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False Claims Act and *Qui Tam* Quarterly Review

INSIDE...

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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FCA Liability of Government Entities

U.S. ex rel. Gaudineer & Comito, L.L.P. v. Iowa, 269 F.3d 932 (8th Cir. Oct. 19, 2001)

The Eighth Circuit affirmed both the dismissal of a *qui tam* suit against a state officer in his official capacity, and the denial of the relator's motion for leave to amend to assert claims against the officer in his personal capacity. Because the relator failed to specify how the officer had acted outside his official duties, the Eighth Circuit ruled that the district court did not err in denying as futile the motion for leave to amend.

The law firm of Gaudineer & Comito, L.L.P. brought this *qui tam* action against the State of Iowa, the Iowa Department of Human Services (DHS), DHS employee Gary Gesaman, and a number of other individuals and organizations. The complaint alleged that the defendants defrauded Medicare by obtaining reimbursement for home and community-based care for individuals who did not meet government disability criteria. After the Supreme Court decided in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000) that states and state agencies are not "persons" subject to *qui tam* liability under the FCA, the relator voluntarily dismissed all claims except its claim against Gesaman in his official capacity.

The relator continued to maintain that it could sue Gesaman in his official capacity even after *Stevens* and also moved to amend the complaint to state a claim against Gesaman in his individual capacity. The proposed amended complaint was almost identical to the original complaint, except that allegations against Iowa and the Iowa DHS were dropped. The district court dismissed the original complaint, concluding that the remaining claim against Gesaman in his individual capacity was really a claim against the state and therefore barred by *Stevens*. The court also denied the motion to amend, ruling that the proposed amendment would be futile because Gesaman was implementing a state policy and had performed no acts in his individual capacity. The relator appealed both the dismissal of the original complaint and the denial of leave to amend.

Stevens Bars FCA Claim Against State Officer Acting in Official Capacity

A divided Eighth Circuit panel affirmed the district court's decision. Although the relator had contended in its brief that Gesaman was amenable to suit under the FCA in his official capacity, it conceded at oral argument that this position was no longer viable under *Stevens*. Under *Kentucky v. Graham*, 473 U.S. 159 (1985), a claim for damages against a state official in his official capacity is a suit against the state. Therefore, the claim against Gesaman in his official capacity was a claim against the State of Iowa and thus barred under *Stevens*. For this reason, the Eighth Circuit ruled, the district court did not err in dismissing the original complaint.

Claim Against State Officer in Personal Capacity Must Allege Conduct Outside Official Duties

The Eighth Circuit panel majority also affirmed the district court's denial of leave to amend on grounds of futility. The court noted that the proposed amended complaint contained no new factual allegations, but simply sought to state a claim against Gesaman in his individual capacity for the same acts it had previously

alleged he was performing in his official capacity. The relator had not alleged what Gesaman's specific duties were, nor how he acted outside those duties. Therefore, the district court did not err in denying leave to amend.

Dissent Rejects Majority's Scope-of-Authority Test

Judge Gibson dissented, holding that the district court ought to have granted the relator leave to amend to state a claim against Gesaman in his individual capacity. The dissent noted that in *Hafer v. Melo*, 502 U.S. 21 (1991), the Supreme Court held that state officials sued in their individual capacity are "persons" under 42 U.S.C. § 1983, even though states and state officials sued in their official capacity are not "persons" under that statute. In reaching that conclusion, the *Hafer* court expressly rejected any distinction based on whether the actions at issue were within the scope of the official's authority. Similarly, the dissent concluded, the FCA permits state officials to be sued in their individual capacity regardless of whether they acted within the scope of their official authority. The scope-of-authority analysis employed by the majority was in the dissent's view properly applicable not to the threshold question of liability, but rather only to the defense of personal immunity.

The dissent noted that even where a state official is sued in his individual capacity, the Eleventh Amendment bars the suit where the state is the real party in interest. The state is the real party in interest when the judgment is sought from the public treasury, when the judgment would interfere with public administration, or when the judgment would restrain or compel state action. However, the fact that the state has chosen to indemnify its officials does not make it the real party in interest, and holding Gesaman personally liable would not interfere with public administration or restrain or compel state action. In fact, the dissent urged, holding Gesaman personally liable for violating state regulations and thereby defrauding the United States would advance rather than thwart state policy, and therefore the district court should have permitted the relator to amend the complaint to state claims against Gesaman in his individual capacity.

***U.S. v. University Hospital at Stony Brook*, 2001 WL 1548797 (E.D.N.Y. Oct. 26, 2001)**

A New York district court ruled that in FCA actions brought by the Government, states are "persons" subject to suit. Although states are not deemed to be persons in *qui tam* suits brought by private relators, the court ruled that they are persons in FCA actions brought directly by the Government.

The United States brought this action against the University Hospital at Stony Brook, a New York public hospital, alleging that the hospital billed inpatient pharmaceuticals to Medicare using improper codes. The hospital moved to dismiss, arguing that it was not a "person" subject to suit under the FCA.

In a brief opinion, the court denied the hospital's motion. It noted that in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000), the Supreme Court held that in *qui tam* suits brought by private relators, states are not "persons" subject to FCA liability. However, the court noted that Justice Ginsburg, in a concurring opinion in *Stevens*, stated that she understood the majority's decision to leave open the "question whether the word 'person' encompasses States when the United States itself sues under the False Claims Act." Furthermore, the court stated that it was "persuaded by the rational [sic] in Justice Stevens' dissent that 'person' in § 3729(a) includes States." Quoting extensively from Stevens' dissent in *Stevens*, the court noted

that during the Civil War in the period before the enactment of the FCA, Congress was very much concerned about fraud by state officials, and that the legislative history of the 1986 amendments indicates that Congress understood the Act to apply to states. Finally, the court quoted an extensive passage, with many case citations, from the defendant's brief arguing that the term "person" in the FCA does not apply to states. At the conclusion of this quotation, the court stated: "The cases cited by Stony Brook do not involve the False Claims Act. They are irrelevant."

Because the court ruled that the United States may bring an FCA action against states, it denied the hospital's motion to dismiss. The court did not reach the issue of whether the hospital was an "arm of the state."

FCA Liability/Materiality

U.S. ex rel. Wilkins v. North American Construction Corp., 173 F. Supp. 2d 601 (S.D. Tex. Nov. 27, 2001)

A Texas district court held that the phrase "false or fraudulent claim" in the FCA's liability provisions includes an implicit requirement of materiality. The court dismissed the Government's claims that the defendants included "hidden" or "padded" waste removal costs in a drilling contract bid and subsequent payment requests, because the defendants had no contractual or other obligation to provide a cost breakdown for their bid. Because the defendants had no duty to disclose their costs in a fixed price bidding situation, the court ruled, the inclusion of waste removal costs was not material. Alternatively, the court ruled, the Government's "hidden cost" counts failed to state a claim under Fed. R. Civ. P. 12(b)(6) and to plead fraud with particularity under Fed. R. Civ. P. 9(b).

Patrick Wilkins, the relator in this action, was chief operating officer of a CH&A Corporation, a subsidiary of GAB Business Services. In 1991, the Army Corps of Engineers awarded to North American Construction Corporation (NACC) a competitively bid fixed-price contract to construct a groundwater treatment facility at Tinker Air Force Base in Oklahoma. CH&A and another company, ECE, became subcontractors to NACC on this contract. The subcontract identified the "contract amount" of $1,295,000 as covering the drilling and installation of extraction wells, the installation of pump systems, and the management of wastes. The actual disposal of wastes was to be paid according to unit prices separately established by the contract.

During the drilling of the wells ECE encountered problems resulting in cost overruns. CH&A had described the soil as predominately soft and silty, but ECE discovered that it was significantly harder and more heavily cemented than CH&A had described. A dispute arose between the two subcontractors over the delays. However, NACC employees warned the two subcontractors that if they blamed each other for the problems the Government would be less likely to approve a Request for Equitable Adjustment (REA). Accordingly, ECE drafted a revised REA asserting that the Government was liable for the cost overruns totaling $3.9 million because of its superior knowledge of the subsurface conditions.

In 1995 Wilkins filed a *qui tam* action against the general contractor and two subcontractors. Three years later the Government intervened. After Wilkins and the Government had amended their complaints, they presented three sets of allegations. First, the Government alleged that the two subcontractors submitted "hidden" or "padded" waste removal costs in a 1992 proposal to the Army Corps of Engineers, and subsequently included these hidden costs in requests for progress payments. Second, the Government and the relator both alleged that the defendants

falsely claimed that the Government had superior knowledge of the site conditions in order to obtain an equitable adjustment. Third, the relator claimed that the parent company of one of the subcontractors was liable, both independently and under an alter ego theory.

The defendants moved to dismiss, arguing that the Government had not sufficiently pleaded that they made false statements either in the bid proposal and contract or in the REA. In 2000, the court granted the defendants' motion to dismiss the Government's claims regarding "padded" waste costs but denied their motion to dismiss the REA claims. In the present amended opinion, the court set out in greater detail the reasons for its 2000 decision and clarified its holding that materiality is an element of an FCA action.

Failure to Disclose Cost Basis of Bid Did Not Give Rise to FCA Liability

The court ruled that the Government's padded waste allegations failed to satisfy the particularity requirement of Rule 9(b) and failed to state a claim under Rule 12(b)(6). The court noted that the defendants had no contractual or other duty to disclose the cost breakdown of their bid. Thus, the padded waste allegations did not specify what statements in the bid, the contract, and the progress payment requests were false or fraudulent, and why or how they were false or fraudulent. Accordingly, the court ruled, these allegations failed to state a claim or to plead fraud with particularity.

Alleged "Padding" of Waste Costs Was Not Material to Claim for Payment

As an alternative basis for its holding on the padded waste claims, the court ruled that given the fixed-price nature of the contract, and the absence of any required or actual disclosure of cost information, the "padding" of waste costs was immaterial as a matter of law. The court held that the "padding" was immaterial under either of two commonly used standards of materiality. One standard, set out for example in *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999), examines whether the false statement has a "natural tendency" to influence, or is "capable" of influencing, government action. The other standard, set forth in the *Restatement (Second) of Torts* examines whether a "reasonable man" would attach importance to the false statement, or the maker of the statement had reason to know that its recipient would regard the false statement as important. Because the defendants submitted the lowest bid and had no duty to disclose their costs, the alleged "padding" had no tendency to influence government action, and there was no reason to believe that a reasonable government agency would have acted differently in the absence of the alleged fraud.

Materiality Requirement Is Inherent in FCA's Proscription of False or Fraudulent Claims

In making its determination that materiality is a required element of an FCA claim, the court considered the text of the statute, its legislative history, and case law interpreting it and analogous provisions. The court noted that almost every court considering this issue has held that the FCA includes a materiality requirement, but without distinguishing between false and fraudulent claims. In *United States v. Wells*, 519 U.S. 482 (1997), the Supreme Court held that in determining whether materiality is a required element of an offense, courts should look first at the text of the statute, then at the established meaning of the statute's language at common law, and finally at the statute's legislative history. In *Neder v. United States*, 527 U.S. 1 (1999), the Court applied this framework to the wire, mail, and bank fraud statutes, and concluded that the established common-law meaning of "fraud" includes a materiality requirement.

However, the application of the *Neder/Wells* framework to the FCA is not entirely straightforward, because the Act does not refer simply to "fraud," but rather to a "false or fraudulent claim." Recently the Third Circuit has suggested that the Act distinguishes between a "false statement," which does not include a materiality requirement, and a "fraudulent statement," which does. *See United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 415 (3d Cir. 2000). However, the court rejected the Third Circuit's interpretation, noting that the Act does not provide liability merely for false *statements*, but only for false *claims*. For example, § 3729(a)(2) imposes liability for the use of "a false record or statement to get a false or fraudulent claim paid or approved." If submission of a false statement were sufficient for liability, the insertion of the word "false" a second time to modify "claim" would be superfluous. While a statement may be false without a showing of materiality, the court ruled, a false statement makes a claim false only if it is material to the defendant's entitlement to the money or property claimed.

The court next inquired into the meaning at common law of the terms "false," "fraudulent," and "claim," and the phrase "false claim." While "fraud" includes a materiality requirement, the court found that the common-law definitions of "false" and "false claim" do not require, but do not preclude, a materiality requirement.

Finally, the court turned to the legislative history of the False Claims Act. The phrase "false or fraudulent claim" is not found in the original 1863 version of the Act, and there was no discussion in the original debates of the terms "false" or "false claim." Nonetheless, FCA claims were repeatedly referred to as actions for "fraud." In the 1982 recodification, the words "false or fraudulent" were substituted for the words "false, fictitious, or fraudulent" and "fraudulent or fictitious" in the original version. The legislative history of the 1986 amendments again referred to the FCA as creating a cause of action for "fraud," and despite knowledge that courts were applying a materiality requirement to FCA actions, Congress did nothing to exclude or alter such a requirement. The legislative history of the new "reverse false claim" provision, subsection (a)(7), referred specifically to liability for material misrepresentations. The court concluded that the term "false or fraudulent" claim includes an implicit materiality requirement.

Government's Claims Based on False Certification in REA Allowed to Stand

The court denied the defendants' motions to dismiss the Government's allegations that they falsely certified both the accuracy and the good faith submission of the Request for Equitable Adjustment. The court found that the Government's REA claims were pleaded with particularity as Fed. R. Civ. P. 9(b) requires. It also rejected the defendants' contention that the differences among the drafts of the REA merely reflected good faith disputes about contractual liability and could not give rise to FCA liability. The Government had alleged that the defendants deliberately exaggerated the Government's role in the cost overruns and intentionally omitted evidence that CH&A had failed to give ECE complete information about site conditions. Such allegations, the court held, stated a claim under the FCA under §§ 3729(a)(1) and (2). The court also denied the defendants' motion to dismiss claims for conspiracy under § 3729(a)(3), at least insofar as those claims were based on the submission of the REA.

Relator's Complaint Dismissed on Rule 9(b) Motion with Leave to Amend

The court granted the defendants' motion to dismiss the relator's complaint for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). The court ruled that

Wilkins' first amended complaint failed to plead the "what" and "how" elements of the FCA violation with particularity. He did not allege what representations the defendants made to the Government, and he provided no indication of what their respective certifications entailed. The "how" was also missing, because Wilkins did "not explain why it is fraudulent for a contractor to submit a claim asserting that the government was responsible for cost overruns when a defendant believes that another contractor also has some undefined amount of responsibility." The court gave the relator leave to amend his complaint to conform to Rule 9(b). The court also dismissed without prejudice the relator's claims against Weatherford, ECE's parent company, for improper service of process, and his claims against GAB, CH&A's parent, for failure to adequately allege liability under either a direct or alter ego theory.

Relator's Complaint Not Superseded by Government's Intervention

The court denied Weatherford's motion to dismiss the relator's complaint as superseded by the Government's intervention. Weatherford argued that "the law is clear that where the government has intervened in a qui tam action and filed an amended complaint, the government's complaint supersedes the relator's complaint as to all claims [the Government] adopts, and the relator's claims have no continuing vitality." The court rejected this argument, noting that the FCA provides that after the Government intervenes, the relator "shall have the right to continue as a party to the action," subject only the limitations set forth in § 2720(c)(2). Subsections (A), (B), and (C) of that paragraph set forth ways in which the Government may limit the relator's participation, while subsection (D) sets forth the only method by which a defendant may limit the relator's role, upon a showing that the relator's participation is for purposes of harassment, or would cause the defendant undue burden or unnecessary expense. Weatherford had not made such a showing, and absent such a showing, the court ruled, the FCA clearly contemplates unrestricted participation and full party status for the relator.

FCA Liability/Implied False Certification

Mikes v. Straus, 274 F.3d 687 (2d Cir. Dec. 19, 2001)

The Second Circuit held that failure to comply with a statute or regulation renders a claim "false" under the FCA only where a party certifies compliance with the statute or regulation as a condition to payment by the Government. Moreover, an FCA action based on a theory of implied false certification of compliance with a given statutory or regulatory rule is viable only if the underlying rule expressly states that compliance is a prerequisite to payment.

In 1991 Drs. Marc Straus, Jeffrey Ambinder, and Eliot Friedman, who specialized in oncology and hematology, formed a partnership called Pulmonary and Critical Care Associates in order to extend their practice to include pulmonolgy. They hired Dr. Patricia Mikes, a board-certified pulmonologist, to provide services in their offices. After several weeks on the job, Mikes discussed with Straus her concerns about spirometry tests being performed in the partnership's offices. (Spirometry is a procedure used to test pulmonary function by measuring the pressure change when a patient blows into a mouthpiece.) Three months later, she was fired, and in April 1992 she filed this *qui tam* action against Straus and his partners, alleging that the defendants' failure to calibrate their spirometers rendered their claims for government reimbursement "false" under the

FCA, and that they discharged her in retaliation for her actions in furtherance of her FCA claim. In 1993 the Government declined to intervene and Mikes served the complaint on the defendants.

In 1994 the district court dismissed the complaint for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). Mikes then filed an amended complaint repeating the spirometry and retaliation claims and also asserting that the defendants improperly received reimbursement for referrals to Magnetic Resonance Imaging (MRI) facilities in which they held a financial interest. The district court denied a motion to dismiss the FCA claims and ordered arbitration of the employment-based claims. In 1996 Mikes filed a second amended complaint, followed by a supplemental complaint, which withdrew the MRI claims. The defendants moved for summary judgment, and in 1999 the district court granted the motion, ruling that the defendants' submission of claims for reimbursement did not implicitly certify that their claims for reimbursement conformed to any qualitative standard, and that even if the Medicare claims were objectively false, the defendants did not submit them with the requisite scienter. *See United States ex rel. Mikes v. Straus*, 84 F. Supp. 2d 427 (S.D.N.Y. 1999).

The defendants then asked for attorneys' fees pursuant to § 3730(d) of the FCA. The district court found that Mikes' MRI claims were vexatious but that her spirometry claims were not, and held that the defendants were entitled to either two-thirds of any attorneys' fees attributable solely to defending the MRI claims or a default fee of $5,000. *See United States ex rel. Mikes v. Straus*, 98 F. Supp. 2d 517 (S.D.N.Y. 2000). After referring the matter to a magistrate judge, the court determined that the defendants' records did not sufficiently distinguish between the time spent on the MRI and on the spirometry claims, and therefore awarded the default sum.

Mikes appealed the grant of summary judgment and the award of attorneys' fees to the defendants. The defendants cross-appealed with respect to the amount of the attorneys' fees award.

Certification Is "False" Only if It Is a Condition of Payment

The court of appeals affirmed the rulings of the district court. It began its discussion with an overview of Mikes' spirometry claims. Mikes asserted that the generally accepted standards for spirometry are set forth in the guidelines published by the American Thoracic Society (ATS). These guidelines, which are incorporated by reference in several federal statutes and regulations, recommend daily calibration of spirometers using a three liter calibration syringe, the performance of three successive test trials, and the appropriate training of spirometry technicians. Mikes alleged that the defendants did not conform to the ATS guidelines, rendering their data inherently unreliable. She alleged that the defendants' assistants who performed the spirometry tests were not properly trained, failed to calibrate the spirometer daily, and could not recall the last time the machine had been calibrated. Moreover, she alleged, the defendants did not possess a three liter calibration syringe, and failed to perform test trials or instruct patients properly during the administration of the tests.

Mikes relied principally on a theory of "legally false" certification, that is, a theory predicated upon a false representation of compliance with a federal statute or regulation or a prescribed contractual term. The Second Circuit ruled that a claim to the Government for reimbursement is not legally false simply because the particular service failed to comply with the mandates of a statute that is only tangential to

the service for which reimbursement is sought. Rather, the court joined the Fourth, Fifth, Ninth, and D.C. Circuits to hold that a certification is legally false under the FCA only where the party certifies compliance with a statute or regulation as a condition of payment by the Government.

The Second Circuit distinguished this holding from a requirement imposed by some courts that a false statement or claim must be material to the Government's funding decision. The court declined to address whether the Act contains a separate materiality requirement.

Certification of Medical Necessity Does Not Mandate a Qualitative Standard of Medical Care

The court rejected Mikes' argument that the defendants' claims for reimbursement contained an express false certification. Mikes sought to rely on the defendants' HCFA-1500 forms, which expressly certified that the services in question were "medically indicated and necessary for the health of the patient." Compliance with this requirement was clearly a condition of payment. Nevertheless, the court ruled, the term "medical necessity" does not impart a qualitative element mandating a particular standard of medical care. "Medical necessity," in the court's view, applies to ex ante coverage decisions but not to ex post critiques of how providers executed a procedure. Therefore, the court ruled, Mikes' cause of action insofar as it was founded on express false certification was without merit.

Implied False Certification Theory Viable Only Where Underlying Rule Expressly Conditions Payment on Compliance

The court next turned to Mikes' implied false certification claim. It noted that the legislative history and judicial interpretations of the FCA provide support for the implied false certification theory, but cautioned that the theory should not be read expansively or out of context. The court stated that the Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations. It cautioned that interests of federalism counsel that the regulation of health and safety measures is primarily and historically a matter of local concern. It worried that permitting *qui tam* claims based on quality of care would promote the federalization of medical malpractice, and observed that courts are not the best forum for resolving quality of care issues. Therefore, the court ruled, the implied false certification theory is appropriate only where the underlying statute or regulation upon which the plaintiff relies expressly states that the provider must comply in order to receive payment from the Government.

Mikes' implied false certification claims were predicated on alleged violations of two provisions of the Medicare statute, 42 U.S.C. §§ 1395y(a)(1)(A) and 1320c-5(a). Mikes argued that submission of a HCFA-1500 form impliedly attests to the providers' compliance with both of these provisions. Section 1395y(a)(1)(A), which provides that "no payment may be made [for services that] are not reasonable and necessary for the diagnosis or treatment of illness or injury," does expressly link compliance with payment. However, as in its analysis of the express false certification claim, the court ruled that the requirement that a service be reasonable and necessary generally pertains to the selection of the particular procedure and not to its performance. The court stated that while such factors as the effectiveness and medical acceptance of a given procedure might determine whether it is medically necessary, the failure of the procedure to conform to a particular standard of care ordinarily will not.

The other provision, § 1320c-5(a), provides that "[i]t shall be the obligation of any health

care practitioner [seeking government reimbursement] to assure . . . that services . . . will be of a quality which meets professional standards of care." This provision clearly does mandate a qualitative standard of care, but does not explicitly condition payment on compliance. Instead, the court ruled, it merely establishes conditions for participation in the Medicare program, not prerequisites for reimbursement. In support of this view, the court noted that this provision permits sanctions for a failure to maintain an appropriate standard of care only where a dereliction occurs in "a substantial number of cases" or a violation is especially gross and flagrant. Since § 1320c-5(a) does not expressly condition payment on compliance with its terms, the court ruled, the defendants' certifications on the HCFA-1500 forms were not legally false.

Defendants Lacked Requisite Scienter for Liability on "Worthless Services" Theory

The court also rejected Mikes' argument (also maintained by the Government in an amicus brief) that the district court erred in failing to consider the theory that the defendants' submission of claims for substandard spirometry essentially constituted requests for the reimbursement of worthless services. This theory was not predicated upon false certification, but rather on the assertion that the knowing request for reimbursement of a procedure with no medical value violates the FCA irrespective of any certification. Nevertheless, the court found that the plaintiff had made no showing that the defendants knowingly submitted a claim for the reimbursement of worthless services. The court ruled that for liability to be imposed the FCA requires "the knowing presentation of what is known to be false," in other words, "a lie." The court stated that because the "[d]efendants have presented such overwhelming evidence of their genuine belief that their use of spirometry had medical value, we conclude as a matter of law that they did not submit their claims with the requisite scienter." The court noted that the defendants had proffered evidence that the spirometers' instruction manuals indicated that they were properly calibrated at the time of shipment, that daily calibration is not required, and that the three liter calibration syringe is only an "optional item." The defendants' former chief medical assistant, who was not a party to the action, testified that the spirometers were sent out for periodic servicing and that he had received training and had conducted a thorough review of the practice's spirometry procedures and found no fault. In light of this evidence that the defendants held a good-faith belief that their spirometry tests were of medical value, the court ruled, Mikes' "unsupported allegations to the contrary do not raise a triable issue of fact sufficient to bar summary judgment."

Attorneys' Fees Awarded Under § 3730(d)(4) for "Objectively" Vexatious Claim

The Second Circuit upheld the district court's award of attorneys' fees to the defendants on Mikes' withdrawn MRI claims. To prove her MRI claims were brought in good faith, Mikes sought to proffer evidence regarding a "Mrs. D," who Mikes alleged was improperly examined by MRI rather than by x-ray. However, the district court excluded this evidence because Mrs. D, whom Mikes mistakenly believed was a Medicare patient, was in fact under 65 and thus not Medicare-eligible.

Section 3730(d)(4) of the FCA provides that a district court may award a defendant reasonable attorneys' fees against a *qui tam* relator "if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The Second Circuit reviewed the district court's decision to award attorneys' fees on the MRI

claims for abuse of discretion. It noted that the Act's legislative history suggests that the standard established by § 3730(d)(4) is similar to that used for claims for attorneys' fees under 42 U.S.C. § 1988. In claims brought under § 1988, an objective standard applies: the plaintiff's subjective bad faith is not a required element. The court ruled that a similar objective standard applies to claims under § 3730(d)(4). Under this standard, a claim is frivolous when, viewed objectively, it may be said to have no reasonable chance of success, and present no valid argument to modify present law.

Applying this standard, the Second Circuit found that the district court was "well justified" in finding Mikes' MRI claims objectively frivolous. It noted that the district court found no evidence that any Medicare patient inappropriately received an MRI and rejected Mikes' reliance on the case of Mrs. D, who was in fact in her late forties, as objectively unreasonable. Because Mikes' MRI allegations were bereft of objective factual support, the Second Circuit ruled, they clearly had no chance of success. Therefore, an award of attorneys' fees to the defendants was justified.

Defendant Entitled to Attorneys' Fees Only for Claims Deemed Frivolous

However, the Second Circuit rejected the defendants' cross-appeal challenging the district court's directive that they differentiate between legal services related to the MRI and the spirometry claims. The court of appeals noted that the Supreme Court has held that where a lawsuit presents "distinctly different claims for relief that are based on different facts and legal theories," time spent on the different claims should be parsed out in determining an award of attorneys' fees. The MRI and spirometry claims did not have the same factual core and were not premised on related legal theories. The MRI claims alleged improper self-referral, while the spirometry claims alleged substandard performance of a medical procedure. The fact that both claims were brought pursuant to the FCA did not justify treating them as one for purposes of an award of attorneys' fees.

The defendants argued that the default attorneys' fee award of $5,000 was "grossly inadequate" in light of the $437,000 that they spent to defend against Mikes' action. But because the defendants were entitled to attorneys' fees only on the MRI claims, they were required to provide time records specifying the names of each attorney working on the matter, the dates worked and hours spent, and a description of the nature of the work performed. Instead, the defendants sought to calculate their fee by dividing in half the total costs of litigation after subtracting billing entries specifically related to spirometry. However, as the district court ruled, they failed to establish that their attorneys actually spent half of their efforts on the MRI claims. Accordingly, the Second Circuit ruled, the district court did not abuse its discretion in awarding a default attorney's fee of $5,000 for the MRI claims.

U.S. ex rel. Swafford v. Borgess Medical Center, 2001 WL 1609913 (6th Cir. Dec. 12, 2001)

In a very brief unpublished opinion, the Sixth Circuit affirmed the grant of summary judgment in a *qui tam* action based on allegations that the defendants failed to comply with accepted medical standards of care embodied in federal regulations. With little explanation, the court affirmed "for the reasons stated in the district court's opinion."

In December 2001 the Sixth Circuit affirmed the district court's grant of summary judgment in a *qui tam* action alleging that the defendants submitted false claims for government reimbursement of venous ultrasound testing services. In a

very short unpublished per curiam decision, the court of appeals affirmed "for the reasons stated in the district court's opinion." That opinion, itself unpublished, held that in order for a relator to prevail on an implied false certification theory, the defendant's compliance with the regulatory authority at issue must be so essential that government payment is conditioned upon compliance. *See United States ex rel. Swafford v. Borgess Medical Center*, No. 4:97-CV-116V (W.D. Mich Feb. 18, 2000), 18 TAF QR 5 (April 2000).

The court of appeals briefly listed three grounds for affirming the grant of summary judgment. First, it noted that mere allegations that that services fell below a requisite standard of care, without more, are insufficient to state a claim under the FCA. Second, it held that the venous ultrasound reports at issue were not knowingly fraudulent. Third, it ruled that disputes as to the interpretation of contract regulations do not implicate FCA liability. Accordingly, the court found no error in the district court's decision granting summary judgment.

Relator's Share

U.S. ex rel. Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323 (M.D. Fla. Nov. 8, 2001)

A Florida district court awarded the relator $20.6 million or 24% of the total recovery in a Medicare fraud case that settled earlier this year for $85.8 million. In light of the exceptionally energetic role of the relator and his counsel in investigating and litigating the case and pursuing the subsequent settlement negotiations to a successful conclusion, the court determined that the relator was entitled to a robust share of the settlement proceeds.

James Alderson was employed as the Chief Financial Officer of a hospital in Montana that was taken over in 1990 by Quorum Health Group, Inc. Shortly after Quorum took over the hospital, Alderson became concerned about Quorum's policy of preparing two sets of cost reports, an "aggressive" report for submission to Medicare and a "reserve" report for Quorum's auditors. When Alderson refused to prepare the two inconsistent reports, Quorum summarily fired him.

In 1993 Alderson filed a pro se *qui tam* complaint under seal against Quorum. With Alderson's assistance, the Government began investigating the matter. Alderson traveled repeatedly to Washington at his own expense to confer with DOJ officials, personally reviewed thousands of documents, and eventually retained counsel and an accounting firm to assist him. In 1995 government attorneys meeting with Alderson's counsel expressed grave reservations about the case. In 1997 they informed Alderson's counsel that they intended to decline intervention, but agreed to delay that decision as a result of Alderson's concerted advocacy. Finally, in 1998 the court refused to grant further extensions and ordered the Government to declare its decision on intervention. After receiving assurances that Alderson's counsel would undertake the principal role in prosecuting the litigation, the Government agreed to intervene. Both Alderson's counsel and the Government played a significant role in litigating the case, and when the focus shifted to mediation in 1999, Alderson and his counsel led the negotiation, with meaningful participation from the Government. After a protracted two-year effort, the case was settled in April 2001.

Relator's Contribution Should Be Considered in Determining Share of Proceeds

In cases where the Government has intervened, § 3730(d)(1) provides that the relator shall

receive between fifteen and twenty-five percent of the proceeds of any settlement, and that the precise percentage shall be based upon "the extent to which the [relator] substantially contributed to the prosecution of the action." Examining the legislative history of this provision, the court found that Congress intended courts to consider a number of criteria in fixing this percentage, including the significance of the information that the relator provided to the Government, the relator's contribution to the result, and whether the information provided by the relator was previously known to the Government.

The court concluded, based on these criteria, that Alderson deserved a robust share of the settlement proceeds. Alderson's initial allegations were highly significant and he made a very important contribution of time and expertise. He contributed decisively to the result, displaying unusual persistence in the face of the Government's skepticism over several years. Moreover, the Government had no awareness of Quorum's practices before Alderson came forward and had no history of pursuing similar schemes before that time.

Significance of DOJ "Relator's Share Guidelines" Discussed

The court also considered DOJ's internal "Relator's Share Guidelines." It observed that these guidelines do not have the force of law and found them "noticeably unhelpful" for purposes of adjudication and at least in part internally inconsistent. However, the court stated that the guidelines, like the legislative history of the FCA, suggested that Alderson was entitled to a robust share of the settlement proceeds.

The court noted that Alderson's counsel was unusually energetic in pursuing the case and that Alderson displayed uncommon resolution in the face of emotional strain and financial hardship. In light of these circumstances, the court determined that a relator's share of twenty-four percent was appropriate.

Section 3730(b)(5) First-to-File Bar

U.S. ex rel. Lechler v. AlliedSignal, Inc., *No. 00-3670 (3d Cir. Oct. 30, 2001)*

In an unpublished opinion, the Third Circuit held that § 3730(b)(5) bars a second *qui tam* action alleging the same scheme and resting upon the same material elements as a prior action. The court of appeals vacated the trial court's decision on the merits and remanded with a direction to dismiss for lack of jurisdiction.

William Lechler, the former president of Sumitomo Corporation, brought a *qui tam* action against AlliedSignal, Inc. in 1997. In early April 1999, Sumitomo and AlliedSignal agreed to settle all pending lawsuits between them concerning the Sumitomo property that was the subject of Lechler's 1997 *qui tam* action. Pursuant to that agreement, Sumitomo moved to amend the complaint to substitute its then-current president, Tsuneo Nagano, as relator in place of Lechler, who had retired, and then to dismiss the complaint with prejudice. Lechler did not object to Sumitomo's motion, which was granted.

At the end of April 1999, Lechler filed the current action, a second *qui tam* action alleging essentially the same scheme and resting upon the same material elements as the previous *qui tam* action filed in 1997. The Government declined to intervene, and the defendants moved to dismiss the complaint for lack of jurisdiction and on res judicata grounds. The district court granted the defendants' motion to dismiss on the basis of res judicata and

denied as moot the motion to dismiss for lack of jurisdiction. Lechler appealed.

District Court Lacks Jurisdiction Over Second Action Based on Same Essential Facts

In a decision marked "not precedential," the court of appeals vacated the district court's judgment dismissing on res judicata grounds and remanded with a direction that the district court instead dismiss for lack of jurisdiction. The court of appeals ruled that this case was controlled by the teachings of *LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227 (3d Cir. 1998), 15 TAF QR 7 (Oct. 1998). In *LaCorte*, the Third Circuit ruled that a later case need not rest precisely on the same facts as a previous claim to run afoul of the statutory first-to-file bar. Rather, a later claim is barred if it states all the essential facts of a previously-filed claim, even if the later claim incorporates somewhat different details. In his appeal, Lechler had conceded that the issues in the two *qui tam* suits were "essentially identical based upon the similarity of the underlying events giving rise to the various legal claims." Therefore, the court of appeals ruled, the district court lacked subject matter jurisdiction and should not have reached the merits of the case.

The court of appeals noted that the Supreme Court had rejected the "doctrine of hypothetical jurisdiction" which some courts had invoked to decide cases on the merits where the merits question is more easily resolved and the prevailing party on the merits would be the same as the prevailing party if jurisdiction were denied. Accordingly, the court was required to consider the question of subject-matter jurisdiction before considering the merits of the appeal. Because Lechler's earlier *qui tam* suit barred the current one, the court of appeals remanded to the district court to dismiss for lack of jurisdiction.

Section 3730(h) Retaliation Claims

U.S. ex rel. Yesudian v. Howard University, 270 F.3d 969 (D.C. Cir. Nov. 13, 2001)

The D.C. Circuit ruled that an action for retaliation under § 3730(h) may not be brought against a supervisor in his individual capacity. The provision imposes liability only on an "employer" for unlawful retaliation, and the court ruled that the term "employer" does not include a mere supervisor in his individual capacity.

Daniel Yesudian brought a claim against his employer Howard University for breach of contract, and also asserted retaliation claims under § 3730(h) against both the university and his former supervisor Joseph Parker. The jury ruled in Yesudian's favor on the breach of contract claim as well as the retaliation claim against Parker, but rejected the retaliation claim against Howard University. The district court granted judgment as a matter of law on the retaliation claim against Parker, but the D.C. Circuit reversed. On remand, Yesudian continued to argue that Parker (and vicariously Howard) was liable on the retaliation claim. However, the district court rejected this argument, reasoning that the jury had found Howard not liable on the retaliation claim, and that Parker was not Yesudian's "employer" for purposes of the retaliation provision. Yesudian appealed, arguing that Parker had forfeited the argument that he was not Yesudian's employer by failing to raise it in the earlier appeal and subsequent remand proceedings.

Relator's Procedural Arguments Rejected

The D.C. Circuit rejected Yesudian's contention that Parker had forfeited the argument that he

was not Yesudian's employer. It noted that in his opposition to Yesudian's motion for relief, Parker had argued that he "was not [Yesudian's] employer and therefore has no power to reinstate him." Although this argument did not directly rest on a construction of the term "employer" in § 3730(h), it logically led the district court to consider the construction of that term, which was ultimately the dispositive issue. Moreover, the D.C. Circuit rejected Yesudian's argument that the district court should not have considered Parker's opposition, which was filed a week late. The applicable court rule states only that when an opposition paper is not timely filed, the court "may" treat the motion that it opposes as conceded. Given the lack of prejudice to the plaintiff, the district court acted within its discretion in resolving the issue on the merits rather than on procedural grounds. Parker's failure to raise the issue on the prior appeal was likewise not dispositive, especially since he was the appellee, defending on a field of battle defined by the appellant.

Term "Employer" Does Not Cover Supervisor in Individual Capacity

Turning therefore to the merits, the D.C. Circuit noted that § 3730(h) plainly mentions only the "employer" as incurring liability, and that the word "employer" does not normally apply to a supervisor in his individual capacity. Even in cases arising under Title VII, which explicitly defines the term "employer" to include the employer's agents, courts of appeals have unanimously held that the word "employer" does not cover a supervisor in his individual capacity. Section 3730(h) contains no such broad definition, so in the FCA retaliation context the case for interpreting "employer" to apply to a supervisor in his individual capacity is much weaker. Moreover, the court noted, § 3730(h) imposes mandatory remedies such as reinstatement, which a mere supervisor could not possibly grant in his individual capacity.

Finally, the court rejected Yesudian's argument that Parker should be liable in his official capacity. Any such claim would necessarily merge with the claim against Howard, which would directly contradict the jury's finding that Howard was not liable. Because Yesudian had offered no argument that the jury's verdict in favor of Howard should be set aside as a matter of law, his claim against Parker in his official capacity was untenable. Therefore, the court of appeals affirmed the judgment of the district court.

U.S. ex rel. Ridenour v. Kaiser-Hill Co., Civ. No. 97-WM-2191 (D. Colo. Sept. 27, 2001)

In September 2001 a Colorado district court dismissed a *qui tam* action over the relators' objections pursuant to § 3730(c)(2)(A). In so doing the court accepted the recommendation of a magistrate judge issued last August, *see* 24 TAF QR 35 (Oct. 2001). The relators, who were employed in various security-related positions at the former Rocky Flats nuclear weapons plant, brought this *qui tam* action in 1997 against Kaiser-Hill Company, its predecessor, and its subcontractor, alleging that the companies billed the Government for over a decade for providing security at the plant, while in fact providing substandard security or none at all.

The Government moved to dismiss the case pursuant to § 3730(c)(2)(A). The court ruled that the standard for dismissal under that section is that set forth in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145-47 (9th Cir. 1998). *Sequoia Orange* held that the Government must demonstrate that the dismissal is rationally related to a legitimate governmental purpose. If the Government meets that burden, the burden then shifts to the relators to demonstrate that dismissal would be fraudulent, arbitrary and capricious, or illegal. The court referred the matter to a magistrate judge, who concluded that the Government had shown that dismissal was rationally related to the legitimate national interests of protecting national security and ensuring timely closure of the plant. The magistrate judge also determined that the relators had not shown that the Government's action was fraudulent, arbitrary and capricious, or illegal.

The relators filed objections to the magistrate judge's recommendation. Although they conceded that protecting national security and ensuring timely closure of the plant are legitimate governmental interests, they contended that the Government failed to prove that dismissal of the complaint is rationally related to those interests, and that the magistrate judge erred in finding that they had not met their burden of proof that the Government's motion was motivated by a fraudulent or illegal purpose.

The court overruled the relators' objections and adopted the magistrate judge's recommendation. The court noted that the Government's power to dismiss a *qui tam* action is broad, and that rational basis review only requires the Government to identify a legitimate interest that could conceivably provide a rational basis for the challenged action. Because the court found that the relators had failed to negate every conceivable basis that could support the Government's motion to dismiss, or to show that the Government's true purposes were fraudulent or illegal, the court dismissed the relators' *qui tam* action with prejudice.

U.S. ex rel. Campbell v. Lockheed Martin Corp., No. 6:95-cv-549-Orl-28DAB (M.D. Fla. Oct. 11, 2001)

In October 2001 a Florida district court invoked the work-product doctrine to deny a defendant's motion to compel discovery of the relator's § 3730(b)(2) disclosure statements in a *qui tam* action. The relator filed this action in 1995, and it was consolidated with a related case. In 1997 the district court granted the defendants' motion for a stay. In April 2001 the district court lifted the stay, and the defendant renewed its motion to compel production of the disclosure statements, which had been denied without prejudice at the time the stay was first imposed.

The defendants argued that they were entitled to production of the disclosure statements on the grounds that they were relevant and unprotected by any privilege. The relator argued that they were a "road map" for case strategy, evidence and legal theories, and thus protected by work-product privilege. The relator also argued that they contained information that the relator provided to his attorneys to enable them to advise him whether to bring a *qui tam* action and how to conduct such an action, and were therefore protected by the attorney-client privilege. The Government likewise argued that the disclosure memoranda were protected by the work-product privilege, as well as the law enforcement investigative privilege and underlying policy concerns. Both the relator and the Government argued that under the "joint privilege" doctrine, the disclosure of the memoranda to the Government did not vitiate their confidentiality.

The court noted that there is a split of authority on this issue. The majority of courts to address this question have ruled that a defendant is entitled to obtain discovery of disclosure statements, but that there were a number of decisions, mostly unpublished, holding that the statements are or may be protected from disclosure. Because none of these authorities were controlling, and none were factually identical to the case at bar, the court undertook its own analysis of the issues involved.

The court rejected the relator's argument that the disclosure statements were protected by attorney-client privilege. Although the statements contained information provided by the relator to his counsel, they did not reveal the underlying privileged communications. Because the attorney-client privilege does not cover the operative facts and the evidence of those facts, the court rejected the relator's claim of that privilege.

However, because the disclosure statements were documents "prepared in anticipation of litigation," the court found that they were protected under the work-product doctrine as codified in Fed. R. Civ. P. 26(b)(3). In order to obtain discovery of ordinary work product, a party must show "substantial need of the materials in the preparation of the party's case and [an inability] without undue hardship to obtain the substantial equivalent of the materials by other means." However, so called "opinion work product," which contains the "mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation," is absolutely protected.

After reviewing the disclosure statements in camera, the court determined that they contained statements of fact intertwined with legal theories, and thus constituted a mixture of ordinary and opinion work product. Moreover, because the submission of a disclosure statement is a statutory prerequisite to maintaining a *qui tam* action, the relator did not voluntarily waive the work-product privilege by submitting the statements to the Government. The FCA does not expressly strip relators of the ability to assert work product privilege with respect to disclosure statements, and the court was unwilling to presume that Congress tacitly intended to do so.

Although the opinion work product in the disclosure statements was immune from discovery, the defendants might have been able to discover a redacted version consisting only of ordinary work product upon a showing of "substantial need." However, the court found that they had failed to make such a showing. Courts have compelled discovery of a disclosure statement where the defendants were "in the dark" about the allegations against them. However, in this case the defendants were

hardly in the dark: the complaints had been unsealed, thousands of documents had been produced, interrogatories had been answered, and the relator had filed a lengthy and detailed affidavit. Furthermore, the court rejected the notion that the disclosure statement should be produced because the case was complex. In fact, the court suggested, the need for work product protection is arguably greater in more complex cases, "in order to assure that the playing field is level and each side is preparing its own case."

Therefore, although the defendants had established that they wanted the disclosure statements, they had not established that they needed them, and that the substantial equivalent could not be obtained through other means. Accordingly, the court denied the defendants' motion to compel discovery, without prejudice to renewal should the defendants be able to make the required showing of need after exhausting other available modes of discovery.

Pentagen Technologies International Ltd. v. U.S., 172 F. Supp. 2d 464 (S.D.N.Y. Nov. 8, 2001)

In November 2001 a New York district court granted sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 against the relator's counsel in a *qui tam* action, and enjoined the relator from filing any further litigation without the permission of the court. This action was the ninth in a series of at least ten lawsuits arising out of the plaintiff Pentagen Technologies' failure to secure a software contract with the Department of Defense. The first, second, and fourth lawsuits were brought in New York and based on copyright and trademark claims. The district court ultimately consolidated and subsequently dismissed these suits, observing that the litigation was a "paradigm of the situation that *res judicata* was intended to avert and resolve." The third lawsuit, brought in Virginia, was likewise dismissed; the Fourth Circuit affirmed, stating that Pentagen's motion for recusal of the district judge was "frivolous on its face" and "reprehensible," and later imposed sanctions on both Pentagen and its counsel. Pentagen then turned to the False Claims Act in its fifth and sixth lawsuits. The district court dismissed the fifth suit, characterizing some of the plaintiff's arguments as "ridiculous," as well as the sixth, which the court found to be "factually identical" to the fifth except for the addition of an additional plaintiff. In the course of the appeal of the decision in the sixth action to the Second Circuit, the plaintiff's counsel represented to the court that he would refrain from bringing any further related actions.

Nevertheless, the plaintiff ultimately brought four more related actions. The seventh, based on intellectual property claims, and the eighth, an abuse of process claim, were dismissed. The present suit, the ninth based on the same set of facts, and the third under the FCA, alleged that Pentagen's competitor CACI colluded with the United States in filing an amicus curiae brief, in meeting with a government official to obtain a witness statement, and otherwise collaborating to defend against the first two *qui tam* lawsuits. The court dismissed the suit, holding that the Government had not waived its sovereign immunity, that the FCA does not provide for a private right of action for litigation misconduct, and that Pentagen's abuse of process claim was barred by the statute of limitations. CACI requested sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 and sought an injunction prohibiting Pentagen from pursuing any further litigation. (For a discussion of Pentagen's tenth lawsuit, dismissed with prejudice earlier this year, see 24 TAF QR 31 (Oct. 2001)).

The court granted CACI's motions. It noted that Rule 11 requires an attorney who signs a filing to certify that it is not brought for an improper purpose such as delay or harassment and that it is supported by a belief formed after a reasonable inquiry that it is not frivolous. Although there was clear, long-standing precedent that the Government cannot be sued unless it has waived its sovereign immunity, and the court specifically warned the plaintiff's counsel that it considered the Government immune, the plaintiff's counsel failed to amend the complaint or offer any meaningful argument that the Government had waived its immunity. Similarly, the inclusion of the non-governmental defendants was also improper, because the FCA does not provide a private right of action for litigation misconduct, and counsel offered no credible argument to support a claim that the court should recognize such an implied right of action. Furthermore, because Pentagen's two previous *qui tam* actions had been dismissed, the plaintiff's counsel could not reasonably have believed that the third such action, absent any new facts or law, would fare any better. Plaintiff's counsel also had no reasonable basis for believing that Pentagen's abuse of process claim was not time-barred, or that even if it were within the statute of limitations, it could survive on the merits.

Thus, the court ruled, this was a most appropriate case for the imposition of Rule 11 sanctions. The court also found sanctions appropriate under 28 U.S.C. § 1927, which unlike Rule 11, requires a showing of subjective bad faith. It ruled that the plaintiff's counsel had engaged in a pattern of litigation designed to evade previous rulings, which was evidence of intentional abuse of the judicial process. The court also noted that after the plaintiff's counsel promised in *Pentagen VI* not to initiate future related litigation, he filed four subsequent actions based on the same operative facts. Therefore, the court found it necessary to punish him for his vexatious litigation strategy and needless occupation of judicial resources. Accordingly, the court directed him to personally compensate CACI for its attorneys' fees and costs in defending this action.

Finally, the court found that Pentagen's long history of litigation made it clear that mere dismissals and monetary sanctions would not effectively deter it from future frivolous litigation. Therefore, the court enjoined the company from filing any future litigation without the court's permission.

U.S. ex rel. Bondy v. Consumer Health Foundation, 2001 WL 1397852 (4th Cir. Nov. 9, 2001)

In November 2001 the Fourth Circuit affirmed the district court's grant of summary judgment to the defendants in a Medicare fraud case. Dr. Harold Bondy, a former staff physician at the Group Health Association (GHA), brought this *qui tam* action against GHA's successors, alleging that GHA submitted false claims to Medicare over a four-year period by failing to credit reimbursements it received from private insurers on Medicare cost reports. Bondy also alleged that GHA unlawfully terminated his employment in retaliation for investigating False Claims Act violations. On cross-motions for summary judgment, the district court granted summary judgment to the defendants on both the false claims counts and the retaliation count. The court ruled that Bondy had presented no evidence that GHA submitted false claims to support his false claims counts, and that res judicata precluded the retaliation count. Bondy appealed.

In an unpublished per curiam opinion, the Fourth Circuit affirmed. The court noted that

Bondy's expert and fact witnesses were unable to testify that GHA had submitted false claims to HCFA. The experts were unable to conclude from their review that GHA had actually engaged in illegal double billing, while the fact witnesses had no concrete knowledge of the preparation of GHA's final submissions to HCFA. Bondy did present documentary evidence of a discrepancy of several million dollars between the original and revised cost reports, which might have created some suspicion about GHA's accounting methods. Although an independent auditor raised concerns that GHA was not properly offsetting third-party revenue, the auditor eventually withdrew a recommendation for an adjustment, and GHA and HCFA subsequently entered into a binding settlement agreement based on the final reimbursement figures. In the court's view this settlement permitted an inference that HCFA approved of GHA's accounting methods. Finding that Bondy's evidence did not move beyond "mere speculation," the Fourth Circuit affirmed the grant of summary judgment on the false claims counts.

The Fourth Circuit also affirmed the grant of summary judgment on the whistleblower retaliation count, which was barred under res judicata in light of a prior unsuccessful age discrimination suit that Bondy filed in 1995. All three elements required for the operation of res judicata were present. First, the parties in the prior and subsequent litigation were the same or in privity with each other. In the prior litigation, the defendants were Humana Group Health Plan, Inc. and GHA, while in the present case the defendants were Humana and GHA's successors-in-interest. The court rejected Bondy's argument that the United States was the real party-in-interest; while that is the case in a *qui tam* action, it is not the case in a retaliation action under § 3730(h), which is brought by an employee on his own behalf, not on behalf of the United States. Second, the claims in the two suits were substantially the same. Although age discrimination and retaliatory termination are separate statutory claims, two claims are substantially the same when they arise out of the same transaction or series of transactions. In this case, the same transaction—Bondy's termination—was involved, and res judicata barred not only every claim that was presented in the prior litigation but also every claim that might have been presented. Third, the prior litigation resulted in a final judgment on the merits. The court rejected Bondy's argument that because the district court granted summary judgment for the defendants in the age discrimination case after Bondy failed to respond to their motion, the court did not carefully examine the merits of his claim, and therefore did not render a judgment "on the merits." The court noted that it is well settled that grants of summary judgment, and even default judgments, are considered to be "on the merits" for purposes of res judicata. Therefore, finding all three elements of res judicata to be present, the Fourth Circuit affirmed the district court's grant of summary judgment on the retaliation count.

***Rockefeller v. Abraham*, 2001 WL 1434623 (10th Cir. Nov. 15, 2001)**

In November 2001 the Tenth Circuit affirmed the district court's grant of summary judgment in a case involving allegations of retaliation against a whistleblowing employee in violation of § 3730(h). The plaintiff Tod Rockefeller, a former environmental specialist with the Department of Energy, was removed from that position in 1997. Rockefeller filed a federal lawsuit against the Department stating claims under the Americans with Disabilities Act and the Rehabilitation Act, and later amended his

complaint in that suit to add a retaliation claim under the FCA. The district court granted summary judgment to the Department, and Rockefeller appealed, appearing *pro se*.

In an unpublished decision, the Tenth Circuit affirmed the ruling of the district court. The court of appeals ruled that the civil remedy provided in 3730(h) does not apply to federal employees. Because Rockefeller was a federal employee, the court held, his exclusive remedy for his alleged discharge in retaliation for whistleblowing activities was under the Civil Service Reform Act. Therefore, the Tenth Circuit held, the district court correctly granted summary judgment on Rockefeller's FCA claim. Similarly, the Tenth Circuit found that the district court correctly granted summary judgment on the non-FCA claims.

***U.S. ex rel. Bidani v. Lewis*, 2001 WL 1609377 (N.D. Ill. Dec. 14, 2001)**

In December 2001 an Illinois district court granted in part and denied in part the relator's motion to file an amended complaint and denied the defendants' motion for judgment on the pleadings in a *qui tam* action alleging that the defendants made false claims to Medicare for reimbursements of kidney dialysis treatments. Anil Bidani, a former employee of an entity controlled by the defendant Edmund Lewis, filed the *qui tam* action in 1997, and in 1998 the Government declined to intervene. The defendants moved to dismiss and in late 1998 the court dismissed all of Bidani's claims on public disclosure grounds except the FCA claims based on violations of the anti-kickback statute, for which the court held Bidani was an original source. Bidani then moved for reconsideration with respect to his claim that one of the defendants did not qualify as a dialysis supplier and in 1999 the court reinstated that claim to the extent that it was based on common ownership of a dialysis facility. Bidani did not argue that other types of claims should be reinstated and did not seek to amend his complaint.

Discovery continued through 2000 and the parties filed cross-motions for summary judgment. In January 2001 the court, finding that the defendants did not have the required knowledge to be liable, granted their motion and dismissed the case. *See* 2001 WL 32868 (N.D. Ill. Jan. 12, 2001), 22 TAF QR 10 (April 2001). Bidani moved for reconsideration, arguing that in light of *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), 16 TAF QR 5 (Apr. 1999), his claims were not "based upon" the public disclosures because they were not derived from those disclosures. On reconsideration, the court agreed that Bidani's action was not based upon a public disclosure, but held that a number of his claims were subject to dismissal on summary judgment for other reasons. *See* 2001 WL 747524 (N.D. Ill. June 29, 2001). However, the court found adequate evidentiary and legal support for Bidani's "discount" claims, which asserted that the defendant American Medical Supply Corp., an entity under Lewis' control, had purchased dialysis supplies at a discount, but illegally obtained reimbursement from the Government at the list price. Therefore the court reinstated the discount claims only. *See id.* at *5-7.

The defendants thereupon moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings, arguing that the discount claims were without merit, because the defendants were not obligated to disclose the discounts, and their failure to disclose them was not material and would not have changed the amount of the Medicare reimbursement. In response, Bidani

moved for leave to file an amended complaint including additional discount claims, as well as four new counts apparently reasserting the kickback and supplier claims that had been previously dismissed.

The court ruled that Bidani would be permitted to file an amended complaint, but only in order to reinstate the discount claims that it had permitted to go forward in its June 29, 2001 decision. The court denied Bidani's request to add additional discount claims or the four new counts in which he sought to reassert his kickback and supplier claims. The court noted that four years had elapsed since the action had originally been filed, a year had passed since the extensive discovery was completed, and several rulings had been made on dispositive motions. It was too late in the proceedings to add new claims or again argue that old claims should not have been dismissed.

The court then turned to the defendants' Rule 12(c) motion for judgment on the pleadings, which it treated as a Rule 12(b)(6) motion to dismiss because the amended complaint had not yet been answered. The applicable statute for the pertinent time period (1991-1994) prohibited receiving remuneration from purchasing reimbursable supplies and provides that discounts constitute remuneration unless "the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made." 29 U.S.C. § 1320a-7b(b)(3)(A). However, the defendants contended that 1999 amendments to the corresponding regulations, set out at 42 C.F.R. § 1001.952(h)(1)(iii), clarify that affirmative disclosure is only required when requested by the agency. The court rejected that argument, ruling that the 1999 amendments were not a mere clarification, but rather the elimination of a previously existing rule requiring disclosure even when not requested.

The defendants also argued that their failure to disclose the discounts was not material because their Medicare reimbursement would not have been affected even if they had disclosed the discounts. In support of this argument, they pointed to a HCFA commentary stating that HCFA could not set payment caps based on suppliers' costs because it did not have access to those costs, and indicating that in certain cases it set caps higher than actual costs. However, the court ruled that this HCFA commentary was only a "response to some pieces of generalized information," and did not show that HCFA would have ignored the discounts in setting reimbursement amounts in this case. Absent regulations or rules conclusively showing that the discounts were immaterial to HCFA, the court ruled, materiality is a factual question that cannot be resolved on a motion to dismiss. Accordingly, the court denied the defendants' motion.

Supreme Court Update

COURT WILL NOT REVIEW RULING REJECTING LOCAL GOVERNMENT LIABILITY

In January 2002, the Supreme Court denied certiorari in a *qui tam* action against a school board that was dismissed on the grounds that local government entities are not "persons" under the False Claims Act and are therefore immune from suit. *See United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001), 22 TAF QR 1 (April 2001), *cert. denied*, 2002 WL 13249, 70 U.S.L.W. 3246 (U.S. Jan. 7, 2002). William Garibaldi and Carlos Samuel, former employees of the school board's audit department, filed this action in 1996 alleging that the board had submitted numerous false claims to the Government as the result of accounting improprieties in the allocation of insurance premiums. The Government declined to intervene and the case proceeded to trial. The jury found actual damages to the United States in the amount of $7.6 million, and also found that the school board had illegally retaliated against the relators for pursuing their claim. The district court eventually entered a judgment of approximately $22 million. The school board appealed, and the Government intervened in support of the relators for purposes of the appeal.

Holding that local governments are not "persons" subject to liability under the Act, the Fifth Circuit vacated the district court's judgment and entered judgment for the school board. The Fifth Circuit relied heavily on the statement in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000), 19 TAF QR 1 (July 2000) that the FCA's treble damages are "essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." According to the Fifth Circuit, imposing punitive damages on local governments is ordinarily against public policy because the punishment, in the form of taxes or reduced services, is typically borne by the innocent local public.

In his petition for certiorari, Garibaldi argued that the Fifth Circuit erroneously presumed that the word "person" in the liability provisions of the False Claims Act could not refer to local governments unless Congress clearly stated its intention to impose liability on them. Garibaldi also argued that while the purpose of the Act may in some measure be to punish and deter wrongdoers, its primary purpose is to remedy losses

incurred by the Government through fraud and it is therefore principally remedial in nature. Furthermore, Garibaldi argued, the Fifth Circuit's holding that municipalities are not "persons" subject to liability under the FCA is inconsistent with Supreme Court precedents holding that municipalities are persons subject to liability in civil rights and antitrust suits. Garibaldi noted the existence of a conflict of authority among the lower courts on this issue, which is currently being litigated in several different federal circuits.

COURT LETS STAND NINTH CIRCUIT RULING ON FIRST-TO-FILE BAR

In November 2001, the Supreme Court denied certiorari in a *qui tam* action dismissed under § 3730(b)(5) of the False Claims Act, the first-to-file jurisdictional bar. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), 22 TAF QR 9 (Apr. 2001), *cert. denied* 122 S. Ct. 615 (Nov. 26, 2001). Linda Lujan filed this action in 1992 against her former employer Hughes Aircraft Company, alleging that it fraudulently shifted costs from fixed-price to cost-plus contracts. The Government declined to intervene, and the district court dismissed the action for violation of the statutory seal provision, because a newspaper had published articles about the case while it was under seal. The Ninth Circuit reversed, holding that dismissal was not an appropriate remedy, and remanded with instructions that the district court should determine whether it had jurisdiction under the public disclosure bar. On remand, the district court again dismissed the action, holding that Lujan's allegations were based upon allegations in an earlier suit, *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), 3 TAF QR 4 (Oct. 1995). On a second appeal, the Ninth Circuit affirmed dismissal of Lujan's pre-1986 claims based on the public disclosure bar, but found that Lujan was an original source of the post-1986 claims. On remand, the defendant moved to dismiss pursuant to the first-to-file bar, and the district court granted the motion, holding that Lujan's claims were based upon the same facts and raised the same issues as Schumer's claims, even though the claims contained somewhat different details. Lujan again appealed.

The Ninth Circuit affirmed the district court's dismissal of Lujan's suit. The court held that § 3730(b)(5) bars an action based on the same material facts as a previously pending action, even if the later action is not based on the same identical facts alleged in the earlier action. Furthermore, the court held, even though Schumer's complaint had since been dismissed, it was pending at the time Lujan filed her *qui tam* suit, and therefore the first-to-file bar applied.

In her petition for certiorari, Lujan argued that the Ninth Circuit had already implicitly resolved the jurisdictional question in her favor by remanding after the second appeal. She also argued that because *Schumer* was dismissed for lack of jurisdiction it was legally a nullity, and therefore did not raise the first-to-file bar.

COURT DECLINES TO ADDRESS ARGUMENT THAT FCA REQUIRES ECONOMIC INJURY

In December 2001, the Supreme Court denied certiorari in an FCA action in which a psychiatrist and his wife, who managed his billing operations, were found to have defrauded Medicare and Medicaid. *See Krizek v. United States*, No. 00-5835, 2001 WL 410310 (D.C. Cir. Apr. 17, 2001), *cert. denied*, 2001 WL 1380028, 70 U.S.L.W. 3317 (U.S. Dec. 10, 2001). The Government filed this action against Dr. George Krizek and his wife Blanka in 1993 seeking over $80 million in damages based on allegations that Dr. Krizek billed for services not provided and upcoded bills to charge for more expensive services than were actually provided. After a three-week bench trial in 1994, the district court found that the Government had not proved the allegations of billing for services not provided and upcoding, but did find the Krizeks liable under the False Claims Act in several instances where more than twenty-four hours of services were billed in a single day. In 1997, the D.C. Circuit sustained this ruling on appeal, but clarified the definition of "claim" for calculating FCA civil penalties, and remanded to allow the litigants to present additional evidence on the calculation of hours billed. On remand, the district court entered judgment in 1998 and the parties again appealed. After a second remand in 1999 from the court of appeals, the district court entered a $237,000 judgment against the Krizeks and in April 2001 the D.C. Circuit summarily affirmed.

In their petition for certiorari, the Krizeks argued that the Government must prove that it has sustained actual economic damages in order to have standing to sue under the False Claims Act. In its summary affirmance earlier this year, the D.C. Circuit did not address this contention in detail, but ruled that the Government had standing in accordance with *Vermont Agency of Natural Resources v. United States*, 120 S. Ct. 1858, 1862 (2000), 19 TAF QR 1 (July 2000).

THE FOLLOWING WAS PROVIDED BY THE DEPARTMENT OF JUSTICE CIVIL DIVISION:

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JUSTICE RECOVERS RECORD $1.6 BILLION IN FRAUD PAYMENTS
HIGHEST EVER FOR ONE YEAR PERIOD

WASHINGTON, D.C. - The United States collected a record $1.6 billion in civil fraud recoveries during the past fiscal year, Assistant Attorney General Robert D. McCallum, Jr. of the Justice Department's Civil Division announced today.

"Taking a firm stand against those who defraud the government is always critical, and is especially so at this time," said Assistant Attorney General McCallum. "Taxpayer dollars should be spent on goods and services honestly provided, and benefit only those who are truly deserving and entitled. When they aren't, those dollars must be recovered. Our nation's security, health, and financial stability depend on it. This new record demonstrates the Department's continued commitment to pursue those who defraud the United States, whether by providing defective products, billing for phantom services, or otherwise misusing public funds for private gain."

Nearly $1.2 billion of the Department's settlements and judgments related to cases filed under the federal whistleblower statute, which allows individuals who disclose fraud to share in the government's recovery. To date, whistleblowers have been awarded over $210 million for cases resolved in the past fiscal year (October 1, 2000 - September 30, 2001).

Health care fraud cases once again topped the list of annual recoveries, totaling more than $1.2 billion. This amount includes the $745 million settlement with HCA-the Healthcare Company for numerous fraudulent schemes which allegedly pervaded the nation's largest chain of for-profit hospitals. The Department also recovered $104 million from Quorum Health Group for submitting alleged false cost reports to Medicare for hospital expenses, and $103 million from Vencor, a major nursing home chain, for alleged false claims to Medicare, Medicaid and TRICARE, the military's health care program, for, among other things, long term care alleged to be inadequate.

"The cost of health care fraud is immense, both in terms of taxpayer dollars and the quality of care provided," said Assistant Attorney General McCallum. "Although the vast majority of health care providers are honest and provide the highest standard of care, we cannot allow those who aren't to deplete critical federal funds or to endanger those who depend on federal health care programs. Ferreting out fraud in the health care system remains one of the Department's top enforcement priorities."

After health care, the largest category of fraud recoveries involved oil and other minerals extracted from public lands. The Department recovered more than $194 million from companies alleged to have underpaid royalties for such rights, in addition to $230 million recovered last fiscal year. This year's recoveries include $110 million from Shell, $40 million from Texaco, $13 million from Kerr-McGee, $8 million from Burlington Resources and $7-7.5 million each from Exxon, Phillips Petroleum and Shell.

The Department's record level of recoveries for fiscal year 2001 also includes the following:

- $27 million from National Healthcare Corporation for alleged false claims to Medicare, resulting from inflating the amount of time spent caring for nursing home patients;
- $22.5 million from the University of California for alleged false claims by UC's five teaching hospitals for reimbursement under Medicare and other federal health insurance programs for services purportedly performed or supervised by faculty physicians rather than by residents without supervision, and for upcoding - the improper assignment of diagnostic codes for the purpose of increasing reimbursement amounts;
- $16 million to resolve claims that several research hospitals unlawfully charged Medicare and other federal health care programs for surgical procedures using experimental cardiac devices;
- $15.7 million from Contech Construction for alleged false claims for providing pipe in connection with a Department of Transportation contract that did not conform with contract specifications;
- $14 million from Bayer, including $6.2 million on behalf of 45 states for their share of Medicaid payments for prescription costs allegedly inflated by the company's fraudulent practices; and
- $9 million from Gateway for allegedly failing to pass along to the government price reductions required under a multiple award schedule contract for computers and components.

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01-591

ALLEGATION: OVERCHARGING FOR AIR SERVICE

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

In October 2001, the United States filed a False Claims Act suit against Alpine Aviation, Inc. for allegedly overcharging a government program that subsidizes air service to small communities nationwide. According to the complaint, the company 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 the flights. The Government is seeking $5,000 to $10,000 for each of the 58 false claims it alleges the company made on that route. Additionally, it is seeking $200,000 in damages. Assistant U.S. Attorney Eric Overby is handling the case for the Government.

ALLEGATION: DEFENSE CONTRACTOR FRAUD

U.S. ex rel. Robinson v. Northrop Grumman Corp., No. 89C0611 (N.D. Ill.)

In October 2001, DOJ intervened in a *qui tam* suit alleging that Northrop systematically overcharged the Defense Department for high-tech devices used in warplanes. According to the complaint, Northrop routinely charged the Government for employees' idle time and allegedly built testing equipment with out-of-date or incomplete specifications in order to profit again when the Government would need the equipment rebuilt to meet more current standards. The Government contends that the company netted more than $100 million as a result of its fraudulent practices. Rex Robinson, a former engineer for the company, and James Holzrichter, a former auditor, filed the suit in 1989. The government initially declined to intervene in this suit in 1992, but reconsidered nearly ten years later because of new evidence obtained by the relators' counsel. Michael Behn of Futterman & Howard (Chicago) represents the relators. Assistant U.S. Attorney Linda Wawzenski is handling the case for the Government.

ALLEGATION: DOUBLE BILLING FOR AMBULANCE SERVICES

U.S. v. Sklar, No. 01-CV-5227 (E.D. Pa.)

In October 2001, the United States filed a False Claims Act suit against Robert Sklar, Scott Donahue and Regional Medical Transport (RMT) alleging that Mr. Sklar offered his services to volunteer ambulance companies that had problems with billing claims and then used their provider numbers to submit claims to two separate Medicare carriers for the same service. Defendants Sklar and RMT also allegedly billed a Pennsylvania Medicare carrier for services RMT provided in New Jersey after Sklar had been denied a New Jersey license to provide ambulance services. The state ordered RMT to stop providing ambulance services when the company was found to be using a stolen ambulance and operating without a proper license. Assistant U.S. Attorney Cedric Bullock is handling the case for the Government.

ALLEGATION: FALSE CLAIMS FOR BLOOD TESTS

U.S. v. Armendariz, No. 01-CV-444 (W.D. Tex.)

In November 2001, the United States filed a False Claims Act suit against Dr. Rafael

Armendariz and his practice administrator, Laura Valls, alleging that Dr. Armendariz billed for blood tests that were not actually performed on children receiving physical examinations under the Texas Medicaid program. The Texas Health Steps Program, which is part of Medicaid, requires participating physicians to conduct blood tests, including tests for lead. Dr. Armendariz' practice allegedly failed to administer the tests, but billed for them anyway. The Government seeks $4.1 million in damages and civil penalties. Assistant U.S. Attorney Harold Brown is handling the case for the Government.

ALLEGATION: FALSE CERTIFICATION OF MINORITY OWNERSHIP

***U.S. v. Durango Construction*, No. 01cv9824 (C.D. Cal.)**

In November 2001, the United States filed a False Claims Act suit against Durango Construction Co., Westword Contractors Inc., and its owner Paul Anderson alleging that the defendants obtained government contracts that were set aside for small, disadvantaged businesses by falsely certifying membership in minority groups. According to the complaint, the defendants falsely certified that Anderson's Hispanic son-in-law owned Durango, while in fact the Anderson family controlled the firm. In 1991 and 1992 defendants obtained government contracts worth approximately $1.8 million for maintenance and repair services at Air Force bases. In 1995, defendants obtained additional military contracts worth approximately $2.25 million. The Air Force's Office of Special Investigations and the Naval Criminal Investigative Service investigated the matter. Assistant U.S. Attorney David Barrett is handling the case for the Government.

ALLEGATION: MISREPRESENTATION OF COSTS

U.S. ex rel. Campbell v. Lockheed Martin Corp., No. 95-CV-549 (M.D. Fla.)

In November 2001, DOJ intervened in a *qui tam* suit alleging that Lockheed Martin Corp. inflated the cost of a contract with the Air Force by failing to provide accurate, complete, and current cost and pricing data. During negotiations for a foreign military sales contract concerning navigation and targeting pods for jets, Lockheed allegedly misrepresented the cost and pricing data. Lockheed Martin allegedly hid a $40 million dollar reserve in the contract proposal in order to offset cost overruns on another Air Force contract. Relator Albert D. Campbell, a former Lockheed Martin employee, filed the suit in May 1995. Andrew Grosso (Washington, D.C.) represents the relator. Assistant U.S. Attorney Ralph Hopkins is handling the case for the Government.

ALLEGATION: CHARGING FOR NONREIMBURSABLE EXPERIMENTAL DEVICES

U.S. ex rel. Cosens v. Scripps Clinic and Research Foundation, No. 990CV1264 (S.D. Cal.)

In November 2001, DOJ intervened in a *qui tam* suit alleging that Scripps Memorial Hospital in La Jolla and Green Hospital of Scripps Clinic in San Diego defrauded the Medicare program. Allegedly, the two hospitals received millions of dollars in Medicare reimbursement for procedures involving nonreimbursable experimental cardiac devices. Relator Kevin Cosens, a former medical device salesman, filed the suit in 1999. Total settlements in related litigation now exceed $30 million.

Donald Warren and Phil Benson of Warren & Benson Law Group (San Diego) represent the relator. Assistant U.S. Attorney David Cohen is handling the case for the Government.

ALLEGATION: SUBSTITUTION OF INFERIOR GOODS

U.S. ex rel. Kaplan v. Magid Mfg. Co., No. 98C7030 (N.D. Ill.)

In December 2001, DOJ intervened in a *qui tam* suit alleging that Magid Manufacturing Co., which supplied industrial hand protection and other safety devices to the Government, substituted lower-priced, lower-quality goods than those ordered and then billed the Government for the higher-priced goods it actually ordered. According to the complaint, Magid also trained its sales representatives on how to defraud its customers (including the Government) through this scheme and then paid them bonuses as an incentive to use the scheme. The complaint seeks up to $16 million in damages and penalties. Relator Scott Kaplan, a sales representative for the company, filed the suit in 1999 under the Federal and Illinois False Claims Acts. Thomas Scorza (Chicago) represents the relator. Assistant U.S. Attorney Linda Wawzenski is handling the case for the Government.

U.S. ex rel. Johnson v. Shell Oil Co., No. 9:96CV66 (E.D. Tex.)

In December 2001, DOJ announced that Union Oil Company of California (Unocal) had agreed to pay **$21.5 million** to settle allegations that the company underpaid royalties due for oil produced on federal and Indian lands. The Government alleged that from 1980 to 1998 Unocal misrepresented the value of the oil that it had produced on federal and Indian lands and underpaid royalties due. J. Benjamin Johnson, Jr. and John Martinek filed this *qui tam* action in 1996. Clayton Dark, Jr. (Lufkin, Texas) represented the relators. DOI OIG and the Minerals Management Service investigated the matter. Assistant U.S. Attorney Wes Rivers represented the Government.

With this settlement the total recovery in this action is now nearly $440 million. DOJ had previously reached settlement agreements with other defendant oil companies, including a $110 million settlement with Shell Oil Company, a $95 million settlement with Chevron Corporation, a $45 million settlement with Mobil Oil, a $43 million settlement with Texaco, a $32 million settlement with BP Amoco, a $26 million settlement with Conoco, a $13 million settlement with Kerr-McGee Corporation, an $11.9 million settlement with Pennzoil, an $8.5 million settlement with Burlington Resources, Inc., an $8 million settlement with Phillips Petroleum, a $7.7 million settlement with Marathon Oil Company, a $ 7.3 million settlement with Oxy USA, and a $7 million settlement with Exxon Mobil.

U.S. v. Consolidated Rail Corporation (E.D. Pa.)

In December 2001, DOJ announced that Consolidated Rail Corporation (Conrail) had agreed to pay **$3.5 million** to settle allegations that it underreported and underpayed for its use of the Northeast Corridor, which is owned by the National Railroad Passenger Corporation, or Amtrak. The Government alleged that Conrail failed to meet its obligation under a 1986 contract with Amtrak to accurately report "car miles" its trains traveled over the Northeast Corridor and pay a fee for those miles. The Department of Transportation OIG and Amtrak's OIG investigated the matter. Assistant U.S. Attorney John Joseph represented the Government.

U.S. v. Lincare, Inc. (E.D. Cal.)

In December 2001, DOJ announced that Lincare, Inc. agreed to pay **$3.15 million** to settle allegations that it improperly billed Medicare for home oxygen therapy provided by the company's centers in Chico and Redding, California. The Government alleged that from 1995 through 1997 Lincare, in violation of a clear prohibition, repeatedly billed Medicare for home oxygen therapy provided to patients purportedly qualified for the procedure under tests that Lincare itself administered. Medicare prohibits suppliers of home oxygen equipment to use their own tests to qualify patients for coverage because of their interest in the outcome of such tests. HHS OIG investigated the matter. Assistant U.S. Attorneys Andrea Gross and Courtney Linn represented the government.

U.S. v. NHC Healthcare Corp. (W.D. Mo.)

In December 2001, NHC Healthcare Corp. reportedly agreed to pay **$250,000** to settle allegations that it billed Medicare and Medicaid for treatment that was either inadequate or never provided at all. The Government alleged that NHC charged Medicare and Medicaid for services that did not meet federal standards. The

complaint alleged that the nursing home chain provided inadequate treatment and nutrition to its patients. The Government's case focused on two residents who suffered from painful bedsores that worsened during their stay at NHC and underwent severe weight loss due to poor nutrition. Assistant U.S. Attorney Andrew Lay represented the Government.

LaserGenics Corp. *(N.D. Cal.)*

In December 2001, LaserGenics Corp. of San Jose, California reportedly agreed to pay **$25,000** to settle allegations that it submitted duplicative research grant proposals to several government agencies including NASA and the National Science Foundation, and falsely certified that the proposals were not duplicative. The grants were funded through the Small Business Innovation Research program, which requires the certification so that the Government does not fund the same project more than once. The NASA and National Science Foundation OIGs investigated the matter. Assistant U.S. Attorney Emily Kingston represented the Government.

U.S. v. Impath, Inc. *(S.D.N.Y.)*

In November 2001, Impath, Inc. reportedly agreed to pay **$9 million** to settle allegations that it submitted false claims to Medicare for laboratory tests used in diagnosis of cancer. The Government's investigation examined the company's billing practices between 1990 and 1998.

U.S. ex rel. McNall v. Covenant Care, Inc., No. CV-98-5707 (C.D. Cal.)

In November 2001, DOJ announced that Covenant Care, Inc. had agreed to pay **$3.2 million** to settle allegations that the health care company had overcharged Medicare for its nursing services at more than 35 nursing facilities it operates in California and other states. The Government alleged that Covenant Care overbilled for nursing service hours by failing to keeping accurate records and by billing Medicare for services provided to non-Medicare patients. Michael McNall, a former controller at Covenant, filed this *qui tam* action in 1998. Lawrence Heller represented the relator. The San Francisco Regional OIG for HHS investigated the matter. Assistant U.S. Attorney Hong Dea represented the Government.

University of Virginia Medical Center *(E.D. Va.)*

In November 2001, University of Virginia Medical Center and its physician practice, Healthcare Services Foundation, reportedly agreed to pay **$3 million** to settle allegations that it improperly billed Medicare for services that were provided in hospital outpatient departments. In some cases, the Government alleged, the defendants billed for hospital outpatient procedures using codes reserved for physician's office visits instead of an outpatient procedure performed at the hospital. Medicare pays a higher rate for physician's office visits to reflect the cost of overhead; because hospitals receive a separate facilities fee to cover overhead, Medicare reimburses for hospital outpatient services at a lower rate. In other cases, according to the Government, the defendants collected both a physician's office visit fee and a facilities fee for the same visit.

U.S. ex rel. Downy v. Corning, Inc., No. Civ.96-0378 (D.N.M.)

In November 2001, Corning, Inc. reportedly agreed to pay **$1 million** to settle allegations that it overbilled Medicare and Medicaid by using excessive prostate-cancer blood tests. The Government alleged that although the company knew that only one of the two blood

tests for prostate cancer is normally necessary, it induced doctors to order both. Mary Downy, a former employee, filed this *qui tam* action in 1996. The relator's share was approximately 23 percent or $225,000. James Branch, Jr. and Vernon Salvador (Albuquerque) represented the relator. Assistant U.S. Attorney Howard Thomas represented the Government.

U.S. ex rel. Rappa v. Oneida Research Services, Inc., No. 00-CV-300 (N.D.N.Y.)

In November 2001, Oneida Research Inc. reportedly agreed to pay **$375,000** to settle allegations that it falsely certified that it had conducted required testing on military parts. The Government alleged that the company failed to perform tests on electronic parts purchased by the DOD and NASA for use in military aircraft, submarines, satellites and a space shuttle, and then falsely certified that it had done so. Mark Rappa, a former employee of Oneida, filed this *qui tam* action in 1996. The relator's share was approximately 24 percent or $90,000. William Markovits of Markovits & Greiwe (Cinncinnati) represented the relator. DOD OIG and NASA investigated the matter. Assistant U.S. Attorney Charles Roberts represented the Government.

U.S. ex rel. Scott v. Quest Diagnostics, No. 98-B-2224 (D. Colo.)

In November 2001, Quest Diagnostics agreed to pay **$352,926** to settle a *qui tam* suit alleging that the defendants defrauded Medicare by improperly submitting claims to a carrier outside their jurisdiction in order to obtain higher reimbursements than they were entitled to. The Government alleged that in order to receive the higher payments, Quest Diagnostics submitted claims from its laboratories in Utah and New Mexico for payment in Colorado. Donna Scott, a former controller of Quest Diagnostic's clinical laboratory in Billings, Montana, filed this *qui tam* action in 1998. The relator's share was approximately 20 percent or $71,110. Mitchell Kreindler of Kreindler & Associates (Houston) represented the relator. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorney Michael Theis represented the Government.

U.S. v. Twin Oaks Nursing Home (E.D. La.)

In November 2001, DOJ announced that Twin Oaks Nursing Home of LaPlace, Louisiana had agreed to pay **$100,000** to settle allegations that it sought reimbursement from Medicaid for services that were either never rendered or were rendered so poorly as not to be reimbursable. The nursing home also entered into a corporate integrity agreement under which it is required to establish a comprehensive compliance program. The FBI, the regional IG, and the Louisiana Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorney Paul Weidenfeld represented the Government.

U.S. ex rel. Gerstein v. TAP Holdings, Inc., Civ. No. 98-10547 (D. Mass.)

In October 2001, DOJ announced that TAP Pharmaceutical Products Inc. had agreed to pay **$559.5 million** to settle allegations that it violated the False Claims Act by paying illegal kickbacks to doctors who prescribed its prostate cancer drug Lupron. The company also agreed to pay a $290 million criminal fine to the Federal Government and a $25.5 million civil settlement to the fifty states and the District of Columbia, bringing the total value of the settlement to $845 million, the largest health care fraud settlement so far in U.S. history. The Government's investigation was triggered by *qui tam* lawsuits brought by two whistleblow-

ers. Douglas Durand, TAP's former Vice President of Sales, quit his job and alerted the Government when he became concerned about the company's marketing practices. Meanwhile, Tufts Associated Health Maintenance Organization and its medical director Dr. Joseph Gerstein also notified the Government after it came under increasing pressure from TAP to switch from Zoladex, an equally effective but significantly less expensive alternative drug, to Lupron. The Government alleged that TAP offered doctors a panoply of inducements to prescribe Lupron, including ski and golfing trips, free televisions and VCRs, cocktail party bar tabs, and an array of free products and services. The relators' share of the FCA settlement was 17 percent or approximately $95 million. Mary Louise Cohen of Phillips & Cohen (Washington, San Francisco, & San Diego) represented Tufts Associated HMO, and Elizabeth Ainslie of Schnader Harrison Segal & Lewis LLP (Philadephia) represented Douglas Durand. Tufts Associated HMO will devote its share to charity. Four physicians have already pleaded guilty in the accompanying criminal investigation and as the settlement was announced the Government unsealed criminal indictments against seven others, six of them TAP employees. The FBI, the HHS OIG, the FDA's Office of Criminal Investigations, and the DCIS investigated the matter. Assistant U.S. Attorney Susan Winkler handled the civil case for the Government with the assistance of DOJ Trial Attorney T. Reed Stephens. Assistant U.S. Attorney Michael Loucks, Health Care Fraud Chief, has been handling the criminal investigation and prosecutions.

U.S. ex rel. Schilling v. KPMG Peat Marwick, LLP, No. 98-901 (M.D. Fla.)

In October 2001, DOJ announced that KPMG Peat Marwick, LLP had agreed to pay over **$9 million** to settle allegations that it had prepared false hospital cost reports that were submitted to Medicare and Medicaid. The Government alleged that KPMG, which was retained by Columbia/HCA Healthcare Corporation to prepare cost reports for several hospitals, knowingly made false claims for repayment on behalf of its clients and concealed errors from government auditors to enable its clients to illegally retain Medicare funds. Simultaneously, KPMG prepared "reserve" cost reports to estimate the potential impact on the hospitals if an audit detected the non-allowable expenses and allocations in the reports that were filed with Medicare and Medicaid. In December 2000, Columbia/HCA, now known as HCA-The Healthcare Company, settled Medicare fraud claims against it for a record $840 million. *See* Spotlight, 21 TAF QR 16 (Jan. 2001); Spotlight, 22 TAF QR 23 (Apr. 2001). John Schilling, a former Supervisor for Reimbursement for the Southwest Florida Division of HCA, filed this *qui tam* action in 1998. The relator's share was approximately 20 percent or $1.8 million. Peter Chatfield of Phillips & Cohen (Washington, D.C.) represented the relator. The FBI in Tampa investigated the matter. Assistant U.S. Attorney Jay Trezevant represented the Government.

U.S. ex rel. Vander Woude v. Lifeline Health Care, Inc., 98-2391-CIV-T-23F (M.D. Fla.)

In October 2001, Lifeline Health Care of Southwest Florida, Inc. agreed to pay **$3.1 million** to settle a *qui tam* suit alleging that it overbilled Medicare and the military health care programs TRICARE/CHAMPUS. The Government alleged that from October 1994 through September 1997, Lifeline submitted false or fraudulent claims for services rendered to patients who did not qualify for home health care and for services that were not medically

necessary. Nurses Doreen Vander Woude, Sharon Judgson, Shela Jackson, and Tammy Lanning, all former employees of Lifeline, filed this *qui tam* action in 1998. The relators' share was approximately 17 percent or $527,000. Kenneth Nolan (Fort Lauderdale) represented the relator. The DCIS investigated the matter. Assistant U.S. Attorney Mark Steinbeck represented the Government.

U.S. ex rel. Piacentile v. Total Parenteral Services (E.D. Tex.)

In October 2001, Total Parenteral Services (TPS) agreed to pay **$2.2 million** to settle a *qui tam* suit alleging that the company paid durable medical equipment dealers and independent agents fees in exchange for the referral of Medicare patients. The Government alleged that the kickback scheme between TPS and the durable medical equipment dealers lasted between 1990 and 1997. Christopher Piacentile, a former employee of TPS, filed this *qui tam* action in 1997. The relator's share was approximately 15 percent or $330,000. Mitchell Kreindler of Kreindler & Associates (Houston) represented the relator. The HHS OIG investigated the matter. Assistant U.S. Attorney Matthew Orwig represented the Government.

U.S. v. RGA Labs Inc. (C.D. Cal.)

In October 2001, RGA Labs Inc. reportedly agreed to pay **$1.2 million** to settle allegations that it falsified test results on electrical components used by the Government in high reliability applications, such as space hardware and military weapons systems. The Government alleged that RGA did not test components that were used in the International Space Station, the Navy's TA-CAN System, the Air Force's Titan Launch Vehicle, the B-1 bomber, and the C-130 aircraft. The NASA OIG and the DCIS investigated the matter. Assistant U.S. Attorney Frank Kortum represented the Government.

U.S. ex rel. Torres v. Twining Laboratories of Southern California Inc., No. 98-CV07708 (C.D. Cal.)

In October 2001, Twining Laboratories of Southern California Inc. reportedly agreed to pay **$500,000** to the Federal Government and the State of California to settle allegations that it used unqualified staff to test welding on the Los Angeles Red Line subway. The Government alleged that Twining falsely represented to the Government that its inspectors met the standards of the American Society for Nondestructive Testing, and a company supervisor ordered fake diplomas to support the false claim. Michael Torres, a former quality assurance engineer with the LA County Metropolitan Transportation Authority, filed this *qui tam* action in 1998 under both the Federal and California False Claims Acts. The Federal Government intervened in the suit, but the State of California did not. The relator's share was approximately 22 percent or $110,000. Additionally, Twining agreed to pay $25,000 to cover Torres' attorneys' fees and costs. Louis Cohen of Barmasse & Cohen (Los Angeles) represented the relator. The DOT IG, the FBI, and the MTA IG investigated the matter. Assistant U.S. Attorney Hong Dea represented the Government.

U.S. ex rel. Karadsheh v. Detroit Medical Center Nos. 96-74662, 96-74463 (E.D. Mich.)

In October 2001, Detroit Medical Center and Harper Hospital agreed to pay **$406,831** to settle allegations that they improperly presented claims to Medicare and Medicaid programs for nocturnal penile tumescence (NPT) tests that had been performed at Harper Hospital's Sleep

Laboratory. The Government alleged whenever a Medicare or Medicaid patient received an NPT test, the hospital billed the Government not only for an office visit, but also for the NPT test itself, and often for numerous additional tests that were components of the NPT test. Medicare and Medicaid regulations prohibit separate billing for NPT tests because the reimbursement for the tests is considered to be included in the reimbursement paid for the office visits related to such tests. George Karadsheh and Lola Stiller filed separate *qui tam* actions in 1996. The two actions were subsequently consolidated. The relators' share was fifteen percent or $61,851. David Haron of Frank, Stefani, Haron & Hall (Troy, Michigan) represented Mr. Karadsheh. John Parisi of Shamberg, Johnson & Bergman (Overland Park, Kansas) represented Ms. Stiller. Assistant U.S. Attorney Carolyn Bell Harbin and U.S. Attorney Saul Green represented the Government.

U.S. v. Traverse Anesthesia Associates, No. 1:01-CR-125 (W.D. Mich.)

In October 2001, DOJ announced that Traverse Anesthesia Associates and Pain Consultants P.C. had agreed to pay **$387,000** to settle civil allegations that they participated in a scheme to defraud Medicare and Medicaid by double billing for anesthesia services. Additionally, the district court ordered the physician practice groups to pay for an advertisement in a professional health care publication admitting their guilt and warning other anesthesiologists about the consequences of health care fraud. The Government alleged that the two physicians' groups each separately billed for the same anesthesia procedure, and falsely billed for doctor supervision of nurse anesthetists when in fact no supervision was provided. Assistant U.S. Attorney Michael Schipper represented the Government.

U.S. v. Great American Insurance Co. (D. Minn.)

In October 2001, DOJ announced that Great American Insurance Company had agreed to pay **$323,616** to settle allegations that the company sought reimbursement for fraudulent claims filed by one of its loss adjusters on his own family's policy covering his farming operation in Minnesota. The Government alleged that after the claims were processed and approved by the Fargo regional office in a manner that violated crop insurance rules, Great American requested reimbursement from the USDA. The USDA's OIG, assisted by the USDA Risk Management Agency's Northern Regional Compliance Office and the Special Investigation Branch, investigated the matter. Assistant U.S. Attorney Greg Brooker represented the Government.

U.S. v. Presidio Corporation (D. Md.)

In October 2001, Presidio Corporation reportedly agreed to pay **$273,000** to settle allegations that it failed to pass on to the Government price discounts and rebates on data processing equipment and software. The Government alleged that while the contract terms between Presidio and the GSA for the sale of data processing equipment required Presidio to pass through to the GSA any price reductions, discounts, and rebates that it received from its vendors, the company continued to charge the GSA the original price after receiving several rebates and discounts. The OIG for the GSA investigated the matter. Assistant U.S. Attorney Charles Peters represented the Government.

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.