brought this reverse false claims *qui tam* action in 1998, alleging that NHIC paid out millions of dollars of Medicaid funds on claims that other insurance companies should have covered. In 2000, the district court dismissed the suit, ruling that NHIC is an arm of the state and therefore enjoys sovereign immunity. *See United States ex rel. Churchill v. Texas*, No. A 00 CA 527 SS, 2000 WL 33706360 (W.D. Tex. Nov. 15, 2000), 21 TAF QR 3 (Jan. 2001). The relator appealed to the Fifth Circuit, and the Government filed an amicus brief in support of the relator's position, but the case settled before it could be argued in the court of appeals. The settlement agreement contains strict confidentiality provisions, and attorneys working on the case declined to comment on it. William Armstrong III, Emerson Banack, Jr., and David Gragg of Langley & Banack (San Antonio) and Ray Weed of Ball & Weed (San Antonio) represented the relator.

U.S. ex rel. Riggs v. General American Life Insurance Co. ***No. 4:99CV00608 (E.D. Mo.)***

In June 2002, General American Life Insurance Co. agreed to pay **$76 million** to settle allegations that it filed false claims in connection with its Medicare Part B carrier contract for the State of Missouri. This is the second largest settlement of allegations of fraud against a Medicare carrier to date. According to the Government, General American submitted false information regarding the accuracy and timeliness with which it processed claims. By systematically manipulating quality assurance data, the Government alleged, the company sought to maintain a high carrier ranking in order to enhance its ability to retain its Medicare contract and compete for additional contracts. Harry and Nancy Riggs, former employees of General American, brought this *qui tam* action in 1999. The relators' share is $14.44 million or approximately 19%. The firm of Ronald E. Osman & Associates (Marion, Ill.) represented the relators. Assistant U.S. Attorneys Claire Schenk and Dorothy McMurty represented the Government.

U.S. ex rel. Singh-Khalsa v. California, ***No. C99-1673 (N.D. Cal)***

In June 2002, DOJ announced that the State of California and the County of Los Angeles had agreed to pay **$73.3 million** to settle allegations that they submitted false claims to Medicare. According to the Government, the state and county billed Medicare for services to minors without any basis for believing that they were financially eligible for Medicare. In addition to mental health and family planning services, the claims covered treatment for sexual assault, substance abuse, and sexually transmitted diseases. In addition to resolving the Government's claims, this settlement also resolves a *qui tam* action brought by Gurubanda Singh-Khalsa, an employee of the Los Angeles Department of Mental Health. The relator's share is approximately $1.36 million. Brandon Wisoff of Farella, Braun & Martel (San Francisco) represented the relator. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorney Sara Winslow, along with Daniel Spiro of DOJ's Civil Division, represented the relator.

Palmetto General Hospital ***(S.D. Fla.)***

In June 2002, Palmetto General Hospital of Hialeah, Fla. reportedly agreed to pay **$29 million** to settle allegations that its home healthcare agency submitted inflated bills to Medicare. Tenet Healthcare Corp., which owns the hospital, announced the settlement. Assistant U.S. Attorney Mark Lavine represented the Government along with Sondra Mills of DOJ's Civil Division.

U.S. ex rel. Rau v. American Medical Response, Inc. ***No. 98-CV-12050 (D. Mass.)***

In June 2002, DOJ announced that American Medical Response, Inc. (AMR), the nation's largest ambulance provider, had agreed to pay **$20 million** to settle allegations that the company submitted false claims for ambulance services to Medicare. According to the Government, the company submitted thousands of false claims for non-emergency ambulance transportation that was not medically necessary or that lacked valid documentation of medical necessity. The Government alleged that the company stated that certain patients were confined to bed or unable to walk when in fact there was no information supporting the statement or the company knew that the patients in question were not bed-confined and were able to walk. Susan Caporaletti and Robin Rau, former employees of AMR, brought this *qui tam* action in 1998. Paul Muniz and Richard Pichette of Peabody & Arnold, LLP (Boston) represented Ms. Caporaletti. Kevin McAllistar of Brennan, Recupero, Cascione, Scungio & McAllistar (Taunton, Mass.) represented Ms. Rau. The relators' share (not including interest) is $3.775 million or approximately 18.9%. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorney Michael Pineault represented the Government.

Tenet Healthcare Corp.

In June 2002, DOJ announced that 139 hospitals operated by Tenet Healthcare Corp. had agreed to pay $17 million to settle allegations that they overcharged government health care programs for laboratory tests. Under the settlement, **$16.18 million** will go to the United States, while $820,000 will go to 22 participating states. The Government alleged that the hospitals submitted claims for tests without regard to whether they were medically necessary, had been properly ordered by physicians, or were otherwise reimbursable. HHS OIG investigated the matter. Attorneys Daniel Spiro, Diana Younts, and Ellen Gale of DOJ's Civil Division represented the Government.

U.S. ex rel. Kimball v. Mercy Healthcare Sacramento, ***No. CIV-S-99-292 (E.D. Cal.)***

In June 2002, DOJ announced that Catholic Healthcare West and its affiliate Mercy Healthcare Sacramento had agreed to pay **$8.5 million** to settle allegations that they and their hospitals filed false cost reports with federal health insurance programs. According to the Government, these entities kept two sets of books. The first set was shown to government auditors, while the second or "reserve" set, which was kept hidden from the Government, identified the unallowable and inflated costs included in filed cost reports. The Government alleged that the defendants established secret reserves of funds in order to repay the Government in case the unallowable costs were eventually discovered. Joseph Kimball, a former reimbursement analyst with Mercy, filed this *qui tam* action in 1999. The relator's share is $2.48 million or approximately 29.2%. Paul Scott (San Francisco) represented the relator. The Government intervened twice in different portions of the case, once in 2000 and again in

2001. HHS OIG and the DCIS investigated the matter. Assistant U.S. Attorney Adisa Abudu-Davis represented the Government.

***U.S. ex rel. Noll v. Brotman Medical Center* (C.D. Cal.)**

In June 2002, DOJ announced that Brotman Medical Center had agreed to pay **$9.75 million** to settle a *qui tam* suit alleging that the Culver City, California hospital overcharged Medicare for rehabilitation services. Brotman is operated by a subsidiary of Tenet Healthcare Corp. The Government alleged that Brotman charged for rehabilitation services provided in beds that were not licensed for rehabilitation purposes, and that the hospital misrepresented the square footage of the rehabilitation unit and other units in Medicare cost reports. William Noll, a former controller of Brotman, brought this *qui tam* action in 1998. The relator's share will be approximately $1.93 million or 19.8%. Mary Inman of Phillips & Cohen (San Francisco) represented the relator. HHS OIG investigated the matter with audit assistance from the Mutual of Omaha Insurance Company. Daniel Spiro, Diana Younts, and Laurence Freedman of DOJ's Civil Division represented the Government.

***U.S. ex rel. Cosens v. Scripps*, No. 990CV-1264 (S. D. Cal.)**

In June 2002, DOJ announced that seven hospitals had agreed to pay more than **$6.34 million** to settle a *qui tam* suit alleging that they submitted claims to government health programs for non-reimbursable experimental cardiac devices between 1987 and 1994. Two California hospitals owned by Scripps Health, Scripps Memorial Hospital in La Jolla and Scripps Green Hospital in San Diego, agreed to pay $3.8 million. Two Pittsburgh hospitals owned by UPMC Health System, Presbyterian Hospital and Shadyside Hospital, agreed to pay $1.5 million. INTEGRIS Baptist Medical Center of Oklahoma City agreed to pay $629,000; Hoag Hospital of Newport Beach, Cal. agreed to pay $305,000; and St. Joseph's Regional Medical Center of South Bend, Ind. agreed to pay $107,000. Kevin Cosens, a former medical device salesman, filed this *qui tam* action in 1994, naming more than a hundred hospitals as defendants. Sixteen of those hospitals previously agreed to settlements totaling more than $29 million. *See* 24 TAF QR 65. The relator's share in the current group of settlements is 20% or approximately $1.26 million. A number of suits against other hospitals are reportedly still under seal. Donald Warren of the Warren & Benson Law Group (San Diego) represented the relator. The HHS OIG investigated the matter.

***U.S. ex rel. Mueller v. Eckerd Corp.*, No. 8:95-CV-2030-T-17EAJ (M.D. Fla.)**

In June 2002, DOJ announced that Eckerd Corporation had paid **$5.866 million** to settle allegations that the company defrauded government health care programs by dispensing partial or "short" prescriptions but billing the Government for the full amount prescribed. The company will also pay $3.133 million to 18 states, bringing the total amount of the settlement to $9 million. Louis Mueller, a former Eckerd pharmacist, brought this *qui tam* action. The relator's share is $880,000 or 15%. Gary Takacs of James, Hoyer & Newcomer, P.A. (Tampa) represented the relator. The FBI, the Florida attorney general, OPM OIG, and the DCIS investigated the matter. Assistant U.S. Attorney Jay Trezevant, Allie Pang of DOJ's Civil Division, and Mark Schlein, Director of the Florida Medicaid Fraud Control Unit prosecuted this action.

Bryan Barrish & Michael Giannini ***(E.D. Mo.)***

In June 2002, DOJ announced that Brian Barrish and Michael Giannini had agreed to pay over **$2.05 million** to settle allegations that the nursing home owners participated in a scheme to supply nursing home residents with unnecessary incontinence supplies. According to the Government, Medicare improperly paid out more than $1.5 million as a result of false billings under the scheme. Barrish and Giannini had previously pleaded guilty to money laundering charges. Under the civil settlement, Barrish and Giannini are debarred from participation in Medicare for five years and will enter into a comprehensive corporate integrity agreement through their management company, S.I.R. Management, Inc. The FBI investigated the matter. Assistant U.S. Attorneys James Crowe Jr. and Suzanne Gau handled this FCA action and the related criminal cases.

Saint Anthony's Health Center ***(S.D. Ill.)***

In June 2002, Saint Anthony's Health Center of Alton, Ill. reportedly agreed to pay **$2 million** to settle allegations that it upcoded pneumonia claims submitted to Medicare. Health Outcomes Technologies, Inc. filed this *qui tam* action. The Government intervened in April of this year. U.S. Attorney Laura Jones represented the Government.

Saint Clare's Health Services ***(D.N.J.)***

In June 2002, DOJ announced that Saint Clare's Health Services will pay nearly **$1.05 million** to settle allegations that the New Jersey healthcare system falsely submitted claims for inpatient stays for patients who received outpatient services. According to the Government, by falsifying patient status, Saint Clare's received higher reimbursement than it would have had it billed properly. HHS OIG investigated the matter. Assistant U.S. Attorney Stuart Minkowitz and Richard Linzer of the Office of Counsel to the Inspector General represented the Government.

PSI Group, Inc. ***(N.D. Cal.)***

In June 2002, DOJ announced that PSI Group, Inc. had agreed to pay **$962,500** to settle allegations that it submitted false mailing statements to the U.S. Postal Service. According to the Government, in 1997 and 1998 the Brisbane, California presort mailing company submitted requests for refunds based on reduced postage rates to which it was not entitled. The U.S. Postal Inspection Service investigated the matter. Assistant U.S. Attorney Joann Swanson represented the Government.

U.S. ex rel. Hensley v. Alabama Quality Assurance Foundation, No. 99-2685 (M.D. Fla.)

In June 2002, DOJ announced that Florida Medical Quality Assurance, Inc. (FMQAI) and its parent company, Alabama Quality Assurance Foundation, had agreed to pay **$838,832** to settle allegations that FMQAI submitted false claims to Medicare. A government investigation revealed that the Medicare program was improperly charged for time spent on the company's Medicaid contract with a Florida state agency. Janice Hensley filed this *qui tam* action. Kenneth Nolan (Fort Lauderdale) represented the relator. Assistant U.S. Attorney Jay Trezevant and Tracy Hilmer of DOJ's civil division represented the Governement.

U.S. v. Grossman, No. 01 CIV. 0603, 2002 WL 1349749 (S.D.N.Y. June 20, 2002)

In June 2002, a New York district court granted summary judgment for over **$150,000** against

Joel Grossman and Grossman & Associates, Inc. in a suit based on allegations that the defendants filed false invoices with EPA. The Government alleged that the defendants, who worked as subcontractors on an EPA project in New Jersey, inflated the amount of expert fees for which they claimed reimbursement, but failed to pay the experts the full amount for which they had been reimbursed. The defendants argued that any judgment would be dischargeable in bankruptcy, but failed to file for bankruptcy despite numerous assurances and several reminders from the court. At the court's invitation, the Government then filed a motion for summary judgment, to which the defendants failed to respond. Based on the evidence presented, the court found that the defendants submitted six false claims, defrauding the Government of just over $30,000. The court calculated the damages award by trebling this amount and assessing civil penalties of $10,000 per false claim.

TAF News

FCA Conference Materials

- As part of its information clearinghouse activities, TAF has materials available for distribution at conferences and other programs. Information can be tailored to a legal or general audience. Resource material, including statistical information, is also available for those writing articles on the FCA.

Qui Tam Practitioner Guide

- The *TAF Qui Tam Practitioner Guide: Evaluating and Filing a Case* can be ordered at no charge by phone, fax, or mail. This "how to" manual includes sections on evaluating the merits and viability of a case, pre-filing and practical considerations, and preparing and filing the complaint.

TAF on the Internet

- TAF's Internet presence is designed to educate the public and legal community about the False Claims Act and *qui tam*. TAF's site is located at http://www.taf.org.

Previous Publications

- Back issues of the *Quarterly Review* are available in hard copy as well as on TAF's Internet site.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). To discuss a potential article, please contact *Quarterly Review* Editor Bret Boyce.

Anniversary Reports and Video

- To mark the anniversary of the 1986 FCA Amendments, TAF has available a variety of resources including a Tenth Anniversary Report, an Assessment of Economic Impact, and an educational video highlighting the effectiveness of the Act. These materials are available at no charge.

Call for Experts and Investigators

- In response to inquiries, TAF is working to compile a list of experts and investigators across an array of substantive areas. Please contact TAF with any suggestions you may have.

Qui Tam Attorney Network

- TAF is continuing to build and facilitate an information network for *qui tam* attorneys. For an Attorney Network Application or a description of activities, please contact TAF. Be sure to ask about TAFNET, our electronic mail system for Attorney Network members.

TAF Library

- TAF's FCA library is open to the public, by appointment, during regular business hours. Submissions of case materials such as complaints, disclosure statements, briefs, and settlement agreements are appreciated.

Acknowledgments

- TAF thanks the Department of Justice and *qui tam* counsel for providing source materials.