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

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

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Taxpayers Against Fraud Education Fund
1220 19th Street, NW
Suite 501
Washington, DC 20036
Phone (202) 296-4826
Fax (202) 296-4838
www.taf.org

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TABLE OF CONTENTS

FROM THE EDITOR

In the early 1960s, a young high jumper named Dick Fosbury, frustrated that he could not increase the height of his jump, adopted a new jumping approach. The new style had him going over the high bar, his body rotating in mid-air and landing backward facing up. This style, which became known as the "Fosbury Flop" after he won the Olympic gold medal in 1968, was initially resisted and ridiculed by his college coaches and jumping colleagues. Today, this approach is the gold standard style for the high jump. Rather than continue to repeat the same, worn-out method, Fosbury changed his paradigm and, in the process, changed that of the high-jumping world.

Every process is perfectly designed to produce what it produces—be it good, bad, or mediocre. This was certainly true for Fosbury. The same principle applies to organizational structures. According to Professor Laurie Fitzgerald, "[A] key maxim of organizational structure [is that] every organization is perfectly designed to produce the result it does. It's as simple as that. No enterprise can be expected to deliver greater or more prodigious outcomes than its architecture is capable of bearing." Unless the process is changed, there can be no change in the product.

Over the last several years, the "architecture" of Department of Justice Civil Division has remained relatively unchanged, hovering around seventy attorneys at Main DoJ. Similarly, the number of False Claims Act settlements has plateaued over the last several years, returning a consistent caseload of about a hundred settlements per year. By extrapolation, the current DoJ organizational structure is perfectly designed to produce about 100 settlements/year.

Earlier this year, Congress, in passing the Deficit Reduction Act (DRA) and its provision incentiving states to enact their own FCA, recognized that there is just so much that the DoJ can do. In a sense, the Deficit Reduction Act called in the cavalry of states to join the fight and, in turn, drastically changed the organizational structure. This architectural overhaul represents a major renovation for the infrastructure, drastically increasing the potential capacity of the overall system. Similar to Fosbury, Congress was bold enough to take a different approach. Rather than continuing to repeat the same, worn-out method of fraudfighting, Congress changed its paradigm and, in the process, changed that of the fraud-fighting world. We just hope that, over time, it won't be called the "DRA Flop."

Sincerely,

Jeb White
jwhite@taf.org

Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1–MARCH 31, 2006

STATUTORY INTERPRETATIONS

A. Section 3730(b)(1) Government Consent For Dismissal

U.S. ex rel. Jones v. Westwind Group, Inc., 2006 WL 521564 (N.D. Ala. Feb. 22, 2006)

An Alabama district court, in denying the Government's motion, ruled that the United States did not have standing to move to alter or amend an order dismissing an FCA *qui tam* action for want of prosecution after the Government formally elected not to intervene and declined to become a party. Moreover, the court ruled that the consent of the Attorney General was not required before the district court could dismiss a nonintervened FCA *qui tam* action for want of prosecution.

Carter Jones filed an FCA *qui tam* action against eleven named defendants, including Westwind Group, Inc., alleging violations of the False Claims Act. Eventually, the Government declined to intervene in the matter and filed a declination notice with court. Included with the notice was a proposed order that (1) would have unsealed the complaint; (2) would have required service of the complaint by relator; (3) would have kept the remainder of the file under seal; (4) would have provided that the Government "is entitled to intervene in this action, for good cause, at any time"; (5) would have provided that "all orders of this court will be sent to the United States"; and (6) would have provided that, "should the relator or the defendants propose that this action be dismissed, settled, or otherwise discontinued, the court will solicit the written consent of the United States before ruling or granting its approval."

The court, however, refused to enter the proposed order and, instead, on September 19, 2005, ordered the file unsealed and ordered the relator to proceed with service on defendants, not only of the summons, but of all previous orders and pleadings.

Instead of complying with the order, the relator filed a motion to dismiss the action "without prejudice." Simultaneously, the Government filed a consent to the dismissal "without prejudice to the rights of the United States."

When the court hinted that it would deny the motion, relator's counsel moved for leave to withdraw, maintaining that the burden of proceeding without the resources of the Government was too great. The court granted the relator's motion, but the court ordered the *relator* to initiate service of process by January 13, 2006, or his action would be "dismissed for want of prosecution." After the relator took no action by the designated date, the court dismissed "the action for want of prosecution.

The Government responded by filing a Rule 59 motion, seeking to clarify or, in the alternative, to alter or amend the order dismissing the action.

Government Consent Not Needed Where Court Order Dismissed Non-Intervened FCA Action

The court was faced with the issue of whether the Government even has standing to invoke Rule 59, "after it formally elected not to intervene and declined to become a party, leaving the *relator* with control over the prosecution of the case." According to the court, the "United States was never a party, by its own choice.… Rule 59 is, by definition, for 'the parties'. This means that Rule 59 is not for non-parties."

In defense of its motion, the Government cites 31 U.S.C. § 3730(b)(1) for the proposition that "the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." The court, however, ruled that this statutory provision necessarily refers to, and is limited to, the time period during which the Government can intervene and while the complaint is under seal. For support, the court reached for the Second Circuit's *Minotti v. Lensink*, 895 F.2d 100 (2d Cir. 1990) decision, which made clear that 31 U.S.C. § 3730(b)(1) "continues to apply only where the plaintiff seeks *voluntary* dismissal of the action pursuant to Federal Rule of Civil Procedure 41(a), and not *where the court orders dismissal*." (emphasis supplied). To reinforce its point, the Second Circuit had added this footnote: "If the consent provision were intended to apply even to court-ordered dismissals, its language requiring permission of the court, as well as of the Attorney General, before dismissal of a private action would make little sense." *Id.* at 104 n.

Because the court initiated the dismissal, not the relator, the court ruled that it was not necessary to decide the issue of whether the Attorney General's consent is required for a *voluntary* dismissal.

Thus, because no "party" asked for a clarification, the court rejected the Government's Rule 59 motion.

B. Section 3730(b)(3) Lifting FCA Seal

U.S. ex rel. Lee v. Horizon West, Inc., 2006 WL 305966 (N.D. Cal. Feb. 8, 2006)

After the Government intervened in an FCA *qui tam* action and filed its complaint-in-intervention, a California district court granted, over the Government's objections, the defendant's motion to lift the seal from the contents of file, revealing the entire file, including the Government's numerous extension requests. The court reached this decision after determining that it would not reveal confidential investigative methods or techniques, jeopardize an ongoing investigation, or harm non-parties.

On August 14, 2000, Julia Lee filed an FCA *qui tam* action against Horizon West, Inc. and Horizon West Healthcare, Inc., alleging that the defendants had, over a substantial period of time, engaged in various schemes to defraud the federal Medicare program. On July 11, 2005, after the seal period was extended a number of times, the Government intervened in the matter and file its complaint-in-intervention. Upon the Government's request, the court also issued an order unsealing: (1) the relator's complaint and first amended complaint; (2) the Notice of Election to Intervene; and (3) all other matters occurring in the action after the Government's intervention. The remainder of the pre-intervention filings remained under seal.

On December 29, 2005, the defendants filed a motion to lift the seal on the remaining pre-intervention documents, including the Government's numerous requests for extensions of time and the supporting declarations. The Government opposed the defendants' motion.

Government Has the Burden of Showing the Seal Should Not Be Lifted

While the parties agreed that FCA Section 3730(b)(3) contemplates the lifting of the seal on the relator's complaint once the Government intervenes, the parties disagreed as to whether the statute provides for the mandatory disclosure of all other documents filed with the court prior to the Government's intervention.

The Government opposed the unsealing on two grounds: (1) that details relating to the Government's underlying investigation should be left under seal as privileged, attorney work-product; and (2) that the documents in question should be left under seal because they contain information protected by the Government's law enforcement/investigatory files privilege.

Borrowing from other courts, the present court ruled that the seal should be lifted unless the Government could show that such disclosure would: (1) reveal confidential investigative methods or techniques; (2) jeopardize an ongoing investigation; or (3) harm non-parties. *See, e.g., United States ex rel. Mikes v. Straus*, 846 F. Supp. 21, 23 (S.D.N.Y. 1994). However, if the documents simply described routine or general investigative procedures, without implicating specific people or providing substantive

details, the court was willing to lift the seal. *See United States v. CACI Int'l. Inc.*, 885 F. Supp. 80, 83 (S.D.N.Y. 1995).

Thus, under the applicable standard adopted by the court, neither the assertion of the attorney-work product privilege nor the assertion of the litigation/investigative privilege was an absolute bar to the disclosure of documents relating to past or current Government investigations.

In the case at bar, the court rejected the Government's bare assertion that the disclosure of its extension requests would "reveal pieces of the government's investigatory techniques, decision-making processes, research, and reasoning that apply in hundreds of similar cases." Furthermore, the court dismissed the Government's argument that the disclosure of its extension requests would unfairly reveal information pertaining to "a related criminal investigation." Instead, the court described the documents as very generally "describ[ing] routine or general investigative procedures," such as the examination of the defendants' financial affairs, settlement discussions, the issuance of subpoenas, and the compilation of witness lists. Perhaps most persuasive, the documents did not implicate specific people, provide substantive details of the investigation, or reveal any of the attorneys' thought processes.

Moreover, because the defendant was challenging the Government's claims based on the FCA statute of limitations provision, the court threw more weight in favor of disclosing the documents. More specifically, because Horizon West Healthcare, Inc. was not added as a party until the Government filed its complaint-in-intervention, the defendant maintained that the documents in question might shed light on the Government's knowledge of Horizon West Healthcare, Inc.'s alleged wrongdoing and whether the Government was justified in delaying its prosecution of Horizon West Healthcare, Inc. for nearly five years.

Accordingly, because the Government was unable to show a valid and supportable reason to keep the file under seal, the court granted the defendant's motion to lift the seal on the entire court file.

C. Section 3730(d)(4) "Frivolous" FCA *Qui Tam* Actions

U.S. ex rel. J. Cooper & Associates, Inc. v. Bernard Hodes Group, Inc., 2006 WL 722133 (D.D.C. March 23, 2006)

A District of Columbia district court, granting a defendant's motion to dismiss an FCA *qui tam* action, ruled that the FCA public disclosure bar precluded the suit, for the facts underlying the relator's allegations, including the misrepresented state of facts and the true state of facts, were already in the public domain. Moreover, the court held that a claim is "frivolous" and "vexatious" under Section 3730(d)(4) if the Government's awareness of the circumstances constituting the alleged transgression makes any legal claim of fraud untenable. Here, because the court determined that the Government approved of the defendant's actions and that the relator was aware of this approval, the court ruled that the relator filed a frivolous action and ordered the relator to pay the defendant's attorney fees' and expenses pursuant to 31 U.S.C. § 3730(d)(4).

In July 1995, J. Cooper and Associates, Inc., a small, disadvantaged vendor eligible to participate in the Small Business Administration's (SBA) Section 8(a) program, was awarded a Section 8(a) contract to perform advertising and public relations services for the Immigration and Naturalization Service (INS). However, soon after, INS began issuing orders to other vendors, including placing advertising orders with Bernard Hodes Group, Inc. and Cass Communications, Inc. in November 1995, and with J. Walter Thompson Co. in February 1996.

After their contract was terminated in January 1997, J. Cooper and Associates sent a letter to the DOJ-OIG stating that "several large white firms misrepresented themselves as being 'small and disadvantaged' in order to obtain contracts with the [INS]," and that "this fraud took place with the INS' [sic.] contract and program people's knowledge." Subsequently, on August 7, 1997, the OIG issued a report of an investigation regarding allegations that the INS "commingled advertising funds that were earmarked for a specific 8(a) or small and disadvantaged advertising contract." Moreover, the OIG report revealed that during the interviewing process, the INS employee stated that each of the defendant vendors "verified their 'small business' status verbally" when questioned by the INS.

On November 25, 2003, J. Cooper and Associates filed an FCA *qui tam* suit against Bernard Hodes Group, Inc., Cass Communications, Inc., and J. Walter Thompson Co., alleging that the defendants misrepresented themselves as small or disadvantaged businesses in order to obtain orders from the INS for advertising and public relations services. The defendants, maintaining that the FCA public disclosure bar precluded the action, countered by filing a motion to dismiss the complaint and for attorneys' fees, costs, and expenses.

Allegations Had Been Previously Disclosed to the Public

In assessing the defendants' argument, the district court pointed to the D.C. Circuit *Springfield Terminal* decision, which explained the significance of the terms "allegation"

and "transaction" in the FCA's public disclosure bar by using the following formula: X (misrepresented state of facts) + Y (true state of facts) = Z (fraud). *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994). A *qui tam* action cannot proceed when "all the material elements of the fraudulent transaction are already in the public domain" (*i.e.*, X and Y are in the public domain), even if the plaintiff "comes forward with additional evidence incriminating the defendant." 14 F.3d at 655. "However, where only one element of the fraudulent transaction is in the public domain (*e.g .*, X), the *qui tam* plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud (*e.g.*, Y) or allegations of fraud itself (*e.g.*, Z)." 14 F.3d at 655.

Applying the *Springfield Terminal* analysis to the case at bar, the district court concluded that the OIG Report's statement that the defendants verified their small business status verbally did not rise to the level of an "allegation," as defined by the D.C. Circuit. In other words, the existence of the OIG Report in the public domain did not divest the court of jurisdiction; theoretically, the plaintiff could still have avoided the public disclosure bar by offering information regarding the true state of facts (*i.e.*, Y) or an allegation of fraud itself (*i.e.*, Z).

Unfortunately for the plaintiff, the court ruled that information revealing the true state of facts already existed in the public domain. Specifically, media reports documenting the true size and scope of the defendants' businesses were revealed in various news articles, include a twenty year-old *New York Times* article.

Relator's Allegations Were "Substantially Similar" to Public Disclosures

The defendants next argued that the relator's suit was based on allegations that were publicly disclosed in the OIG Report. The OIG Report investigated allegations that some businesses received "small business" status when they did not meet the requirements of a small business. The OIG Report then states that the defendants "verified their small business status verbally" when contacted by the INS. However, because the relator's suit alleged that the defendants were, in fact, not small business, the relator maintained that the suit was not based on allegations contained in the OIG Report.

However, after examining *all* of the public disclosures together, the court concluded that the relator's allegations were "substantially similar" to those disclosed in the public domain, so as to "based upon" allegations in a public disclosure.

Not Original Source Because Relator Was Lacking Knowledge of Particular Defendant's Misactions

After quickly concluding that the relator's complaint was "based upon" this public disclosure, the court proceeded to the issue of whether the relator qualified for the Section 3730(e)(4)(B) original source exception. Accordingly, the court examined whether the relator had direct and independent knowledge of "*any* essential element of the underlying fraud transaction (*e.g.*, Y)." *Id.* at 657 (emphasis in original). In other

words, the relator could have qualified for the exception by proving that it was the original source of either the information concerning the alleged misrepresentations or the information indicating that the defendants were all large businesses.

The court concluded that the relator failed to show direct and independent knowledge of either type of information. Although the relator did write to the OIG in January 1997 that "several large white firms misrepresented themselves . . . in order to obtain contracts with the [INS]," the court ruled that this vague statement failed to demonstrate that the relator had any knowledge of alleged wrongdoing by the *particular* defendants. *U.S. ex rel. Kinney v. Stoltz*, 327 F.3d 671, 675 (8th Cir. 2003) (stating that knowledge of fraudulent practices in general is not sufficient to overcome the FCA's jurisdictional bar, and that a relator must demonstrate direct and independent knowledge of the role played by the particular defendants).

In addition, the court pointed out that the relator did not argue that it was the original source of the information regarding the size and wealth of the defendant-businesses that was disclosed in various media reports. Furthermore, the court could found no evidence in the record that the relator provided—or could have provided—any media outlets with this information.

Thus, because the relator failed to clear the FCA public disclosure bar, the lower court granted the defendants' motion to dismiss.

Defendants Awarded Attorneys' Fees And Expenses For "Frivolous" FCA *Qui Tam* Action

Arguing that relator's claims were "untimely and otherwise meritless," the defendants begged the court to award them attorneys' fees and expenses under the FCA's fees provision, 31 U.S.C. § 3730(d)(4). As an initial matter, the court recited the language of Section 3730(d)(4), which provides:

> the court may award to the defendant its reasonable attorneys' fees and expenses 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 the purposes of harassment.

The district court summarized this statutory standard into one sentence: "A claim is frivolous if it is utterly lacking in legal merit and evidentiary support." In the FCA context, the court proclaimed, "A claim is frivolous and vexatious if the government's awareness of the circumstances constituting the alleged transgression makes any legal claim of fraud untenable."

With this understanding of the law, the court granted the defendants' Section 3730(d)(4) motion, for there was evidence that showed that the INS was aware that the defendants were not small and or disadvantaged businesses and offered them advertising and public relations contracts anyway. Indeed, as even the relators stressed in its January 1997 letter to the OIG, the defendants' "fraud took place *with the INS*' [sic.]

contract and program people's knowledge." According to the court, this governmental approval negated any claim of fraud against the defendants. Because the relator was aware of this fact, the court concluded that the relator filed a frivolous and vexatious lawsuit. In turn, the court awarded the defendants attorneys' fees and expenses.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Smith v. Yale New Haven Hospital, 2006 WL 387297 (D. Conn. Feb. 14, 2006)

While a Connecticut district court granted a relator's motion for reconsideration of its ruling granting a defendant-hospitals motion to dismiss an FCA *qui tam* action, the court affirmed its prior ruling that the FCA first-to-file bar can block a second-filed *qui tam* action even when the first-filed action was filed by the same relator. Interestingly, the court invited the relator to amend his first action to add the allegations raised in his second-filed suit.

Robert Smith filed two FCA *qui tam* actions against the same defendant, his former employer Yale-New Haven Hospital (YNHH). The court dismissed the second suit based on Section 3730(b)(5) first-to-file bar. Smith moved for reconsideration of the court's ruling.

Generally, reconsideration will only be granted when a party can point to "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (citations omitted) Smith cited the recent Ninth Circuit case, *Campbell v. Redding Med. Ctr.*, 421 F.3d 817 (9th Cir. 2005), for the proposition that exceptions to the "first to file" bar should be recognized. Smith argued that the *Campbell* decision changed the analysis, as the court previously relied, in part, on the Ninth Circuit's decision in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), in holding that there are no exceptions to the "first to file" bar.

However, the court, in disagreeing the with relator, observed that *Campbell* upheld the Circuit's previous decision in *Lujan*, limiting it only for the particular situation in the case at hand. *See Campbell*, 421 F.3d at 821–22, 825. *Campbell* held only that "in a public disclosure case, the first-to-file rule of § 3730(b)(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4)." *Id*. The present court easily distinguished the case at bar from *Campbell*, because the plaintiff in second *qui tam* action was the same as the plaintiff in first suit.

Moreover, Smith admitted that the "plain language" of Section 3730(b)(5) prevents the filing of a second action against by the same relator against the same defendant. Instead, Smith argued only that an exception should be recognized as following the plain meaning would lead to "absurd or futile results."

In the alternative, Smith asked the court for an opportunity to reincorporate the allegations raised in his second action with the allegations raise in his first suit. Instead of buying Smith's "absurd" argument, the court granted Smith his alternate route of amending his first complaint to re-incorporate the particulars of his allegations raised in the second action.

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

U.S. ex rel. Gear v. Emergency Medical Associates of Illinois, Inc., 436 F.3d 726 (7th Cir. Feb. 1, 2006)

The Seventh Circuit, in affirming an Illinois district court's dismissal of an FCA *qui tam* action pursuant to the FCA public disclosure bar, held that industry-wide public disclosures bar *qui tam* actions against any defendant who is directly identifiable from the public disclosures. The court of appeals also stressed that the relator did not qualify for the Section 3730(e)(4) original source exception, even if he had "direct and independent" knowledge of the alleged fraud, for he had not "voluntarily provide[d] the information to the Government before filing [the] action," as required under 31 U.S.C. § 3730(e)(4)(B).

While working as a resident at three Chicago-area teaching hospitals affiliated with Emergency Medical Associates of Illinois, Brent Gear allegedly observed his employer submitting false claims for payment to the Government. Specifically, Gear alleged that his employer fraudulently billed Medicare for services performed by residents in Midwestern University's residency program as if those services had been performed by attending physicians. Because Medicare already covered the residents' salary, Gear's employer, in essence, double billed Medicare. Gear raised these allegations by filing an FCA *qui tam* action.

The lower court ultimately granted the defendants' motion for summary judgment, finding that the FCA public disclosure bar precluded the suit. Gear appealed the decision to the Seventh Circuit.

FCA Public Disclosure Bar Applied Because Industry-Wide Disclosures Identified Defendant

In affirming the lower court's decision, the court of appeals first addressed the issue of whether the information on which the complaint was based was already publicly disclosed when Gear filed his complaint. The Seventh Circuit pointed out that since the mid-1990s there have been public allegations that Medicare was being billed for services provided by residents as if attending physicians had actually performed the services. The court specifically highlighted a 1998 General Accounting Office report, which stated that there was a settlement between the Department of Justice and the University of Pennsylvania under which the University agreed to pay $30 million to settle similar allegations of improper billing. In addition, the Seventh Circuit chronicled the resulting HHS-OIG nationwide initiative to investigate how the nation's 125 medical schools, including Midwestern University, billed Medicare for services provided by residents. Lastly, the court directed their attention to a number of news articles that explored the issue.

Gear contended, however, that these public disclosures did not expose the allegations he raised against these *particular* defendants. Reading the FCA public disclosure

bar broadly, the court of appeals rejected Gear's argument that the public disclosure bar only applies if the specific defendants named in the lawsuit have been identified in the public records. Instead, the Seventh Circuit proclaimed, "Industry-wide public disclosures bar *qui tam* actions against any defendant who is directly identifiable from the public disclosures." Here, the court of appeals declared that the defendants were identifiable, for the public disclosure revealed industry-wide abuses.

Relator's Complaint Was "Based Upon" Public Disclosure

Additionally, the court was convinced that Gear's lawsuit was based on these public disclosures, even though Gear had submitted his own affidavit stating that he based his complaint on "personal observations and experience." The court was particularly swayed by the fact that Gear was an editor of the American College of Emergency Physicians' publication *24/7 News for Emergency Medicine Residents*, which featured an article during his tenure that described the PATH initiative and named five hospitals that had settled PATH investigations. In turn, the court rejected Gear's affidavit as "self-serving" and insufficient to sustain a claim that his allegations were not based on public information.

Not Original Source Because He Did Not Provide Information to Government Prior to Filing

While the Section 3730(e)(4)(B) original source exception could have saved Gear's complaint from dismissal, the court stressed that it was not enough for Gear to potentially had "direct and independent knowledge of the information"; he must have "voluntarily provided the information to the Government before filing [the] action. . . ." 31 U.S.C. § 3730(e)(4)(B). Gear conceded that he never spoke to the Government about his claims prior to filing suit. Thus, the Seventh Circuit affirmed the lower court's decision to grant the defendants' motion for summary judgment.

***U.S. ex rel. Westerfield v. University of San Francisco*, 2006 WL 335316 (N.D. Cal. Feb. 14, 2006)**

A California district court, granting an FCA defendant's motion to dismiss, ruled that the FCA public disclosure bar precluded the action and that the relator did not qualify for the Section 3730(e)(4)(A) original source exception, for the relator did not allege facts in her complaint or provide evidence at a hearing demonstrating that she had voluntarily notified the Government before filing her *qui tam* suit. In addition, the court ruled that the statute of limitations had run on her Section 3730(h) retaliation action, for the plaintiff failed to allege any facts demonstrating that the defendant engaged in misconduct that warranted equitably estopping the defendant from asserting a statute of limitations defense.

While employed as the Coordinator of Academic Accommodations for the University of San Francisco, Patricia Paul Westerfield became concerned that the University was violating the Americans with Disabilities Act (ADA) by failing to provide reasonable accommodations for disabled students, falsely certifying as a condition of receiving government funding that it had complied with statutes relating to discrimination, and manipulating the data on the number of disabled students. Allegedly after bringing her concerns to the University, her employment was terminated.

In February 2003, Westerfield filed a complaint in state court against the University. Subsequently, she also filed an FCA *qui tam* action in federal court against the University, raising claims under FCA Sections 3729 and 3730(h). The defendant filed a motion to dismiss her FCA *qui tam* action.

Relator's Allegations Were "Substantially Similar" to Public Disclosures

The University, encouraging the court to dismiss the *qui tam* action, argued that Westerfield failed to plead her fraud claim with sufficient particularity and that the FCA public disclosure bar precluded the action. Specifically, the University maintained that Westerfield's FCA claim had been previously disclosed in the course of the litigation of Westerfield's previously-filed state court action.

The court noted that documents filed in court in the context of litigation are sufficient to publicly disclose information. *United States v. Alcan Electrical and Engineering, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999). Thus, the only issue was whether Westerfield's FCA claim was based on the allegations or transactions disclosed by the filings in Westerfield's state court action.

In her opposition brief, Westerfield did not dispute that the allegations which formed the basis of her FCA claim had been previously disclosed by her complaint and related filings in the state court action. Rather, she merely argued that she qualified as an original source. At the hearing on this motion, Westerfield argued that her state court complaint was not a public disclosure under the FCA because it did not plead fraud. However, the court ruled that the substance of the prior disclosures need not explicitly mention the FCA nor explicitly allege the fraud to constitute a public disclosure. *See Alcan Electrical and Engineering,* 197 F.3d at 1019–20 (holding that previous complaint that did not mention the FCA or any overcharging, false certification or any other specific fraud on the government still constituted public disclosure). Instead, the prior filings will constitute public disclosure if they "contained enough information to enable the government to pursue an investigation against" the University. *See id*. at 1019.

After the state court assessing Westerfield's state court complaint, the court ruled that the complaint was "substantially similar" to the allegations which form the basis of her FCA claim. Accordingly, the court then turned to whether she qualified as an original source, under 31 U.S.C. 3730(e)(4)(B).

Relator Was Not Original Source Because She Did Not Provide Information to Government Prior to Filing her Suit

Here, although she represented at the hearing that she voluntarily notified the Government before filing her suit, the court noted that she did not allege such facts in her complaint or provide evidence demonstrating her compliance with this requirement. Therefore, the court dismissed her FCA claim with leave to amend to allege facts demonstrating that she voluntarily provided the information to the government before filing the suit.

Section 3730(h) Retaliation Claim Was Time-Barred

The University moves to dismiss Westerfield's retaliation claim on several grounds, including that it was barred by the statute of limitations. The parties agreed that California's two-year statute of limitations was applicable to her Section 3730(h) retaliation suit. *See United States ex rel. Lujan v. Hughes Aircraft*, 162 F.3d 1027, 1035 (9th Cir. 1998); Cal.Code Civ. Proc. § 335.1. Westerfield alleged that she was terminated on May 31, 2003, but she did not file her action until August 20, 2004, more than two years later. Thus, based on the facts alleged in her complaint, her retaliation claim was time-barred.

However, Westerfield argued that she was not actually terminated until August 31, 2004 because on August 9, 2002 the University sent her a letter stating "it was holding open its offer until August 31, 2004 of transition payments and salary benefits."

The court noted that a court may find equitable estoppel applies based on the following non-exhaustive factors: "(1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied." *Santa Maria v. Pacific* Bell, 202 F.3d 1170, 1176 (9th Cir. 2000). Here, even if Westerfield could have alleged facts demonstrating that the University continued to negotiate with her with respect to her severance benefits or offering her a new position, such conduct was not wrongful or deceptive. Thus, the court ruled that such conduct would not warrant applying equitable estoppel.

***U.S. ex rel. Smith v. Yale University*, 2006 WL 397952 (D. Conn. Feb. 14, 2006)**

A Connecticut district court, dismissing an FCA *qui tam* action, ruled that the FCA public disclosure bar precluded jurisdiction over allegations in the complaint based on information that was disclosed during discovery in a related state court action, that was obtained from third parties, and that was pled on information and belief. In the alternative, the court dismissed the complaint under Rule 9(b), for the complaint failed to identify the specific individuals responsible for authorizing or implementing the allegedly fraudulent billing scheme. Moreover, the court

dismissed the relator's Section 3730(h) retaliation claims, for he failed to allege facts sufficient to support the conclusion that the alleged harassment and "forced" resignation was "because of" his protected activity.

From July 1990 to June 1999, Robert Smith was employed as an attending staff physician at Yale-New Haven Hospital (YNHH) and as a professor at the Yale School of Medicine. Most recently, Smith served as a Professor of Radiology and Associate Chair of Information Technology and Systems Administration, Department of Radiology, Cornell University Joan and Sanford I. Weill Medical College, New York Presbyterian Hospital from 1999 until the summer of 2003.

Medicare and Medicaid only pay for services that are reasonable, medically necessary and utilized for diagnostic and therapeutic purposes in connection with health care services provided to Medicare and Medicaid beneficiaries. 42 U.S.C. § 1395y(a)(1). Indeed, physicians are required to submit a certification form which certifies that "the services shown on this form were medically indicated and necessary for the health of the patient and were personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision."

Smith alleged that during his employment, Yale and YNHH violated the FCA by improperly billing and retaining payments from the Medicare and Medicaid Programs for (1) radiological studies for which the signing radiologist did not review the associated image and/or the preliminary report, including alleged billing for: (a) the "clean up project," (b) the use of the "Autosign" function on the hospital computer system and (c) the review of reports of neuroradiology fellows; (2) studies by radiologists who were not qualified teaching physicians; and (3) medically unnecessary studies, including alleged billing for old studies and unnecessary panels of studies in the emergency room. In an effort to bill for these radiological studies, Smith alleged that YNHH and Yale knowingly engaged in improper billing schemes by falsifying and altering patient records, submitting bills which they knew were in violation of Medicare and Medicaid billing requirements and falsely certifying that they were in conformity with applicable regulations and minimum standards of patient care.

Smith maintained that after he began investigating these alleged practices, his employers, through their officers, agents and employees, harassed and discriminated against him in the terms and conditions of his employment by, *inter alia*, intimidating him, cutting his salary, stripping him of his administrative positions and titles, forcing him to resign, interfering with his attempts to obtain other employment, forcing him to leave the State of Connecticut and publicly defaming him. Smith alleged that YNHH and Yale similarly retaliated against Dr. Arthur T. Rosenfield and Dr. Morton I. Burrell.

Smith filed the present *qui tam* action against YNHH in July 2000, alleging that the hospital violated the FCA by falsely billing and retaining Medicare and Medicaid payments. In July 2002, he filed a second *qui tam* action, this time against YNHH and Yale, raising claims under Section 3729 and Section 3730(h). But perhaps most dispositive to present action, on January 7, 2002, more than six months prior to filing either *qui tam* action, Smith brought a state-court action alleging violations of state

law concerning his employment, including claims for retaliation under Section 31-51q of the Connecticut General Statutes, breach of contract and constructive discharge. YNHH moved to dismiss the suit.

Complaint Was "Based Upon" Prior Public Disclosure

The first question the court faced was whether the FCA public disclosure bar precluded Smith's *qui tam* actions. YNHH argued that the public disclosure in this case took place on January 7, 2000, the date on which the state court action was filed.

Section 3730(e)(4)(A) provides an exclusive list of the situations in which the public disclosure bar applies, such that if the public disclosure does not occur in "a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," the *qui tam* action is not barred. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992). Pointing to a Third Circuit decision, the court stressed that the phrase "in the course of a civil, criminal, or administrative hearing" should be interpreted broadly, so as to include "allegations and information disclosed in connection with civil, criminal, or administrative litigation," including information disclosed during discovery. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prud. Ins. Co.*, 944 F.2d 1149, 1156 (3d Cir. 1991); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994) ("Given the fluidity in the meaning of the term 'hearing,' and the fact that we can discern no reason why Congress might have intended otherwise, we agree with our sister Circuits . . . that an entire civil proceeding can constitute a 'hearing' for purposes of section 3730(e)(4)(A)."). Under this approach, the "disclosure of discovery material to a party who is not under any court imposed limitation as to its use is a public disclosure under the FCA" regardless of whether such discovery has been filed with the court. *Stinson*, 944 F.2d at 1158.

As the public disclosure jurisdictional bar applies only when a complaint is "based upon" publicly disclosed information, 31 U.S.C. § 3730(e)(4)(A), YNHH, applying the strained Second Circuit interpretation, also argued that the allegations disclosed in the state court action were "substantially similar" to the allegations in the instant action. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990). Therefore, as even Smith conceded, the state court action constituted a disclosure and the *qui tam* action was "based on" the disclosure, as defined by the controlling case law.

Court Rejects *Springfield Terminal*

Smith, however, countered that he qualified for the Section 3730(e)(4) "original source" exception, for he supposedly (1) "ha[d] direct and independent knowledge of the information on which the allegations are based," (2) "ha[d] voluntarily provided the information to the Government before filing an action under this section" and (3) had "directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based." 31 U.S.C. § 3730(e)(4)(B); *United States v. New York Med. Coll.*, 252 F.3d 118, 120 (2d Cir. 2001) (citations omitted).

Smith cited *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994), for the proposition that he only needed to have "direct and independent knowledge" of *any essential element*. However, the Second Circuit had explicitly rejected this proposition:

> The [*Quinn*] approach is inconsistent with the plain language of the FCA, which should govern the court's interpretation….The statute does not provide that all that is necessary is that the relator have "direct and independent knowledge of *some* of the information on which the allegations are based." Even with the understanding that "based" should be construed to be "supporting," there is no indication in the language of the statute that the supporting information need only provide a fraction of the necessary elements of the allegation.

See New York Med. Coll., 252 F.3d at 121. Therefore, the court ruled that the relator must show that he had direct and independent knowledge of the *core* information upon which his allegations of fraud were based.

Relator Can Have "Direct And Independent Knowledge" of False Claims Submitted Post-Termination

The defendant also argued that as many of the Smith's allegations supposedly took place after he left the hospital in June 1999, so he could not have "direct and independent knowledge" of any of the post-June 1999 allegations. The court rejected the defendant's argument, instead ruling that he is permitted to establish direct and independent knowledge of conduct that occurred after his departure, so long as the allegations flow from matters over which he had direct knowledge while employed. According to the court, "[a]ssuming that conduct substantially similar to that of which Relator has direct knowledge continued after his departure, it would not be in the ultimate interest of Government recovery to limit an action solely to conduct that occurred during his employment."

Under this rule, the court quickly determined that the "information underlying the claim" commenced during his employment, so he was not prevented from establishing "direct and independent knowledge" solely because the conduct continued after his departure.

Relator Does Not Obtain "Independent" Knowledge From Information Obtained Via Discovery In State Court Action

Defendant maintained that Smith could not have "direct and independent knowledge" of most of his allegations, for a bulk of the underlying information was actually obtained via the discovery process in the state court action.

While warning that the disclosure by itself is not sufficient to defeat jurisdiction if the relator was the source of the information disclosed, the court agreed that if Smith had obtained information regarding post-June 1999 transactions through discovery in

the state court action, he could not, as a matter of law, have "independent" knowledge of that information. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d. 1993) (holding that relator is not an original source as to information produced during discovery). In turn, the court focused on the allegations that appeared in the second complaint but did not appear in the original complaint, for these allegations were added after the discovery process in the state court action.

Relator Was Not an Original Source

Accordingly, the only question remaining was whether the discovery information produced on which Smith relied was "core" information or whether it was merely additional evidence supporting his allegations. Ultimately, the court ruled that it was "core" information and he did not have "direct and independent knowledge" of this information. Perhaps most damning, the statements in the amended complaint were not present in the original complaint and Smith did not explicitly state where he obtained the information. Accordingly, since Smith presented no evidence that he had direct and independent knowledge of fraudulent billing and since his admissions suggested none, the court ruled that there was insufficient evidence to find that he was an original source as to the post-June 1999 allegations.

Confirming Known, Independent Knowledge With Others Disqualifies Relator as an "Original Source"

However, before ending the inquiry, the court took it one step further. The court pointed to court decisions holding that information obtained from third parties, such as co-workers, is neither "direct" nor "independent." *See, e.g., United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1007 (10th Cir. 1996); *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1207 (10th Cir. 2003) (characterizing a "parasitic *qui tam* action" as one "based on knowledge obtained secondhand through other employees").

The court, making a judicial leap, stated that a relator who confirms information with his coworkers that he otherwise obtained disqualifies him from being an "original source." In other words, if the relator's information came from another source and he confirmed it by an independent investigation, he cannot claim, after the fact, that he was an original source.

Complaint Failed to Satisfy Rule 9(b)

In the alternative, the court also held that the FCA claims failed to satisfy the particularity requirements of Rule 9(b). Smith had argued that since the alleged fraud was extremely complex, involved thousands of instances, occurred over an extended period and involved information "peculiarly within the adverse parties' knowledge," the Rule 9(b) particularity requirements should have been relaxed.

The defendant, however, asserted that the information at issue was not within its exclusive control, arguing that the Government possessed all claims submitted by the hospital and that such information could be obtained through sources, such as the Freedom of Information Act.

However, as the court noted, *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.* had already rejected this argument, explaining that:

> [E]very FCA *qui tam* action involves allegations of false or fraudulent claims submitted to the government. In many of these cases, the information needed to fill the gaps of an inadequately pleaded complaint will be in the government's hands. In addition, if the relator seeks to obtain the requisite information from the government, for example by submitting a request under the Freedom of Information Act (FOIA), he or she may encounter Section 3730(e)(4) of the FCA, which prohibits *qui tam* actions based upon publicly disclosed allegations unless the relator is an "original source" of that information.

360 F.3d 220, 230 (1st Cir. 2004). Therefore, because the records of all claims submitted to the Government and the billing records were in the possession and control of the defendants, the court relaxed the requirements of Rule 9(b), so as to permit pleadings based on "information and belief" as to this information.

Although the pleading standards were relaxed, the court, pointing to a Second Circuit decision, imposed a requirement that the pleadings based on information and belief be accompanied by "a statement of facts upon which the belief is based." *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987); *accord Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972).

In turn, because Smith failed to include a statement of facts outlining the basis of his beliefs and because the complaint did not identify any particular false or fraudulent claim allegedly submitted to the Government, the court found that Smith failed to satisfy the Rule 9(b) particularity requirements.

Section 3730(h) Claims Were Not Time-Barred

The court next turned its attention to Smith's Section 3730(h) retaliation claim. The defendant called for dismissal of the claim, arguing that the action was untimely and that the claim is governed by the 90-day limitations period of Connecticut's whistleblower statute.

As the Supreme Court recently held, Section 3730(h) is not governed by a federal limitations period, so the courts must apply the most closely analogous state limitations period. *Graham Cty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 125 S.Ct. 2444, 2453 (2005). In making this determination, the court asked which state law cause of action is most closely analogous to Section 3730(h) and whether the limitations period applicable to that cause of action comports with the policies underlying the federal law.

The defendant argued that the "most closely analogous" state statute is Connecticut's "whistleblower" statute, Conn. Gen. Stat. § 31-51m(b), which provides for a ninety-day limitations period.

Smith conceded that Section 31-51(b) provided for a cause of action similar to the FCA retaliation claim, however, he argued that it was not the "most closely analogous" cause of action available under Connecticut law. Smith distinguished Section 31-51m from 31 U.S.C. 3730(h) in that the scope of protected conduct for which Section 31-51m provides protection is much narrower, thus protecting employees from "far fewer activities" than does Section 3730(h). Specifically, Smith pointed to the language in Section 31-51m, which only protects employees who *report* violations or suspected violations of law, whereas Section 3730(h) protects all employees who engage in lawful acts "in furtherance of an action under this section, *including investigation for, initiation of, testimony for, or assistance in* an action. . . ."

Smith, instead, highlighted the three-year statute of limitations provided for under Connecticut General Statutes Section 31-51q or under the common law wrongful discharge claim as being the "most closely analogous" limitations period under state law.

The court, agreeing the Smith, was swayed by several court decisions which have held that the state law cause of action most closely analogous to that provided for under Section 3730(h) was the state's common law tort claim for wrongful discharge. *See, e.g., United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1035 (9th Cir. 1998) (holding that "the most analogous statute of limitations under California law is the one-year statute applicable to wrongful termination in violation of California public policy"). Similarly, the Supreme Court noted, in remanding *Wilson* for determination of which state statute was most closely analogous to Section 3730(h) actions, that the dissenting judge in the appellate court had concluded that "the most closely analogous state statute of limitations is North Carolina's three-year statute of limitations governing wrongful discharge claims." *Wilson*, 125 S.Ct. at 2453.

Turning to the second question in the analysis, the court also found Connecticut's three-year limitations period to be consistent with Section 3730(h) and the general policies underlying it.

Thus, applying the three-year period to Smith's complaint, the court ruled that all of the alleged retaliatory acts fell well within the three-year statute of limitations period. Accordingly, Relator's Section 3730(h) retaliation claims were not barred by the applicable statute of limitations.

Retaliation Claim Failed Because Plaintiff Failed To Satisfy "Because Of" Prong

In order to state a claim for retaliation under Section 3730(h) of the FCA, a relator must show that (1) the employee engaged in conduct protected under the FCA; (2) the employer knew that the employee was engaged in such conduct; and (3) the employer discharged, discriminated against or otherwise retaliated against the employee because of the protected conduct. *Karvelas*, 360 F.3d at 235. Smith claimed that he investigated and reported to Yale and YNHH problems regarding improper

billing and "fraud." Although the court considered these allegations too vague under a Rule 9(b) standard, the court reminded the parties that Rule 9(b) does not apply to 3730(h) retaliation claims. Under the correct lowered standard, the court ruled that he sufficiently pled that he was engaged in "protected conduct."

The court ruled that Smith failed to convince the court that he satisfied the second prong of the 3730(h) inquiry. He had alleged that he was retaliated against "[b]ecause of his investigation and reporting of the frauds." However, the court was troubled that "[n]owhere in his complaint d[id] [he] allege a factual predicate concrete enough to support his conclusory statement that he was retaliated against because of conduct protected under the FCA." *Karvelas*, 360 F.3d at 240. Accordingly, the court dismissed his Section 3730(h) claims.

***U.S. ex rel. Olsen v. ITT Educational Services, Inc.*, 2006 WL 64597 (S.D. Ind. Jan. 9, 2006)**

An Indiana district court, rejecting the defendant's argument, ruled that the FCA public disclosure bar did not preclude an FCA *qui tam* relator's action, for there was no showing that the relator had relied on a public disclosure for the information detailed in his complaint. However, the court ultimately granted defendant's motion to dismiss, for the relator failed to satisfy the particularity requirements of Rule 9(b) by alleging how and when the false claims were submitted to the Government.

Robert Olson, a former ITT Educational Services instructor, brought an FCA *qui tam* action against ITT, a provider of technology-oriented postsecondary degree programs in seventy-nine institutes throughout the United States. Olson alleged, *inter alia*, that ITT "misrepresented that it was providing an education," when instead it "created a diploma mill in order to secure tuition fraudulently from the United States." After the Government refused to intervene in the matter, ITT filed a motion to dismiss the action, raising defenses under Rule 9(b) and the FCA public disclosure bar.

Complaint Failed to Satisfy Rule 9(b)

First turning its attention to Rule 9(b), the court had great difficulty in identifying any allegations of a false statement made by ITT for the purpose of obtaining payment from the Government; instead, most of the complaint described what he considered to be a low-quality education. Indeed, Olson failed to plead with particularity that ITT promised its students a higher level of education than what they actually received. As the court reminded Olson, the purpose of the FCA is to prevent individuals from making false statements in order to receive money from the Government. Accordingly, because Olson did not adequately plead a false claim with particularity, the court dismissed the action pursuant to Rule 9(b).

FCA Public Disclosure Bar Does Not Apply

ITT also argued that the FCA public disclosure bar should preclude Olson's suit. First, ITT maintained that Olson's allegations had been publicly disclosed prior to the filing of Olson's complaint. Olson did not appear to dispute this claim. He filed his initial complaint *in camera* on April 8, 2004. However, prior to Olson's filing, ITT was the subject of a federal criminal investigation that included the execution of federal search warrants at eleven ITT locations on February 25, 2004.

The court next determined whether Olson's *qui tam* action was based upon those publicly disclosed allegations. An action is "based upon" public disclosures within the meaning of § 3730(e)(4)(A) when it "both depends essentially upon publicly disclosed information and is actually derived from such information." *United States ex rel. Feingold v. AdminaStar Fe., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003) (quoting *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999). Olson's action depended upon the information that had already been publicly disclosed. But, it was irrelevant that Olson's claim alleged the same information that had already been publicly disclosed unless Olson got the information on which his claim was based from the actual public disclosure. *See Mathews*, 166 F.3d at 863. As long as Olson did not rely, even in part, on the public disclosure as the source of his information, then § 3730(e)(4)(A) could not bar the court from entertaining the action.

The court could find no evidence that Olson relied on the public disclosure for information used in his complaint. Indeed, the allegations from his complaint showed that Olson's information supporting the allegations originated from his own personal experience as an instructor at ITT. Because the action was not based upon publicly disclosed information, the analysis stopped there for the court. Accordingly, the court rejected the defendant's alternative argument under the FCA public disclosure bar.

Accordingly, although he eluded the FCA public disclosure bar, the suit was ultimately dismissed without prejudice on Rule 9(b) grounds.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

Lehoux v. Pratt & Whitney, 2006 WL 346399 (D. Me. Feb. 8, 2006)

A Maine district court, ruling that a two-year statute of limitations applies to Section 3730(h) retaliation actions brought in the State of Maine, dismissed the plaintiff's suit as untimely. Moreover, the court ruled that Section 3730(h) does not apply to alleged acts of retaliation that occurred after the plaintiff was terminated.

Randy Alcide Lehoux has filed a 31 U.S.C. 3730(h) retaliation action against his former employer, Pratt & Whitney. Pratt & Whitney filed a motion to dismiss, arguing that the November 8, 2005 complaint was barred by a two-year statute of limitations applicable to FCA actions brought in the State of Maine.

Lehoux's employment with Pratt & Whitney was terminated on January 20, 2003, and the present action was filed on November 8, 2005. The parties agreed that the applicable statute of limitation is the two-year limitation period on claims under the Maine Whistleblowers Protection Act., 5 M.R.S.A. § 4613(2)(C).

However, the defendant, pointing to *U.S. ex rel. Wright v. Cleo Wallace Centers*, 132 F. Supp. 2d 913 (D. Colo. 2000), maintained that it could not be liable under the Act for post-termination retaliation taken against Lehoux. According to *Wright*, "Section 3730(h) specifically provides remedies for retaliatory discharge but not for acts of retaliation subsequent to termination."

The relators (and the court) were unable to counter with any case law to refute *Wright*. In turn, the court ruled that Lehoux's cause of action accrued, at the latest, on the date he was terminated and he had two years from that date to bring his FCA claim to this court. Because Lehoux's did not beat the clock, the court ruled that the action was time-barred.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Section 3731(b)(1) Statute of Limitations

U.S. ex rel. Finney v. Nextwave Telecom, Inc., 337 B.R. 479 (S.D.N.Y. Feb. 24, 2006)

A New York district court, dismissing an FCA *qui tam* action, ruled that the FCA statute of limitations tolling provision, which permits an FCA action to be brought within three years of the date that "facts material to the right of the action are known or reasonably should have been know by the official of the United States charged with responsibility to act," is limited in its application to FCA actions brought by the Government. The court also ruled that the FCA conspiracy liability provision, making it unlawful to conspire to defraud the Government "by getting a false or fraudulent claim allowed or paid," was not broad enough to reach reverse false claims by parties that allegedly conspired to defraud the United States by concealing their own financial obligations to Government.

In 1996 and 1997, the FCC conducted a series of auctions to allocate electromagnetic spectrum licenses. Seeking to encourage the involvement of small businesses, the FCC limited participation in some of the auctions to entrepreneurs and small businesses and offered installment payment plans to those buyers. NextWave Telecomm, Inc. was awarded ninety of these licenses on winning bids totaling nearly $5 billion. Unable to pay for these winning bids, NextWave subsequently filed for bankruptcy.

On August 16, 1996, the FCC retained attorney Weil Gotshal to assist in maximizing its position as a creditor of winning auction bidders, and to advise the FCC on revisions to its installment payment procedures and requirements. Weil Gotshal's contract with the FCC terminated on June 13, 1997.

On March 29, 2005, Ann Finney filed an FCA *qui tam* action against NextWave and Weil Gotshal, alleging that Gotshal conspired with NextWave to lower its financial liability to the Government by ignoring an applicable statute, which would have limited NextWave's bankruptcy petition. Finney also alleged that Gotshal violated the FCA by submitting a false claim for payment of legal services under its contract with the FCC.

Specifically, Finney claimed that, though Weil Gotshal was required under his contract with the FCC to make recommendations to maximize the FCC's position as a creditor of spectrum auction winners, Gotshal failed to identify the existence of or to analyze the implications of the Federal Credit Reform Act (CRA), 2 U.S.C. § 661a-f, which precludes modification of a federal loan in the absence of advance Congressional approval, and of the CRA's alleged applicability to the FCC auction of electromagnetic spectrum licenses and NextWave's related bankruptcy proceedings. In other words, because Gotshal's work product was defective, Finney argued that any claim for payment constituted a false claim.

On July 26, 2005, the Government declined to intervene. The defendants subsequently filed a motion to dismiss the action, arguing that the suit was barred by the FCA statute of limitations provision.

FCA Statute of Limitations Tolling Provision Is Only Available on Government Actions

While the relator agreed that the action did not fall with in the FCA's six-year statute of limitations window, she argued that the tolling provision saved her claim. Thus, the court was faced with the issue of whether a private relator can take advantage of Section 3731(b)'s three-year tolling and ten-year limitations period where, as here, the Government did not intervene in the action.

On the one hand, the Ninth Circuit has held that the tolling provision does, in fact, apply to suits brought solely by a *qui tam* relator, and that the knowledge prong of subsection (b)(2) is not limited to the knowledge of the Government, but rather extends to the relator. *See United States ex. rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996), *vacated on other grounds*, 521 U.S. 1101 (1997).

On the other hand, at least two district courts have held that subsection (b)(2) only applies to actions in which the Government intervenes. *See United States ex. rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263 (S.D.N.Y. 1998); *United States ex rel. El Amin v. George Washington Univ.*, 26 F. Supp. 2d 162 (D.D.C. 1998). Indeed, the *Thistlethwaite* Court considered the Ninth Circuit's interpretation of § 3731 and expressly rejected it as inconsistent with the language of the statute.

The present court considered the Ninth Circuit's interpretation of the provision and expressly rejected it as inconsistent with the language of the statute. The court interpreted the plain meaning of the statute to support the conclusion that the three-year knowledge requirement contained in subsection (b)(2) only applies to cases in which the Government intervenes. According to the court, "That subsection, which creates the three-year tolling provision and the ten-year limitations period, makes no mention of the *qui tam* relator. Rather, it refers only to an 'official of the United States.'"

Thus, because the Government refused to intervene in the matter, the court declared that the relator could not avail herself of subsection (b)(2)'s lengthier limitations period. In turn, with her claims governed by a six-year statute of limitations period, the claims were time barred, since they were filed almost eight years after Gotshal's contract with the FCC expired.

Section 3729(a)(3) Conspiracy to Make "Reverse False Claims" Is Not an Actionable Claim

Likewise, the court rejected the relator's remaining FCA claims, including her Section 3729(a)(3) conspiracy claim, alleging that the defendants conspired to decrease or avoid NextWave's payment obligations to the Government.

The court, rejecting this use of the Act, ruled that "reverse false claims" cannot form the basis of a conspiracy under the FCA. While the Second Circuit had not con-

sidered the issue, the court pointed to two decisions reaching the same conclusion. *See United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Prods. Inc.*, 370 F. Supp. 2d 993, 1003 (N.D. Cal. 2005); *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 255 F. Supp. 2d 351, 413–14 (E.D. Pa. 2002). As the *Atkinson* court made clear, "Plainly excluded from [the terms of § 3729(a)(3)] is liability for a person who conspires to defraud the United States by concealing his or her own financial obligation to the government." *Atkinson*, 255 F. Supp. 2d at 414.

***U.S. ex rel. Sanders v. North American Bus Industries, Inc.*, 2006 WL 361337 (D. Md. Feb. 15, 2006)**

In denying a relator's motion for reconsideration or to alter or amend judgment dismissing FCA claims that supposedly fell within the FCA limitations period, a Maryland district court ruled that the defendant's triggering action occurred when he gave advise that caused his customer to submit false claims, not when the false claims where subsequently submitted.

Thornton Sanders filed a motion for reconsideration, seeking the court to reexamine its dismissal of his *qui tam* action against Deloitte & Touche USA, L.L.P. under the FCA statute of limitations provision. Sanders maintained that the court dismissed some claims that actually complied with Section 3731(b)(1)'s six-year time restriction.

Sander's *qui tam* action alleged possible violations of the FCA "reverse false claims" provision, 31 U.S.C. § 3729(a)(7), and centered around Deloitte's work with the North American Bus Industries, Inc. (NABI). According to Sanders, Deloitte had allegedly misled U.S. Customs into misclassifying bus shells that NABI was importing into the country so that NABI could avoid a required import tax. In addition, Sanders alleged that at some unspecified time prior to January 1999, Deloitte advised NABI that it could use this ruling to import future bus shells under the new classification and thereby avoid taxes. NABI allegedly did import bus shells under the new classification and some of these imports occurred after July 1999, although Sanders did not identify a single specific import.

Sanders filed a motion to amend his complaint to name Deloitte as a defendant on June 30, 2005, which the court granted on July 19, 2005. Regardless of whether the limitations period stopped running June 30 or July 19, the court declared that Sanders' claims were time-barred. Under Sanders' theory of liability, Deloitte violated Section 3730(a)(7) by causing NABI to make statements to the Government that allowed NABI to improperly avoid an obligation to pay taxes on the imported bus shells. Sanders maintained that Deloitte "caused" the false statements accompanying subsequent imports because Deloitte filed the original request for reclassification and then advised NABI that it could use the ruling to import bus shells in the future under the new classification.

The court, however, ruled that Sanders' argument failed because, to the extent Deloitte "caused" these false statements, all of Deloitte's acts occurred prior to July 19, 1999. The court drew a dividing line at what Deloitte did, not at what NABI did subsequent to Deloitte's involvement. For purposes of the statute of limitations, the date of Deloitte's violation was not the date of any subsequent import by NABI, for Deloitte did not prepare the paperwork for those imports and had no control over those import. Accordingly, the court denied Sander's motion to reconsideration or to alter or amend judgment.

B. Lack of Section 3732(a) Venue

U.S. ex rel. Smith v. Yale University, 2006 WL 566440 (D. Conn. March 7, 2006)

A Connecticut district court dismissed an FCA *qui tam* action, alleging that a defendant-hospital had an obligation to withhold billing for the production of radiographical films until and unless they were reviewed by an authorized physician. The court ruled, in dismissing the action, that the relator had not alleged nor demonstrated authority or a factual basis for establishing such an obligation. The court also dismissed the action against two other defendant-hospitals, for the hospitals had no connection with the forum state and the FCA venue provision, 31 U.S.C. § 3732(a), does not sanction the joinder of multiple defendants involved in distinct and independent frauds in one case in a district where only one defendant is found.

Robert Smith had filed two FCA *qui tam* actions against the same defendant, his former employer Yale-New Haven Hospital (YNHH). The court dismissed the second action, ruling that 31 U.S.C. 3730(b)(5), the FCA first-to-file bar blocked the relator's second action. After granting the relator's motion for reconsideration, the court consolidated the two *qui tam* actions into the present action. Again, the defendant filed a motion to dismiss.

Smith's allegations center around radiological studies allegedly improperly billed to Medicare and Medicaid. These studies consist of two parts—the technical component and the professional component. The technical component consists of x-rays performed by hospital technicians, whereas the professional component consists of physicians' ordering particular x-rays to aid in the diagnosis and treatment of patients, reviewing or reading developed x-ray films, and reporting the findings to a data processing system and/or a patient's medical record.

Smith claimed, *inter alia*, that YNHH billed for its technical services despite the fact that studies were "completed but not read" by a qualified physician. Under Smith's interpretation of the applicable law, YNHH billed Medicare and Medicaid for technical services that were not qualified for payment under statutes and regulations by which a provider became entitled to compensation for radiological services. Smith alleged that by obtaining payments to which it was not entitled to receive, YNHH perpetrated fraud on the Government.

Relator Failed to Allege an Actionable Regulatory or Statutory Violation

However, the court noted that Smith failed to provide the court with a citation of a statutory or regulation provision, which the hospital allegedly violated. Moreover, the court stressed that the hospital's certification of the technical component did not constitute a certification of either the medical efficacy or full performance of the professional component. In other words, the court drew a dividing line between the two com-

ponents, each with their own separate and distinct certification requirements. Because Smith blurred this line and treated the two components as one unit, the court ruled that Smith erroneously tied additional obligations to the professional component.

The court ruled that, at the most, the allegations demonstrated a lack of qualification for compensation for the professional component of healthcare services. Because YNHH did not bill for the professional component of the services, the court dismissed the relator's claims against the hospital.

Improper Venue Over Unrelated, Out-of-State Defendants

As for the Smith's remaining claims against NYPH and Cornell, two New York entities, the court ruled that it did not have jurisdiction over the parties. While the FCA venue provision, 31 U.S.C. § 3732(a), allows plaintiffs to reach multiple defendants in a jurisdiction where only one defendant is found, the multiple suits must still "involv[e] the same scheme or pattern of fraudulent conduct." S. Rep. No. 99-345 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5297. Here, the relator alleged a similar set of facts, but he did not allege that the defendants engaged in a common scheme of fraud against the Government. Additionally, there were no allegations that the New York defendants took any acts that were committed in or had any effect in the forum state of Connecticut.

Therefore, the court dismissed the *qui tam* action against all three defendants.

C. Procedural Defects

U.S. ex rel. Bogart v. King Pharmaceuticals, 2006 WL 293582 (E.D. Pa. Feb. 7, 2006)

A Pennsylvania district court granted the plaintiff-States motion for summary judgment, seeking dismissal of any claims of the relator to a share of settlements against a pharmaceutical manufacturer. The court ruled that the ability of the relator to receive a share of the settlement was dependent upon him complying with the procedural requirements of the various state *qui tam* statutes. In turn, because the relator failed to follow state law requirements that notice be given to the various state governments, the court refused to grant the relator a share of the settlement.

Edward Bogart brought a *qui tam* action against King Pharmaceuticals, under the *qui tam* statutes of various states, claiming that the pharmaceutical manufacturer overcharged states for drugs. The action was originally filed on March 12, 2003. Bogart made no disclosures to any of the state governments prior to its filing. In fact, according to the court, Bogart did not provide copies of or otherwise serve the complaint or otherwise give notice to any of the states of any of the allegations in the complaint until June 2004.

On June 17, 2004, Bogart filed an amended complaint that added claims under the New Mexico Medicaid False Claims Act. Bogart supposedly made no disclosures to any of the state government plaintiffs relating to any of the claims in the amended complaint prior to its filing. Again, the relator's initial disclosure and notice to any of the states was supposedly made on June 17, 2004, via a letter from the relator's counsel, which included copies of the amended complaint.

After the states reached a settlement with King, the states moved for summary judgment, seeking dismissal of any claims of the relator to share of settlements. The court was then faced with the issue of whether the Bogart's procedural failures effectively defeated his claims to any of the states' settlements as a matter of law.

Qui Tam Action's Service Defects Frustrated the Statutory Purposes

As an initial matter, the court highlighted that it is long-settled that a party pursuing a statutory remedy must comply with all the procedures the statute mandates. *See United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157 (1914). Where a statute creates a new remedy, as the states' *qui tam* statutes do, "upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." *Id.* In turn, the court held that the relator's right to a share of the states' settlements with King depend on whether he established those rights under the states' individual statutes.

The court agreed with the prevailing view that the FCA's filing and service requirements are not merely jurisdictional, but instead calls for a balancing of factors when determining whether procedural defects warrant dismissal. *See, e.g., United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995); *United States ex.*

rel. Pilon v. Martin Marietta Corp., 60 F.3d 995, 998–99, 1001 n. 4 (2d Cir. 1995)(expressing reluctance to find that FCA requirements are jurisdictional and examining the impact of filing and service defects on purpose of statute).

Borrowing from *Pilon*, the court considered whether Bogart's failure to adequately serve the states "incurably frustrated the statutory objectives underlying the filing and service requirements." *Pilon,* at 998. The court found that it did and thus warranted dismissal of his claims to a share of the states' settlements. As the court stressed, "[T]he States' *qui tam* statutes' service requirements were instituted to protect each State's right and ability to control the litigation involving their claims in their own courts. Although the States determined that the settlements reached with Defendants were fair and reasonable, the Relator's failure to adequately serve the States still frustrated the purposes of the States' statutes and prejudiced the States accordingly."

Moreover, the court explained that if the states had received timely notice, they could have intervened earlier and participated fully in the investigation and subsequent settlement negotiation.

In turn, the court granted the states' summary judgment motion, thereby dismissing Bogart's claims for a share from the states' settlements.

***U.S. ex rel. Health Outcomes Technologies v. Hallmark Health System, Inc.*, 409 F. Supp. 2d 43 (D. Mass. Jan. 6, 2006)**

After the Government intervened in an FCA *qui tam* action and transferred the action to the proper venue, a Massachusetts district court ruled that the claims against the defendants did not relate back for limitations purposes to the date the relator originally action. Moreover, the court dismissed the claims in the Government's complaint-in-intervention that dealt with years not asserted in the relator's original complaint.

On February 27, 1996, Health Outcomes Technologies, a Pennsylvania corporation, filed an FCA *qui tam* action in Eastern District of Pennsylvania against two in-state hospitals and 98 out-of-state hospitals, alleging that the hospitals committed fraud involving Medicare by "knowingly submitting to Medicare, between 1992 and 1997, false claims for the treatment of patients that did not have the primary diagnoses the hospitals claimed." In August, 2001, the Eastern District of Pennsylvania severed the claims against the Massachusetts hospitals and transferred them to the District of Massachusetts. On December 31, 2003, the Government intervened in the action.

Three of the Massachusetts hospitals filed a motion to dismiss, arguing, *inter alia*, that the action was barred by FCA statute of limitations provision.

Venue Was Lacking for Out-of-State Defendants

The defendants argued that it was clear on the face of the original complaint that the Eastern District of Pennsylvania was not a proper venue in which to bring a claim against them. They also maintained that it was clear from the conduct of the litiga-

tion since its inception that there was never any intent to proceed against them in that jurisdiction and that, under these circumstances, the claims should have been filed initially in Massachusetts where venue was proper. Thus, the defendants asserted that any claims that were untimely as of the date the case was transferred to Massachusetts, specifically any claims for conduct prior to August 9, 1995, must be dismissed on statute of limitations grounds.

In the original complaint, the relator only brought claims against two defendants who allegedly "reside[d] and transact[ed] business in the Eastern District of Pennsylvania." As to the remaining 98 defendants, the relator premised venue on 31 U.S.C. § 3732(a) which states, "Any action under Section 3730 may be brought in any judicial district in which the Defendant or, in the case of multiple defendants, any one Defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred."

Despite the wording of Section 3732(a), the court ruled that venue was lacking as to the out-of-state defendants, for joinder of defendants is only proper where the plaintiff alleges a conspiracy, concert of action, communication, contract, joint or several liability between (or any kind of relationship among) the defendants. Specifically, Section 3732(a) does not operate independently of Fed.R.Civ.P. 20(a) which states, "All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

Because the original complaint did not attempt to allege any basis under Rule 20 to support invocation of § 3732(a), the court ruled that venue was lacking.

Government Failed to Show "Good Faith"

The defendants also argued that venue was clearly improper in the original district due to misjoinder and, thus, transfer was no transfer at all. The Government, however, seeking a tolling of the statute of limitations, countered with 28 U.S.C. 1406(a), which states, "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

However, the court, pointing to a Supreme Court ruling, insisted on a "good faith" showing from the Government. Specifically, in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466–67 (1962), the Supreme Court stated, with respect to § 1406(a), "The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. . . ."

In addition, in *Biby v. Kansas City Life Insurance Co.*, 629 F.2d 1289 (8th Cir. 1980), the Eighth Circuit held that, with respect to tolling the statute of limitations, "[s]ome measure of good faith expectation of proceeding in the court in which the complaint is filed is essential". *Id.* at 1294. The *Biby* court went on to conclude that

Goldlawr offers § 1406 as protection to the plaintiff who erroneously guesses about some elusive fact, not the plaintiff who engages in a crafty procedural ploy. *Id*.

Lastly, the present court highlighted the application of *Goldlawr and Biby* in a recent district court decision dealing with relator's allegations against the Arkansas hospital-defendants. *See United States v. St. Joseph's Regional Health Center,* 240 F. Supp. 2d 882 (W.D. Ark. 2002). In *St. Joseph's*, the court ruled that "where a plaintiff deliberately selects an improper forum; makes no effort to serve the defendant in that forum so that the defendant cannot seek to correct the error; makes the transfer request itself-*ex parte*-for its own purposes; and never had any intention of prosecuting the claim in the forum of filing, there is no analytical basis for the filing to toll the statute of limitations." *Id*. at 891–92.

Mimicking *St. Joseph's* decision, the present court determined that the government never intended to proceed with the action in Pennsylvania but instead used the Eastern District of Pennsylvania as a "holding dock" for 98 misjoined hospital-defendants while it investigated and engaged in settlement negotiations with various defendants.

Court Refused to Grant a Presumption of Good Faith for Government Lawyers

The Government, citing *Am-Pro Protective Agency v. United States*, 281 F.3d 1234 (Fed. Cir. 2002), attempted to save the suit by arguing that government attorneys conducting litigation for the United States enjoy a special presumption of good faith. However, *Am-Pro Protective Agency* supports the proposition that *government officials* are accorded a presumption of good faith when carrying out their duties; the court refused to extent the same umbrella to *government lawyers* with respect to the conduct of civil litigation. "As the defendants point out, the government's argument would, in essence, permit an end-run around the Federal Rules of Civil Procedure for all government lawyers."

Accordingly, finding the reasoning of the *St. Joseph's* decision to be persuasive and having reviewed the law and facts relating to the present case, the court concluded that the Government's claims did not relate back to the date of the filing of the original complaint but only to the date when the case was transferred to the present court. Therefore, under the FCA six-year statute of limitations, all claims before August 9, 1995 were dismissed as being untimely.

D. Lack of Retroactivity

U.S. ex rel. Bogart v. King Pharmaceuticals, 2006 WL 293582 (E.D. Pa. Jan. 23, 2006)

A Pennsylvania district court granted a plaintiff-State's motion to dismiss a *qui tam* relator's pendent claim under the State's Medicaid False Claims Act, for the allegedly false claims were submitted prior the Act's enactment and the Act did not apply retroactively to claims involved in the relator's action. Moreover, the court ruled that the relator was not entitled to recovery under the "common fund doctrine," for this theory is not applicable to False Claims Act *qui tam* actions.

Edward Bogart filed a *qui tam* action under various state statutes, including the New Mexico False Claims Act, alleging that King Pharmaceuticals defrauded the Medicaid system during a time period that ended on December 31, 2002. After the states reached a settlement with King, New Mexico filed a motion to dismiss Bogart's claim to any share of its settlement, arguing that the state statute was not effective until May 19, 2004. Bogart countered by arguing that the statute applied retroactively to cover his alleged claims.

Presumption Against Retroactivity of Statutes

As an initial matter, the court noted that courts have long favored a presumption against statutory retroactivity. *See Landgraf v. USI Film Products, et al.*, 511 U.S. 244 (1994). The relator, however, cited *Bradley v. School Board of Richmond* in support of a presumption *in favor of* statutory retroactivity, unless such retroactivity "would result in manifest injustice or there is statutory discretion or legislative history to the contrary." 416 U.S. 696, 711 (1974).

According to the court, the relator failed to note, however, that the Supreme Court "anchor[ed][its] holding in [that] case on the principle that a court is to apply the law in effect at the time it renders its decision," unless doing so would result in the aforementioned injustice or would ignore statutory discretion or legislative history. *Bradley*, 416 U.S. at 711.

The court quickly distinguished the present case from *Bradly*, noting that *Bradley* concerned the question of whether a change in the law ought to be applied to a case on direct review at the time the new law is enacted.

The court stressed that where a new statute would have a genuinely retroactive effect and thus "impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed," the presumption against retroactivity holds, barring clear congressional intent to the contrary. *Id.* Thus, in order to determine whether the New Mexico statute applies retroactively, the court turned to the same question concerning the federal FCA.

Specifically, in *Hughes Aircraft Co. v. U.S., ex rel. Schumer,* the relator had argued that the 1986 FCA Amendment should be applied retroactively to false claims made between 1982 and 1984. 520 U.S. 939 (1997). The Supreme Court rejected the relator's argument.

In the present case, the court found even more reason to reject retroactivity. In *Hughes*, the basic statute already existed at the time of the lawsuit, and the court was called upon merely to consider the retroactive applicability of an amendment. In the instant case, the New Mexico False Claims Act itself did not exist at the time the relator's action accrued. According to the court, "Surely there is no better example of a legislative development that permits more plaintiffs to bring suit than was possible before the statutory enactment-literally creating a new cause of action. With no legislative history available to the contrary, this court must uphold the presumption against retroactive applicability and hold that the Relator's claim under the NM False Claims Act fails."

"Common Fund Doctrine" Is Not Applicable to FCA Settlements

In the alternative, Bogart argued that even if the NM False Claims Act had no retroactive applicability, the State's motion to dismiss was premature because he was entitled to a share of New Mexico's settlement agreement recovery under the "common fund doctrine."

"The common fund doctrine provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 820 (3d Cir. 1995).

The theory, however, has been applied "only in a few well defined situations," namely trust law, class actions and insurance subrogation. Bogart sought to extend the doctrine to the FCA context so that he could claim a share of the settlements of the majority of states without *qui tam* statutes.

According to the court, the primary consideration in an application of the common fund doctrine is "whether the circumstances of th[e] case present an inequity that needs redress." *Brytus v. Spang & Co.*, 203 F.3d 238, 245 (3d Cir. 2000).

The court ruled that such an inequity did not exist in the FCA context. First, and perhaps most importantly for the court, a common fund did not exist, for each of the states, including the non-*qui tam* states, reached a separate and severable settlement agreement with King. Second, New Mexico was not looking for a "free ride," as alleged by Bogart, as to the benefits received due to Bogart's claims. Instead, the court highlighted that each of the non-*qui tam* states had directly signed an individual settlement agreement with King. To rule otherwise, the court complained that it would pervert the intentions of states which have decided not to codify *qui tam* statutes. In other words, Bogart's "extension of the common fund doctrine to the current context would essentially impose whistleblower reward statutes on 38 sovereign state governments that have decided not to enact them." The court, refusing to take that step, granted the motion to dismiss.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Joshi v. St. Luke's Hospital, Inc., 2006 WL 522195 (8th Cir. March 6, 2006)

The Eighth Circuit, affirming a Missouri district court's dismissal of an FCA *qui tam* action pursuant to Rule 9(b), ruled that the relator's allegations that "every" claim submitted by the defendant-hospital was fraudulent lacked sufficient "indicia of reliability," for the relator was a physician, not a member of the billing department, and the relator's conclusory allegations were not supported by, at least, some representative examples. Moreover, the court refused to consider the examples actually provided by the relator, for these allegedly false claims described incidents that fell outside of the FCA statute of limitations period.

From 1989 to 1996, Dr. Keshav S. Joshi practiced as an anesthesiologist at St. Luke's Hospital in Missouri. During the course of his employment, Joshi discovered that Dr. Mohammed Bashiti, St. Luke's chief of anesthesiology, was allegedly conspiring with the hospital to submit false claims to the Government. In April 2004, Joshi filed an FCA *qui tam* action against Bashiti and the hospital, alleging violations of 31 U.S.C. 3729(a)(1) and (a)(3). More specifically, Joshi alleged, *inter alia*, that the hospital requested and received Medicare reimbursement for services performed by Bashiti at the reimbursement rate for medical direction of services, when the hospital was actually entitled only to the lower reimbursement rate for medical supervision or no reimbursement at all.

The district court dismissed Joshi's complaint for failing to plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b). The lower court also denied Joshi's motion to amend the complaint, concluding that the proposed amendments described incidents that fell outside the statute of limitations period and did not cure the complaints deficiencies. Joshi appealed.

Allegations Lacked Sufficient "Indicia of Reliability"

In affirming the district court's decision, the Eighth Circuit borrowed liberally from the Eleventh Circuit's reasoning in *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1011 (11th Cir. 2005) (per curiam), in which the relator alleged that his former employers violated the FCA by falsifying certificates of medical necessity and billing for unnecessary or nonexistent treatment to unlawfully obtain Medicare payments. In *Corsello*, the relator, a sales employee who did not work in the billing department, did not allege any details concerning false claims actually submitted for payment; rather, he alleged that the fraudulent schemes were pervasive and wide reaching in scope, and therefore

the defendants must have submitted fraudulent claims. *Corsello*, 428 F.3d at 1013. The Eleventh Circuit noted that the allegations "failed to provide a factual basis to conclude fraudulent claims were ever actually submitted to the government in violation of the [FCA]." *Id*. Thus, the court dismissed the relator's complaint for failing to plead fraud with particularity, noting that the allegations lacked sufficient "'indicia of reliability' . . . because they failed to provide an underlying basis for [the relator's] assertions." *Id*. at 1013–14.

Similarly, the Eighth Circuit complained that Joshi's argument that "every" claim submitted from the anesthesiology department was fraudulent lacked sufficient "indicia of reliability." According to the court of appeals, "Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department, and his conclusory allegations were unsupported by specific details of St. Luke's and Dr. Bashiti's alleged fraudulent behavior."

Moreover, concerned that Joshi's "conclusory" allegations would not allow the defendants to craft a response, the court stressed that the relator should have provided *some* representative examples of their alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors. Because Joshi's complaint was supposedly void of a single, specific instance of fraud, much less any representative examples, the Eighth Circuit ruled that the district court properly dismissed the complaint for failing to comply with Rule 9(b).

Proposed Amendments Not Allowed Because They Were Time-Barred

Joshi countered by proposing to add a table summarizing medications issued to seven patients (identified by their initials) during six days in November 1995. The table and accompanying allegations would have indicated that the patients were administered a particular quantity of medicine and the hospital billed for a quantity greater than the amount actually administered.

However, the court rejected Joshi's proposed amend, for the specific instances of fraud cited by Joshi all occurred in November 1995 and Joshi failed to tie the allegations into a continuous pattern of conduct by St. Luke's and Bashiti. In turn, the court of appeals ruled that the FCA six-year statute of limitations provision barred these additional claims.

Thus, the Eighth Circuit concluded that the lower court did not err in dismissing Joshi's complaint under Rule 9(b) and in denying Joshi's motion for leave to amend the complaint.

***U.S. ex rel. Piacentile v. Beverly Enterprises, Inc.*, 2006 WL 686474 (W.D. Ark. March 16, 2006)**

An Arkansas district court, granting a defendant's Rule 9(b) motion to dismiss an FCA *qui tam* action, stressed that the relator must provide some representative examples of the alleged fraudulent conduct, specifying the time, place, and content

of their acts and the identity of the actors. Here, because the relator pled only a generalized description of how certain agents and employees of the defendants believed their employer was involved in a scheme to defraud the Government, the court ruled that the particularity requirements of Rule 9(b) were not met.

Joseph Piacentile filed an FCA *qui tam* action alleging that Beverly Enterprises, Inc., Hill-Rom Company, and Hanger Orthopedic Group, Inc. presented false claims for reimbursement to Medicare, Medicaid, and other federal health care programs, and conspired to provide prohibited kickbacks and referrals for their services.

The defendants filed a motion to dismiss the action, arguing that the complaint failed to plead fraud or conspiracy with the requisite specificity, as required by Rule 9(b).

Rule 9(b) Not Satisfied Because Complaint Lacked Representative Examples of False Claims

In granting the defendants' motion to dismiss, the court ruled that the complaint failed to satisfy Rule 9(b). The court was particularly swayed by a recent Eighth Circuit decision, *U.S. ex rel. Joshi v. St. Luke's Hospital*, 2006 WL 522195 (8th Cir. 2006), which involved allegations similar to those of the case at bar. In *Joshi*, the relator-anesthesiologist alleged that the defendant-hospital had submitted false claims for Medicare and Medicaid reimbursement for anesthesia services performed by one of its physicians, and alleged that the physician had conspired with the hospital in a scheme to defraud the Government. However, the *Joshi* court dismissed the action under Rule 9(b), for the relator had failed to provide *some* representative examples of their alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors.

The court found that the same pleading deficiencies existed in the case at bar: "The complaint pleads only a generalized description of how certain agents and employees of the defendants believed their employer was involved in a scheme to defraud. This is not the type of specificity which will satisfy the requirements of Rule 9."

However, unlike *Joshi*, the present court granted the relator thirty days to amend his complaint to satisfy the pleading requirements of Rule 9(b) by supplying some representative examples. If, however, the relator fails to amend his complaint during this time, the court stated that it would dismiss the suit *sua sponte*.

***U.S. ex rel. Raymer v. The University of Chicago Hospitals*, 2006 WL 516577 (N.D. Ill. Feb. 28, 2006)**

In a *qui tam* action in which Federal Government refused to intervene in the federal claims and the State intervened and filed a complaint-in-intervention for the state claims, an Illinois district court refused to consider the State's complaint and the attached exhibits in ruling on the adequacy of the relators' pleadings. In turn, while the State made allegations that potentially satisfied the Rule 9(b) particular-

ity requirements, the relators did not meet this hurdle, for they did not plead with particularity the identity of the person making or submitting the false claims and did not identify the defendant personnel who authorized the allegedly false billing. Merely alleging that "management" authorized the false billing was not sufficient.

Donald Raymer and Michael Grosche, formerly employed as registered nurses in the University of Chicago Hospital's Neonatal Intensive Care Unit (NICU), filed a *qui tam* action against their former employer, raising claims under the federal FCA and the Illinois Whistleblower Reward and Protection Act, 740 ILCS 175/1 *et seq*. While the Federal Government declined to intervene in the federal portion of the suit, the State intervened and filed an amended complaint.

According to the plaintiffs' complaint, the NICU regularly "double bunked" and occasionally "triple-bunked" babies by "plac[ing] them back to back in radiant warmers, isolettes, or open cribs in a bed space designed for only one infant," thus violating various medical authorities and guidelines which recommend or require that babies be separated from adjacent bed spaces by a minimum of four to eight feet. The plaintiffs alleged that the hospital's incentive to "double-bunk" was because the hospital was allegedly paid or reimbursed by the state and federal governments on a per capita per diem, not a per bed per diem, basis, thus allowing the hospital to exceed the maximum number of NICU beds and to earn profits in excess of its permissible patient capacity. Lastly, the plaintiffs alleged that the combination of double-bunking and failing to immediately isolate infected NICU infants resulted in an extraordinarily high rate of serious infections, lengthier and more costly hospitalizations, and at least one baby's death.

The hospital filed a motion to dismiss both complaints.

State's Complaintand Attachments Not Considered in Assessing Sufficiency of Relators' Complaint

As an initial matter, the court pointed out that the multiple exhibits attached to the Illinois complaint could not be considered when determining the adequacy of the relators' complaint. *See Gavin v. AT & T Corp.*, 2004 WL 2260632, at *1 (N.D. Ill. 2004) (stating that "'documents attached to a motion to dismiss are considered part of the pleadings if *they are referred to in the plaintiff's complaint* and are central to his claim,'" and concluding that even if "defendants' submissions appear to be 'central to the complaint,' but not one is expressly referenced therein, [ ] they are beyond the scope of the pleadings") (quoting *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998)) (emphasis in original). Therefore, the court considered the relators' complaint and Illinois' complaint separately in deciding the motions to dismiss.

Broad References to "Corporate Management" Do Not Satisfy Rule 9(b)

The court turned its attention to whether the relators' complaint satisfied the Rule 9(b) litany of "the who, what, when, where, and how" of the predicate acts of that

fraud. The court, finding the "who" element to be particularly lacking in the relators' complaint, rejected the relators' excuse that this information was in the defendant's exclusive possession. The court concluded that the relators, as nurses who worked for extended periods in the NICU, should have been capable, at a minimum, of identifying the titles or positions of those responsible superiors, and perhaps others, who allegedly promoted these NICU medical practices. According to the court, "Allegations about specific individuals who allegedly committed on one or more occasions one or more of the three predicate acts against Medicaid or Tri-Care infants must be pled."

Alternatively, the relators argued that their complaint specifically identified those individuals responsible for the alleged practices. However, the court noted that the complaint only referenced the "U of C Hospital" or the "U of C Hospital management," and that these vague allegations about corporate management does not sufficiently identify the particular employees who directed or engaged the fraudulent activity.

Moreover, the court ruled that the relators also failed to plead with the necessary specificity other aspects of the predicate acts, including when these acts occurred, which particular Medicaid or Tri-Care infants suffered from which of the allegedly illegal practices, and how the acts were carried out.

Complaint Failed To Specify Which Regulations Were Violated

The court also chastised the relators for failing to indicate which statutes or guidelines the hospital violated. Indeed, while the Illinois complaint identified specific laws and regulations that the hospital allegedly violated, the relators' raised a general allegation that "U of C Hospital expressly certify that they [*sic*] comply with all state and federal laws and accreditation guidelines as a condition of reimbursement."

The court was particularly swayed by a Seventh Circuit decision, *Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999), which held that "minor technical regulatory violations do not make a claim 'false' for purposes of the FCA; the existence of mere technical regulatory violations tends to undercut any notion that a prior representation of regulatory compliance was knowingly and falsely made in order to deceive the government." Without the relators circling the specific regulations at issue, the court complained that it could not determine whether the alleged violations were merely technical or were instead so sufficiently serious that certifications of regulatory compliance made to Medicaid amounted to fraudulent misrepresentations.

Thus, with regard to whether the alleged practices violated state and federal regulations or guidelines, the court found that the relators' complaint did not meet the Rule 9(b) pleading standard.

In addition to rejecting the relators' allegations of fraudulent healthcare practices, the court also ruled that the relator had not sufficiently pled that false claims were actually submitted to Medicaid. According to the court, Rule 9(b) requires the relators to plead with particularity "the identity of the person making the misrepresentation" or, in other words, the hospital personnel who authorized the billing. *Wade v. Hopper*, 993 F.2d 1246, 1250 (7th Cir. 1993) (quoting *Schiffels v. Kemper Financial Servs.*, 978

F.2d 344, 352 (7th Cir. 1992). Again, because the allegations merely referred to the "U of C Hospital" or "management," the court ruled that the particularity requirements of Rule 9(b) was not satisfied.

Interestingly, the court maintained that this information was easy to find and was accessible, for the allegedly false claims were submitted to the Government and were, therefore, "in the public record."

Thus, the court granted the hospital's motion to dismiss the relators' complaint pursuant to Rule 9(b). The court did not address the sufficiency of the State's amended complaint.

***U.S. ex rel. Smith v. The Boeing Company*, 2006 WL 542851 (D. Kan. Feb. 27, 2006)**

A Kansas district court dismissed an FCA *qui tam* action pursuant to Rule 9(b), for the relators' complaint did not identify any contractual provisions, regulations or statutes under which the defendants presented false or fraudulent claims for payment or approval. Moreover, the court ruled that the complaint failed to provide any detail about the time, place, or contents of the false claims submitted to the Government. However, the court, allowing the relators' Section 3730(h) retaliation claims to stand, pointed out that Rule 12(b)(6), rather than Rule 9(b), governs this claim, meaning the claim cannot be dismissed unless it is beyond doubt the relators can prove no set of facts in support of it.

Taylor Smith and Jeannine Prewitt filed an FCA *qui tam* action alleging that their former employer, The Boeing Company, and one of its subcontractors, Ducommun, Inc., violated the FCA by submitting false or fraudulent claims for payment to the Government. The relators claimed that shortcomings in the manufacturing and quality control processes at Ducommun resulted in delivery to Boeing of "bogus" or "unapproved" aircraft parts, and that after the relators brought these facts to Boeing's attention, Boeing concealed the information, submitted false claims for payment relating to aircraft and parts delivered by Boeing to the Government, and retaliated against the relators.

After the Government declined to intervene, the defendants filed motions to dismiss the complaint, arguing that the relators' FCA claim failed to satisfy Rule 9(b) and that their retaliation claim failed to state a claim upon which relief could be granted.

Complaint Did Not Satisfy Rule 9(b)

Boeing argued that the complaint failed to allege that any fraudulent claims were actually submitted to the Government. Ducommun, on the other hand, also argued that the relators failed to allege that it knowingly defrauded the Government. Pointing out that it supplied parts to Boeing's commercial airplanes division, Ducommun maintained that "[a]bsent an allegation that any particular person at Ducommun knew that parts on a particular contract with Boeing were ultimately going to be sold to the government, the relators cannot state a cause of action against Ducommun." Ducom-

mun also highlighted that the relators failed to identify any specific defective parts sold to the Government, any claims of Ducommun to Boeing for payment, any particular contracts or subcontracts that were at issue, or the impact on the Government from Ducommun's alleged conduct.

The relators, looking for the court to relax the Rule 9(b) standards, pointed out that, as former Boeing employees, they had limited access to company's internal documents. For support, the relators point to *United States ex rel. Roby v. Boeing Co.*, 184 F.R.D. 107 (S.D. Ohio 1998), a similar case where the court said the relators could not be expected to know the identities of the individuals at Boeing who engaged in the alleged fraud, because such an evidentiary matter might be exclusively within the knowledge of Boeing.

After dissecting the relators' complaint, the court concluded that, while the relators raised a number of potential defects with the aircraft and the defendants' quality control practices, the relators did no identify any contractual provisions, regulations or statutes under which the defendants presented false or fraudulent claims for payment or approval. Moreover, the court stressed that a complaint alleging fraud must set forth the time, place and contents of the false representations, the identity of the party making the false statements and the consequence thereof. Because the complaint failed to meet these requirements, the court ruled that it did not satisfy Rule 9(b).

The court also rejected the relators' argument that the complaint—though lacking in detail—was sufficient because the relevant documents were in Boeing's possession or within its knowledge. The court conceded that "[a]llegations of fraud *may be based on information and belief*" but only "when the facts in question are peculiarly within the opposing party's knowledge *and the complaint sets forth the factual basis for the plaintiff's belief.*" *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1237 (10th Cir. 2000) (quoting *Scheidt v. Klein*, 956 F.2d 963 (10th Cir. 1992)) (emphasis in original). Because the relators did not satisfy these prerequisites, the court granted the defendants' motion to dismiss the complaint pursuant to Rule 9(b). However, the court granted the relators' request for leave to file an amended complaint.

Relators Stated a Claim Under Section 3730(h)

As for the relators' Section 3730(h) retaliation claim, the court refused to accept the defendants' interpretation of Rule 9(b). The court pointed out that Rule 12(b)(6), rather than Rule 9(b), governs this claim, meaning that the claim cannot be dismissed unless it is beyond doubt the relators can prove no set of facts in support of it.

The relators maintained that they engaged in conduct protected by the FCA, including the investigation of "matters which are calculated, or reasonably could lead, to a viable FCA action." The defendants counter that, under *U.S. ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996), the relators had to "make clear their intentions of bringing or assisting in an FCA action" to overcome the presumption that they were merely acting in accordance with their employment obligations.

While the relators did not allege that they told Boeing that they were contemplating an FCA action, they maintained that their situation was distinguishable from

Ramseyer, for they informed Boeing of their intent to report the noncompliance to the Government. In turn, the relators maintained that they were investigating matters of a sort that could reasonably lead to an FCA action and that Boeing was aware of that fact. Because Boeing was unable to cast doubt upon the relators' ability to prove a set of facts in support of these allegations, the court allowed the Section 3730(h) claims to survive. Accordingly, Boeing's motion to dismiss the FCA retaliation claims under Rule 12(b)(6) was denied.

***U.S. ex rel. Gibbons v. Kvaerner Philadelphia Shipyard, Inc.*, 2006 WL 328362 (E.D. Pa. Feb. 10, 2006)**

A Pennsylvania district court, refusing to dismiss an FCA *qui tam* action, ruled that the relator's complaint satisfied Rule 9(b), for the relator supported her false claim allegations with the essential factual background or the "who, what, when, where, and how." The court also refused to engage the defendant's argument that the relator was not an "original source" of the allegations, for the defendants failed to allege that there was a public disclosure and the "the court reaches the original source question only if it finds the plaintiff's suit was based on information publicly disclosed."

Kimberly Gibbons worked as at auto welder for Kvaerner Philadelphia Shipyard as part of a federally subsidized job training program. During the course of her employment, she discovered that Kvaerner was defrauding the Government by submitting false employee training records in order to receive larger amounts of training subsidies. Specifically, under an agreement with the Department of Defense and the Department of Labor, Kvaerner trained and employed ship workers in exchange for subsidies, which were used to provide salaries and wages to the employees who participated in the training program.

In order to receive subsidies, Kvaerner was required to meet specific requirements set forth by the agreement, including establishing a plan to distribute to employees assessments in a variety of different competencies and to monitor employee hours. According to Gibbons, tying federal funding to these requirements, however, had a consequence that Kvaerner took advantage of. Essentially, the more training that was required for each employee determined the level of funding that Kvaerner would receive. The poorer the results on the assessments, the greater the funding, for if an employee achieved an appropriate skill level, then he was removed from the funding. Gibbons alleged that Kvaerner fraudulently took advantage of this situation, by under training employees. Gibbons also alleged that Kvaerner submitted false claims, inflating the number of employees it employed. Gibbons raised these allegations in FCA *qui tam* action against Kvaerner.

After the Government declined to intervene in the action, the defendant filed a motion to dismiss, arguing that the complaint failed to meet the Rule 9(b) standard and that the relator was not an original source.

Complaint Satisfied Rule 9(b)

The court quickly determined that the complaint satisfied Rule 9(b), for she supported her false claim allegation with the essential factual background or the "who, what, when, where, and how." *In re Rockefeller Center Proposed Securities Litigation*, 311 F.3d 198, 217 (3d Cir. 2003).

Most importantly for the court, the complaint included great detail supporting the alleged "how" and "what" elements of fraud. Gibbons stated that Kvaerner's fraudulent practices were designed to artificially maintain funding to the Shipyard from the Government, and the complaint provided specific examples of this conduct by detailing efforts that included advising workers to falsely answer questionnaires from Department of Labor investigators and the creation of a work environment where workers feared reprisals if they did not respond to the questionnaires as instructed.

The complaint also sufficiently alleged "when" the violations took place, detailing that the fraudulent practices began in approximately 2000 and continued through the middle of 2004. As for the "where" element, Gibbons pointed to the "Grant Block," a specific building located next to the paint shop, as the area where employees ostensibly went for training, but instead where employees did no work, did not receive training, and slept or read newspapers.

Lastly, the complaint sufficiently pled the "who" element by singling out two individuals, who would go around prior to an audit and approach each individual who did not sign one or more of the training sheets and tell them that they were required to sign, print their name, social security numbers and department.

With all of the Rule 9(b) elements in place, the court denied the defendant's motion and ruled that the complaint sufficiently cleared the 9(b) hurdle.

FCA Public Disclosure Bar Did Not Preclude Suit

The court also rejected the defendant's interpretation of the Section 3730(e)(4)(B) original source exception. The defendant had argued that the action could not move forward, for the relator did not qualify as an "original source" of the information, as defined in the Act. However, under the language of the statute, a "court reaches the original source question only if it finds the plaintiff's suit is based on information publically [sic] disclosed." *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994).

Here, there were two crucial problems with the defendant's argument. First, the defendant failed to argue that the alleged fraud was publicly disclosed. Under the language of the Act, whether Gibbons was an original source only becomes an issue if it was established that her knowledge of the alleged fraud came about through a public disclosure. The court ruled that the "failure to even allege such a public disclosure doom[ed] the application of the False Claims Act's jurisdictional bar provision."

The second problem was that Gibbons, in fact, claimed to be an original source. Even if the defendant had alleged that her knowledge was attained through public disclosures, the court determined that Gibbons appeared to satisfy the statutory defini-

tion of an "original source." Specifically, Gibbons claimed that she acquired her knowledge of the alleged fraud based on the direct and independent knowledge she acquired through her capacity as a welder, team leader, and union representative on the Board of Directors of Kvaerner. Furthermore, she voluntarily provided this information to the Government before bringing the suit.

Accordingly, the court refused to apply the FCA public disclosure bar to Gibbons' *qui tam* suit.

***U.S. ex rel. Bartlett v. Tyrone Hospital, Inc.*, 2006 WL 221494 (W.D. Pa. Jan. 27, 2006)**

A Pennsylvania district court dismissed an FCA *qui tam* action for failing to comply with the particularity requirements of Rule 9(b) and for failing to properly allege an agreement, as required to establish a Section 3729(a)(3) conspiracy claim. In addition, the court dismissed the plaintiff's Section 3730(h) retaliation claim, for the plaintiff's actions of seeking an internal audit, which was an inquiry for internal business purposes only, did not constitute "protected activity" for the purposes of establishing an FCA retaliation claim.

Thomas Bartlett, the former CEO of Tyrone Hospital, and Kimberly Gummo, the former Human Relators Director of Tyrone, filed an FCA *qui tam* action against their former employer, alleging that the hospital and Quorum Health Resources, L.L.C. engaged in scheme to defraud federal health care programs. Specifically, the relators alleged that the FCA was violated through the fact that arrangements between the defendants resulted in claims being made under the federal healthcare programs, including Medicare, Medicaid and TRICARE/CHAMPUS health insurance programs, that violated the Anti-kickback Statute, 42 U.S.C. § 1320a–7b(b), and the Stark Statute, 42 U.S.C. § 1395nn, and that such claims were submitted to the Government being certified as not having violated these or any other federal statutes. The relators also alleged violations of the FCA retaliation provision, 31 U.S.C. 3730(h).

After the Government declined to intervene in the action, the defendants filed a motion to dismiss, arguing that the relators' complaint did not satisfy the particularly requirements of Rule 9(b).

Complaint Did Not Satisfy Rule 9(b)

While the court agreed that illegal kickback and the illegal self-referral schemes could form the basis of a viable FCA action, the court ruled that Rule 9(b) was not satisfied, for a description of any actual claims submitted for payment was somewhat vague and practically non-existent. The court also agreed that the relators' application of an "implied certification theory" had merit, pointing to *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 238 F. Supp. 2d 258, 263–266 (D.D.C. 2002), but the specificity with which the actual violations were alleged did not provide the necessary detail.

In essence, the particularity with which the relators presented consisted of a grouping of all individual claims for reimbursement dating from 1994 through the present that contained a claim for reimbursement for CT scan services provided by the hospital. The court ruled that this description of false claims was insufficient to satisfy Rule 9(b), for no other information was offered that differentiated these claims from others, such as dates or the names of the specific doctors who made the referrals.

The relators countered that the information necessary to satisfy Rule 9(b) was within the defendant's control, thereby demanding a lower pleading standard for the relators. However, the court ruled that even pleading the fraud claims based upon "information and belief" must be accompanied by a statement of what efforts were taken to obtain such information from the opposing party. *In re American Travellers Corp. Securities Litigation*, 806 F. Supp. 547, 554 (E.D. Pa. 1992). Because the relators had not provided this information, the court ruled that even a lower Rule 9(b) standard was not satisfied by the complaint. Moreover, the court refused to lower the standard for the relators, for the relators had worked for Tyrone in administrative positions, had knowledge of the inner workings of Tyrone itself, were aware of the identities of the defendants, and had administrative responsibilities which caused them to be aware of the alleged conspiracy regarding alleged claims for government reimbursement. However, according to the court, the relators failed to even allege a single specific claim that was falsely submitted to the Government.

Rule 8(a), Not Rule 9(b), Applies to Section 3729(a)(3) Conspiracy Claims

As for the relators' claims under the FCA conspiracy provision, 31 U.S.C. § 3729(a)(3), the defendants argued that the failure of the relators to properly plead the underlying fraud in accordance with Rule 9(b) defeated the accompanying conspiracy allegations as well. In support of their argument, the defendants cite *U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, No. 94-CV-7316, 2000 WL 1207162 (E.D. Pa. Aug. 24, 2000).

The court, however, ruled that the defendants incorrectly read *Atkinson*, which actually found that the underlying fraud allegations must comply with the heightened pleading requirements in Rule 9(b), but that the allegations of conspiracy only need to comply with the notice pleading requirements found in Rule 8(a). *Atkinson* at *10.

In turn, the present court ruled that the Rule 8(a) pleading requirements, and not the heightened pleading requirements of Rule 9(b), apply to the conspiracy alleged the relators' complaint. Therefore, the court disagreed with the defendants that the failure to comply with Rule 9(b) inevitably doomed the claims based upon § 3927(a)(3).

Section 3729(a)(3) Conspiracy Claims Failed to Satisfy Rule 8(a)

In order to comply with Rule 8(a) when pleading a conspiracy pursuant to 31 U.S.C. § 3729(a)(3), a relator must "describe 'the general composition of the conspiracy, some or all of its broad objectives, and defendant's general role in that conspiracy.'" *Atkinson*

at *10 citing *Rose v. Bartle*, 871 F.2d 331, 336 (3d Cir. 1989). However, even under this lowered pleading standard, the court ruled that the claims failed, for the complaint indicated that "defendants" paid kickbacks to physicians, but it did not specify which defendants. Moreover, the complaint failed to state the existence of an agreement to defraud the Government by the defendants. Therefore, the court dismissed the action, but allowed the relators an opportunity to file an amended complaint.

Damages Are Not Required to State a Claim Under Section 3729(a)(3)

Of additional note, the court explicitly rejected *Blusal Meats, Inc. v. U.S.*, 638 F. Supp. 824, 828 (S.D.N.Y. 1986), which indicated that a third element of damages incurred by the Government as a result of a false claim is required. The present court noted that the express language of the statute indicates the opposite: "Any person . . . who conspires to defraud the Government . . . is liable to the . . . Government for a civil penalty . . . , plus 3 times the amount of damages which the Government sustains because of the act that person. . . ." 31 U.S.C. § 3729(a). *Blusal Meats* recognized this point, but did not clarify that the third element of "damages" is unnecessary to succeed in a conspiracy action under § 3729(a)(3), but only that it is necessary for recovery of damages that are alleged to have been suffered by the United States. *See Blusal Meats*, at 828. The court declared that damages are not necessary to make a claim of conspiracy under the FCA, and therefore to recover the civil penalty and costs.

Plaintiff's Actions Were Not Section 3730(h) "Protected Activity"

As for the relators claim under the FCA retaliation provision, 31 U.S.C.A. § 3730(h), the hospital argued that the relators did not plead that the defendants were on notice of the plaintiffs' intention to institute or further the initiation of an FCA *qui tam* action. The plaintiffs disagreed arguing that the acts of Bartlett were in furtherance of an investigation for this action that was to be filed, specifically that he uncovered illegal kickbacks and referrals, informed Tyrone's Board of Directors and his supervisors at Quorum of these details and recommended "self-disclosure" of these matters to the Government. Bartlett claimed that his removal as Tyrone's CEO and then his termination by Quorum was as a result of his discoveries and recommendation. Once again, the plaintiffs argued that Rule 8(a), and not Rule 9(b), applied to the pleading of the plaintiffs' claims of retaliation. While the court agreed, the court ruled that complaint failed to satisfy this lower standard.

The court agreed that Bartlett's acts as alleged would constitute protected activity, but nowhere did the complaint allege that Bartlett sought to conduct this activity to institute an FCA *qui tam* action. The court, therefore, transformed the activity into not being "protected activity." Rather, as alleged, the court deemed the plaintiff's activity as being conducted in furtherance of his duties as CEO of Tyrone. According

to the court, such investigatory actions of non-compliance pursuant to one's duty as an employee do not constitute protected conduct. As the court clarified, when such investigations are part of the employee's duties, such duties do not suffice to establish protected conduct and further notice that the investigation is for purposes of an FCA claim required of the employee.

Accordingly, the court also dismissed the Section 3730(h) retaliation claims.

***U.S. ex rel. Longest v. Dyncorp*, 2006 WL 47791 (M.D. Fla. Jan. 9, 2006)**

A Florida district court denied a defendants' motion to dismiss an FCA *qui tam* action pursuant to Rule 9(b), for the relator provided more than mere conclusory allegations of the alleged fraudulent schemes and her allegations were buttressed by her status as a corporate insider with extensive familiarity with the defendant's billing practices and contractual obligations. In addition, the court, in refusing to dismiss the relator's Section 3730(h) retaliation claim, refused to announce a rule that internal complaints, as a matter of law, can never trigger FCA retaliation protection.

Gloria Longest, a former Senior Accountant and Accounting Manager for Dyncorp International LLC, worked for Dyncorp at its Patrick Air Force Base location, where her duties included reviewing invoices, supervising accounting clerks, reviewing and approving vouchers for payment by vendors, and performing sample audits. Longest and audit personnel supposedly uncovered various schemes during these sample audits. These schemes included, *inter alia*, seeking double reimbursement for travel expenses; seeking reimbursement for inflated or unearned per diem, danger pay, and post differential allowances; and charging the Government for services without verifying documentation, such as time cards. Longest maintained that she and her coworkers informed Dyncorp management, who did not order more comprehensive audits or enact controls to prevent further overcharges. The only action taken by Dyncorp was firing Longest. Longest subsequently filed an FCA *qui tam* action raising these allegations and raising claims under the FCA retaliation provision.

After the Government declined to intervene in the matter, the defendants filed a motion to dismiss, arguing that the action failed to satisfy Rule 9(b) and that the retaliation action did not state an actionable claim.

Complaint Satisfies Rule 9(b)

The defendant's primary argument was that the complaint failed to provide sufficient particularity regarding the "false claims for payment" and therefore ran afoul of Rule 9(b). In support of its motion to dismiss, the pointed to *United States ex rel. Clausen v. Lab Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002).

The court, however, quickly distinguished *Clausen*, for unlike the situation in *Clausen*, Longest did not "simply and without any stated reason" allege that the defendants submitted false claims to the Government. For example, Longest described how

the defendants would receive monthly billing statements for employee travel expenses and would post the appropriate debits to employee receivable accounts. The posting of these debits would also result in the corresponding amounts being included on the bi-weekly Public Voucher invoices, which the defendants submitted to the Government for payment.

According to the court, although she did not list every conceivable detail about Dyncorp's allegedly fraudulent activity, Longest listed enough to provide the "indicia of reliability" about each facet of these schemes that the law requires. *See Clausen*, 290 F.3d at 1311. The court was particularly swayed by her familiarity with Dyncorp's contractual requirements and billing procedures. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005) (analyzing *Clausen* and stating that because "Clausen was a 'corporate outsider,' his failure to provide a credible set of facts to support his vague allegations rendered his complaint deficient under Rule 9(b).").

Dyncorp, pointing again to *Clausen*, argued that Longest had to satisfy Rule 9(b)'s particularity requirement as to *each* distinct scheme she alleged in her complaint. But *Clausen* announced no such requirement. And the court was unable to find a case adopting such a ruling. Rather, after a closer reading of *Clausen*, the court found the decision to suggest the opposite conclusion. Specifically, the *Clausen* majority explained that "[a]lthough Clausen has provided none of these items of information here, *some* of this information for at least *some* of the claims must be pleaded in order to satisfy Rule 9(b)." *Id.* (emphasis added). Implicitly, then, Clausen could have satisfied Rule 9(b) without providing any additional information as to some of his claims.

In turn, the court underscored that Rule 9(b) exists to prevent spurious charges and provide notice to defendants of their alleged misconduct, not to require plaintiffs to meet a summary judgment standard before proceeding to discovery. Once a plaintiff has satisfied Rule 9(b) as to one scheme, the purposes behind the rule have been served. Requiring the level of specificity sought by the defendants would undermine the FCA's goal of encouraging people with knowledge of undisclosed fraud to come forward. *Clausen* at 1310 n. 17.

Moreover, the court found that her allegations were buttressed by her status as a corporate insider with extensive familiarity with Dyncorp's billing practices and contractual obligations. To the extent such a finding might be required, the court found that Longest had provided sufficient indicia of reliability to satisfy Rule 9(b) as to every scheme alleged in the her complaint.

Plaintiff Raised Actionable Section 3730(h) Claim

Turning to her Section 3730(h) claim, the court quickly rejected Dyncorp's gripe that Longest failed to state a claim for retaliation. Dyncorp had argued that Longest did not allege that she ever took any steps in furtherance of a FCA action and that internal complaints to her supervisor were not "protected activities" under that Act.

Highlighting *Childree v. UAP/GA CHEM, Inc.*, 92 F.3d 1140 (11th Cir. 1996), the court ruled that the defendants' interpretation was not supported by the case law. After analyzing the "action filed or to be filed" language of § 3730(h), the *Childree*

court held that it did not require that a FCA action ever have been filed before a whistleblower would be protected from retaliation. *Id.* at 1146. In addition, the court noted that "a retrospective test which furnished no protection unless an action was eventually filed would preclude protection in every case where the evidence of wrongdoing was so compelling that the employer settled before an action was filed." *Id.* The *Childree* court held that " § 3730(h) protection is available not only where a false claims action is actually filed but also where the filing of such an action, by either the employee or the government, was 'a distinct possibility' at the time the assistance was rendered." *Id.* at 1146.

Under *Childree*, Longest was protected from retaliation so long as there was merely a distinct possibility of the filing of a FCA suit at the time she was allegedly complaining about overcharges. Indeed, the court noted that she need not have even known the FCA existed to qualify for its protection. *See id.* (stating that "nothing in the language of § 3730 suggests that its protections are limited to those who were motivated by it."). As such, the court answered that requiring her to plead the specific steps that she took in furtherance of a FCA would be improper. It was enough that she asserted that she was discriminated against in the terms and conditions of her employment by Dyncorp because of "lawful acts done by her in furtherance of an action under the False Claims Act."

Internal Complaints Do Not *Per Se* Block Section 3730(h) Suits

As for Dyncorp's second argument that internal complaints are insufficient to trigger the protections of the FCA, the court found no case that announced that such complaints, as a matter of law, were never capable of triggering Section 3730(h) protections. Moreover, even if the court adopted such a strained interpretation, the complaint alleged that beginning in late 2002, she reported Dyncorp's allegedly fraudulent activities to the State Department. Thus, the Longest maintained that she engaged in more than merely "internal complaints."

Accordingly, the court denied the defendants' motion to dismiss.

LITIGATION DEVELOPMENTS

***U.S. ex rel. White v. The Apollo Group, Inc.*, 2006 WL 487853 (W.D. Tex. Jan. 6, 2006)**

A Texas district court, dismissing an FCA *qui tam* action for failing to state a claim upon which relief could be granted, ruled that the relator could not sustain his action against the defendant because he was litigating the action *pro se*.

Leeland White brought a *pro se* FCA *qui tam* action against The Apollo Group, Inc., alleging that the company charged the Federal Government for forty-five hours of instruction, while only providing its students with 20 hours of instruction. The defendant filed a motion to dismiss the claim. The court, citing *United States ex rel. Lu v. Ou*, 368 F.3d 773, 774 (7th Cir. 2004), joined the unanimous chorus of courts in ruling that the relator cannot prosecute an FCA *qui tam* action without counsel. Accordingly, the court dismissed the suit.

***Elza v. United States*, 335 B.R. 654 (E.D. Ky. Jan. 5, 2006)**

A Kentucky district court vacated a bankruptcy court's decision to grant the Government summary judgment in an adversary proceeding to except from Chapter 7 discharge a debt arising out of a judgment entered against a debtor in an FCA cause of action. The court ruled that the debtor's conduct, in knowingly supplying the Federal Government with coal from a nonconforming mine, with the result that the coal which the Government received was of lesser quality than that for which it contracted, was not a "willful and malicious injury" *per se*, as required under the bankruptcy dischargeability exception, 11 U.S.C.A. § 523(a)(6).

Interventions & Suits Filed/Unsealed

JANUARY 1–MARCH 31, 2006

***U.S. ex rel. McDermott v. Genentech Inc.*, (D. ME)**

In January 2006, the court unsealed former employee Paul McDermott's *qui tam* complaint against Genentech Inc. Filed in July 2005, the complaint alleges that Genentech Inc. and marketing partner Biogen Inc. illegally promoted the cancer treatment drug Rituxan for arthritis pain, a use not yet approved by regulators. The suit also alleges that McDermott was fired as a result of bringing his concerns to Genentech executives. The DOJ has chosen not to intervene.

***U.S. ex rel. Poteet v. MedTronics Inc.*, (E.D. TN)**

In January 2006, the court unsealed former travel manager Jacqueline Kay Poteet's *qui tam* complaint against MedTronics Inc. Filed in 2004, the complaint alleges that MedTronics gave complex spine surgeons "excessive remuneration, unlawful perquisites and bribes in other forms for purchasing goods and medical devices." Andrew Carr Jr. of Bateman & Lewis (Memphis) represents the relator. The DOJ has not yet intervened, but has tried to settle the case over the relator's objections.

***U.S. v. Ohio Valley General Hospital*, (W.D. PA)**

In January 2006, Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania, announced the filing of an FCA suit against the Ohio Valley General Hospital. The suit alleges that Ohio Valley violated the False Claims Act in its presentation of charges in cost reports for Procuren, a salve used in the hospital's Wound Care Center, that was not FDA approved and, therefore, not a medication for which it could seek reimbursement from Medicare. The complaint also alleges that Ohio Valley also sought Medicare reimbursement for its Seniority Care Department, a "club" for senior citizens which provided no Medicare-eligible services. It is further alleged in the complaint that beginning in 1993 through 2000, Ohio Valley and Curative Technologies Incorporated, which managed Ohio Valley's Wound Care Center, fraudulently manipulated their management fee agreement in order to pass on the cost of Procuren to Medicare through the hospital's cost reports. Procuren had been identified in 1992 by Medicare as not eligible for payment by Medicare. Ms. Buchanan stated that through this litigation, the United States was seeking to recover more that $2,000,000 in damages that were improperly paid to Ohio Valley as a result of the alleged false claims.

***U.S. v. Michigan Allied Health Professionals*, (E.D. MI)**

In March 2006, the DOJ announced its intervention in a civil false claims *qui tam* action against R.J. Cooper and Scott Cooper. Also named as defendants are R.J. Cooper Company, Inc., R.J. Cooper and Associates, Inc., Dynamic Medical Products and Services of Michigan, and Great Lakes Restorative. The complaint alleges that from 2000 to 2005, the defendants conspired to submit false claims for more than $1.2 million in durable medical equipment Medicare payments. FBI Special Agent Daniel D. Roberts and HHS-OIG Assistant Special Agent Thomas Spokaeski investigated the matter.

Patricia Stamler represents the relators. Assistant U.S. attorney Michael J. Riordan is representing the Government.

Florida ex rel. McCann v. Bank of America

In March 2006, the Leon circuit court unsealed former employees Joseph McCann and Richard Sorenson's *qui tam* complaint against Bank of America. Filed in 2005, the complaint alleges that from 1990 to 2003, Bank of America failed to properly process checks in its role as a check clearinghouse under Florida state law and thus deprived the State of revenue to be targeted for public schools. Under the Florida Disposition of Unclaimed Property Act (FDUPA), banks, insurance companies and other holders of unclaimed credits must, after an expiration of five years, give the funds to the Florida Department of Banking and Finance. The department is authorized to make a one-time attempt to notify the owners of the unclaimed credits. If the owners fail to respond, the credits are transferred to the Abandoned Property Trust Fund. The trust fund finances the operation of the Unclaimed Property Program and pays out owner claims. The remaining unclaimed funds are transferred to the Florida Department of Education to support public schools. Ervin Gonzalez of Colson, Hicks & Eidson (Coral Gables) represents the relators. The Florida Attorney General's office has declined intervention.

Judgments & Settlements

JANUARY 1–MARCH 31, 2006

***U.S. v. University of Connecticut*, (D. CT)**

In January 2006, the DOJ announced that the University of Connecticut had agreed to pay **$2.5 million** to settle allegations of research fraud. The Government alleged improper fraud on approximately 500 research grants received by the University between July 1997 and October 2004. The grants included came from the EPA, NASA, the NSF, and the Departments of Defense, Commerce, Education, Energy, Interior, Transportation, and Health and Human Services. U.S. Attorney Kevin O'Connor managed the case for the Government.

***U.S. ex rel. Relator v. Shinwha Electronics, Inc.*, (D. HI)**

In January 2006, the DOJ announced that Shinwha Electronics, Inc. had agreed to pay **$1.2 million** to settle allegations of defrauding the DOD. Additionally Shinwha agreed to dismiss a $407,000 claim against the United States for non-payment. The Government alleged that the Korean company falsified inspection certifications for fire alarms and safety equipment at U.S. military installations throughout Korea. The relator, a former regional manager for Shinwha filed this suit in 2002. The relator's share was $240,000 or approximately 20 percent. Tom Grande and Warren Price (Honolulu) represented the relator. The Army Criminal Investigation Command's Major Procurement Fraud Unit investigated the matter. U.S. Attorney Edward Kubo Jr. managed the case for the Government.

[Editor's note: This is the first settlement against a foreign company under the False Claims Act.]

***U.S. v. Levesque*, (D. NH)**

In January 2006, the DOJ announced that Donna Levesque had agreed to pay **$140,000** to settle allegations of fraud against the Social Security Administration (SSA). The Government alleged that Levesque made false statements on applications and failed to reveal material facts about her work that, if disclosed, would have demonstrated she was not eligible to receive benefits. Although Levesque continually represented to the SSA that she was disabled and unable to work, she was working regularly by operating LaBow Florist and Gifts, a business in Manchester, New Hampshire. As a result of the false representation, she received $122,789 in benefits, to which she was not entitled. Assistant U.S. Attorney John J. Farley represented the Government.

***U.S. v. Raised Floor Installation*, (S.D.N.Y.)**

In January 2006, the DOJ announced that Raised Floor Installation (RFI) and its President Eric Lagerstrom had agreed to pay **$106,000** to settle allegations of fraud against the General Services Administration (GSA). The Government alleged that RFI made false claims for payment when it used lower-grade tile than contracted for in the installation of a raised floor in a Federal Office building. RFI then submitted

false invoices to GSA, claiming to have used the required tile. GSA-OIG investigated the matter. Assistant U.S. Attorney Heather McShain represented the Government. Judge Barbara S. Jones approved the settlement agreement.

U.S. v. Pediatrix Medical Group

In February 2006, the DOJ announced that neo-natal care provider Pediatrix Medical Group Inc. had agreed to pay **$25.1 million** to settle allegations of Medicaid and TRICARE fraud. The Government alleged that from 1996 to 1999, Pediatrix falsely billed federal and state programs for services not provided.

[Editor's note: DOJ also reviewed payment records from 2000 to 2002, but this settlement does not cover that period.]

U.S. ex rel. King v. Intrepid, U.S.A., Inc., **(D. MN)**

In February 2006, the DOJ announced that Intrepid, U.S.A., Inc. had agreed to pay **$8 million** to settle allegations of defrauding Medicare, Medicaid, and TRICARE. The Government alleged that from 1997 to 2004, Intrepid submitted payment claims for Medicare, Medicaid, and TRICARE for home health services that were not provided by a qualified person, lacked physician orders and plans of care, and lacked sufficient documentation of the home-bound status of the beneficiaries. Former compliance specialist Mia Gray King and former head of operations Patricia Zabell filed this *qui tam* suit in 2003. The relators' share is $1.18 million, or approximately 15 percent. Andrew Luger of Greene Espel, P.L.L.P (Minneapolis) represented the relators. HHS-OIG and the Minnesota Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorney Gerald Wilhelm and DOJ trial attorneys Keith Dobbins and Wendy Tien represented the Government.

U.S. v. McKesson Corp.**, (W.D. WA)**

In February 2006, the DOJ announced that wholesale pharmaceutical distributor McKesson Corporation had agreed to pay **$3 million** to resolve allegations of fraud against the Department of Defense. The Government alleged that from 1997 to 2001 McKesson knowingly charged the Defense Department's medical treatment facilities more for pharmaceutical products than was allowable under its prime vendor contracts with the government. DOD investigated the matter. U.S. Attorney John McKay managed the case for the Government.

U.S. ex rel. Relator v. Dr. Farahany**, (W.D. NC)**

In February 2006, the DOJ announced that Dr. Amir Hussein Farahany had agreed to pay **$2.6 million** to resolve allegations of Medicare fraud. The Government alleged that from 1997 to 2003, Dr. Farahany double-billed, overbilled, and billed Medicare for services never performed.

[Editor's Note: The settlement requires that Dr. Farahany hire a government-approved auditor who will monitor his billing practices for five years.]

***U.S. ex rel. Pacific Shipyards Int'l LLC v. Tanadgusix Corp.*, (D. HI)**

In February 2006, the DOJ announced that Alaskan Village Corporation Tanadgusix Corp. (TDX) and Marisco Limited had agreed to pay **$450,000** to settle allegations of defrauding the GSA. The Government alleged that TDX and Marisco knowingly acquired and put into use a surplus Navy floating drydock in contravention of GSA surplus property program requirements. Competing shipyard Pacific Shipyards filed this *qui tam* suit. GSA-OIG investigated the matter. U.S. Attorney Edward H. Kubo, Jr. managed the case for the Government.

***U.S. ex rel. Isakson v. Custer Battles*, (E.D. VA)**

In March 2006, a jury delivered a **$10 million** judgment against Custer Battles, LLC for fraud against the Department of Defense. The complaint alleged that Custer Battles had fraudulently billed the DOD on over 30 supposed Iraq reconstruction projects. Former employees Robert Isakson and William Baldwin brought this *qui tam* suit. Alan Grayson and Victor Kubli represented the relators. Judge T.S. Ellis III presided over the trial and is considering the verdict.

[Editor's Note: The Government did not intervene in this case.]

***U.S. ex rel. Politiski v. Matria Healthcare, Inc.*, (S.D. GA)**
***U.S. ex rel. Clarke v. Diabetes Self Care Inc.*, (W.D. VA)**

In March 2006, the DOJ announced that Matria Healthcare, Inc. had agreed to pay **$9 million** to resolve allegations of Medicare fraud. The Government alleged that Matria and Diabetes Self Care Inc. engaged in a scheme to send self-care diabetes products to customers who did not need them or were already dead, then failed to reimburse Medicare when the products were returned. Former Matria employees Sandra Clarke and Kim Politiski filed *qui tam* suits in 2002. Relator Clarke will receive $1.18 million and relator Politiski will receive $792,000. Mike Bothwell and Mark Simpson of Bothwell & Simpson, P.C. (Roswell, GA), and Lon Engel of Engel & Engel (Baltimore) represented the relators. Gregory Demske investigated the matter for HHS OIG. Assistant U.S. Attorneys Julie C. Dudley (W.D. VA), James L. Coursey Jr. (S.D. GA), and DOJ Trial Attorney Alan Gale represented the Government.

***U.S. ex rel. Safina Office Products v. Corporate Express Office Products*, (D.DC)**

In March 2006, the DOJ announced that Corporate Express Office Products had agreed to pay **$5.02 million** to settle allegations of contract fraud against the General Services Administration (GSA). The Government alleged Corporate Express sold office supply products manufactured in countries not permitted by the Trade Agree-

ments Act to United States government agencies. Edward Wilder and Robert Chou Lee, two executives of Safina Office Products, filed this *qui tam* suit in 2003. The relators' share is $753,000, or approximately 15 percent. Vince McKnight of Ashcraft & Gerel (Washington) represented the relators. Assistant U.S. Attorney Laurie Weinstein and DOJ trial attorneys Tracy Hillmer and Melissa Meister represented the Government.

***Abraham Lincoln Memorial Hospital*, (C.D. IL)**

In March 2006, the DOJ announced that Abraham Lincoln Memorial Hospital had agreed to pay **$1.34 million** to resolve allegations of Medicare fraud. The Government alleged that between 2000 and 2002, the hospital used specific diagnosis codes for gram-negative pneumonia, septicemia, and acute renal failure, none of which were supported by the patients' medical records. HHS-OIG investigated the matter. U.S. Attorney Roger Heaton managed the case for the Government.

[Editor's Note: As part of the settlement, the hospital has entered into a three-year corporate integrity agreement with HHS.]

***U.S. v. Debbi*, (S.D.N.Y.)**

In March 2006, the DOJ announced that New York ophthalmologist Shaul Debbi had agreed to pay **$335,000** to settle allegations of Medicare fraud. The Government alleged Dr. Debbi had performed unnecessary eye surgeries at long-term residential facilities for the mentally and physically disabled. Furthermore, Debbi arranged for a physician's assistant he employed to examine residents in the homes and charged Medicare as if he had performed the examinations. HHS-OIG and the FBI investigated the matter. Assistant U.S. Attorneys Russell Yankwitt and Kathleen Zebrowski represented the Government. Judge Paul A. Crotty approved the settlement.

[Editor's note: In May 2003, Debbi pled guilty to federal criminal charges based on the same conduct. This civil suit came about because he failed to make the restitution payments provided by his criminal judgment.]

***U.S. v. Malis*, (D. MA)**

In March 2006, the DOJ announced that Dr. Charles D. Malis had agreed to pay **$102,500** to settle allegations of upcoding to commit Medicare fraud. The government HHS alleged that Malis billed Medicare for "prolonged service" office visits that were not necessary and also billed for visits that never happened. HHS OIG Special Agent Carrie Navarro investigated the matter. Assistant U.S. Attorney Greg Shapiro represented the Government. As part of the settlement, Dr. Malis has entered into a legal compliance program with HHS.

***U.S. v. Insight Public Sector, Inc.*, (D. DC)**

In March 2006, the DOJ announced that Insight Public Sector, Inc. had agreed to pay **$1 million** to settle allegations of fraud against the Small Business Administration (SBA). The Government alleged that Insight's predecessor corporation Comark Government & Education Services (CGES) falsely certified itself as a "small business" on its application for inclusion on the GSA's Multiple Award Schedule, thus obtaining a preference in regard to the award of certain purchase orders. The SBA-OIG and GSA-OIG investigated the matter.

***U.S. v. Beebe Medical Center*, (E.D. PA)**

In March 2006, the DOJ announced that Beebe Medical Center and two gastroenterologists had agreed to pay **$1 million** to settle allegations of Medicare fraud. The Government alleged the physicians had an agreement with Beebe under which they received not only their professional fee but also 37 percent of the hospital's facility fee for medical procedures performed at Beebe, in violation of the Stark anti-kickback law. Assistant U.S. Attorney Douglas McCann represented the Government.

STATE & LOCAL FCA JUDGMENTS & SETTLEMENTS

Florida v. Tenet Healthcare

In February 2006, Florida Attorney General Charlie Crist announced that Tenet Healthcare Corp. had agreed to pay **$7 million** to settle a racketeering lawsuit alleging it inflated reimbursement claims to the State's Medicare "outlier" fund for costly inpatient hospital services. The State had alleged Tenet violated both the federal and state civil RICO statutes by inflating charges for medical procedures and gaming the outlier fund for expensive procedures exceeding Medicare's standard reimbursement rates. Tenet, which operates 15 hospitals in Florida, has agreed to pay $4 million to establish an "Uninsured Patient Fund," another $1.9 million into an escrow to be distributed to plaintiffs, and another $1 million to pay for the State's investigation of the case.

22 States v. Tenet Healthcare

In February 2006, Tenet Healthcare Corp. agreed to pay 22 states **$820,000** to settle Medicaid fraud allegations related to outpatient services. The government alleged that Tenet hospitals in the 22 states had engaged in questionable practices, including the billing of outpatient laboratory services such as chemistry panels, hematology, urinalysis and general health screening panels. The settlement also releases Tenet from administrative and civil liability from the "unbundling" expenses related to the alleged misconduct.

Los Angeles County Metro Transportation Authority v. Reno Metal Products

In February 2006, a jury returned a verdict finding that Reno Metal Product had submitted 57 false claims to LA Metro. The amount of treble damages is $308,586. Under the California False Claims Act, the civil fine could be up to $570,000. Nedra Jenkins represented the Government.

California v. Pleasant Care Corp.

In March 2006, California Attorney General Bill Lockyer announced that Pleasant Care Corp. had agreed to pay **$1.35 million** to settle negligent care charges. The State alleged that Pleasant Care committed more than 160 regulatory violations over a 5-year period. Under the settlement, Pleasant Care has agreed to hire more nursing staff and establish a whistleblower program that enables employees, residents or others to report mistreatment of residents. It also agreed to train its staff in such areas as wound treatment, preventing malnutrition and dehydration, and accurate record keeping. Pleasant Care, which owns 30 nursing homes in California, agreed to pay a $1 million civil fine and reimburse the State $350,000 for investigation costs.

Legislative Update

Model False Claims Act: Qualifying for Additional Medicaid Funds Under Section 1090(b) of the Social Security Act

Model State False Claims Act

Qualifying for Additional Medicaid Funds Under Section 1909(b) of the Social Security Act

In this era of limited state Medicaid budgets and mounting fiscal pressures, the U.S. Congress has given the states an opportunity to partner with the Federal Government in the fight against Medicaid fraud, all the while providing the States an additional source of needed revenue. Specifically, under Section 1909(b) of the Socal Security Act, 42 U.S.C. § 1396h(b), as enacted by Section 6031 of the Deficit Reduction Act of 2005, the Federal Government will pay the States an increased share of the amounts recovered for protecting the federal Medicaid dollar. Traditionally, when States prosecute fraudfeasors for defrauding Medicaid, the States are required to forward the Federal Government its share of the recovered funds. Now, for those States with qualifying False Claims Acts, the Federal Government will allow those States to retain an additional ten percentage points of the federal share. In this way, States can effectively increase their revenues while at the same time protecting their own Medicaid funds from fraud. This report details the necessary elements of a qualifying state False Claims Act and includes a Model State False Claims Act that satisfies the requirements of Section 1909(b).

BACKGROUND

The False Claims Act, also known as the "Lincoln Law" for its original proponent, has become a powerful weapon in protecting the public treasury. In the 1980s, as the United States was engaged in increased defense spending, there was increasing concern that some defense contractors were engaged in fraud against the American taxpayer. After much publicized stories about $900 airplane ashtrays, $7,600 coffeemakers and $400 hammers charged to the Defense Department by wayward contractors, the U.S. Congress responded in 1986 by reinvigorating the federal False Claims Act, with the intention of "reach[ing] all types of fraud, without qualification, that might result in financial loss to the Government."[1] Today, nearly twenty years after these important amendments, the False Claims Act has become the Government's primary tool in fighting fraud against the Federal Treasury, returning over $17 billion in the last twenty years.[2] Likewise, over a dozen states have built this same level of protection for their public dollars by enacting their own versions of the False Claims Act.[3]

However, while the False Claims Act has been quite successful, a significant loophole still exists when it comes to protecting the Medicaid program. Specifically, the federal False Claims Act only applies to fraud against the Federal Government, not the

1. S. Rep. 99-345, 99th Cong., 2d Sess., at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284. *See also* http://www.taf.org/legislativehistory.htm for the complete legislative history to the 1986 FCA Amendments.

2. *See* http://www.taf.org for additional information.

3. Currently, several states have already enacted a False Claims Act, including California, Delaware, Florida, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, New Hampshire, New Mexico, Nevada, Tennessee, Texas, Virginia, and the District of Columbia. The full text of these state acts are available at http://www.taf.org/statefca.htm.

States, and therefore does not cover the States' share of Medicaid spending. In February 2006, Congress sought to close this loophole by enacting section 6031 of the Deficit Reduction Act of 2005, S. 1932, which added section 1909(b) to the Social Security Act to encourage the remaining States to pass their own versions of the federal False Claims Act. And, with potentially millions of additional Medicaid dollars at stake and an early effective date of January 1, 2007, Congress is encouraging state legislators to act quickly. Taxpayers Against Fraud Education Fund, a nonprofit, public interest organization dedicated to combatting fraud against the American tax dollar, has pulled together the following information to assist these States in enacting qualifying legislation. TAFEF believes that State taxpayer dollars used to fund the Medicaid program deserve the same level of protection againstr fraud that Federal taxpayer dollars now have under the False Claims Act. A number of States already benefit from this same level of protection. The new 10-percentage-point bonus will reward the remaining States for giving their State Medicaid funds the same level of anti-fraud protection. TAFEF is committed to assisting those States in enacting False Claims Acts that qualify for the 10-percentage-point bonus and while deterring and punishing fraud again Medicaid and other state programs.

Section 1909(b) of the Social Security Act

Section 1909(b) offers the States a strong incentive to enact a state False Claims Act. Specifically, a State that has in effect a qualifying False Claims Act is entitled to an increase of ten percentage points in the share of any amounts recovered under an action brought under the Act. For example, if a State's federal Medicaid matching rate is 57 percent, it would typically receive only 43 percent of the amount recovered from the fraudfeasor. However, if the State has enacted a qualifying False Claims Act, its share of any recovery would increase by 10 percentage points, to 53 percent of any amount received under its False Claims Act. (In this example, the state's share of the recovery effectively increases by 23 percent!) In order to qualify for this increase, section 1909(b) requires that a State must demonstrate to the Inspector General of the U.S. Department of Health and Human Services (OIG) that its False Claims Act complies with the following requirements:

(1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in section 1903(a).

(2) The law contains provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code.

(3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.

(4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code.

RECOMMENDED STATUTORY PROVISIONS

This report is intended to assist States in drafting False Claims Acts legislation that complies with section 1909(b) of the Social Security Act of 2006. Specifically, this report highlights the statutory provisions that the OIG may look to when assessing whether the proposed legislation is "as effective" as the federal False Claims Act. To meet this necessary hurdle, TAF Education Fund, in distilling existing state FCAs, believes that the state legislation should include the following sixteen provisions:

- a provisions providing *qui tam* whistleblowers (formally known as "relators") standing to bring FCA actions on behalf of the state government, under the seven types of conduct currently prohibited in 31 U.S.C. 3729(a), including the following:
- Presenting, or causing to presented, a false claim;
- Making, or causing to be made, a false statement or record in support of a false claim;
- Conspiring to violate the FCA;
- Making, using, or causing to be made or used a "false record or statement to conceal, avoid or decrease an obligation to pay to transmit money or property to the Government." *See* Model State False Claims Act (MSFCA), Sections 2(a)(1)-(a)(7).
- a provision statutorily setting treble damages (with double damages in instances of sufficient cooperation) and civil penalties at amounts of $5,000 to $10,000 per false claim. *See* MSFCA § 2(a).
- a provision permitting successful relators to collect at least the same percentage of the recovery as allowable under 31 U.S.C. 3730(d), namely that the relator is guaranteed 15 to 25 percent of judgment when the State government intervenes, and 25 to 30 percent if the State government does not intervene. *See* MSFCA § 3(d)(1).
- a provision awarding reasonable attorneys fees and costs to a successful relator. *See* MSFCA § 3(d)(1)–(2).
- a provision defining the Act's *mens rea* requirement of "knowing" or "knowingly" to include: "(1) actual knowledge of the information, (2) deliberate ignorance of the truth or falsity of the information, or (3) reckless disregard of the truth or falsity of the information," and further specifying that "no proof of specific intent to defraud is required." *See* MSFCA § 1(b).
- a provision setting the statute of limitations for all violations under the FCA, including actions under the Act's retaliation provision, to be ten years after the date on which the violation occurred. The federal FCA provision, 31 U.S.C. § 3730(b)(1), has a confusing formula that calls for a 10-year, 6-year, and 3-year limitation, based on various situations. TAF Education Fund recommends that the States simply the statute of limitations provision by adopting a single statutory term of ten years, which would comply with Social Security Act section 1909(b)'s requirement that the state FCA be "as effective in rewarding and facilitating *qui tam* actions" as the federal False Claims Act. *See* MSFCA § 4(a).

- a provision establishing the burden of proof as a "preponderance of the evidence" standard. *See* MSFCA § 4(c).
- a provision providing a cause of action for relators who suffer retribution from employers for whistleblower activities related to the FCA. *See* MSFCA § 3(g).
- a provision that allows relators to go forward with a *qui tam* action, even if government officials are aware of the fraud at issue, unless the elements of the actionable false claims alleged in the *qui tam* complaint had been publicly disclosed specifically in the news media or in a publicly disseminated governmental report at the time the complaint was filed and the relator did not have independent knowledge of the fraud. *See* MSFCA § 3(e)(3).
- a provision providing that the first to file a *qui tam* claim is the only relator who qualifies to pursue such a claim. *See* MSFCA § 3(b)(5).
- a provisions providing that the *qui tam* complaint is filed under seal and not served on the defendant or made public in any way, and that the entire action is stayed while the State (acting through its Attorney General) is notified of the lawsuit by service of a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses." *See* MSFCA § 3(b)(2)-(3).
- a provision providing that the State's Attorney General assumes "primary responsibility" for the lawsuit, but also that the relator continues also as plaintiff. *See* MSFCA § 3(c)(1).
- a provision preserving certain rights of the relator when the State government intervenes, including the right to object and be heard on a motion to limit the relator's role, or to dismiss or settle the case. *See* MSFCA § 3(c)(2).
- a provision providing that if the Government elects not to intervene, the *qui tam* relator may proceed with the action. *See* MSFCA § 3(c)(3).
- a provision providing that during litigation, a relator's role may be restricted by the court "[u]pon a showing by the government that the unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment," or "[u]pon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense." *See* MSFCA § 3(c)(2)(C).
- a provision providing that upon a showing of "good cause," the court may permit the government to intervene "at a later date," even if the government originally declined to intervene. *See* MSFCA § 3(c)(3).

TAF Education Fund also recommends that the States adopt provisions that address issues of venue and discovery, including provisions empowering the state to utilize subpoena powers similar to the civil investigative demands authorized under section 3733 of the federal False Claims Act. *See* 31 U.S.C. § 3733. Because these issues of

civil procedure vary from state to state, TAF Education Fund has chosen to not include such provisions in the Model State False Claims Act. Additional resources are available at www.taf.org.

The following model legislation contains each of the sixteen elements that TAFEF believes will qualify a state Fale Claims Act for the 10-percentage-point bonus under section 1909(b). This legislation is based primarily upon the federal False Claims Act and existing state False Claims Acts. The complete text of each of these statutes may be found at www.taf.org.

MODEL STATE FALSE CLAIMS ACT

Sections

§ 1 Definitions

For purposes of this Act:

(a) **Claim.** "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the State, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the State (hereinafter "state funds"), or if the State will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(b) **Knowing and Knowingly.** "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

(1) Has actual knowledge of the information.

(2) Acts in deliberate ignorance of the truth or falsity of the information.

(3) Acts in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

(c) **Person.** "Person" includes any natural person, corporation, firm, association, organization, partnership, business, or trust.

(d) **Employer.** "Employer" includes any natural person, corporation, firm, association, organization, partnership, business, trust, or State-affiliated entity involved in a nongovernmental function, including state universities and state hospitals.

§ 2 Acts Subjecting Person to Treble Damages, Costs and Civil Penalties; Exceptions

(a) **Liability.** Any person who commits any of the following acts shall be liable to the State for three times the amount of damages which the State sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the State for the costs of a civil action brought to recover any of those penalties or damages, and shall be liable to the State for a civil penalty of not less than $ 5,000 and not more than $10,000 for each violation:

(1) Knowingly presents or causes to be presented to any employee, officer, or agent of the State, or to any contractor, grantee, or other recipient of State funds, a false or fraudulent claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.

(3) Conspires to defraud the State by getting a false claim allowed or paid, or conspires to defraud the State by knowingly making, using, or causing to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State.

(4) Has possession, custody, or control of public property or money used or to be used by the State and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt.

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the State and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State.

(8) Is a beneficiary of an inadvertent submission of a false claim to any employee, officer, or agent of the State, or to any contractor, grantee, or other recipient of state funds, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the State within a reasonable time after discovery of the false claim.

(b) **Damages Limitation.** Notwithstanding subdivision (a), the court may assess not less than two times the amount of damages which the State sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the State who are responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the State.

(3) At the time the person furnished the State with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) **Exclusion.** This section does not apply to claims, records, or statements made under the State Revenue and Taxation Code.

§ 3 Attorney General Investigations and Prosecutions; Powers of Prosecuting Authority; Civil Actions by Individuals as *Qui Tam* Plaintiff and as Private Citizens; Jurisdiction of Courts

(a) **Responsibilities of the Attorney General.** The Attorney General diligently shall investigate a violation under section 2. If the Attorney General finds that a person has violated or is violating section 2, the Attorney General may bring a civil action under this section against that person.

(b) **Actions by private persons.**

(1) A person may bring a civil action for a violation of this Act for the person and for the State in the name of the State. The person bringing the action shall be referred to as the *qui tam* plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interest of the parties involved and the public purposes behind this act.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State Attorney General. The complaint shall also be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The State may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and the information.

(3) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until after the complaint is unsealed and served upon the defendant pursuant to State Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the State shall—

(A) proceed with the action, in which case the action shall be conducted by the State; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings a valid action under this subsection, no person other than the State may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to *qui tam* actions.**

(1) If the State proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The State may seek to dismiss the action for good cause notwithstanding the objections of the *qui tam* plaintiff if the *qui tam* plaintiff has been notified by the State of the filing of the motion and the court has provided the *qui tam* plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(B) The State may settle the action with the defendant notwithstanding the objections of the *qui tam* plaintiff if the court determines, after a hearing providing the *qui tam* plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(C) Upon a showing by the State that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the State elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the State's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the State to intervene at a later date upon a showing of good cause.

(4) Whether or not the State proceeds with the action, upon a showing by the State that certain actions of discovery by the person initiating the action would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the State has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the State, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to *qui tam* plaintiff.**

(1) If the State proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, which includes damages, civil penalties, payments for costs of compliance and any other economic benefit realized by the government as a result of the action, depending upon the extent to which the person and/or his counsel substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions specifically in a criminal, civil, or administrative hearing, or in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the appropriate state court judge finds to

have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the State does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds, which includes damages, civil penalties, payments for costs of compliance and any other economic benefit realized by the government as a result of the action. Such person shall also receive an amount for reasonable expenses which the appropriate state court judge finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the State proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section (1) upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 1, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the State to continue the action.

(4) If the State does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses 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.

(e) **Certain actions barred.**

(1) No court shall have jurisdiction over an action brought under subsection (b) against a member of the State legislative branch, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the State when the action was brought.

(2) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.

(3) Upon motion of the state Attorney General, the court may, in consideration of all the equities, dismiss a relator if the elements of the actionable

false claims alleged in the *qui tam* complaint have been publicly disclosed specifically in the news media or in a publicly disseminated governmental report, at the time the complaint is filed.

(f) **State not liable for certain expenses.** The State is not liable for expenses which a person incurs in bringing an action under this section.

(g) **Private action for retaliation action.** Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate court of the State for the relief provided in this subsection.

§ 4 Limitation of Actions; Activities Antedating This Article; Burden of Proof

(a) **Statute of limitations.** A civil action under Section 3 may not be brought more than 10 years after the date on which the violation was committed.

(b) **Retroactivity.** A civil action under Section 3 may be brought for activity prior to the effective date of this Act if the limitations period set in subdivision (a) has not lapsed.

(c) **Burden of proof.** In any action brought under Section 3, the State or the *qui tam* plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) **Estoppel.** Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contenders, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subdivision (a), (b), or (c) of Section 3.

§ 5 Remedies Under Other Laws; Severability of Provisions; Liberality of Legislative Construction; Adoption of Legislative History

(a) **Remedies under other laws.** The provisions of this Act are not exclusive, and the remedies provided for in this Act shall be in addition to any other remedies provided for in any other law or available under common law.

(b) **Severability of provisions.** If any provision of this Act or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of

the Act and the application of the provision to other persons or circumstances shall not be affected thereby.

(c) **Liberality of legislative construction and adoption of legislative history.** This Act shall be liberally construed and applied to promote the public interest. This Act also adopts the congressional intent behind the federal False Claims Act, 31 U.S.C. §§ 3729–3733, including the legislative history underlying the 1986 Amendments to the federal False Claims Act.

§ 6 Applicable Rules of Civil Procedure

[Reminder: TAF Education Fund recommends that the States adopt provisions that address issues of venue and discovery, including provisions empowering the State to utilize subpoena powers similar to the civil investigative demands authorized under ssection 3733 of the federal False Claims Act. *See* 31 U.S.C. § 3733. Because these issues of civil procedure vary from state to state, TAF Education Fund has chosen not to include such provisions in the Model State False Claims Act.]

APPENDIX

Deficit Reduction Act of 2005

CHAPTER 3—ELIMINATING FRAUD, WASTE, AND ABUSE IN MEDICAID

SEC. 6032. ENCOURAGING THE ENACTMENT OF STATE FALSE CLAIMS ACTS

(a) IN GENERAL.—Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) is amended by inserting after section 1908A the following:

"STATE FALSE CLAIMS ACT REQUIREMENTS FOR INCREASED STATE SHARE OF RECOVERIES

"SEC. 1909. (a) IN GENERAL—Notwithstanding section 1905(b), if a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.

"(b) REQUIREMENTS.—For purposes of subsection (a), the requirements of this subsection are that the Inspector General of the Department of Health and Human Services, in consultation with the Attorney General, determines that the State has in effect a law that meets the following requirements:

"(1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in section 1903(a).

"(2) The law contains provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code.

"(3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.

"(4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code.

"(c) DEEMED COMPLIANCE.—A State that, as of January 1, 2007, has a law in effect that meets the requirements of subsection (b) shall be deemed to be in compliance with such requirements for so long as the law continues to meet such requirements.

"(d) NO PRECLUSION OF BROADER LAWS.—Nothing in this section shall be construed as prohibiting a State that has in effect a law that establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to programs in addition to the State program under this title, or with respect to expenditures in addition to expenditures described in section 1903(a), from being considered to be in compliance with the requirements of subsection (a) so long as the law meets such requirements."

(b) EFFECTIVE DATE.—Except as provided in section 6035(e), the amendments made by this section take effect on January 1, 2007.

ADDITIONAL RESOURCES

• The text of the federal False Claims Act, 31 U.S.C. 3729 et seq., is available at http://www.taf.org.

• The legislative history behind the federal False Claims Act is available at http://www.taf.org/legislativehistory.htm.

In Their Own Words

Looking Back

Looking Back

William Meshel, M.D.

I was lying in a hospital gurney outside the elevator not so long ago, about to be wheeled down to the operating area to have surgery for the removal of my right kidney where a newly diagnosed cancer was found. The anesthesiologist and some other physicians didn't give me much of a chance of making it through. With other medical problems I had, they were guessing I had maybe a 40-percent chance of making it. Waiting outside the elevator for a last talk was a friend I truly love. He won't let me use his name in this writing because the FBI isn't particularly fond of publicity. In his words, if I mentioned him by name, he would "never get out of El Paso." In truth, he is one of the finest people I have ever known. If there are some of you old enough to remember the cartoon character ""Dudley" Do Right" of the *Royal Canadian Mounted Police,* he is a lot like this fellow. He is the Special Agent I worked most closely with during my 5 years with the FBI as either a cooperating witness or a confidential informant. He was there to wish me luck and, we both knew, to maybe say goodbye. He said he wanted to thank me for everything I had done. He wanted me to know that the Director of the FBI had just approved a special commendation for me. He said that the certificate wasn't ready yet and if things went wrong, he wanted me to know about it. He also promised to get it into the hands of my adopted son Danny, who lives in Indiana. I told him, as honestly as that situation coerces, upon oneself that in fact it was I who was grateful. I told him that "it was a great ride" and it truly was. It is a little of that story that I want to tell.

For much of the world outside of our family of fraud fighters there are many nouns to describe what I did. They are words like "snitch," "informant," "ratfink," "rat," "skunk" and a whole host of other less-than-honorific tittles. Why that is the case is an issue for sociologists or social psychologists to ponder. The truth is without our guys (i.e. TAF) and the assorted Agents and Prosecutors, our whole system just plain wouldn't work. The crooks would end up with the most money and the most power all the while funneling limited resources away from their true purpose. Personally, I have no doubt that much of medicine would fall prey to the bad guys and people needing medical care would be the victims of those lost resources. Look at third-world countries and it is so obvious how corruption totally erodes any hope or chance for a future for most people living in those places. It is very obvious how malignant that corruption is when you live in El Paso, just a couple of blocks from Mexico, where the police are often more dangerous than the criminals. I truly feel for those people, and it pains me when people on this side of the border form vigilante groups like the "minutemen" and hide their racism behind an American flag. Those Mexicans that try and come here are trying to support their families and have some chance at a decent life. Isn't that the same reason all of the immigrants have come?

More than anything else, I did what I did because of this deep love of our country that I have felt for as long as I can remember. You know, the way you feel sometimes when there is country music playing and you drive by a flag. So, when I got a phone call

from the first Special Agent I worked with Robin and she asked "if I would be willing to help," the answer was really easy for me. But when I was offered payment, I refused, explaining that there is no way I would agree to that. If I was going to help my country it wasn't going to be for money, it was because I could and was asked.

I get a free pass to tell this story the way I want thanks to Jeb White and TAF. How often in life do you get to tell a story your way, taking the space you need and knowing that it will be published without censorship before one word is written? Thank you, TAF, and thank you, Jeb, for that great treat. I like to think of it as a big peanut butter and jelly sandwich. . . . Let me explain. Recently, I had to be admitted to the same hospital I worked at for an abnormal heart rhythm that was not letting me breath. I had to be shocked twice in an attempt to get back to a normal rhythm. Before that happened, I asked the nurse for a peanut butter and jelly sandwich, she wrote it down as "pt. Requests P B and J. Unsure of what that was, the Director of Nurses went to the pharmacy to try and figure out what it was I was asking for. When she figured out the true meaning, it became a local hospital joke. I figured if I was going to die, I wanted to have a peanut butter and jelly sandwich first. I didn't die and I didn't get my sandwich, but that's why for me writing this is a great big peanut butter and jelly sandwich.

I want you all to know how deeply I feel for all of you and our organization. I believe it is incredibly important and a noble and important cause. For the last few years of my life, it has given me direction and enjoyment and, to my great and unexpected surprise, a love of the law.

My dad Israel Meshel was a pharmacist in the south Bronx, where we grew up. He graduated from the now defunct Columbia University College of Pharmacy. He had more love for the United States than almost anyone I know. He was a very proud American, but in fact he was an illegal alien and had never entered this country in any of the traditional legal ways. He was a Jew born in the small town of Pinsk, located sometimes in Russia and sometimes in Poland depending on when you checked the map. Pinsk is to be found somewhere in the general vicinity of the larger city of Minsk. It was a time of great anti-Semitism, even before the Nazi's came and decimated the town's populace. So bad was life there that he left on his own as a child in his young teens, traveling through Europe, trying, somehow and someway, to come to our shores. In those times, Jews had a much easier time immigrating to Cuba or Mexico than to the United States. In fact, his mother, who left Pinsk years after he did, made it legally to the U.S. years before he came.

He made it to Cuba, where he lived for 14 years, earning a living as a door-to-door peddler. He learned English on his own and devised a way to get here. He purchased a three-way cruise ticket from Havana to New York back to Havana and a last trip to New York again. In the days before computers, he could throw away the first leg of his strange journey and make it appear like he originally left from New York to visit Havana on vacation and return home to New York.

His life experiences and travels made him know, in a very personal way, how great our country is. When I was a child, he would talk late at night to me and he would tell me how great it is to be here and what a wonderful place we lived in. In the 1950's

in the heightening Cold War, there was a world trade exhibition in New York. The Russians came to show off the grand successes achieved by their "people's revolution." I was a child and my Dad took me to see the show. I still have vivid memories of this. He asked some questions of one of the exhibitors, in perfect Russian, whereupon the man became visibly nervous and upset; these were the days of the KGB. I remember a pictorial exhibit of a great hydroelectric plant built by the Soviet Union. The captions explained that this was the second greatest generator of hydroelectric power in the world. My dad just laughed and said to me "and who do you think is the greatest producer of hydroelectric power." He knew what we had and he wanted me to know, too.

Every year around April, there were radio announcements that aliens had to report to the post office. As a kid, I remember thinking they were talking about space aliens. It was a time of year that caused my dad anxiety.

During Vietnam, both my brother and I volunteered for the military, I went in the Navy and he went in the Army. He was sent to Edgewood Arsenal, where, among other things, gas and biologic warfare research was conducted. He had to get a security clearance, and I remember my Dad sweating through that. When I entered the Navy, I got sent to a surveillance squadron in Key West, where I also had to get a security check. I remember my dad laughing and asking us if we couldn't both just be regular military doctors without need of such things as FBI checks.

When I first met Robin, the Agent who recruited me so many years later, they were investigating a home health agency and I had worked for a doctor that had a relationship with that agency. I remember the interview vividly, for I hadn't personally seen any of the things that they were asking about. I still remember Robin looking sternly at me across a table, telling me that lying to the FBI was a criminal offense. I answered that I was sure that was true, but I wasn't lying. I came to love Robin, as a friend and compatriot. When my wife passed away from a brain tumor, Robin was right there and with her strong religious beliefs helping me to get through.

Robin and I would meet at different locations, sometimes weekly, sometimes twice a month to talk things over. Our meetings were often in a public placing, kind of like hiding something in plain sight. Later, her aforementioned partner ""Dudley,"" joined our group. Less often, we would meet at the fortress-like federal building that houses both the FBI and DEA. When my son Danny came to visit in El Paso, they gave him the grand tour, which included confiscated vehicles, technical areas and, my personal favorite, an arsenal where we both got to handle an old wooden Thompson submachine gun. They were great to him and have always been great to me. I couldn't be more proud of a group of people and their collective ethic than the FBI. What I have always liked the most was their total unwillingness to step on anyone's protected rights; better to lose the case than violate their oath to protect and defend the Constitution.

Every year, when you are either a confidential informant or a cooperating witness, you get to be read, what they call, the "admonishments." This is a witnessed series of promises that you are promised nothing and will not do a whole slew of silly things. Some of these include not doing anything illegal unless you get prior permission to do so, not instigating an investigation on your own, not claiming to be an actual employee

of the FBI or Government, and not going out and buying things for the Government. My favorite example was not to go out an order a "fleet of hummers." It was always a fun thing to do, though, because you would usually meet someplace and all get in one car, while the admonishments are read. It was like something you might see in an old spy or G-Man movie and that made it fun in a "Tony Soprano" way. In the early times, I think I remember signing a document, but later you didn't sign anything and you were referred to by your code name. By the way, they use some of the lamest code names you could imagine. Personally I would have preferred a strong, powerful code-name maybe something like "Hawkeye," you remember from the Mash series. But no such luck; people in my position have to accept some really dumb code names, none of which I think I am allowed to relate, but believe me, they completely lacked imagination. They were more like names from some kids television show. Alas, we snitches get so little respect.

In those early days, most of the Agents I worked with were excited about the upcoming criminal trial of the home health agency I mentioned before. The investigation took years and all these doctors were supposed to go away to wherever crooked doctors go. There were allegedly "roomfuls" of evidence and not much doubt of the outcome; at least so I thought. To my astonishment, the trial started and in the beginning of jury selection the Government folded like a house of cards. So much for the invincibility of the Government in the prosecution of the bad guys. It was a disheartening loss to the Agents involved.

There were other problems that became apparent. The computer systems the FBI used didn't seem to be close to a level you would believe the premiere law enforcement agency in the nation should be.

The Agents that work some very complicated medical fraud cases don't really have a deep understanding of some of the medical issues involved. That, of course, is to be expected, and it is an area where well-intentioned medical civilians can help a lot. I did some of that, but what I did most and enjoyed most was ferreting out new cases.

After working with Robin for almost a year, I was complaining to her about how crooked the clinic I was working at was. They would routinely go through charts and, without any physician authorization or patient medical need pull charts and refer patients to their own workman's comp physical therapist. I had no personal problem using physical therapists, but not solely for the purpose of ripping off the Texas State Workman's Compensation program. She then asked me why I didn't file a *qui tam*. Of course, at that point, I had no clue what a *qui tam* was. She patiently explained, in a fairly accurate way, and thus I began my initiation into the whole process. Her paraphrased words of advice that are a good tip still today to anyone filing a *qui tam* went something like this: "File it and live your life as if you will never get any monies from the case; then be surprised and happy if it happens." This particular clinic was one recently placed in El Paso by HealthSouth. The FBI started sniffing around and they closed up and left town. I and my good buddy and physician-friend Dr. Man Tai Lam tried to file the case, but we couldn't get any of the big boys interested. We were stopped dead in our tracks by the attorney-screeners for the name brands. When I was work-

ing there, we used to be subject to corporate slogans like "think out of the box" and, I remember, the personally drawn cartoon by Scrushy that showed everybody pushing a wagon together for the benefit of HealthSouth. I did learn one interesting thing in all of this, if you are a crook and being investigated sometimes just leaving the area and stopping the behavior stops the investigation cold. I used to point out to the FBI people that worked with me that it seemed like you could be as crooked as you like just keep it under a million a year and stop it after 5 years and you'd get away scott free.

The next large grouping of cases I checked into was not qui-tams. I wasn't actually doing this to file cases for myself; I was trying to help the Government and help the fight against fraud. Later I came to the realization that there was nothing wrong with getting an appropriate reward when a *qui tam* is filed that also helps in that fight. I also realized it was a lot easier to get people to work with me if I explained there could be a personal reward to them, as well. Greed worked as a motivator and, after all, isn't that the driving force behind free enterprise? The medical community in El Paso, and probably in much of the country, is inundated with fraud. There are cases almost everywhere you care to look. I think that the use of the FCA has really helped deter a lot of fraud from beginning in the first place.

Many of the chiropractors in town had their own private ATM machines going with workman's comp abuse. Every patient that would present would end up bringing in close to $20,000 if they played the game right. Through the use of "work hardening," "work conditioning" programs, they could self-evaluate the patient's needs and keep the therapy coming until they got the maximum returns. Then, of course, there were the other tricks, like doing group therapy and billing it as individual therapy. The self-referral rings, with chiropractors, attorneys and auto body shops, were another scam. The Government eventually caught on to the workman's compensation scams and changed the reimbursement so this is no longer possible.

There is a funny story that I heard that I think is probably based on real events. The FBI was looking at a chiropractor who rented a pool to do aquatic therapy. He would treat groups of people and bill it out as individual therapy. An undercover agent was sent in to use the pool at the same time to verify what was going on. The chiropractor that rented the pool called the police and this undercover agent was made to leave by the local PD for trespassing.

I finally decided that I was uncovering enough cases that I should probably find an attorney who would work with me on developing possible *qui tam* cases. Not knowing any local attorneys I walked into three offices at random and asked them about qui-tams. Not one of them had the vaguest clue what I was talking about. I went about trying to explain, you know" suing for myself and the king." Well, that didn't get anywhere either. So by pure accident, and on the fourth try, I came upon my now beloved friend and a truly great guy Antonio Silva, Attorney-at-Law. I walked into his office and immediately noticed a plaque given to him by the Mexican-American Bar Association for his work in the famous *Perez, et al v. FBI* case, which was a nationwide action alleging discrimination by the FBI in hiring Hispanics. This was an important case that opened the door to the hiring and advancement of Hispanic FBI agents.

Tony knew exactly what a *qui tam* was and the chemistry was and is terrific. We had everything going for us, I was a Republican and he was a Democrat, I was working for the FBI and he had beaten them, I was Anglo and he was Hispanic. In a crazy way we became a great team and have been working together for years. He is locally well respected and often represents many Federal Agents in town, because they know he is good. I have faced serious medical situations and near-death experiences in the past couple of years, and Tony was always there at the bedside with me.

So that was the beginnings of what came to be our own little fraud fighting team. Dr. Tai Lam, who is just about the best guy on the planet, is an infectious disease expert who is very influential and respected in town. Together and with "Dudley" and Robin, we tried to do as much good as we could.

I had my own personal reasons for wanting to fight the good fight. As I mentioned before, I am patriotic but I am also something of a police groupie. When I lived in Galveston, Texas, I was the police surgeon and used to amuse myself by riding around in police cars hoping for some action. If something did happen, I would switch cars because I know the guy I was riding with was in for hours of paperwork. Also, I don't want to give anyone the idea that I am some kind of righteous saint. During the sixties, I had smoked my share of pot while in school. I have made plenty of mistakes in my life that is for sure. But I did marry and love an absolutely wonderful women Julie who died of a brain tumor. I wanted to do this for her. In my own way, it was to honor her goodness and kindness that I wanted to devote my final years to doing the right thing. It is my own private way of honoring her memory and my love for her. May God rest her soul.

Some of the most fun stuff for me was when I got to be in places where I was needed to tape conversations, be someone else or be myself in phony situations and attempting to gather evidence.

Actually, I never got to play someone else. Once, after being with them for some four years, I was told they might be interested in cracking down on fake designer clothes being marketed as the real deal. My good buddy, who we are calling ""Dudley,"" asked me if I "could play a Jew from New York" so that I could act like a New York garment center buyer. We never actually got to do that case, but I found it amusing that the FBI, in the person of my buddy had forgotten the obvious. I simply told him, "Of course I can play a Jew from New York, since I am a Jew from New York." That oversight by the daunted FBI still brings a smile to my face. The gadgets were fun; I can tell you about some by way of a real case that we worked

I was at my real job as an emergency physician when I got an offer from this company looking for physicians to work with either chiropractors or physical therapists to help the elderly population. At this point, I interpreted helping the elderly to actually mean stealing from Medicare, which it actually turned out to be.

I called "Dudley" right away and told him of my suspicions and, within an hour, he called me back and told me that there already was a case opened up on these guys, but it was in Phoenix and it was stalled. He said to set up a meeting with the person writing the letter and we could go for it. He already had permission to tape that first encounter.

The way this worked is that I carried a day planner that had concealed in it's binder a very tiny digital recorder. All I had to do was to open it up and we were set. As always in these situations, besides recording, you have a separate device that is transmitting and the FBI, God bless their souls, are always really close by, usually in a car, in the off chance they have to rush in and save your butt. The transmitter in this case was an exact duplicate of the pagers that physicians in this area use. I also had my cell phone and that could be used to actually call you and direct you in a specific direction if you were missing something. From my end of the conversation, I would make it seem like it was a call about a patient. It was pretty easy to do no wires or anything on your person that could be found like we see in the movies.

Before the actual meeting you meet up with the Agents and check the equipment and go over the direction you want things to go. This often happened in cars parked nearby. It was always great fun for me. Like leading a double life, a great adventure with some great people for a noble cause.

In this case, I ended up working for these crooked folks part-time for about two months, never receiving any pay from them for my work as a physician in their clinic. I was actually glad they were getting away with not paying me; I didn't want any part of profits from a crooked deal, and it would just complicate everything for me.

At one point, the subject I initially met with offered to go with me to meet some of their people in Phoenix. This is, of course, exactly what we wanted. The FBI got all the appropriate authorizations and permissions. We would be crossing three states and needed the approval of those states as well. The car trip involved a long distance in the dessert. If this were something other than white-collar Medicare fraud, it might be a dangerous situation. In my experience, the FBI always protects their people.

We were followed the whole way from El Paso to Phoenix and back. I had a box of Altoid mints in my shirt pocket that had, concealed beneath the mints, a recording device. I had a transmitter that had the appearance of a pager. There were also extra batteries that I would have to change en route since the transmitter used up a great deal of battery charge. I had my cell phone for instructions if needed and a backup second transmitter that was set to start the moment I pulled some scotch tape off the battery connection.

These guys were real pros. We were followed the whole time, yet I never saw them until, by accident, the subject we were dealing with made an unexpected u-turn and drove right by the Agents. I changed batteries once in a bathroom at a gas station and used that brief period to transmit a change in plans. I got all the information we needed at that point and used the second transmitter to broadcast a luncheon meeting with one of the principals.

On the way back, in the middle of the dessert, there is a chintzy little tourist gift shop that touts itself as the home of "The Thing." "The Thing" is a skeletonized body, or a fake model of a body, that you get to see, along with what they claim is Adolph Hitler's staff car for a grand total of $1.25 admission. Since I was doing this as a civilian-volunteer and not as an actual employee of the FBI, I felt like playing a little after our hours of "work." I convinced the subject that we should stop and check out "The

Thing," which we did for about an hour. The problem was that there was nothing else at that exit except this bizarre little gift shop, so that the cars following us had to exit up ahead and circle back through the dessert so as not to be obvious. They will absolutely not leave you unprotected. After a period of time passed with us theorizing how to prove exactly what "The Thing" was, I got a call on my cell phone from the FBI and was told "Bill, will you please stop playing around." If it wasn't "Dudley" calling, I am sure a different verb would have been used. "Playing," of course, was exactly what I was doing, and it is an extremely fond memory.

Later on in this case, the owner of these clinics made an appearance in El Paso to "train me" and I got him on tape giving me all the details of how he scams Medicare and gets away with it. After that taping, we decided that the original subject was, more or less, an innocent victim of the whole affair. I flipped him for the Government and that case has it all. The owner, upon learning of the investigation, sold off his interests in all these clinics. The fraud has stopped and prosecution is pending.

Most often, the cases go nowhere. If the fraudulent actions stop, much of the Government's motivation is gone. There are not enough Agents or AUSA's to handle all the cases. There are lots of false starts. The AUSA's may not be interested or may be overwhelmed or, may not be in some cases, very motivated. That is the plain truth and I know you all know that.

My friend Tai Lam and I are very close. We are owners and on the board of the same hospital. We have many patients in common and enjoy the times we spend together. He is the kind of friend that you might have had in college where you end up talking about all kinds of things, from the existence of God to a good book. He is a very rich source of pleasure in my life and we are very close. We couldn't be more different in many ways. He is small and Chinese, being born in Chaoyang near Hong Kong and having gone to Medical school in Taiwan. I am Jewish, very overweight, and tower above him. We put in a great deal of effort over several years working a case we consider very important. We have been friends for years and have a deep understanding of each other and the communication between us is excellent.

On this case, the Government decided to send down a DOJ attorney who happened to be small and Chinese. Also at the meeting were a local AUSA who is very overweight and Jewish. FBI and some others attended the meeting. The peculiar and funny part, not lost on "Dudley," Tai or myself, was that, as the meeting progressed I found myself talking to the Chinese DOJ attorney while Tai found himself mostly addressing the heavy Jewish AUSA. It seems it was perfectly natural for us to communicate to the ethnic and physical counterparts of ourselves from the Government.

There are of course many, many more cases that I don't want to bore you with. Thank you for the opportunity to share what I have with you. As I told Jeb, I am honored and the members of TAF are truly my family.

God bless.
Bill Meshel

From the Frontlines

Settlement:
Practical Considerations

Settlement:
Practical Considerations

Stephen D. Altman[*]

We all know that the vast majority of *qui tam* actions that result in recoveries do so through settlement rather than trial. In addition, the negotiation of those settlements involves consideration of more issues than typical commercial settlements. Therefore, in my second installment in the *False Claims Act &* Qui Tam *Quarterly Review*, I want to focus on some of those considerations required to achieve and maximize your settlement. This is not intended as a legal review of the issues. I have endeavored to provide case cites to illustrate and explain points and to help you begin further inquiry. This article should provide practical directions for a not-so-practical situation.

But first, two cautions: one, the analysis of many of the issues may be influenced by the individual and by the office that is litigating the matter. There are approximately 200 government lawyers specializing in False Claims Act cases—70 at Main Justice and over 100 Assistant United States Attorneys (AUSA's). Various offices may take different approaches to issues. Moreover, different client agencies may also influence the litigation and negotiation in different ways.

A second caution: do not think that your strategy in litigating a case should be aimed at settlement. While a settlement should always be considered at each step, remember that the case that is best prepared for trial gets the best settlement. Moreover, the best negotiations are done when you have credibility, and you gain credibility through the manner in which you prepare a case for trial. Beyond that though, there are settlement issues that you must keep in mind as you evaluate, litigate, and negotiate a *qui tam* actions. These include the Government's goals, negotiable and nonnegotiable issues, your ability to influence the amount of the settlement, and the many factors that can influence the relator's share.

1. THE GOVERNMENT'S GOALS

Generally, the Department of Justice's goal in resolving a *qui tam* case is to maximize its financial recovery. Like any civil litigant, it applies a litigation-risk analysis against its possible recovery and then considers the defendant's ability to pay a judgment. Unlike many civil litigants, the Civil Division does not explicitly weigh resource demands.[1] U.S. Attorney Offices, on the other hand, may be more inclined to consider this factor.

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* This is the second article by Steve Altman to assist relators in identifying and navigating some of the complex areas regarding *qui tam* cases to successful conclusions. It is for educational purposes and should not be relied on for legal advice. It does not provide an exhaustive legal analysis but is intended to highlight practical considerations and identify areas for further consideration. To contact Steve, visit stephenaltman.com or e-mail him at sdaltman@verizon.net.

1. It may do so to justify a settlement as fair, adequate and reasonable.

The Department must also consider its role in serving its client agencies. Agencies may be concerned with a continuing flow of products or services. Some agencies take greater roles than others in the prosecution of FCA cases. In every case the Department obtains the recommendation from the client agency as to whether it should settle. Nevertheless, unlike in private practice, it is the Department of Justice's decision—not the client agency's decision—on whether to accept a settlement. Moreover, the money recovered does not always go back to be used by the agency. Generally, single damages are provided to the agency which, in turn, determines whether it has an open appropriation through which it can use the money or whether it must return the money to a miscellaneous account in the Treasury. This fact may influence the agency's participation in the suit and its recommendation for settlement.

The Department must also be concerned with precedent—both legal precedent in developing the law under the FCA and settlement precedent so that defendants are treated fairly. A relator, on the other hand, may not by concerned with the development of the law. The relator may feel that he should take risks to maximize his recovery in a given case, without regard to the wider implications.

2. NEGOTIABLE AND NON-NEGOTIABLE ISSUES

A relator's primary issue in settlement negotiations is money, and so is the Department's. But along with this, the Department must negotiate other issues, such as the scope of the release. The Department insists on as narrow a release as possible; typically, only for the conduct for which the defendant is paying money. If relator has filed a broad complaint with many issues, a defendant may seek a release of issues that are not the subject of the Government's settlement calculation or investigation. Thus, a relator's effort to include additional claims to maximize his/her recovery and bargaining power often has little trade value and may interfere with the resolution of the case, for the defendant must protect his client from these claims.

In addition, the Department must consider whether it needs the defendant to extend warranties or otherwise repair or correct the product or service, as well as consider whether the Government should continue to do business with the defendant. On the first of these issues, the Department discourages defendants from shifting money from the FCA settlement into a remedy for the situation, except in cases where the defendant's financial situation justifies it. When there are additional non-monetary components to the settlement, issues arise as to whether and how to value them for purposes of the relator's share. (See discussion below.)

There are many issues that the Government insists be in its FCA settlement agreements that are not negotiable and are not typical in civil settlements. While these may not be the concern of a relator, you should know what they are. They include:

- Insistence on the right to issue a press release and refusal to negotiate its wording.
- Disallowance of all costs associated with the settlement and the investigation and defense of the case from overhead accounts, so the Government does not end up

paying for the settlement in future contracts.

- The Government will not release any tax liability in an FCA agreement. Moreover, it will not agree to any terms that assist a defendant in arguing that the settlement is tax deductible.
- There will be no statement describing the defendant's cooperation with the investigation.
- Warranty provisions will not be released unless the settlement goes to a particular defect and then the release will only be to the warranty as it applies to that defect. In addition, the Government will reserve claims for any consequential and third party damages.

Finally, there are the related issues of whether the defendant can resolve any criminal liability and whether the defendant will be excluded, suspended, or debarred from doing business with the Government. These are not issues that the government attorney can negotiate, but it may be necessary for him/her to assist in the coordination of these separate negotiations because defendant may not settle piecemeal. In some cases, including most health care matters, the government agency may insist on an agreement resolving administrative issues, such as a corporate integrity agreement or CIA, before it supports a settlement. In other cases, the defendant may insist on a resolution of its criminal or administrative liability before it finalizes a civil settlement. In those cases, the Department has sometimes entered into agreements that are contingent upon the resolution of the parallel proceedings within a proscribed time period.

But settlements are ultimately about the money; that is, the assessment of possible damages and the litigation risk of obtaining a successful judgment. Some relators may take issue with the Government's theory of damages in a given case, or its assessment of the litigation risks, or its practice to often trade away penalties rather quickly in some negotiations and focus on a multiple of single damages as the settlement value of a case. While there is certainly room for legitimate disagreement on these issues, proving damages is often the most complicated and difficult aspect of trying an FCA case and the Department has more experience in this area than anyone else. Important in the negotiation is the Department's need to appear aggressive but credible. Overreaching arguments do little but delay the ultimate resolution. I discuss below the issues of counting penalties and using them in negotiations, challenging the Department's settlement value of a case, and negotiating the number.

3. HAVING A SEAT AT THE TABLE

One of relator's first orders of business is whether he can participate in the negotiations. Keep in mind that it is the Government's case and your client has a right to a portion of the recovery. The Government will take the lead in negotiations. Do not initiate settlement negotiations with the defendant on your own. Few things will spoil a good working relationship with the government attorney more than this.

The role you will actually play in the negotiations will depend on many factors which include your relationship with the government attorney, who the relator is, how

helpful and necessary the relator is to the factual discussion, and the relationship between the relator and the defendants. Taking the last item first, it is not uncommon for defendants to insist that relators not be allowed at the table.[2] This may or may not apply to their counsel. Does defense counsel trust you? Can you agree that you will not expand the case or bring a new case based on the discussions? Do you have allegations in addition to the Government's claims that should also be negotiated? Sometimes the relationship is so bad the defendants will insist that the government attorney negotiate even non-intervened claims; that is, make them go away if there is to be a settlement.

Sometimes the relator is such an important witness that the government attorney needs him or her at the table to refute defendant's representations. Obviously, that is an advantageous situation. More often, however, the degree to which the government attorney wants you there depends on your working relationship with him/her. Your role in the negotiation may also depend upon how closely you agree with the government attorney on the computation of damages. Even if you disagree, if you have a good working relationship, the government attorney may want you there to play the "bad guy" role, with a more extreme theory to make him/her look reasonable.

When you are not actually at the table, you can still have an active role consulting with the government attorney. You may be able to provide responses, evidence, or alternative theories. One problem you will have is that you are not privy to the information that the defendant is sharing with the Government. If you can show the government attorney that you can help respond to the new facts, you will increase the likelihood of consultation. Failing that, you must assess the likelihood of objecting to the settlement. Before doing so, is there anyone to whom you can appeal? Can you write to the agency counsel or to a supervisor? Although escalating the issue may sometimes have consequences, and most line attorneys are backed up by their supervisors, it is not unusual for both relators and defense counsel to have meetings with DOJ on such appeals. You can avoid undue consequences if you set up any such appeal through the government attorney and include him/her in any meeting. Another approach that should be considered is to develop a good working relationship with the agent doing the investigation.

Do not forget that your attorneys' fee claim and any private action that the relator may have against the defendant, such as a wrongful discharge claim or a retaliation claim, allows you to have direct negotiations with the defendant, which you can initiate. Also, since most defendants will want to complete a global settlement of all outstanding issues, you may have some leverage to settle these matters on favorable terms and make up for some disappointment with the settlement of the case-in-chief. You may be able to use these opportunities to tell the defendant that you may challenge the settlement.

2. This assumes that defendant knows that a *qui tam* has been filed. Often, during the seal period discussions between the defendant and the Department, discussions may segue into settlement discussions. If the Department wants to tell the defendant that a *qui tam* is pending, it will seek a limited lifting of the seal for that purpose.

4. HOW MUCH IS ENOUGH: FAIR, ADEQUATE, AND REASONABLE

Pursuant to 31 U.S.C. 3730 (c)(2)(B), the relator may object to a Government-negotiated settlement on the grounds that the settlement is not "fair, adequate and reasonable under all the circumstances." The relator may be entitled to a hearing on the issue and several courts have allowed some discovery. *See e.g., U.S. ex rel. McCoy v. California Medical Review Inc.*, 133 FRD 143 (N.D. Cal. 1990). Thus, the relator has a limited statutory right that allows him to negotiate with the Government over the amount of money necessary to conclude a settlement. How much is enough is never an easy calculation. The Department has no simple formula.

In his confirmation hearings in 2003, Associate Attorney General Robert McCallum provided the following written answer to a question from Senator Grassley concerning criteria for settling FCA cases:

> The Department does not have written or fixed criteria that it applies mechanically to False Claims Act matters when it makes a determination to settle a case. Each case is examined on an individual basis… The Department will usually consider a presentation from the defendant and from relators regarding the facts and applicable law. Our touchstone for settling matters is the litigation risk in establishing the facts, providing the requisite scienter under the statute, and establishing good case precedents. In strong cases, any settlement is likely to be closer to the full triple damages as provided for in the statute. In cases where the litigation risk may be higher, a lower "multiple" to the single damages may be appropriate for the purpose of our settlement evaluation. In addition, we also take into account the financial capacity of the defendant, particularly in the bankruptcy context.

With those criteria, the Government negotiates its settlement. But the relator may disagree with the Government's assessment of risk, with its calculation of damages, or with the scope of the case. In assessing the Government's valuation, do not be concerned with the influence of politics or outside lobbying on behalf of a defendant. While the defense bar may launch initiatives as a group, it is rare for someone to use influence on behalf of someone who is under investigation for defrauding the United States. Moreover, the line attorneys and their supervisors who are making the key decisions are nicely insulated from such approaches.

If your disagreement is on damages, consider how to present your argument. First, the simpler the argument the better. Second, is it a method of calculation that has been used before, especially by the agency, in administrative matters? Third, can you get a CPA, such as a retired DCAA or IG auditor, to present it? If your disagreement is on liability, pay considerable attention to proving knowledge on the part of the defendant. Also consider defenses that may not be legally binding but may have jury appeal, such as Government knowledge, Government acquiescence, or confusion on the interpretation of a regulation.

Most attorneys at main Justice and most AUSA's will give you a chance to present your arguments regarding the value of the case. In fact, it is not uncommon for their supervisors to also participate if you have made a reasonable request. Occasionally, you can get someone at main Justice to take a look at a case being handled by an AUSA. In any of these opportunities, consider not only your arguments about why the investigation is inadequate, or why the Government's damage theory is too conservative, but also consider how you can help. What do you bring to the table? What resources can you provide? Also consider the client agency's needs. It helps a great deal if you can find someone at the agency that cares.

You may have a credible argument that will allow you to challenge the settlement as not "fair, adequate, and reasonable" under section 3739(c)(2)(B) of the Act. Although the Government has a consistent record of winning these disputes, your ability to raise a non-frivolous challenge to the settlement gives you some negotiating leverage. Do not overplay this hand, though. Courts clearly give deference to the Government in these hearings. Be careful not to put too much weight on the case of *Gravitt v. GE*, 680 F. Supp. 1162 (S.D. Ohio 1988), in which the court did overturn the Government's settlement. Critical in that complicated matter was the court's decision that the Government settled the case based on the double damages and lower penalties permitted by the Act when the case was filed, but should have and could have applied the triple damages and higher penalties that were passed during the pendency of the litigation. (Since then relators have found little success in these hearings. *See, e.g., Summit, U.S. ex rel. Ayers v. Bondcote Corp. et. al*, CA 403-011 (S.D. Ga. August 20, 2004), *U.S. ex rel. Burr v. Blue Cross and Blue Shield of Florida Inc.*, 882 F. Supp. 166 (M.D. Fla. 1995).

The Government's success in these hearings should not be a surprise. Most courts follow presumptions in favor of settlements. *See e.g., Officers of Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982), and *In Re GM Corp. Pickup Truck Products Liability Litigation*, 55 F.3d 768,784 (3d Cir. 1995). Courts generally give the Government deference, especially in conducting the business of prosecutions and litigation. *See Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 844 (1984). The court will rarely substitute its opinion for that of the Government in such matters, and only where it finds an abuse of discretion. Remember that the hearing allowed by the Act is not automatic. Indeed, the Ninth Circuit stated that it should not be a burden on the court or the Government *U.S. ex rel. Kelly v. Boeing Co,*. 9 F.3d 743 (9th Cir. 1993). Because the United States is the "real party in interest" in *qui tam* litigation, the relator is required to meet a "substantial burden" in demonstrating that the settlement is not fair. *U.S. ex rel. Grober v. Summit Medical Group*, No. 02-177C (W.D. Ky. Slip op. at 7, July 9, 2004). Finally, while the language is similar to that of class actions, I expect the courts to apply the tests differently. In reviewing class action settlements the courts have a role to protect the victims that are not before them; in FCA matters, the victim is the party proposing the settlement.

If you are at the hearing stage, it may be too late; but before that the threat of seeking a hearing is not ignored—particularly by the defendant and AUSAs with less FCA experience. While the courts have rejected many bases for a challenge to the

settlement, you can consider raising issues about the likelihood of success; the amount of discovery or investigation that has been conducted; the scope of the release if it includes claims that are not the basis of the settlement amount; the method of computing the damages; and the history of the negotiations and your participation or lack thereof.

5. ASSESSING AND NEGOTIATING PENALTIES

In assessing the value of a case you must consider at least three aspects concerning the penalties. First, how many penalties are there? Second, does the number of penalties in relation to the damages implicate the 8th Amendment prohibition against excessive fines? And third, what would be the amount of each penalty?

Counting penalties can be easy for most cases, but may be very contentious in others. You should be aware of the issue raised in *U.S. ex rel. Koch v. Koch Industries Inc.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999), regarding whether a document that may contain several false claims is counted as one penalty or multiple penalties. *See also U.S. v. Krizek*, 192 F. 3d 1024 (D.C. Cir. 1999) *and U.S. ex rel. Augustine v. Century Health Services Inc.*, 289 F. 3d 409 (6th Cir. 2002). This may be one of those areas where you have a little room to push if you can craft an argument for higher penalties, but counsel your client that expansive theories of counting penalties have not faired well.

Defendants have argued that the number of penalties should be reduced because the resulting award, when compared to single damages, violates the excessive fines clause in the Eight Amendment to the Constitution, citing *Hudson v. United States*, 522 U.S. 93 (1997) and *U.S. ex rel. Stevens v. Vermont Agency of Natural Resources*, 529 U.S. 765 (2000). Cases that have addressed the issue include *US ex rel. Smith v. Gilbert Realty Co. Inc.*, 840 F. Supp. 71 (E.D. Mich. 1993), and *U.S. v. Byrd*, 100 F. Supp. 342 (E.D. N.C. 2000). In *U.S. v. Mackby*, the Ninth Circuit remanded with instructions that the district court determine whether the number of penalties and damages were "so grossly disproportionate to the gravity of the violation as to violate the Eight Amendment." 261 F.3d 821, 830 (9th Cir. 2001). The district court found that the award was appropriate and the Circuit affirmed. *U.S. v Mackby*, 339 F.3d 1013 (9th Cir. 2003). (In that case the Government chose not to seek recovery for all penalties to avoid the excessive fines challenge.)

Few cases have reviewed the size of the penalty. Considerations may include the size of the defendant, whether damages other than monetary damages can be identified, and the defendant's history.

The government attorney will usually include his/her penalty count in the assessment of defendant's potential liability. Historically, however, settlements have been based on a multiple of single damages and the penalties have been traded away fairly quickly in the negotiation. This has not always been the case where the single damages are relatively small and the penalties relatively high. Why should the Government give up penalties as part of a settlement? The Department has not to my knowledge articulated an explanation. My first view is that there is a resource issue: other cases

also demand attention. Second is a fairness issue. If two defendants conduct similar frauds with similar damages, but because of the way a particular regulation is written, one defendant submits one claim and another submits 1000 claims, should the second defendant really be punished more? Finally, both industry and Congress are aware of the practice and have not criticized it. At least one court has accepted that it is within the Department's discretion and denied a relator's challenge to a settlement on this ground. *See U.S. ex rel. Grober v. Summit Medical Group,* No. 02-177C (W.D. Ky. Slip op. at 8 July 9, 2004).

6. THE RELATOR'S SHARE

Obviously the relator's share is negotiable. The starting point is the provision of the statute, 31 U.S.C. 3730(d)(1), which sets the determination on whether the Government has intervened. Other factors include whether the case was primarily based on publicly disclosed information;[3] and whether the relator "planned and initiated the violation"; and whether the relator is convicted of criminal conduct arising from his role in the violation. 31 U.SC. 3730(d)(3).

Regarding the statutory language, the Senate legislative history identifies three factors in its consideration: 1) the significance of the relator's information; 2) the contribution of the person bringing the action; and 3) whether the information was previously known to the Government.

The next reference point is the Department's Relator Share Guidelines (available on TAF's website www.taf.org and at 11 FCA Quarterly Review 17–18 October 1997) as interpreted by the courts. *See e.g., U.S. ex rel. Fox v. Northwest Nephrology Assoc. PS.*, 87 F. Supp. 2d 1103, 111 (E.D. Wash. 2000) and *U.S. ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323 (M.D. Fla. 2001). These decisions make use of, but do not strictly follow, the guidelines. For instance, courts have provided significant awards even though the case has not gone to trial and the size of the settlement is quite large. *See, e.g., U.S. ex rel. Pedicone v. Mazack Corp.*, 807 F Supp. 1350 (S.D. Ohio 1992).

The Department's Guidelines give factors that can increase or decrease the award. They are not binding, but can help focus a court's analysis and also the negotiations over the share. The Guidelines provide good insight into the Department's view of the proper relator's share. The Department wants relators to get a share that will encourage future cases. They are also aware of the risks and efforts that many relators take to bring their cases. At the same time, the Department represents the Treasury. If a fifteen percent share of a multimillion-dollar recovery will greatly reward a whistleblower and will be sufficient to encourage future filings, why should the Department give away additional taxpayer money? In addition, one should be cognizant that each time a share is negotiated, it is setting a precedent for future shares; therefore, the Government considers not just the amount awarded in that case but also its impact

3. For a discussion of when a relator satisfies the jurisdictional requirement of being an original source but the case is not based primarily on relator's disclosures, see U.S. ex rel. Merena v SmithKline Beecham Corp. 205 F3d 97 (3rd Cir. 2000).

on many other cases. Thus, in negotiating a share, a relator may want to emphasize, in addition to the guidelines, the uniqueness of the situation as well as the potential success he may have if he litigates the issue.

It is important to note, however, that several relevant issues are not addressed in the Guidelines. These include the impact of jurisdictional issues, such as first-to-file and original sources controversies, as well as other points of contention, such as the scope of the release (does it include unadopted claims?) and even the amount of the settlement. Sometimes these disputes can be resolved in the context of negotiating the relator's share. The Government may adjust the share to help resolve these other disputes.

Given these governmental considerations, stay aware of the timing of the relator share negotiations, and whether they may influence future settlements when there are multiple defendants. While there is no hard-and-fast rule on when a share should be negotiated, a relator probably wants to raise the issue before the main settlement is finalized. This gives him a better picture of how the size of the ultimate settlement will affect his recovery and also raises the issue while he has leverage and may tie the two issues together. The government attorney may resist discussing the share until the settlement and may view insistence on negotiating the share as a lack of cooperation to be considered by the court in determining the share. This need not be the "Catch-22" it appears to be. Explain your client's need to understand the impact of the settlement and make an effort to have a record of your attempts to assist the settlement negotiations and your share demand.

If you fix a share amount that will apply to future settlements with additional defendants in the same case, the Government will insist that the relator give up his right to challenge the amount of the future settlements. This may appear severe, but such agreements usually are only used where there is a good working relationship between the relators and government counsel. The Government insists on such a release because it simultaneously releases its right to oppose a relator challenge with arguments that go to the relator's right to recovery.

Finally, remember that in any agreement the Government will insist on a standard release from the relator in which the relator agrees that the settlement is fair, adequate, and reasonable.

In addition to the *Alderson* and *Pedicone* decisions cited above, some examples of courts addressing relator share issues include:

- *US ex rel. Merena v. SmithKline Corp.*, 205 F.3d 97 (3d Cir. 2000) (discussing when there are multiple relators whether a public disclosure eliminates the award or limits the award to the 0 to 10 percent category);
- *U.S. ex rel. Burr v. Blue Cross and Blue Shield of Fla. Inc.*, 882 F. Supp. 166 (M.D. Fla. 1995) (awarding a relator's share of 15 percent because the relator contested settlement amount and failed to demonstrate personal hardship);
- *U.S. ex rel. Coughlin v. IBM Corp.*, 992 F. Supp. 137 (N.D. NY 1998) (awarding a 15 percent relator share because, *inter alia*, the relator opposed requests for extension and opposed settlement).

7. PROCEEDS OF THE ACTION OR SETTLEMENT

The relator is entitled to a share of the "proceeds of the action or settlement of the claim." 31 U.S.C. 3730(d).[4] Two issues arise in computing the proceeds. First, whether the proceeds arise from allegations that were not clearly identified in her complaint and second, the extent to which non-monetary aspects of a settlement are included in the proceeds.

Courts have dealt with several issues regarding the relator's rights to proceeds arising from claims in addition to those clearly articulated in his complaint. One issue is the question of whether the award should be parsed among claims. In *US ex rel. Merena*, the Third Circuit sent the case back to the district court to separate the claims into those in which the relator had valid rights and those in which there may have been prior public disclosures which would have foreclosed his rights had he brought them separately. Similarly, the Ninth Circuit remanded the relators award in *U.S. ex rel. Campbell v. Redding Medical Center,* 421 F. 3d 817 (9th Cir. 2005) to determine if the relator's original complaint entitled him to a share over a later competing complaint. Another issue that courts have considered is whether the Government can segregate portions of the settlement from the proceeds for share purposes. In *U.S. ex rel. Alderson v. Quorum*, *supra*, the court refused to allow the Government to segregate part of the settlement because, on factual grounds, neither the settlement nor the Government's evidence identified a separate portion of the proceeds as coming from an unrelated matter. Finally, in *U.S. ex rel. Barajas v. Northrop,* 258 F 3d. 1004 (9th Cir. 2001), the Circuit Court dealt with an issue of first impression when it determined that the relator had a right to recover from the Government's settlement of a claim that the Government discovered during the investigation of relator's original complaint.

Normally, one thinks of proceeds as the money that is placed in the Treasury as a direct result of the *qui tam*. Had the case gone to trial, the judgment would go into the Treasury. No other relief would be granted. In the case of a settlement, does the money that goes to the Treasury represent the entire proceeds? What about the value of an extended warranty, or the value of contract concessions or the dismissal of unrelated litigation against the Government? In *qui tam* cases, this issue of what constitutes proceeds has become a contentious issue. Interestingly, the relator and the defendant share an interest in quantifying and maximizing the value of non-monetary considerations.

Some examples of what district courts have considered "proceeds" include:

- **Waiver of claims.** *In US ex rel. Thornton v. Science Applications International Corp.*, 207 F. 3d 769, 771 (5th Cir. 2000), the court discussed under what circumstances the value of claims that the defendant released against the Government should be included in proceeds. The court decided that the value of certain

4. Keep in mind that promises to pay are not proceeds. Relators do not get their share of settlement proceeds until the government actually receives the money. This is relevant when the settlement calls for payment over time, or when bankruptcy has or may have a role in defendant's ability to pay. *See US ex rel. Fox v Northwest Nephrology Associates, P.S.*, 87 F. Supp. 2d 1103 (E.D.Wash 2000).

claims released by the defendants, but not the value of the transfer of software codes to the Government, should be included in the proceeds. The code was not part of the quid pro quo for the settlement.

- **Payments representing an administrative settlement.** In *Quorum, supra*, the United States tried to exclude $5 million from the proceeds on the grounds that although the money was part of the settlement, it arose from a matter outside the relator's allegations. The court held that as a matter of fact, the Government had not demonstrated that the administrative matter was separate from the relator's alleged fraud.
- **Repairs or replacements.** *In U.S. ex rel. Barajas v. Northrop*, 258 F3d. 1004 (9th Cir. 2001), the Government would have had to pay to replace tainted damping fuel and therefore the court included the value of the replacement fuel that defendant provided as part of the settlement.
- **Warranty.** In *U.S. ex rel. Coughlin v. IBM*, 992 F. Supp. 137, 142 (1998), no share of the value of a warranty was awarded, in part because no claims for additional work were ever made by the Government under the warranty.

8. ALTERNATIVE REMEDIES

The FCA recognizes that the Government may elect to pursue its claim by a means other than the FCA. In such cases, the relator should not be deprived of his rights. 31 U.S.C. 3730(c)(5).

The Department's view is that the alternative remedy section should apply in very limited circumstances. One is when the recovery is pursuant to a fraud statute with multiple damages, such as the Civil Monetary Penalties Act. It should also apply where the relator's right to pursue an FCA remedy has been foreclosed by some Government action. For example, if the Government declines to intervene and then settles the matter as a contract adjustment but does not dismiss the FCA action, the relator may continue to prove that a fraud has been committed. In this situation, the Government will not allow relator to share in the proceeds of the administrative settlement unless and until he/she has obtained an FCA judgment and the earlier settlement has been used as an offset. Remember, the FCA awards multiple damages for fraud, not for breach of contract. *See e.g., Ervin and Associates v. United States*, 2003 U.S. Dist. Lexis 25064 at 6 (D.DC August 14, 2003).

Nevertheless, courts have identified situations where the recovery did not fit the Government criteria. For example, in *U.S. ex rel. Bledsoe v. Community Health Systems Inc.*, 342 F 3d 634, (6th Cir. 2003), where the settlement carved out the *qui tam* from the release, the court still held that a settlement "in lieu of intervening in a *qui tam* asserting the same FCA claim is an alternative remedy . . ." *Id.* at 649. The matter was remanded to determine if the relator could satisfy Rule 9(b) and if the Government could show that the conduct that was the basis of the settlement was not the conduct that was the basis of relator's complaint.

Also, in *U.S. ex. rel. Barajas v. Northrop*, 258 F 3d. 1004 (9th Cir. 2001), the Court found that, under the particular circumstances of that case, the Government's pursuit and settlement of a suspension remedy was an alternative proceeding, because the Government had declined to intervene in relator's case and then settled another of relator's cases in such a way that estopped the relator from pursing the case himself.

In *U.S. ex rel. Burr v. Blue Cross and Blue Shield of Florida, Inc.*, 882 F. Supp. 166 (M.D. Fla. 1995), the court found a sufficient factual record to segregate portions of the settlement from the proceeds, including the compromise of a claim that the defendants had against the Government.

Generally, criminal prosecutions are not considered alternative remedies. However, in *U.S. v. Bisig,* 2005 WL 3532554 (S.D. Ind. 2005), a court found that a criminal forfeiture was an alternative remedy and resulted in "proceeds" of the action.

9. FIRST TO FILE

The statute provides that "no person . . . may bring a related action based on the facts underlying the pending action" 31 U.S.C. 3730(b)(5). This "first to file" bar may not appear to have much to do with settlements. Nevertheless, it has been the subject of negotiation and litigation regarding both whether the relator is entitled to a share and the amount of any share. You should be aware of and prepared to deal with issues concerning the tests to determine whether your case has the same "underlying action." *See Lacorte v. SmithKline Beecham Clinical Labs,* 149 F3d. 727 (3d Cir. 1998). Also relevant here is whether either party has pled the claims with sufficient particularity to claim a share. *See U.S. ex rel. Marena v. SmithKline Beecham Corp.* 114 F Supp. 352 (E.D. Pa. 2000). Equally relevant is whether both relators had jurisdiction to bring the action. *See U.S. ex. Rel Campbell v. Redding Medical Center*, 421 F. 3d 817 (9th Cir. 2005).

If the Government or other relators argue that you are not entitled to a share, this does not prevent you from negotiating with them to obtain a reduced share if you can convince them that you have a litigable issue and that they have litigation risk.

10. ATTORNEYS' FEES

At some point, the Government or the defense counsel or relator's counsel should initiate a negotiation separate from the negotiation to settle the underlying case. Generally, in intervened cases the Government will not care about the attorneys' fees. If the defendant has limited assets, however, and the settlement has been reduced as a result, the Government expects the relator's counsel to take the same share that it is taking.

The fees belong to the relator, who has the burden of demonstrating the number of hours and the hourly rate. The defendant can then argue that the fee is not reasonable. Several defendants have litigated this issue. *See* e.g., *U.S. ex rel. Avondeck v. Pastor Medical Associates P.C.*, 224 F. Supp 2d 342 (D. Mass. 2002), *and U.S. ex rel. Poulton v. Anesthesia Assoc. of Burlington Inc.*, 87 F Supp. 2d 351 (D. Vt. 2000). Moreover, a rela-

tor may not be able to recover the costs associated with negotiating the relator's share. *See Taxpayers Against Fraud v. GE Co.*, 41 F3d. 1032 (6th Cir 1994).

I am aware of only one case in which a court looked at the proportionality of the fees as a percentage of the Government's recovery. *See U.S. ex. Rel Angel v. Planning Research Corp.*, CA 94-618 A (E.D.Va. 1994).

11. NON-INTERVENED CASES

When the United States has not intervened, it does not mean you have free reign to settle as you see fit. The following considerations can effect your settlement of non-intervened cases.

A. Government's rights to foreclose a settlement.

You must consider the Government's rights to foreclose your settlement. These rights vary by circuit. Section 3730(b)(1) states that "[t]he action may be dismissed only if the Court and the Attorney General give written consent to dismissal and their reasons for consenting." In the Ninth Circuit, that provision is interpreted to apply only before the United States opts out of the litigation. After that event, the Government must show "good cause" by moving for a hearing to object to a settlement. See U.S. ex. rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994). The Fifth and Sixth Circuits have rejected this limitation and have held that the Government's right to veto a settlement in a declined *qui tam* is unrestricted. See U.S. ex. rel. Searcy v. Philips Electronics, 117 F. 3d 154 (5th Cir. 1997) and U.S. ex. rel. Doyle v. Health Possibilities, 207 F. 3d 335 (6th Cir. 2000) and Dimartino v. Intelligent Decisions, 2004 WL 549799 (M.D. Fla. 2004).

B. Guidance in Government's letter to the parties.

You should consider the guidance given in the letter that both the relator and defendant should have received from the Government when it made its decision not to intervene. This letter provides limits on some of the terms and conditions that the Government will approve. The settlement agreement should contain the standard provisions, including the non-allowability clause, tax neutrality, consequential damages limitation, and warranty exception. The failure to include the provisions may or may not be sufficient to uphold a Government challenge to the settlement. *See e.g., U.S. ex. rel. Pratt v. Alliant Technologies Inc.*, 50 F. Supp. 2d 942 (C.D. Cal. 1999). A relator may agree to keep his part of an agreement confidential, but he may not bind the Government in this respect.

C. Government's concerns about fees.

You should consider whether the Government will be concerned with any split between attorney fees and FCA proceeds. Tell the defendant that you must negotiate the attorney fees separately from the negotiation of the government claim. Some de-

fendants have offered a lump sum "for the whole case including fees." You need to resist this because it may create a conflict between the calculation of your fee and the amount from which your client's share will come.

If the United States reviews the attorney fees, it is not simply to determine if they are appropriate but to insure that money has not been shifted from the False Claims Act settlement to the fees. *See e.g., U.S. ex rel. Gibault v. Texas Instruments*, 104 F.3d 276 (9th Cir. 1997).

D. Government's concern for the scope of the release.

Finally, remember that you will not be allowed to provide a very broad release. The United States will not consent to a dismissal with prejudice unless it is receiving money in the settlement. That is, if the defendant is only paying attorney fees or wrongful discharge damages to the relator, then the dismissal must be without prejudice to the United States. If the Government is receiving money in the settlement, it will still require that there be a release that only covers the specific conduct for which it is receiving a settlement, or for the specific allegations in the complaint. If the defendant insists on more, you may ask the Government to issue a side letter, referred to as a "cold comfort letter," in which it will not give a release but may represent that it has no present intention of taking any action related to the allegations in the complaint.

There are a few other considerations to keep in mind in non-intervened cases. You may be able to enlist the Government in brokering a settlement. Also, the way you document a settlement and obtain approval from the court depends on who you are working with and where the case is located. There may be one agreement signed by the Government, defendant and relator, and sometimes the agency. However, often the agency will enter into a separate agreement to resolve administrative matters; similarly, the Government and relator may enter into a separate "relator share" agreement. Finally, you may be in a jurisdiction that only expects you to file a simple dismissal, or you may need to file a motion with an explanation to the court that the dismissal is in the Government's interest.

12. MEDIATION

While the Department has a good record negotiating FCA cases, both the Department and many sophisticated defendants may be open to using mediation in appropriate circumstances. While the topic may receive mixed reviews among some AUSA's, I have assisted many U.S. Attorneys Offices in considering whether and how to use a mediator. FCA cases raise many of the reasons why litigants use such assistance, including emotional issues, multiple parties, lack of trust, need for confidentiality, the need to save time and money, need to talk directly to clients and decision makers, and differences between the parties' assessments of the case. Relators should be open to the possibility of bringing in a disinterested party to help resolve these conflicts.

While mediation advocacy is beyond the scope of this article, I offer the following considerations. What type of mediator do you need? Whether you need someone to

evaluate the claims or facilitate the conversation, the person's mediation skills are more important than any substantive expertise. What issues do you want to have resolved? A mediator can assist in share issues and fees. Finally, who should attend the mediation? Make sure that the right people are there representing each party.

13. CONCLUDING NEGOTIATING TIPS

Let me return to my two initial cautions. My first caution: your ability to negotiate a satisfactory settlement of the case and a share of the proceeds depends, in part, on your working relationships. Try to have good relationships with client agency personnel. Look for opportunities to meet face to face with government personnel. Try to develop the facts without interfering with the Government's investigation. Try to expeditiously resolve jurisdictional issues, such as those that go to the relator's right to bring the action, or find a way to put them on hold until they are ripe for resolution.

Balance high expectations while maintaining credibility. Communicate those expectations to the government attorney in a way that demonstrates you can help achieve it. Keep in mind that, most government attorneys are not risk takers. How can you take some of the risk? Most government attorneys are overworked. How can you share some of the load? Should you hire your own accountant? Can you assist in managing difficult defendants? Think about the defendant's goals. In addition to money, the defendant may be interested in publicity, legal fees, and the criminal and administrative ramifications. Can you use any of those as leverage? Can you help solve any of defendant's problems, for example, by agreeing to confidentiality?

My second caution: focus on developing the case not settling it, but keep settlement in mind. Always focus on the development of the investigation and discovery. For all the legal issues that come into play, the factual development still makes or breaks FCA cases. At the same time, always think about how your current activity—whether a document request, a deposition, or a motion—may affect a settlement. Finally, if there are claims in which the Government did not intervene, do not expect a free ride. Either abandon the claims or develop them with an eye toward asking the Government to reconsider its intervention decision.

The timing of settlement negotiations is also important. Many cases are settled prior to intervention. As in any litigation, some cases get better during the litigation and some get worse. Keeping an eye on the impact of the litigation on settlement is important. For example, before entering formal settlement discussions, try to get weak defenses struck from the case. Even if they had little merit, they would complicate the negotiations and give defendant more arguments. Early motions to strike defenses (such as estoppel, accord and satisfaction, stature of limitations, and waiver) are often successful.

In conclusion, you can see that settling a *qui tam* action can be very complicated and time consuming. Prepare yourself and your client for this arduous task. Plan to give it the time and effort that it requires.

Legal Analysis

Penalty Points, Part Three:
Constitutional Defenses

Penalty Points, Part Three:
Constitutional Defenses

Lani Anne Remick[*]

This article is the third part of a three-part series examining the penalty provisions of the False Claims Act. This part will examine Constitutional defenses to the imposition of penalties under the Act. Parts One and Two addressed how courts determine the number of penalties to award and the dollar amount of the penalty within the statutory range.

* Prior to four years as a Trial Attorney in the Fraud Section, Civil Division, United States Department of Justice, the author represented relators in federal and state false claims actions while in private practice in San Francisco. She currently devotes herself full-time to the practice of motherhood.

III. DUE PROCESS

A. Defense Rarely Raised and Never Successful Under the Act

B. Supreme Court Punitive Damages Cases Should Not Be Applied to the Act

INTRODUCTION

As explained in Part Two of this series, the imposition of penalties under the False Claims Act is mandatory for each claim found to be false. Nevertheless, a court's calculation of a total penalty amount in accordance with the Act's provisions is not necessarily the last step in the determination of a penalty award. In certain circumstances, the penalty may be subject to constitutional restraints. Defendants have challenged the Act's penalties under the Double Jeopardy and Due Process Clauses of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.

Double jeopardy challenges to the Act's penalties apply only when civil claims under the Act are accompanied by parallel criminal proceedings. This defense enjoyed a brief period of recognition, but is now extremely unlikely to succeed. An understanding of the history of the double jeopardy defense remains relevant today, however, because the Supreme Court's test for whether a sanction constituted "punishment" for purposes of the Double Jeopardy Clause has since been imported into the excessive fines context.

The excessive fines defense has a much broader potential application, as it may be raised whether or not parallel criminal proceedings are involved. It is a relatively new defense on the False Claims Act scene, since it was only in 1993 that the Supreme Court first held that the Excessive Fines Clause applies to civil (as opposed to criminal) sanctions. Several courts have since applied the Clause to penalty awards under the Act, but defendants have seldom succeeded in showing that the Act's penalties are in fact "excessive."

Finally, due process challenges appear only in a few very old cases under the Act, but may begin to appear again if defendants attempt to import into the context of the Act recent Supreme Court decisions limiting punitive damages on due process grounds. Applied to the Act's penalties, however, the types of due process limits suggested in the Court's punitive damages cases would impermissibly substitute the judgment of a court for that of Congress as to what the appropriate penalty should be for submission of a false claim. Because the due process rationale of the Court's punitive damages cases, *i.e.*, that punitive damages must be limited in order to provide defendants with "fair notice" of the damages they may face, does not apply where penalties are defined by federal statute, the due process limits of the punitive damages cases should not be applied to penalties under the Act.

I. DOUBLE JEOPARDY

Where a civil False Claims Act case involves parallel criminal proceedings, the Double Jeopardy Clause[1] may be raised as a defense. The gist of the double jeopardy defense is that an award of penalties (or treble damages and penalties) under the Act constitutes "punishment," such that the imposition of both the Act's remedies *and* criminal sanctions would put the defendant twice "in jeopardy." In the most common procedural posture, the Clause is cited as a defense to the imposition of penalties under the Act following a criminal conviction,[2] guilty plea,[3] or acquittal[4] based on the same underlying conduct or transaction. Although less common, the Clause may also be cited as a defense to criminal charges when civil liability has previously been imposed under the Act.[5] In the absence of a related criminal proceeding, the double jeopardy defense has *no* application to claims under the Act.[6]

Although it has often been raised in an attempt to avoid the Act's penalties, the double jeopardy defense has been rejected in the overwhelming majority of cases and today has less chance than ever of succeeding. As detailed below, historically, courts, including the Supreme Court, had uniformly held that the double jeopardy defense was inapplicable to civil claims brought under the Act, because the Act's damages and penalties were civil remedies rather than criminal "punishment," and thus did not put the defendant in "jeopardy." Then, in 1989, the Court held for the first time in *United States v. Halper*[7] that the imposition of penalties under the Act could constitute a second "punishment" for double jeopardy purposes if the penalties actually imposed bore "no rational relationship to the goal of compensating the Government for its loss."[8] The Court cautioned, however, that *Halper* was a "rare case" and that in the "ordinary case" the Act's fixed-penalty-plus-double-damages formula would not produce a penalty that would run afoul of the Clause.[9]

Indeed, lower courts applying *Halper*'s reasoning to subsequent cases under the Act continued to find the defense inapplicable. Furthermore, a mere eight years after

1. The Double Jeopardy Clause reads: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const., Amdt. 5.

2. United States v. Peters, 110 F.3d 616 (8th Cir. 1997); United States v. Barnette, 10 F.3d 1553 (11th Cir. 1994); United States v. Boutte, 907 F. Supp. 239 (E.D. Tex. 1995), *aff'd*, 108 F.3d 332 (5th Cir. 1997); United States v. Pani, 717 F. Supp. 1013 (S.D.N.Y. 1989); Berdick v. United States, 612 F.2d 533 (Ct. Cl. 1979); United States v. Kates, 419 F. Supp. 846 (E.D. Pa. 1976); United States v. Greenberg, 237 F. Supp. 439 (S.D.N.Y. 1965).

3. United States v. Killough, 848 F.2d 1523 (11th Cir. 1988); United States v. Sazama, 88 F. Supp.2d 1270 (D. Utah 2000); United States v. Fliegler, 756 F. Supp. 688 (E.D.N.Y. 1990); United States v. Howell, 702 F. Supp. 1281 (S.D. Miss. 1988); United States v. Annicchiarico, 238 F. Supp. 339 (D.N.J. 1963); United States v. Grunstein & Sons Co., 127 F. Supp. 907 (D.N.J. 1955).

4. SGW, Inc. v. United States, 20 Cl. Ct. 174 (1990); United States v. MacEvoy, 10 F.R.D. 323 (D.N.J. 1950).

5. *See, e.g.,* United States v. Brekke, 97 F.3d 1043 (8th Cir. 1996).

6. *See, e.g.,* United States v. Williams, 2003 WL 21384640 at *3 (N.D. Ill., June 12, 2003) ("[B]ecause Defendants have not been charged with any criminal violation, they lack the requisite standing to contest the FCA's damage provisions on the basis of double jeopardy.").

7. 490 U.S. 435, 109 S.Ct. 1892 (1989).

8. 490 U.S. at 449, 109 S.Ct. at 1902.

9. *Id.*

Halper, in the case of *Hudson v. United States*,[10] the Supreme Court overruled *Halper*'s attempted distinction between nominally-civil remedies which were "punishment" and those that were not. Instead, the Court held that "[t]he Clause protects only against the imposition of multiple *criminal* punishments for the same offense"[11] and returned to its pre-*Halper* methodology for distinguishing between civil and criminal sanctions. Since the *Hudson* decision, double jeopardy is basically no longer a viable defense to claims under the Act.

A. *Hess* and Its Progeny: Double Jeopardy Defense Routinely Rejected in FCA Cases

The 1943 case of *United States ex rel. Marcus v. Hess*[12] was the basis for lower courts' initial long-term rejection of the double jeopardy defense. In *Hess*, the Supreme Court rejected a double jeopardy challenge to the imposition of civil liability under the Act where defendants had previously entered a plea of *nolo contendere* and been sentenced to pay a criminal fine based on the same conduct. The Court held that the double jeopardy defense was inapplicable because proceedings under the Act were not "actions intended to authorize criminal punishment to vindicate public justice" such as would subject a defendant to "jeopardy," but rather were "remedial and impose[d] a civil sanction."[13]

The Court approached the question of whether the remedies available under the Act were "civil" and "remedial" as one of "statutory construction"[14] rather than focusing on the particular damages or penalties at issue in the case. Regarding the (then double) damages provision of the Act, the Court found that it could not be said to afford the government "any recovery in excess of actual loss for the government."[15] The Court pointed out that since the case was a *qui tam* and the statute provided for a 50-percent relator share, the government's half of the double damages was only equal to the amount of actual damages proved.[16] The Court also observed that treble damages were available under the antitrust laws and cited the general practice in state statutes of allowing "double, treble, or even quadruple" damages in civil matters.[17] As for the (then $2000 per claim) penalty provision, the Court noted that there was no provision for imprisonment for failure to pay penalties under the Act such as might characterize a criminal forfeiture, and held that the mere use of the terms "forfeit and pay" was insufficient to transform the Act into a criminal statute.[18]

10. 522 U.S. 93, 118 S.Ct. 488 (1997).

11. 522 U.S at 99, 118 S.Ct. at 493 (citations omitted).

12. 317 U.S. 537, 63 S.Ct. 379 (1943).

13. *Id.* at 548–49, 63 S.Ct. at 386–87 (citing Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 (1938)).

14. *Id.*

15. *Id.* at 550, 63 S.Ct. at 387.

16. *Id.*

17. *Id.* at 550–51, 63 S.Ct. at 387.

18. *Id.* at 551, 63 S.Ct. at 387–88.

In sum, the Court found that the main purpose of the Act was "restitution" and that "the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."[19] Because the Act did not authorize a criminal punishment but rather was civil and "remedial," the Court held that the Double Jeopardy Clause did not apply. For more than 45 years following the *Hess* decision, lower courts accordingly rejected the double jeopardy defense in proceedings under the Act.[20]

B. *Halper* and Its Progeny: Double Jeopardy Defense Viable in "Rare Case"

In 1989, while continuing to recognize as in *Hess* that "proceedings and penalties under the civil False Claims Act are indeed civil in nature" and that in the "ordinary case" application of the Act's penalty provision would do no more than make the Government whole, the Court in *United States v. Halper*[21] announced that in a "rare case," a civil penalty under the Act could be so disproportionate to the amount of actual damages as to constitute a "punishment."[22] In such a case, the *Halper* Court held, to impose both the Act's penalties and a criminal punishment would violate the Double Jeopardy Clause.

The *Halper* defendant submitted 65 separate false claims to Medicare, for a total overpayment of $585. He was first convicted under the criminal false claims statute and for mail fraud, sentenced to imprisonment, and fined. The Government then filed a civil suit against him under the Act, seeking double damages ($585 x 2) plus a civil penalty of $130,000 (65 false claims multiplied by the $2,000 penalty then in effect). The district court struck down the penalty on double jeopardy grounds, observing that it was more than 220 times greater than the amount of the fraud.[23]

In analyzing whether the proposed $130,000 penalty constituted a second "punishment" for double jeopardy purposes, the Supreme Court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."[24]

19. *Id.* at 551–52, 63 S.Ct. at 388; *see also id.* at 549, 63 S.Ct. at 387 ("We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it.") (citation omitted).

20. *See, e.g.*, *Berdick*, 612 F.2d at 538 (double jeopardy defense rejected because the Act's penalties were "civil, not criminal," citing *Hess*); *Kates*, 419 F. Supp. at 853–54 (double jeopardy defense rejected without discussion, citing *Hess*); *Greenberg*, 237 F. Supp. at 443–44 (where government sought no damages but only penalties, double jeopardy defense rejected as "without merit" with no discussion, citing *Hess*); *Annicchiarico*, 238 F. Supp. at 339–40 (double jeopardy defense not applicable despite fact that government sought no damages and defendants had already paid restitution and a fine pursuant to criminal plea because Act allowed recovery of penalties even in absence of any damage and proceedings were civil under *Hess*); *Grunstein & Sons Co.*, 127 F. Supp. at 912 (defense did not apply because, under *Hess*, Act is "not criminal"); *MacEvoy*, 10 F.R.D. at 326–27 (case was indistinguishable from *Hess* and therefore double jeopardy defense did not apply). *Cf.* United States v. Grannis, 172 F.2d 507, 511–12 (4th Cir. 1949) (because it was "clearly established that the defense of double jeopardy is not applicable in civil actions under [the Act]," trial court committed error in permitting jury to be told that defendants had been acquitted of related criminal charges).

21. 490 U.S. 435, 109 S.Ct. 1892 (1989).

22. *Id.* at 442, 449, 109 S.Ct. at 1898, 1902.

23. *See id.* at 439, 109 S.Ct. at 1897 (quoting district court decision).

24. *Id.* at 448; 109 S.Ct. at 1902.

The Court acknowledged precedent establishing that the Government was entitled to "rough remedial justice," and could demand compensation according to "somewhat imprecise formulas, such as . . . a fixed sum plus double damages."[25] The Court went on to hold, however, that when the actual application of such a formula produces a sanction that "bears no rational relation to the goal of compensating the Government for its loss," the sanction can no longer be said to be solely remedial, but instead constitutes "punishment."[26] Noting the "tremendous disparity" between the proposed penalty and actual damages,[27] as well as the fact that the government had incurred only about $16,000 in expenses related to the case, the Court held that the $130,000 penalty was "sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy."[28]

The Court emphasized the narrowness of its ruling, describing it as a "rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[29] In the same vein, the Court noted that "a suit under the Act alleging one or two false claims would satisfy the rational-relationship requirement. It is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise."[30]

Indeed, history shows that *Halper* has remained limited to its unusual facts. Lower courts applying *Halper* to subsequent cases under the Act have repeatedly and consistently found that other penalty awards were not so disproportionate as to constitute "punishment," and that the Double Jeopardy Clause was therefore not implicated.[31]

25. *Id*. at 446, 109 S.Ct. at 1900.

26. *Id*. at 449–50, 109 S.Ct. at 1902.

27. *Id*. at 452, 109 S.Ct. at 1903–04.

28. *Id*. at 452, 109 S.Ct. at 1904. The Court remanded the case to give the government an opportunity to present evidence of its "actual costs arising from *Halper*'s fraud," since the $16,000 figure was only an approximation. *Id*.

29. *Id*. at 449, 109 S.Ct. at 1902.

30. *Id*. at 451 n.12, 109 S.Ct. at 1903 n.12.

31. *See, e.g., Peters*, 110 F.3d at 616 (no double jeopardy violation where ratio of fixed penalties of $20,000 to $153,476 in single damages was less than 1 to 1 and number of claims for which defendant was held liable (four) was "relatively small"); *Barnette*, 10 F.3d at 1559–60 (where Government's direct loss was at least $15.7 million, even highest potential award of $50.5 million would not constitute a "second punishment" because the ratio of total recovery to total loss, including costs, would not exceed 3.2 to 1); *Boutte*, 907 F. Supp. at 239 (where government's direct loss was approximately $301,000 not including costs, treble damages plus penalties award of approximately $1 million was not punishment; total award was approximately 3.38 times the amount of the direct loss, and ratio would be even less if Government's costs were considered); *Fliegler*, 756 F. Supp. at 696–97 (Government's costs of approximately $110,000 for prosecuting both criminal and civil actions bore a rational relationship to $115,000 penalty (23 claims at $5,000 each) imposed by court on partial summary judgment); *SGW, Inc.*, 20 Cl. Ct. at 178 (where Government sought penalties and approximately $137,000 in treble damages, potential recovery was not so disproportionate as to require dismissal of action on double jeopardy grounds; damages due to contractor's alleged misconduct were "potentially immense" and treble damages sought by Government were "less than plaintiff has already been paid on the contract and well less than half the total contract amount"); *Pani*, 717 F. Supp. at 1017–19 (where 3 false claims totaled $1,280, $32,460 in damages and penalties sought by Government could not be said to bear "no rational relationship" to compensating the Government for its loss, considering the expenses of investigation and prosecution). *Cf. Killough*, 848 F.2d at 1534 (in case decided after district court's ruling but prior to the Supreme Court's decision in *Halper*, court found that even if it was to adopt *Halper* district court's reasoning, award of $104,000 in forfeitures along with $1,267,800 double damages would not violate the Double Jeopardy Clause because it would do no more than "afford the government indemnity for the injuries done it") (quoting *Hess*); *Sazama*, 88 F. Supp.2d at 1273–74 (even if *Halper* applied to case decided after Supreme Court's *Hudson* opinion was issued, there was no double jeopardy violation where ratio of recovery sought to amount of fraud was 4.7 to 1, "a far cry from the 222 to 1 ratio that motivated the *Halper* Court").

C. *Hudson* and Its Progeny: Double Jeopardy Basically Dead As A Defense to FCA Penalties

Although even under *Halper* the double jeopardy defense rarely (if ever) succeeded as a challenge to the Act's penalties, the mere availability of the defense at least provided defendants with some measure of hope. In *Hudson v. United States*,[32] even that was crushed, as the Court largely disavowed its previous *Halper* analysis. The *Hudson* Court expressly rejected *Halper*'s approach of trying to distinguish between civil penalties that constituted "punishment" those that did not, calling it "ill considered" and "unworkable."[33] Instead, the Court clarified that the Double Jeopardy Clause protects "only against the imposition of multiple *criminal* punishments."[34]

The *Hudson* Court reasoned that *Halper* had deviated from the Court's previous jurisprudence in two major respects. First, *Halper* had improperly bypassed the "threshold question" of whether the penalty at issue was a *criminal* punishment or not. Second, *Halper* had improperly focused on the penalty actually imposed, rather than limiting its analysis to an evaluation of the "statute on its face."[35] *Hudson* reaffirmed the Court's previously established approach, returning to a two-step analysis exemplified by *United States v. Ward*.[36]

Under the *Ward* approach, a court addressing whether a particular penalty implicates the Double Jeopardy Clause must determine first, as "a matter of statutory construction," whether the legislature intended the penalty in question to be civil or criminal in nature.[37] If it finds that the penalty was intended to be civil, the court must then take the second step of determining whether, despite the legislature's intent, the penalty is nonetheless so punitive as to transform it into a criminal penalty.[38] This determination must also be made "in relation to the statute on its face."[39] The *Hudson* Court admonished that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[40]

In short, after *Hudson*, in order for a double jeopardy defense to succeed against penalties under the Act, the defendant would have to convince a court, by "the clearest proof" and by reference to "the statute on its face," that the Act's civil penalties

32. 522 U.S. 93, 118 S.Ct. 488 (1997).

33. *Id.* at 101–02, 118 S.Ct. at 494.

34. *Id.* at 99, 118 S.Ct. at 493.

35. *Id.* at 101, 118 S.Ct. at 494.

36. *Id.* at 96. 118 S.Ct. at 491 (citing United States v. Ward, 448 U.S. 242, 248–49, 100 S.Ct. 2636, 2641–42 (1980)).

37. *Id.* at 99, 118 S.Ct. at 493.

38. *Id.*

39. *Id.* at 99–100, 188 S.Ct. at 493. The Court enumerated seven factors that should be considered: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69, 83 S.Ct. 554, 567–68 (1963)).

40. *Id.*

constitute a *criminal* punishment. This seems highly unlikely, since *Hudson* essentially mandates a return to the pre-*Halper* analysis under the which the Court, in *Hess* and other cases, had repeatedly found the Act's penalties to be civil in nature.[41] Even the *Halper* Court acknowledged the long line of precedent establishing that "proceedings and penalties under the civil False Claims Act are indeed civil in nature."[42]

Defendants have perhaps foreseen the difficulty of convincing a court that the Act's penalties constitute criminal punishment, as there is a dearth of published opinions post-*Hudson* in which a double jeopardy defense was raised to claims under the Act. At least one post-*Hudson* opinion, however, rejected the defense, holding that penalties (and treble damages) under the Act are "civil" for purposes of double jeopardy analysis.[43] In addition, at least two other courts have held that similar penalty provisions under other statutes are civil remedies.[44] Thus, after a brief and insubstantial resurrection in the days of *Halper*, the double jeopardy defense has returned to its long-term residence in the False Claims Act defense graveyard. As will be seen below, however, *Halper's* test for whether a sanction constitutes "punishment" remains very much alive, although in a new context—the Court's Excessive Fines Clause jurisprudence.

II. EXCESSIVE FINES

Although *Hudson* marked the end of the double jeopardy defense as a viable challenge to the Act's penalty provisions (and many other civil sanctions), the *Hudson* Court did point out several possible alternative defenses to such sanctions. The Court noted in *dicta* that "some of the ills at which *Halper* was addressed are addressed by other constitutional provisions," including the Eighth Amendment's prohibition against excessive fines.[45] As *Hudson* foreshadowed, the Excessive Fines Clause[46] has increasingly been raised as a challenge to the Act's penalties.

41. Moreover, if court were to hold that the Act's penalties constitute "criminal" punishment for purposes of double jeopardy analysis, then defendants in proceedings under the Act would also be entitled to the full panoply of procedural protections available in criminal cases. *See, e.g.*, SEC v. Palmisano, 135 F.3d 860, 864 (2d Cir. 1998) ("The test to be used in determining whether a sanction is . . . subject to the Double Jeopardy Clause's bar on multiple punishments, is the same inquiry that is used in determining whether other criminal proceeding protections apply."). Such a result would be highly anomalous after treating the Act as a civil statute for more than 140 years, and would also have widespread implications for other civil statutes with similar remedial schemes.

42. 490 U.S. at 441–42, 109 S.Ct. at 1898 (citing *Hess*, Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 (1938) and Rex Trailer Co. v. United States, 350 U.S. 148, 76 S.Ct. 219 (1956)); *see also id.* at 438, 109 S.Ct. at 1896 (noting that district court had explicitly recognized that the Act's provision for damages plus penalties "was not in itself criminal punishment").

Although the dollar amount of the penalty available under the Act has been raised from $2,000 to a range of $5,500 to $11,000 since the *Hess, Helvering v. Mitchell, Rex Trailer,* and *Halper* decisions establishing its civil nature, it is important to remember that the penalty was set at $2,000 when the Act was originally enacted in 1863. Thus, in real dollar terms, today's penalties are probably far *less* than they were historically. Accordingly, if the $2,000 penalty was "civil" back when these cases were decided, it should still be civil today, despite the nominal increase of its amount to a range of $5,500 to $11,000.

43. United States v. Lamanna, 114 F. Supp.2d 193, 198 (W.D.N.Y. 2000).

44. United States v. Lippert, 148 F.3d 974, 976–77 (8th Cir. 1998) (Anti-Kickback Act penalty of twice the amount of each kickback plus "not more than $10,000" for each violation is not a criminal punishment); *Palmisano*, 135 F.3d at 866 (2d Cir. 1998) (SEC penalties ranging from $5,000 to $500,000 per violation were civil).

45. 522 U.S. at 102, 118 S.Ct. at 495.

46. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amdt. 8.

A. Supreme Court Rulings on the Excessive Fines Clause

The excessive fines defense is somewhat new in cases under the Act, as for many years it was thought that the Eighth Amendment applied only to criminal cases. In 1993, however, in the case of *Austin v. United States*,[47] the Supreme Court held that the Excessive Fines Clause could apply in a civil context, if the civil sanction at issue constituted "punishment." Subsequently, in *United States v. Bajakajian*,[48] the Court held that, where it applies, the Clause prohibits imposition of a fine that is "grossly disproportional to the gravity of a defendant's offense."[49]

1. *Austin:* Excessive Fines Clause Applies to Civil Sanctions

In *Austin*, the Supreme Court held for the first time that the Excessive Fines Clause could apply to a civil sanction. The case was not a False Claims Act case, but rather involved a civil *in rem* statutory forfeiture of a mobile home and auto body shop which had been associated with illegal drug activity. After examining the text and history of the Excessive Fines Clause, the *Austin* Court held that it "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'"[50] The Court rejected the argument that the Clause applied only in criminal cases, on the grounds that "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment."[51]

To determine whether a particular sanction constitutes a "punishment" for purposes of the Excessive Fines Clause, the Court adopted the same test that had been used for double jeopardy purposes in *Halper*, *i.e.*, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . . ."[52] Unlike the *Halper* Court, however, the *Austin* Court did not base its analysis on the individual sanction at issue. Rather, the Court examined 1) whether at the time the Eighth Amendment was enacted the remedy of forfeiture was understood, at least in part, as punishment,[53] and 2) whether forfeitures under the particular forfeiture statute at issue could properly be considered punishment today.[54]

The Court found that statutory *in rem* forfeitures had historically been viewed as punishment and that there was nothing about the present forfeiture statute that would contradict that historical understanding.[55] Since the statutory forfeiture pro-

47. 509 U.S. 602, 113 S.Ct. 2801 (1993).

48. 524 U.S. 321, 334, 118 S.Ct. 2028, 2036 (1998).

49. For an excellent discussion of the Supreme Court's excessive fines cases and their implications for the False Claims Act, see Suzanne E. Durrell, The Excessive Fines Clause of the Eighth Amendment and the Civil False Claims Act: To *United States v. Bajakajian* and Beyond, False Claims Act and *Qui Tam* Quarterly Review 29 (July 2002).

50. 509 U.S. at 610, 113 S.Ct. at 2805 (quoting *Browning-Ferris*, 492 U.S. at 265, 109 S. Ct. at 2915).

51. *Id.* at 610, 113 S.Ct. at 2806.

52. *Id.* (quoting *Halper*, 490 U.S. at 448, 109 S. Ct. at 1902).

53. *Id.* at 611–19, 113 S.Ct. at 2806–10.

54. *Id.* at 619–22, 113 S.Ct. at 2810–12.

55. *Id.* at 619, 113 S.Ct. at 2810.

vision therefore could not be said to be solely remedial under the *Halper* test, the Court held that it was a "punishment" subject to the limitations of the Excessive Fines Clause.[56] The *Austin* Court did not set forth a standard for determining whether the forfeiture provided for in the statute was excessive, instead remanding the case for consideration of that issue.[57]

2. *Bajakajian:* Standard for Excessiveness is "Gross Disproportionality"

In 1998, the Court picked up where it left off in *Austin*, articulating for the first time in *United States v. Bajakajian* the standard for determining whether a sanction is "excessive" under the Excessive Fines Clause. *Bajakajian* echoed *Austin* in holding that a penalty is only subject to the Excessive Fines Clause if it constitutes "punishment" for an offense. It then added the standard: a penalty is "excessive" if the amount of the penalty is "grossly disproportional to the gravity of the defendant's offense."[58] *Bajakajian*, like *Austin*, was not a False Claims Act case. Instead, it involved the forfeiture, pursuant to a criminal forfeiture statute, of $357,144 in cash that the defendant had attempted to take out of the country without reporting it as required by law. The district court held that forfeiture of the whole amount was "excessive," but that a $15,000 forfeiture would pass constitutional muster. The Ninth Circuit affirmed.

a. Is the Sanction "Punishment"?

As in *Austin*, the *Bajakajian* Court applied the *Halper* "solely remedial" test to determine whether the criminal forfeiture statute's sanctions constituted "punishment."[59] The Court's continued use of the *Halper* test was perplexing in that, just the year before in *Hudson*, the Court had abandoned the test in the double jeopardy context, deeming it "unworkable" and "ill-advised." The *Hudson* Court had also strongly suggested that the *Halper* test was overbroad, pointing out that, since the Court had previously recognized that "all civil penalties have some deterrent effect," *no* civil penalty could truly be said to be "solely" remedial; accordingly, no civil penalty could ever satisfy the *Halper* test and escape constitutional scrutiny.[60]

Nevertheless, the *Bajakajian* Court went through the exercise of applying the *Halper* test to the criminal forfeiture statute before it. As in *Austin*, the Court focused on the statute on its face, considering the statutory language, the purpose of the for-

56. *Id.* at 622, 113 S.Ct. at 2812.

57. *Id.* at 622–23, 113 S.Ct. at 2812.

58. 524 U.S. at 334 & 337, 118 S. Ct. at 2036 & 2038.

59. *Id.* at 329 n.4; 118 S.Ct. at 2034 n.4 (noting that even if the forfeiture at issue was remedial in part, it would still be "punitive in part," and this is "sufficient to bring the forfeiture within the purview of the Excessive Fines Clause") (citing *Austin*, 509 U.S. at 621–22, 113 S.Ct. at 2811–12).

60. *Hudson*, 522 U.S. at 102, 113 S.Ct. at 494–95.

feiture, the circumstances under which the forfeiture could be imposed, and whether the type of forfeiture provided had historically been considered a punishment.[61] Not surprisingly, the Court had no trouble concluding that the statutory criminal forfeiture constituted a "punishment."

At the same time, however, the *Bajakajian* Court suggested that many civil penalties may fall outside the scope of excessive fines review. Discussing certain early customs statutes imposing civil *in rem* forfeitures and monetary forfeitures proportioned to the value of the goods involved, the Court commented that such statutes "serve the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties" and historically were not considered punishment.[62] The *Bajakajian* dissent interpreted this discussion as suggesting that many civil fines may be outside the reach of the Excessive Fines Clause, even if they impose penalties which far exceed the harm suffered.[63]

b. Is the Sanction "Grossly Disproportional"?

After determining that the criminal forfeiture was "punishment" and therefore a "fine" subject to the Excessive Fines Clause, the Court next went on to determine what the test should be for determining whether a fine is "excessive." It began by citing its previous excessive fines jurisprudence, stating that "the touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[64] The Court then held that a fine is excessive if the amount is "grossly disproportional to the gravity of the defendant's offense," giving two reasons why it was adopting the higher standard of "gross disproportionality" instead of merely requiring "strict proportionality."[65] First, "judgments about the appropriateness of a fine belong in the first place to the legislature" and should be granted "substantial deference."[66] Second, "any judicial determination regarding the gravity of a particular offense will be inherently imprecise."[67]

The Court then applied the "gross disproportionality" standard to the facts of the case. The Court noted that the $357,144 that the government sought to forfeit had not been illegally obtained, and thus the defendant was not among the classes of persons,

61. *Bajakajian*, 524 U.S. at 328–32, 118 S.Ct. at 2033–35. Specifically, the Court noted that the forfeiture was imposed at the end of a criminal proceeding and required conviction of an underlying felony in order to be imposed. Further, even if the forfeiture had some remedial purposes, it was still punitive in part. Finally, the Court rejected the Government's argument that the forfeiture was analogous to traditional *in rem* forfeitures that were not considered punishment.

62. *Bajakajian*, 524 U.S. at 342–43, 118 S.Ct. at 2040–41.

63. *Id.* at 344–45, 118 S.Ct. at 2041 (Kennedy, J., dissenting) ("[T]he majority treats many fines as 'remedial' penalties even though they far exceed the harm suffered."); *id.* at 356, 118 S.Ct. at 2047 (Kennedy, J., dissenting) ("So-called remedial penalties, most *in rem* forfeitures, and perhaps civil fines may not be subject to scrutiny at all. I would not create these exemptions from the Excessive Fines Clause.").

64. *Id.* at 334, 118 S.Ct. at 2036 (citing *Austin*, 509 U.S. at 622–23, 113 S.Ct. at 2812 and Alexander v. United States, 509 U.S. 544, 559, 113 S.Ct. 2766, 2776, 125 L.Ed.2d 441 (1993)).

65. *Id.* at 336, 118 S.Ct. at 2037.

66. *Id.*

67. *Id.*

such as money launderers or drug traffickers, against whom the statute was intended to protect.[68] It then found that the maximum criminal sentence which could have been imposed on the defendant under the Sentencing Guidelines was a $5,000 fine and six months imprisonment.[69] The Court held that this criminal penalty "confirm[ed] a minimum level of culpability."[70] Finally, the Court noted that respondent's conduct caused minimal harm, including "no fraud on the United States, . . . and no loss to the public fisc."[71] Based on these facts, the Court found the forfeiture to be "grossly disproportional," observing that it was larger by "many orders of magnitude" than the $5,000 criminal fine imposed by the sentencing court and that it bore "no articulable correlation" to any Government injury.[72]

B. Lower Courts' Application of the Clause to Penalties Under the Act

Only a small number of courts have considered excessive fines challenges to penalties under the Act. To the extent they have addressed the issue, these courts have held that the Act's penalties do constitute "punishment" subject to excessive fines review. Defendants have rarely succeeded, however, in convincing the courts that the penalties actually imposed under the Act in a particular case were "excessive."

1. Are the Act's Penalties "Punishment"?

Interestingly, many of the courts addressing excessive fines defenses in the context of the Act have simply skipped over the initial inquiry of whether the Act's penalties constitute "punishment" (perhaps anticipating, as did the *Hudson* Court, that no penalty is likely to escape the reach of the *Halper* test).[73] The Ninth Circuit in *United States v. Mackby*,[74] is apparently the only court which has provided a complete analysis of the issue.[75]

68. *Id.* at 337–38, 118 S.Ct. at 2038.

69. *Id.*

70. *Id.* at 339, 118 S.Ct. at 2038.

71. *Id.* at 339, 118 S.Ct. at 2039.

72. *Id.* at 339–340, 118 S.Ct. at 2039.

73. *See, e.g.,* United States v. Rachel, 2004 WL 2422113 (D. Md. Sept. 29, 2004); Lamb Engineering & Construction Co. v. United States, 58 Fed. Cl. 106 (2003); United States v. Cabrera-Diaz, 106 F. Supp.2d 234 (D.P.R. 2000); United States v. Byrd, 100 F. Supp.2d 342 (E.D.N.C.2000); United States v. Advance Tool Co., 902 F. Supp. 1011 (W.D. Mo. 1995), aff'd, 86 F.3d 1159 (8th Cir. 1996).

74. 261 F.3d 821 (9th Cir. 2001) (*Mackby I*).

75. The court in *United States v. Williams*, 2003 WL 21384640 at *4 (N.D. Ill. June 12, 2003), concluded that the Act's penalties (as well as its treble damages) constitute "punishment." The court provided little discussion of this conclusion, merely citing *Mackby I* and mentioning the Supreme Court's statement in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784–86, 120 S.Ct. 1858, 1869–70 (2000) that the treble damages and increased penalties of the 1986 amendments are at least in part, punitive in nature.

The court in *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993), also determined that the Act's penalties constitute "punishment"; however, it based this conclusion on the particular fine at issue, rather than examining the statute on its face. *See id.* at 74 (comparison of the "low level of actual damages" (under $2,000) to the applicable minimum penalty of $290,000 ($5,000 x 58 false claims) indicated that penalty constituted "punishment"). After *Austin*, *Hudson*, and *Bajakajian*, the accepted approach is to examine the statute on its face. *See, e.g., United States v. Lippert*, 148 F.3d at 977 n.2 ("[W]hether the Excessive Fines Clause applies to a type of civil penalty should be based on a facial evaluation of the statute. If the Clause applies, a court must then determine whether the particular fine at issue is constitutionally

The *Mackby* court concluded that the Act's penalty provision (as well as its treble damages provision)[76] was "punishment" and thus subject to the limitations of the Excessive Fines Clause. The court considered the statute on its face and looked at the same types of factors that were examined in *Bajakajian*.[77] Specifically, with respect to penalties, the court noted that the Act itself does not state whether its penalty provision is intended to be remedial or punitive. However, the court reasoned that the fact that no damages need be shown in order to recover penalties under the Act suggests that the penalties have a punitive purpose. The court further concluded that the fact that treble damages are provided in addition to penalties demonstrates that the penalties are not intended to provide a form of damages. The court also noted that the legislative history of the 1986 amendments to the Act indicated a deterrent purpose, and that the Supreme Court had previously concluded that the Act was adopted to punish and prevent frauds. Based on these factors, the court held that the Act's penalties constituted "a payment to the government, at least in part, as punishment."[78]

Notwithstanding the *Mackby* court's ruling in the Ninth Circuit, and although it may be an uphill battle at least while the *Halper* test as applied by *Austin* and *Bajakajian* is the law, an argument can still be made that the Act's penalty provisions are remedial and "non-punitive," because they serve to reimburse the Government for losses associated with false claims.[79] As noted above, the *Bajakajian* decision hints that, even under the *Halper* test, there may be entire categories of essentially compensatory civil fines that do not constitute "punishment," including monetary sanctions which far exceed "actual damages." The Court has long recognized that the Act is intended to reimburse the government not just for the losses quantified by the particular claims at

excessive."); *see also Austin*, 509 U.S. at 622 n. 14, 113 S.Ct. at 2039 n. 14 (Court focused on statute "as a whole" in determining whether it was punitive).

Finally, it is not entirely clear whether or not the court in *United States ex rel Trice v. Westinghouse Hanford Co.*, 2000 WL 34024248 at *24 (E.D. Wash. March 1, 2000), determined that the Act's penalties constitute punishment. In addressing a defense argument that the imposition of penalties in the absence of actual damages would violate the Excessive Fines Clause, the court seemingly blended the two prongs of the *Bajakajian* test: after a discussion that considered the Act's penalty provision on its face but not any specific penalty award, the court concluded that "Congress determined that this was the proper penalty, and does not seem grossly disproportional to a defendant's violation." *Id.*

76. A complete discussion of whether treble damages constitute "punishment" for excessive fines purposes is outside the scope of this article. However, it is worth noting that some of the cases cited above in the double jeopardy context suggest that treble damages are not "punishment." For example, the Eighth Circuit held that the Act's treble damages provision was "in the nature of rough remedial justice" as described in *Halper* and not punitive, and that defendants therefore had *no* double jeopardy defense to the treble damage component of an award; instead, the double jeopardy analysis was limited to examining "how the total fixed penalties relate arithmetically to the total damages caused." *Peters*, 110 F.3d at 617; *see also Brekke*, 97 F.3d at 1048 (Act's treble damages were not punishment because they were no different than the "ordinary case" of "fixed-penalty-plus-double-damages" cited in *Halper*, thus, previous civil settlement under the Act was "compensatory rather than civil" and no bar to a subsequent indictment); *cf.* United States v. Howell, 702 F. Supp. 1281, 1284 (S.D. Miss. 1988) (in case decided after district court ruling but before Supreme Court decision in *Halper*, court held without discussion that *Halper* district court's rationale was "not even arguably applicable" to Government's claims for damages under the Act). Whether treble damages are punishment for purposes of the Excessive Fines Clause continues to be a hotly contested issue.

77. *Mackby I*, 261 F.3d at 830. As discussed *supra* at note 61 and accompanying text, these factors include "the language of the statute creating the sanction, the sanction's purpose(s), the circumstances in which the sanction can be imposed, and the historical understanding of the sanction." *Id.* (citation omitted).

78. 261 F.3d at 830.

79. For the complete text of one such argument, see the Government's Brief in *Mackby I*, available on WESTLAW at 1999 WL 33631494 at *40–45 (9th Cir.).

issue, but also other costs, such as the costs of investigation and prosecution, as well as costs that are difficult or impossible to quantify, such as the "constant Treasury vigil" false claims necessitate[80] and the damage to the public's confidence in the integrity of government programs.[81] The argument can thus be made that, even though the Act provides for treble damages and penalties instead of merely single damages, its remedies, like those of the remedial customs duties referred to in *Bajakajian*, are merely intended to make the government whole by reimbursing it for all of the costs accruing from the presentation of false claims.[82] At least two courts applying *Bajakajian* have suggested that civil penalties similar to those under the Act, "insofar as they reimburse the Government, if roughly, may not be subject to the Excessive Fines Clause."[83]

In addition, there is always the possibility that the Court may eventually find the *Halper* test to be just as "ill-advised" and "unworkable" in the excessive fines context as it was in the double jeopardy context. The Court might reject the punitive vs. non-punitive distinction and return to applying excessive fines analysis only to criminal cases, keep the punitive vs. non-punitive distinction but redefine it,[84] or devise some other test for determining when the Clause is applicable.[85]

80. United States v. Toepelman, 263 F.2d 697, 699 (4th Cir. 1959) ("[S]urely, no proof is required to convince one that to the Government a false claim, successful or not, is always costly. Just as surely, against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable. The Act seeks to reimburse the Government for just such losses. For a single false claim $2000 would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant Treasury vigil they necessitate.").

81. United States v. Mackby, 339 F.3d 1013, 1019 (9th Cir. 2003) (*Mackby II*) ("The government has a strong interest in preventing fraud, and the harm of such false claims extends beyond the money paid out of the treasury. . . . Fraudulent claims make the administration of Medicare more difficult, and widespread fraud would undermine public confidence in the system.") (citing U.S. ex rel. Rosales v. San Francisco Housing Auth., 173 F.Supp.2d 987, 1019–20 (N.D.Cal.2001) (discussing Congress's purpose in the FCA to maintain public confidence in the government by protecting against fraud) and S.Rep. No. 99-345, at 2–3, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267–68 (noting the pervasiveness of fraud in government in programs, including entitlement programs, and the difficulty in deterring fraud)).

82. *But see* Cook County v. United States *ex rel.* Chandler, 539 U.S. 119, 120, 123 S.Ct. 1239, 1241 (2003) (commenting in *dicta* that the Act's treble damages have both compensatory and punitive functions); (Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784–86, 120 S.Ct. 1858, 1869–70 (2000) (commenting in *dicta* that after the 1986 amendments the Act's treble damages and penalty provisions, at least in combination, are "essentially punitive in nature").

83. United States v. Kruse, 101 F. Supp.2d 410, 414 (E.D. Va. 2000) (Anti-Kickback Act); *see also Lippert*, 148 F.3d at 978 (penalties available under Anti-Kickback Act "may not be subject to the Excessive Fines Clause at all, because . . . they serve the remedial purpose of reimbursing the government for losses accruing from kickbacks").

84. For example, instead of requiring that a sanction be "solely" remedial in order to avoid the "punishment" label, the test could require that the sanction be "primarily" remedial or "substantially" remedial.

85. *See, e.g., Kruse*, 101 F. Supp. 2d at 413 (goal of Excessive Fines Clause is to "prevent[] the Government from abusing its power to punish" and test for application of Clause should consider "whether the Government is acting in its prosecutorial role or in the role of an injured party")

2. Are the Act's Penalties "Grossly Disproportional"?

Although two pre-*Bajakajian* district court cases held that penalties under the Act violated the Excessive Fines Clause,[86] most cases decided after *Bajakajian* have upheld the Act's penalties.[87] As discussed below, courts have considered a wide variety of factors bearing on the excessiveness inquiry, some of which are generally applicable to all excessive fines challenges to the Act, and some of which are case-specific.

a. Generally Applicable Considerations

i. Clearly Articulated Congressional Purpose for Penalties. As the *Bajakajian* Court instructed, every court considering an excessive fines challenge must "grant *substantial* deference to Congress in legislating punishment."[88] Such deference is particularly appropriate in cases challenging the Act, because of Congress' "well-articulated basis for its damages scheme under the FCA."[89] As the Seventh Circuit put it, "'[it] could not be more clear that Congress, in adopting [the treble damages and increased penalties of the 1986 amendments], addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute.'"[90] Indeed, the Act's legislative history indicates, for example, that the Act's penalties were enacted in response to Congress' findings that fraud against the Government was: 1) significant in monetary terms, 2) growing due to inadequate deterrence under the previous $2,000 penalty scheme, and 3) spread across all government programs, big and small.[91] In addition, as another court noted, Congress' selection of a per occurrence penalty in addition to treble damages "reflect[s] the frequency and extent of defendant's false claims submissions."[92] In short, the Supreme Court's admonition that courts must

86. *See Advance Tool*, 902 F. Supp. at 1018–19 (where Government failed to prove actual damages at trial, minimum penalty of $3.43 million ($5,000 time 686 false invoices) would be unconstitutionally excessive); *Gilbert Realty*, 840 F. Supp. at 74–75 (where actual damages were $1,630, minimum penalty of $290,000 ($5,000 times 58 false claims) would be constitutionally excessive).

87. **Penalties violated Excessive Fines Clause:** Hays v. Hoffman, 325 F.3d 982 at 993–94 (8th Cir. 2003) (potential fine of more than $1,000,000 "bears no rational relationship to the false claim misconduct—seeking reimbursement for spending $6,000 to purchase apples"); *Cabrera-Diaz*, 106 F. Supp.2d at 242 (where defendant submitted 455 false claims totaling approximately $450,000, potential penalty range of $2,275,000 to $4,550,000 was deemed excessive).

Penalties did not violate Excessive Fines Clause: *Mackby II*, 339 F.3d at 1016–19 (where single damages were $58,151, penalty of $550,000 ($5,000 x 111 claims) was not excessive); *Rachel*, 2004 WL 2422113 at *3 (where defendant's fraudulent schemed netted $408,478, penalty of $220,000 ($10,000 x 22 false claims) was not excessive); *Lamb Engineering*, 58 Fed. Cl. at 111–12 (rejecting excessive fines defense and granting summary judgment for $20,000 penalty ($5,000 x four false claims) while denying summary judgment on claim for treble damages of $258,900); *Williams*, 2004 WL 21384640 at *4–*6 (where actual damages were at least $14,387 (not including costs), and "punitive portion of the fine" (*i.e.*, $28,774 double damages plus $27,500 penalty) was $56,274, court held that the resulting "total penalty" of $70,661 was not excessive); *Byrd*, 100 F. Supp.2d at 344–45 (where treble damages were $255,036, penalty of $1,320,000 ($5,000 x 264 false claims) was not excessive).

88. *Williams*, 2004 WL 21384640 at *6 (emphasis original).

89. *Id.*

90. *Id.* (quoting United States ex rel. Chandler v. Cook County, 277 F.3d 969, 978 (7th Cir. 2002), *aff'd*, 538 U.S. 119, 123 S.Ct. 1239 (2003)).

91. *Id.* (citing S. Rep. No. 99-345).

92. *Byrd*, 100 F.Supp. 2d at 345; *see also Westinghouse*, 2000 WL 34024248 at *24 ("Congress determined that [a penalty between $5000-$10,000] was the proper penalty. . . .").

show "substantial deference" to legislative judgments regarding sanctions is particularly apt in cases under the Act because of the extensive legislative record detailing Congress' reasons for adopting the Act's particular penalty scheme.

ii. Penalties Reach Intended Targets. A second factor that will always weigh in favor of upholding the Act's penalties is that, unlike the penalties at issue in *Bajakajian*, penalties under the Act are imposed only against those whom the Act was intended to target. A significant factor influencing the *Bajakajian* Court's finding of "gross disproportionality" was that the defendant was not among the class of people the currency statute at issue was meant to cover, *i.e.*, money launderers, smugglers and drug dealers. The False Claims Act, by contrast, "targets those who knowingly make a false claim for payment to the government."[93] Thus, any person who is found liable under the Act will fall among the class of persons targeted by the Act's penalties.

iii. Significant Harm Caused By Defendant's Acts. The fact that violations of the Act by definition involve fraud on the government and harm to the public fisc is another generally-applicable factor suggesting that the Act's penalties are not excessive. In finding that the *Bajakajian* defendant had caused "minimal harm," the Court specifically noted that his conduct involved "no fraud on the United States, . . . and no loss to the public fisc."[94] Cases under the Act, however, always involve fraud on the United States and usually also involve loss to the public fisc, as well as harm to the integrity of government programs.[95] Thus, false claims cases always involve a type of harm that the Supreme Court specifically contrasted to the "minimal" harm at issue in *Bajakajian*. In recognition of the serious nature of the harm caused by *all* false claims against the Government, at least two district courts have held that even where the Government has not proved any actual damages, an award of penalties under the Act can still comport with the Excessive Fines Clause.[96]

b. Case-specific Considerations

i. Comparison to Maximum Penalty Available Under Act. One important case-specific consideration in determining whether a particular penalty under the Act suffers from "gross disproportionality" is a comparison of the amount of the requested penalty to the maximum penalty available under the Act. For example, in concluding that penalties under the Act were not excessive, both the district court and the Ninth

93. *Mackby II*, 339 F.3d at 1017 ("Mackby, who submitted claims using a false PIN number, therefore falls among the class of person targeted by the Act."); *see also Rachel*, 2004 WL 2422113 at *3 ("Unlike Bajakajian, Priscilla Rachel [who had already been found liable for violating the FCA and who had acted at least with "reckless disregard"] is the type of person whom the relevant statute intended to target.").

94. 524 U.S. at 339, 118 S.Ct. at 2039.

95. *See Mackby II*, 339 F.3d at 1018 (in upholding fine against excessiveness challenge, court relied in part on fact that "Mackby's false claims also harmed the government, in the form of both monetary damages and harm to the administration and integrity of Medicare").

96. *See Westinghouse*, 2000 WL 34024248 at * 23–24 (rejecting defendant's claim that Act's penalties would be excessive if plaintiff could not prove any damage to the United States); *Advance Tool*, 902 F. Supp. at 1018–19 (even where government had failed to prove actual damages, penalty of $365,000 would not be unconstitutionally excessive).

Circuit in the *Mackby* case relied heavily on the fact that the penalties actually sought by the Government in this case were far below the maximum available: although the Act would have authorized 8499 penalties of up to $10,000, or a total penalty of nearly $85 million, the Government sought only 111 penalties of $5,000, for a total penalty of $550,000.[97] The Ninth Circuit held that "the substantial difference between the actual judgment . . . and the maximum available penalties weighs against a finding of gross disproportionality."[98] As *Mackby* teaches, a savvy plaintiff facing a situation where penalties might potentially be deemed "excessive" (e.g., where there are a large number of false claims of a low dollar value) may want to consider seeking less than the maximum available penalties from the outset.

ii. Comparison to Criminal Penalties for Same Conduct. A comparison of the requested penalty under the Act to available criminal penalties for the same conduct has also been used by the courts to analyze whether the Act's penalties are "grossly disproportional" in a particular case. The *Bajakajian* Court, finding that the maximum available punishment for defendant's conduct under the Sentencing Guidelines would have been a $5,000 criminal fine and a 6 month term of imprisonment, held that these potential criminal penalties "confirm[ed] a minimum level of culpability."[99] Furthermore, the Court found that the fact that the requested forfeiture was larger by "many orders of magnitude" than the $5,000 fine imposed by the sentencing court weighed in favor of a finding of disproportionality.[100]

Applying this reasoning in *United States v. Mackby*, the Ninth Circuit held that even where the available range of criminal fines was "an order of magnitude" less than the civil judgment under the Act, the fact that the defendant could also have been sentenced to a term of imprisonment of 37 to 46 months and restitution of the full amount of the government's loss weighed against a finding of "gross disproportionality."[101] The court noted that "when courts have compared civil judgments with criminal penalties for the same conduct, they have considered the *full* criminal penalty."[102] In constrast to *Bajakajian*, the court held that the substantially greater penalties that the *Mackby* defendant could have faced did not "confirm a minimal level of culpability."[103]

iii. Presence of Related Criminal Activity. Another one of the factors cited by the *Bajakajian* Court was that the defendant's currency reporting violation was not connected to any illegal scheme such as money laundering or drug trafficking. The fact that the defendant was not engaged in any related criminal activity weighed in favor of the Court's finding that the forfeiture at issue was "grossly disproportional." The

97. *See Mackby II*, 339 F.3d at 1018.

98. *Id.*

99. *Bajakajian*, 524 U.S. at 339, 118 S.Ct. at 2038.

100. *Id.* at 339–40, 118 S.Ct. at 2039.

101. *Mackby II*, 339 F.3d at 1018.

102. *Id.* (emphasis added) (citations omitted).

103. *Id.*

presence or absence of related criminal activity has also been listed as a factor for consideration in at least one excessiveness challenge to the Act's penalties.[104]

iv. Gravity of the Offense. Courts have also considered a variety of factual circumstances as otherwise bearing on the "gravity of the defendant's offense." Examples include: the amount required to achieve deterrence;[105] whether the defendant's conduct could be considered "an isolated lapse in judgment";[106] the fact that defendant's conduct, although technically a "false claim," was not the type of activity to which one would normally expect such liability to attach;[107] and the government's conduct.[108]

vi. Mathematical Ratio Not Determinative. As a final case-specific consideration, it is important to note that, although "proportionality" is the central requirement of the Excessive Fines Clause, it would be improper for a court to limit its analysis to calculating the mathematical ratio of single or "actual" damages to the amount of the penalty and then arbitrarily decide based on the resulting number whether the penalty is "grossly disproportional." Instead, as discussed above, multiple factors must be considered in determining the proportionality of the dollar amount of the penalties under the Act to "the gravity of the defendant's offense." Focusing exclusively on numerical ratios would improperly elevate to dispositive status what should be just one factor bearing on the excessiveness inquiry. Properly, most courts have not even mentioned such a ratio as part of their analysis.[109]

104. *See* United States v. Mackby, 221 F. Supp.2d 1106, 1109–10 (N.D. Cal. 2002), *aff'd*, 339 F.3d 1013 (9th Cir. 2003) (noting there was no indication that Mackby was involved in other illegal activity).

105. *See id.* at 1113–14 ("Mackby's argument [that a minimal fine would be sufficient for purposes of deterrence] rings hollow given his steadfast denial of any wrongdoing, notwithstanding this Court's and the Ninth Circuit's holdings to the contrary."); *Byrd*, 100 F. Supp.2d at 345 (Act's penalties are meant to deter submission of false claims and "their application here serves to protect the Food Stamp Program").

106. *Williams*, 2003 WL 21384640 at *6 (fact that "[d]efendants knowingly submitted fraudulent information on no less than five occasions over the same number of years" cited in support of conclusion that penalty was not grossly disproportional).

107. *Gilbert Realty*, 840 F. Supp. at 75 (fact that "one does not normally expect a landlord to consider the terms of the rental agreement for an inexpensive rental apartment each time a rent check is cashed" rendered penalties based on cashing of rent checks unconstitutionally excessive; additional penalties based on actual false certifications to the housing authority were not excessive).

108. *Advance Tool*, 902 F. Supp. at 1018 (government's inability to prove damages, its "poor investigative procedures," and its "confusing and regulatory and contractual purchasing arrangements which virtually encourage the type of conduct at issue here" were basis for court's finding that proposed penalty was unconstitutionally excessive).

109. Two exceptions approach opposite ends of the excessiveness spectrum: in *Advance Tool*, 840 F. Supp. at 74, a ratio of approximately 1:178 between single damages of $1,630 and a penalty of $290,000 was held to be excessive, whereas in *Williams*, 2203 WL 21384640 at *6, a ratio of "less than four" between the double damages plus penalty portion of the award and its single damages component was considered not to be excessive. *Cf. Lamb Engineering*, 58 Fed. Cl. at 112 (penalties not excessive where there were "only four violations during the course of a contract potentially worth approximately $3.4 million").

3. Are "Excessive" Penalties Eliminated Entirely or Merely Reduced?

A finding that a particular penalty is "excessive" does not mean that *no* penalty may be awarded. Although the district court in *United States v. Cabrera-Diaz* allowed no penalty at all after finding that even the minimum penalty required under the Act would have been excessive,[110] most courts have simply reduced the penalty to a constitutionally acceptable level, usually by finding some alternative way of calculating the number of "claims" for which a penalty must be assessed.

For example, in *United States v. Advance Tool*,[111] the defendant had submitted 686 claims for tools that did not meet government specifications. The court found that the resulting minimum $3.43 million fine would have been excessive. Accordingly, it decided to base the number of penalties on the 73 different types of tools involved, resulting in a penalty of $365,000 which the court found constitutionally acceptable. Similarly, in *Hays v. Hoffman*,[112] the court declined to adopt an expert's testimony suggesting that a $6,000 unallowable expense had been spread through numerous cost reports at eight facilities, resulting in over 200 false claims. Finding that this approach was "laced with Excessive Fines Clause implications" the court instead awarded eight penalties, one for each of the facilities involved. The court in *United States ex rel. Smith v. Gilbert Realty*[113] took a hybrid approach: finding that a penalty of $290,000 based on 55 false claims would have been excessive, the court found that 48 of the claims were not sufficiently serious to warrant a penalty and disallowed those penalties entirely; it then awarded penalties on the remaining 7 claims, resulting in a final penalty award of $35,000 which the court held was constitutionally acceptable.

Thus, a plaintiff who has not already circumvented the excessive fines issue by self-reducing the requested number of penalties should at least be prepared to suggest to the court some alternative methodology for calculating a constitutionally acceptable penalty in the event of an excessive fines challenge. Otherwise, plaintiff runs the risk that the court will undertake its own reduction without the plaintiff's input (as in the above examples), or disallow the penalty entirely (as in *Cabrera-Diaz*).

To sum up the excessive fines analysis, while the Clause provides defendants with a viable challenge to the imposition of penalties under the Act, in those cases where the defense has been applied, the Act's penalties usually have not been found excessive. Even where penalties are deemed excessive, they are usually reduced, not eliminated entirely. Thus, the excessive defines defense appears unlikely to affect most penalty awards. Nevertheless, the mere availability defense has changed the landscape of penalties litigation and raises new strategic considerations for plaintiffs pursuing penalties

110. *See* 106 F. Supp.2d at 242.

111. 902 F. Supp. 1011, 1018–19 (W.D. Mo. 1995)

112. 325 F.3d 982, 993–94 (8th Cir. 2003).

113. 840 F. Supp. 71, 74–75 (E.D. Mich. 1993).

under the Act. At a minimum, constitutional scrutiny will likely now be applied in cases where courts previously would have ended their inquiry with a statement that they had no discretion to alter the penalty award mandated by the Act.[114]

III. DUE PROCESS

A. Defense Rarely Raised and Never Successful Under the Act

Finally, defendants have also challenged the Act's penalties under the Due Process Clause of the Fifth Amendment.[115] The core of the substantive due process defense is that penalties under the Act are unconstitutional unless there is a "fair ratio" between the penalty amount and actual damages.[116] This defense was raised in the 1959 case of *Toepelman v. United States*,[117] in which defendants argued that it would violate due process to award penalties under the Act in a case in which the government failed to prove actual damages. Defendants asserted that "[i]f the forfeiture is not in some measure referable to the damages suffered, . . . then there is no lawful basis for the taking which the forfeiture makes of the defendant."[118] The Fourth Circuit rejected this contention on the ground that

> damages are always suffered by the United States when a false claim is presented and . . . the Government may protect itself against this eventuality even though the damages are not nicely ascertainable, so that even when the penalty is multiplied by a plurality of impositions, the total amount of the forfeiture cannot be justly regarded as a taking without just cause or due process.[119]

114. Two such cases which come to mind are *United States v. Lorenzo*, 768 F. Supp. 1127, 1133 (E.D. Pa. 1991) (where single damages were $130,719 and defendant had filed 3683 false claims, court awarded statutory minimum penalty of $18,415,000 ($5,000 times 3683), holding that the Act "limits a court's discretion to a range between $5,000 and $10,000 per false claim") and *United States v. Fahner*, 591 F. Supp. 794, 801–02 (N.D. Ill. 1984) (where single damages were $9,775 and defendant had submitted 551 false claims, court awarded penalty of $1,102,000 ($2000 times 551), commenting that "while the total damage award in this action may appear to be excessive, it reaches such proportions for the sole reason that [defendant] has been found to have submitted 551 separate false claims").

115. The Due Process Clause reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const., Amdt. 5.

116. Defendants have also occasionally invoked procedural due process, arguing that the Act's penalties are so punitive in nature as to constitute a criminal punishment, and that it is therefore unconstitutional not to afford a defendant under the Act the procedural safeguards of a criminal proceeding. *See, e.g.*, Toepelman v. United States, 263 F.2d 697 (1959). It does not appear that any court has ever accepted this argument with respect to the Act's penalties. Moreover, as noted above, such a holding appears highly unlikely given the demanding standard set forth in the *Hudson* case for concluding that a nominally civil penalty is nevertheless a criminal punishment.

After the 1986 amendments increased the Act's damages and penalties, numerous defendants also raised a due process defense to the "retroactive" application of the new provisions to false claims made prior to 1986. Now that 20 years have passed since the amendments, this defense has little (if any) continuing significance.

117. 263 F.2d 697, 698–700 (4th Cir. 1959).

118. *Id.* at 698.

119. United States v. Cato Brothers, Inc., 273 F.2d 153 (4th Cir. 1959) (summarizing the holding of *Toepelman*).

In 1969, defendants raised the due process defense again in *United States v. Greenberg*.[120] In *Greenberg*, the government sought penalties under the Act but did not assert any damages. Defendants claimed that application of the Act's penalties to them in such circumstance would "violate[] due process because there is no rational relationship between the actual or possible damages to the government and the statutory penalty of $2,000 for each false claim and double the amount of actual damages."[121] The district court summarily rejected this argument, citing *Toepelman*.[122]

B. Supreme Court Punitive Damages Cases Should not Be Applied to the Act

Interestingly, after its rejection by this pair of decades-old cases, it appears that the due process defense has not been discussed again in a published opinion involving the Act.[123] Recently, however, the Due Process Clause has been the subject of several Supreme Court decisions which may spark a renewed interest in the defense as it relates to the Act's penalties.

In a series of decisions, the Court has held that the Due Process Clause of the Fourteenth Amendment prohibits the states from imposing "grossly excessive" punitive damages on tortfeasors.[124] Most recently, in the case of *State Farm Mutual Insurance Co. v. Campbell*,[125] the Court, while avoiding a bright-line rule, suggested that substantive due process considerations may require a "single digit" ratio between punitive damages and actual damages, or even a lower ratio where actual damages run to large dollar amounts.[126]

It is unclear whether substantive such due process limitations on punitive damages in tort cases may appropriately be applied to the imposition of civil penalties pursuant to a federal statutory scheme enacted by Congress. Indeed, the central due process principle underlying the Court's punitive damages cases, *i.e.*, that a tortfeasor is entitled to adequate notice of the magnitude of the punitive sanction a State

120. 237 F. Supp. 439, 443–44 (S.D.N.Y. 1965).

121. *Id.* at 443–44.

122. *Id.*

123. In *Peterson v. Weinberger*, the Fifth Circuit upheld the district court's conclusion that a forfeiture under the Act "should reflect a fair ratio to damages to insure that the Government completely recoups its losses." 508 F.2d 45, 55 (5th Cir. 1975). The court, however, although it cited *Toepelman*, did not invoke the Due Process Clause. Rather the Fifth Circuit appears to consider a reduction of penalties to be a matter within the court's discretion. *See* United States v. Garibaldi, 46 F. Supp.2d 546, 564–65 (E.D. La. 1999) (in the Fifth Circuit, unlike in other circuits, court has discretion to reduce the number of penalties required by the Act).

Cf. In re Matter of Garay, 444 A.2d 1107, 1113 (N.J. 1982) (in case challenging award of penalties under state medicaid fraud statute, court commented that "[a]utomatic application of the maximum penalty when a person committed a large number of frauds involving small dollar amounts could be unreasonable and therefore a violation of due process," but did not reach the issue).

124. *See, e.g.*, BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589, 1592 (1996) (Due Process Clause of the Fourteenth Amendment prohibits states from imposing a "grossly excessive" punishment award on a tortfeasor).

125. 538 U.S. 408, 123 S.Ct. 1513 (2003);

126. *Id.* at 425, 123 S.Ct. at 1524 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); *id.* ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

might impose,[127] does not apply in the context of the Act. Unlike punitive damages, of course, the Act's penalties are set forth by statute and thus prospectively provide all defendants (and potential defendants) clear notice of the sanctions they may face should they elect to submit false claims to the federal government. Moreover, *unlike* punitive damages, the Act's penalties are not unlimited. Rather, they are circumscribed by the statutory penalty range and the number of false claims submitted by the defendant. Thus, the due process rationale behind the Supreme Court's punitive damages cases does not apply to the Act' penalties.[128]

Even if the Court's punitive damages due process cases would not literally transfer to the context of the Act, however, there is the possibility that some of the reasoning of those cases may work its way into cases challenging the Act's penalties, via the excessive fines defense. As the Supreme Court noted in *Cooper Industries, Inc. v. Leatherman Tool*,[129] constitutional violations in both the due process and the excessive fines contexts are predicated on a judicial determination of "gross disproportionality." As a result, concepts initially introduced in these due process punitive damages cases could later creep into the Court's excessive fines jurisprudence, in much the same way the *Halper* test originated in the double jeopardy context but later became the standard for determining whether a civil sanction constitutes "punishment" under the Excessive Fines Clause.

Imposed in the context of a state law tort action, the limits suggested by the Supreme Court in *State Farm* may seem desirable, as they arguably add a degree of predictability and standardization to the one-of-a-kind factual situations presented in each different tort case. Imposed in the context of cases arising under the Act, however, such limitations would appear to impermissibly override Congress' considered judgment that the Act's penalties properly reflect the seriousness of submitting false claims to the government.

For example, the parameters suggested in *State Farm* would effectively grant false claims of less than $550 a free pass from penalties (because, in the case of such claims, the ratio of the Act's minimum penalty of $5,500 to the damage amount of $550 or

127. *See, e.g., BMW v. Gore*, 517 U.S. at 574, 116 S.Ct. at 1598 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

128. In the context of reviewing civil sanctions set forth in a federal statute for double jeopardy purposes, the Supreme Court in *Hudson* commented in *dicta* that the Due Process Clause "protect[s] individuals from sanctions which are downright irrational." 522 U.S. at 102–03, 118 S.Ct. at 495. Although this comment suggests that the Act's civil sanctions would be subject to due process review, the Court's statement that only sanctions which are "downright irrational" are prohibited by the Due Process Clause also suggests that such review would be very deferential. Moreover, in support of this proposition, the *Hudson* Court cited *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461 (1955), in which the Court addressed a Fourteenth Amendment due process challenge to a state statute regulating visual care. The *Williamson* Court applied a very lenient standard of review, examining only whether the regulation bore "no rational relation" to its objective. *Id.* at 491, 75 S.Ct. at 466. The *Williamson* Court overturned the district court's findings that the regulation violated due process, asserting that the "day is gone" when the Court would strike down state laws as improvident or unwise. *Id.* at 488, 75 S.Ct. at 464–65. The Court also emphasized that for protection against alleged abuses by legislatures, "the people must resort to the polls, not to the courts." *Id.* (quoting *Munn v. State of Illinois*, 94 U.S. 113). *Hudson*'s citation of *Williamson* suggests, therefore, that statutory civil sanctions would be reviewed under a very deferential standard, with extreme deference given to Congress' judgment as to the remedies appropriate to meet its objectives.

129. 532 U.S. 424, 434–35, 121 S.Ct. 1678, 1684–85 (2001).

less would be greater than ten and thus would not be a "single digit" ratio). Such a result could severely undermine the effectiveness of the Act. Federal healthcare programs such as Medicaid and Medicare process a huge number of claims, a large percentage of which would likely fall below the $550 threshold; nevertheless, participants submitting false claims below this amount would basically be immunized from the Act's penalties. Moreover, compared to a small number of very large claims, a large number of smaller claims is already harder to detect and more difficult to find the resources to recover. Thus, the imposition of penalties even in cases of low-dollar false claims serves an important purpose in reimbursing the government for the high cost of policing such claims and the high costs that such prolific but small false claims impose in terms of the integrity of, and public confidence in, affected government programs. Indeed, as discussed in Part One of this series, penalties may be imposed under the Act even where the plaintiff cannot prove any damages associated with a particular false claim. The wholesale adoption of *State Farm* and similar cases into the context of the Act would thwart the Act's purposes by preventing the imposition of penalties for small dollar (or no dollar) value false claims.

At the other end of the spectrum, extremely large false claims would also escape Congress' intended penalties and possibly even treble damages (based on *State Farm*'s suggestion that where compensatory damages are "substantial" even punitive damages that are simply equal to the compensatory damages might "exceed the outer limits of due process"). Here again, this would inappropriately reduce or eliminate the Act's penalties in the case of those violators who have access to the largest amounts of taxpayer funds and who most flagrantly cheat the government. The better rule is that set forth by the Eleventh Circuit in *United States v. Barnette*,[130] *i.e.*, that even where a potential recovery exceeds the Government's total loss by a very large dollar amount, it still does not run afoul of the Constitution unless it is "disproportional" to the total loss. As the Court put it, "[t]he Constitution does not have two sets of provisions, one that operates at retail and another at wholesale. It offers no quantity discounts."[131]

In short, to apply the Court's due process limitations from the punitive damages context to the Act would impermissibly substitute the judgment of a court for that of Congress. Such judicial activism cannot be justified in the name of "fair notice" to defendants, because the Act's penalty provision already provides defendants with notice of the potential penalties they may face.[132]

* * *

130. 10 F.3d at 1560 (where direct loss was at least $15.7 million and Government sought recovery of between $15.1 million and $50.5 million under various theories, including civil claims under the Act, court held that fact that total recovery sought exceeded total loss by a large amount was irrelevant, stating that "[w]e do not dispute that the amounts claimed . . . are large, but they are not disproportionate, and proportionality is the key").

131. *Id.*

132. *Cf.* Golson v. Green Tree Financial Services Corp., 26 Fed. Appx. 209, 216 (4th Cir. 2002) (unpublished) (declining to apply *BMW v. Gore* due process argument in Title VII case because statute provided defendant with notice of the range of damages that could be imposed, and fact that penalty fell within the range set by Congress was a "strong indicator" that the award was not unconstitutional).

When it comes to constitutional challenges to the imposition of penalties under the Act, the double jeopardy defense is the past, the excessive fines defense is the present, and the due process defense may or may not be the future. To date, most penalty awards under the Act have survived constitutional challenge under the Double Jeopardy and Excessive Fines Clauses, and for the most part only the extreme outliers have been struck down. If recent Supreme Court due process cases in the punitive damages context were to be applied to the Act, however, the limits on damages suggested in these cases could threaten to override Congressional intent by eviscerating the Act's penalty provisions. Because the fair notice principles of due process underlying these punitive damages cases do not apply where a federal statute provides a defendant with notice of the penalties it may face, the types of limits the Supreme Court has imposed on punitive damages should not be applied to limit the Act's penalties.

Upcoming Legal Battles

If a Tree Fell in the Woods and No One Was There When It Fell, Did It Make a Sound?
A Defendant's Self-Reporting Its Violation of the False Claims Act to Trigger the Public Disclosure Bar

If A Tree Fell In The Woods And No One Was There When It Fell, Did It Make A Sound?

A Defendant's Self-Reporting Its False Claims Act Violation To Trigger The Public Disclosure Bar

Jonathan D. Lichterman[*]

I. INTRODUCTION

There is an age-old philosophical riddle which asks "if a tree fell in the forest, and no one is around to hear it fall, did it make a sound." While philosophers may continue to debate, a similar riddle has arisen in the forest that has become interpretation of the Public Disclosure Bar of the federal False Claims Act (FCA).[1] In the FCA forest, one might ask "if a defendant merely reports its own violation of the FCA to the Government before a *qui tam* lawsuit has been filed against it, was there a public disclosure?" Like its philosophical counterpart, there has been conflicting answers to this issue.

The seminal case holding that the mere disclosure to the Government is a public disclosure is the United States Court of Appeals for the Seventh Circuit's decision in *United States v. Bank of Farmington*.[2] However, some courts, exemplified by the United States District Court for the Eastern District of Pennsylvania in *United States ex rel. Brennan v. The Devereux Foundation*, have rejected this view, finding a voluntary disclosure to the Government which has not been disclosed to the public at-large is not "public" within the meaning of the Public Disclosure Bar.[3] Consistent with the text and purpose of the FCA, this latter approach enunciated in *Brennan*, is more sound and should be adopted. However, even to the extent the narrow, *Bank of Farmington* line of cases is followed, the relator may still have a shield from dismissal in the form of the "source requirement" of the Public Disclosure Bar.

II. THE PUBLIC DISCLOSURE BAR OF THE FALSE CLAIMS ACT

A. History Of The Public Disclosure Bar

"The past serves as prologue [and therefore] some familiarity with [the FCA's] tortuous, wending history is critical to an understanding" of its "public disclosure bar" and "original source exception" to that bar.[4] The False Claims Act of 1863 was adopted during the Civil War in order to combat fraud and price gouging in war procurement contracts.[5]

* Jonathan Lichterman is an attorney with the law firm of Meckler, Bulger & Tilson, LLP in Chicago, Illinois, whose practice focuses on complex commercial litigation including prosecuting *qui tam*/False Claims Act actions, anti-trust violations and other business crimes and torts.

1. 31 U.S.C. § 3730 (e)(4)(A).

2. United States v. Bank of Farmington,166 F.3d 853 (7th Cir. 1999).

3. United States ex rel. Brennan v. The Devereux Foundation, No. CIV. A. 01-4540, 2003 WL 715750 (E.D. Pa., Feb. 25, 2003)

4. United States. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

5. *Id.* (citing United States ex rel. LaValley v. First Nat'l Bank of Boston, 707 F. Supp. 1351, 1354 (D. Mass. 1988); JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS 1–3 (1993)).

Indeed, the original version of the FCA allowed relators to recover even where they added nothing to the discovery of the fraud, fully permitting "parasitic suits" like the one made infamous in the 1943 Supreme Court decision *United States ex rel. Marcus v. Hess*.[6] In *Hess*, the relator brought a *qui tam* suit based upon allegations he simply copied from a public criminal indictment brought by the Government.[7]

Hess inspired "public outcry" over the liberality of the *qui tam* provisions, prompting speedy congressional response—enactment of a new version of the FCA.[8] This new version barred all *qui tam* suits "based on evidence or information the Government had when the action was brought" regardless of whether the Government was aware that it even had the information, and regardless of whether it was the relator that had provided the information to the Government.[9]

Not surprisingly, "once again, the passage of time revealed that Congress, in its attempt to evade Scylla, had steered precipitously close to Charybdis." *Id.* The new statutory barriers substantially decreased the use of *qui tam* provisions to enforce the FCA and courts greeted those *qui tam* suits that did arise with considerable caution.[10]

The 1984 Seventh Circuit case of *United States ex rel. State of Wisconsin v. Dean*,[11] marked the "nadir of the *qui tam* action."[12] In *Dean*, the Seventh Circuit held that the federal FCA barred a *qui tam* suit "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge."[13] Thus, following this so-called "government disclosure bar," the *Dean* Court dismissed the State of Wisconsin's *qui tam* action alleging Medicaid fraud that the *State's own investigation* had uncovered, because the State had already reported the fraud to the Federal Government as required under the terms of its participation in the Medicare reimbursement program—a classic "Catch-22."[14] Simply put, because the information was theoretically available to the Government had it looked in its files and figured out that fraud was in fact being committed, the *qui tam* suit was barred under the "government disclosure bar."[15]

As a result, the National Association of Attorneys General immediately adopted a resolution urging Congress "to rectify the unfortunate result of the *Dean* case."[16] Congress responded with the *Federal False Claims Amendment Act of 1986* (the "1986 Amendments"), the avowed purpose of which was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[17]

6. United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)

7. *Id.; see also Letter from Rep. Howard L. Berman and Sen. Charles E. Grassley to Janet Reno,* 145 Cong. Rec. E1540, 1546–01 (July 14, 1999) ("The Grassley/Berman Letter").

8. *See Springfield Terminal Ry.,* 14 F.3d at 649.

9. *Id.* (citing 31 U.S.C. § 3730(b)(4) (1982)).

10. *Id.*(citations omitted)

11. 729 F.2d 1100 (7th Cir. 1984).

12. *Springfield Terminal Ry.,* 14 F.3d at 649.

13. *Id.* (citing *Dean*, 729 F.2d at 1103).

14. *Id.*

15. *Id.*

16. *Id.* (quoting S.REP. No. 345, 99th Cong., 2d Sess., at 13, *reprinted in* 1986 U.S.C.C.A.N. at 5278).

17. *Id.* (quoting S.REP. No. 345, 99th Cong., 2d Sess., at 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266).

Concerned about "sophisticated and widespread fraud" depleting the federal coffers, the Senate Report regarding the 1986 Amendments concluded that:

> only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. [Accordingly, the Senate bill] increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.[18]

The 1986 Amendments were motivated by three principle goals:

> First and foremost, Congress wanted to encourage those with knowledge of fraud to come forward. Second, [it] wanted a mechanism to force the government to investigate and act on credible allegations of fraud. Third, [it] wanted relators and their counsel to contribute additional resources to the government's battle against fraud, both in terms of detecting, investigating and reporting fraud and in terms of helping the government prosecute cases. The reward to the relator is for furthering these goals.[19]

In order to meet these goals, yet still prevent the "parasitic" types of lawsuits exemplified by *Hess*, Congress enacted within the 1986 Amendments what has been dubbed "the Public Disclosure Bar" and "Original Source Exception" to that bar.[20]

The reason for the Public Disclosure Bar is simple: if the relator simply "repeats allegations that he or she heard from someone else and about which the government is *already aware and taking action*, the relator contributes nothing to the government's efforts to combat fraud." *Id.* (emphasis added). Accordingly, in the 1986 Amendments, Congress provided that a *qui tam* case is barred if the relator has based his or her filing upon some publicly disclosed allegations "unless the relator . . . provided information concerning the allegations to the government before filing suit."[21] In sum, "the 1986 amendments were intended to increase private citizen involvement in exposing fraud against the government while preventing opportunistic suits by private persons who heard of fraud but played no part in exposing it."[22]

B. "Public Disclosure," In General Under the FCA?

The Public Disclosure Bar specifically provides that,

> no court shall have jurisdiction over an action . . . based upon a public disclosure of allegations or transaction in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO]

18. *Id.* (quoting S.REP. No. 345, 99th Cong., 2d Sess., at 1–2, *reprinted in* 1986 U.S.C.C.A.N. at 5266–67).

19. *See The Grassley/Berman Letter* (emphasis added).

20. *See Id.*

21. *Id.*

22. Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 565 (11th Cir. 1994).

> report, hearing, audit, or investigation, or from the news media, unless the . . . the person bringing the action is an original source of the information.[23]

Not surprisingly, given the sometimes tortured interpretations derived from the seemingly plain words of the FCA, a debate has arisen regarding whether "public disclosure" means actually and affirmatively disclosed to the public at large, or whether mere theoretical or potential availability can constitute public disclosure.[24]

This debate was thoughtfully addressed by the Tenth Circuit in *United States ex rel. Ramseyer v. Century Healthcare Corp.*[25] In adopting the requirement that a disclosure must have been affirmatively made known to the public in order to trigger the Public Disclosure Bar, the *Ramseyer* Court focused on common usage and understanding of the term "disclosure."[26] To "disclose" is commonly defined as "to make known; reveal or uncover."[27] "Thus, a report which is merely *potentially* discoverable—such as through a Freedom of Information Act request—but not actually 'made known' to the public, does not come within the ambit of public disclosure."[28]

The *Ramseyer* Court further noted that the "affirmative disclosure" interpretation of the Public Disclosure Bar also "coheres with the twin purposes of the FCA:"

> (1) to encourage private citizens with first-hand knowledge to expose fraud; and (2) to avoid civil actions by opportunists attempting to capitalize on **public** information without seriously contributing to the disclosure of the fraud.[29]

23. 31 U.S.C.A. 3730 (e)(4)(A). Notably, this paper deals only the "public disclosure" aspect of the Public Disclosure Bar and does not addressed "based upon" or the Original Source Exception.

24. *Compare* United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir.1991) (information exchanged between private parties through discovery but not filed with the court is "potentially accessible to the public" and thus is publicly disclosed) *with* United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519–20 (9th Cir.1995) (holding that "public disclosure" means actual disclosure rather than potential availability), *petition for cert. filed,* 64 U.S.L.W. 3593 (U.S. Feb. 15, 1996) (No. 95-1340) *and* United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 652–53 (D.C. Cir. 1994) (expressing doubt that documents revealed during discovery but not filed in court were publicly disclosed, and rejecting view that "public disclosure" includes information that "is only theoretically available upon the public's request"); *see also* United States ex rel. Fine v. MK-Ferguson Co., 861 F. Supp. 1544, 1550–1551 (D.N.M. 1994) ("aside from disclosures resulting from news media exposure, public disclosure occurs when the government has affirmatively provided to members of the general public access to information upon which the FCA claim is based. The linchpin of this formulation of the public disclosure test is the requirement that the government perform some affirmative act of disclosure. The mere existence of a report, audit, or investigation containing information pertaining to fraud does not, in and of itself, constitute public disclosure."); United States ex rel. Fallon, v. Accudyne Corp., 921 F. Supp. 611, 624–625 (W.D. Wis. 1995) (relying on MK-Ferguson and Quinn, Court held that notices of non-compliance sent to defendant were not public disclosures; investigative reports by DNR were not public disclosures).

25. 90 F.3d 1514, 1518–1519 (10th Cir. 1996)

26. *Id.*

27. *Id.* (quoting The Random House College Dictionary 378 (Rev. ed.1980); Black's Law Dictionary 464 (6th ed.1990) (defining "disclose" as "[t]o bring into view by uncovering; to expose; to make known")).

28. *Id.* (citation omitted).

29. *Id.* at 1519–20 (quoting United States ex rel. Precision Co. v. Koch Industries, 971 F.2d 548, 552 (10th Cir.1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1364, 122 L.Ed.2d 742 (1993).

> As to the second of these purposes, we do not believe that an actual disclosure rule will encourage parasitic lawsuits. Information to which the public has potential access, but which has not actually been released to the public, cannot be the basis of a parasitic lawsuit because the relator must base the *qui tam* suit on information gathered from his or her own investigation. If a specific report detailing instances of fraud is not affirmatively disclosed, but rather is simply ensconced in an obscure government file, an opportunist *qui tam* plaintiff first would have to know of the report's existence in order to request access to it. With regard to such materials, which are at best "only potentially in the public eye," we agree with the District of Columbia Circuit that "no rational purpose is served—and no 'parasitism' deterred—by preventing a *qui tam* plaintiff from bringing suit based on their contents."[30]

Another key purpose of the Public Disclosure Bar is encouraging the exposure of fraud.[31] Indeed, the 1986 Amendments to the Act (which abolished the "government knowledge bar") was enacted "to ensure that information bearing on potential fraud will come to light even if government officials should decide not to initiate proceedings based on information contained in government files."[32] The 1986 Amendments changed the focus of the FCA's jurisdictional bar from information that the Government simply had within its files to information or evidence which actually had been disclosed to the public.[33]

> [Indeed,] [n]ot requiring some positive act of disclosure would reinstate the pre-1986 jurisdictional bar based on mere "government knowledge" of information pertaining to fraud. Congress sought to replace this restrictive jurisdictional prerequisite in part because of its concern that the government was not pursuing known instances of fraud. As a consequence of the government's perceived inability or unwillingness to prosecute fraud, Congress gave private attorneys general greater access to the courts. If the mere existence of a "no action" recommendation buried in an unreleased internal audit report has the effect of foreclosing *qui tam* actions, the 1986 amendments were for naught.[34]

Only when there is a positive act of disclosure to the public can the Government "no longer throw a cloak of secrecy" around the allegations, for at that point the information has been "irretrievably released into the public domain."[35]

30. *Id.* at 1520 (discussing *Springfield Terminal Ry.*, 14 F.3d at 653.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (quoting *MK-Ferguson*, 861 F. Supp. at 1551).

35. *Id. (*quoting United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 322 (2d Cir. 1992).

C. Are Disclosures to the Government by a Defendant "Public" Under the FCA?

The debate over whether information must be "actually disclosed" versus "theoretically available" has reared its head in the analysis of when a disclosure by a defendant to the government is considered a "public disclosure." In response to this issue, a line of cases that has completely abrogated the view that information be disclosed to the public at large and instead held that the "mere disclosure" to the Government by a defendant may be enough to trigger the public disclosure without actual, or even potential, dissemination to the public at large. In contrast, other cases have drawn the opposite conclusion—affirmative disclosure" applies to disclosures by a defendant to the Government. This section discusses those two competing interpretations and the implications of each.

1. *Farmington* and Its Progeny: Mere Disclosure by a Defendant to the Government May Be a "Public Disclosure"

Heading the "mere disclosure" line of cases is the 1999 decision by the Seventh Circuit, *Bank of Farmington*.[36] In *Bank of Farmington*, the defendant Bank of Farmington obtained certain loan guarantees from the Farmers' Home Administration (FmHA) related to loans by the "borrower."[37] In addition, these loans were personally guaranteed by one of the borrower's relatives.[38]

When the borrower defaulted, the Bank submitted loss reports to the FmHA without any mention of the personal guarantee.[39] In addition to seeking compensation from the FmHA by submitting "loss reports" to the same, the Bank also sued the guarantor.[40]

In the Bank's lawsuit against the guarantor, the guarantor's attorney learned through discovery that the Bank had never disclosed the existence of the personal guarantee to the FmHA, subsequently serving a subpoena for deposition upon the FmHA employee principally responsible for the agency guaranty.[41] Having no knowledge of the personal guarantee, this FmHA employee contacted the President of the Bank to inquire as to the purpose of the subpoena.[42] In response the Bank President disclosed that it had in fact failed to disclose the guarantee in its loss reports, thus triggering the guarantors discovery request.[43] Thus, the first that the FmHA learned of this potential FCA violation was through the defendant itself. [44]

36. 166 F.3d 853 (7th Cir. 1999)

37. *Id.* at 856–857.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

The guarantor subsequently brought an FCA *qui tam* lawsuit against the Bank based on its failure to disclose the guarantee.[45] Following the line of cases that hold that if a disclosure is potentially available to the public, it is "public" for purposes of the Public Disclosure Bar, the District Court dismissed the Relator's claim because the violation had been disclosed through discovery.[46]

Although the Seventh Circuit rejected this reasoning, holding that discovery material does not become "public" until it is filed, it nevertheless found that the basis for the allegations had in fact been publicly disclosed when the Bank President told the FmHA employee about the Bank's failure to disclose on the loss reports the existence of the personal guarantee.[47] The *Bank of Farmington* Court further rejected

> the district court's holding that there was some sort of public disclosure because the government was in "constructive possession" of the information, here, in having access to the materials in FmHA files and to the borrowers files at the Bank. To accept this argument would undo the purpose of the 1986 amendments. It would return the jurisdictional bar to the old version, which barred lawsuits based on information in the government's possession.[48]

Although it correctly identified the errors of the District Court's opinion, it reached the same conclusion—the claim was based upon a "public disclosure." Unlike the *Ramseyer* opinion, to reach this conclusion the *Bank of Farmington* Court focused on the meaning of "public," concluding that disclosure of the basis for a *qui tam* lawsuit to a "competent" government official (i.e., "one who has managerial responsibility for the very claims being made) is "public".[49] It reasoned that,

> this construction accords with a standard meaning of "public," which can also be defined as "authorized by, acting for, or representing the community." . . . Disclosure to an official authorized to act for or to represent the community on behalf of government can be understood as public disclosure.
>
> The point of public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large about the dangers of misappropriation of their tax money. Disclosure to the public at large is a step in lowering the jurisdictional bar precisely because it is likely to alert the authorities about the alleged fraud. After investigation, they can take the proper steps to deal with it—prosecution, settlements involving repayment of funds, or whatever may be called for in the particular

45. *Id.*

46. *Id.* at 859–860.

47. *Id.* at 860.

48. *Id.* at 860 n.5.

49. *Id.*

> case. Since a public official in his official capacity is authorized to act for and to represent the community, and since disclosure to the public official responsible for the claim effectuates the purpose of disclosure to the public at large, disclosure to a public official with direct responsibility for the claim in question of allegations or transactions upon which a *qui tam* claim is based constitutes public disclosure within the meaning of § 3730(a)(4).[50]

A handful of district courts have followed *Farmington*, holding that a disclosure by the defendant to a competent official with the Government, without any actual disclosure to the public at large, can in fact be a public disclosure under the FCA.[51]

2. *Farmington* Rejected—Disclosure to Government Without Disclosure to the Public at Large Is not a Public Disclosure

In contrast to *Bank of Farmington* and its progeny, other courts have squarely rejected the notion that a defendant's own disclosure to a "competent" government official is a "public disclosure" absent being affirmatively made available to the public at-large.[52] Significantly, in *Brennan*, the United States District Court for the Eastern District of Pennsylvania took the *Bank of Farmington* decision head-on.[53]

In *Brennan*, the relator, an employee of the defendant, made an internal complaint to the defendant that its billing practices with respect to private Medicaid payors were fraudulent.[54] The defendant, in turn, "voluntarily" notified the private Medicaid pay-

50. *Id.* The *Bank of Farmington* Court also noted several clarifications of its landmark ruling. It noted that private communications between private parties are not "public disclosures" under the FCA. It further noted that,

> [d]isclosure to officials with less direct responsibility might still be public disclosure if the disclosure is public in the commonsense meaning of the term as "open" or "manifest to all." . . . The more open a disclosure is, the less any public official need be specifically informed. If it is sufficiently open, no official need be specifically informed. The more likely the competent official is to be apprised of the relevant facts by a disclosure, the less "public," in the sense of open or manifest to all, it need be. If the disclosure is made, as here, to precisely the public official responsible for the claim, it need not be disclosed to anyone else to be public disclosure within the meaning of the Act.

Id. However, the *Bank of Farmington* Court also explained that

> not all disclosure to a public official is public disclosure. Assuming no other public promulgation of the information, the public official to whom the information is disclosed must be one whose duties extend to the claim in question in some significant way. It would not have been public disclosure here had the Bank divulged the information in this case to a postal carrier or to the Governor of Guam and to no one else.

Id.

51. *See e.g.*, United States ex rel. Grant v. Rush-Pres./St. Like's Med. Cen., No. 99 C 06313, 2001 WL 40807 (N.D. Ill. Jan 16, 2001) (voluntary private disclosures by the defendant to the U.S. Attorney's Office during the course of government investigation were "public."); United States ex rel. Cosens v. Yale-New Haven Hosp.,233 F. Supp. 2d 319 (D. Conn. 2002) (following *Bank of Farmington,* court held that statements made only to Medicare investigators were a "public disclosure").

52. *See* Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861, 870 (4th Cir. 1999) (no public disclosure occurred when defendant met with State Department Officials in order to discuss its own unlawful billings, especially where the meeting was not transcribed or recorded (thus presumably making the subject matter of this meeting unable to be disseminated to the public at large)).

53. 2003 WL 715750.

54. *Id.* at *1.

ors and "relevant government entities," being the Department of Health and Human Services (HHS), that it had submitted fraudulent bills.[55] Subsequently, the relator notified the HHS and filed suit under the FCA.[56]

Relying on the *Bank of Farmington*, the defendants brought a motion to dismiss for lack of subject matter jurisdiction, arguing that the voluntary disclosures of the violations to the government constituted "public disclosures."[57] In ruling that a defendant's voluntary disclosure of wrongdoing to the Government is not a public disclosure, the *Brennan* Court noted that in the Third Circuit, "disclosures are not public unless they are directly in the public's view or within the public's access."[58] Ironically, this same principle was approvingly adopted in *Bank of Farmington*.[59]

The *Brennan* Court next took aim specifically at the *Bank of Farmington* court's conclusion that,

> [t]he point of the public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large about the dangers of misappropriation of their tax money. Disclosure to the public at large is a step in lowering the jurisdictional bar precisely because it is likely to alert the authorities about the alleged fraud.[60]

In response, the *Brennan* curt also addressed the legislative history of the Public Disclosure Bar, concluding that:

> *Farmington* directly contradicts the clear intent of § 3730(e)(4)(A). Congress crafted § 3730(e)(4)(A) in order to prevent a member of the public from being able to pursue a claim based on information obtained via a government inquiry or media account as opposed to personal knowledge. . . .[61] Congress altered the FCA in 1986 [in part] to allow private parties to proceed with *qui tam* claims in cases where the government already had knowledge of a possible claim. . . .

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Bank of Farmington*, 166 F.3d at 860. Notably, the *Bank of Farmington* Court stated that,

> the language of the statute itself is "public disclosure," not "potentially accessible to the public." A plain and ordinary meaning of "public" is "open to general observation, sight, or cognition, . . . manifest, not concealed," 12 Oxford English Dictionary, 780 (2d ed. 1989) [hereinafter, *OED*]; that of "disclosure" is "opening up to view, revelation, discovery, exposure." 4 *OED*, at 738. To say that something *is* publicly disclosed even if it is not in fact open to general observation or actually opened up to view, but is only potentially so, and that it is *not* publicly disclosed only if a court has forbidden its disclosure, is to distort the ordinary meaning of the words and in fact to read into the statute provisions that Congress did not enact.

Of course, this acknowledgement by the *Bank of Farmington* Court makes its holding even more puzzling.

60. *Brennan*, 2003 WL 715750 at *3 (quoting *Bank of Farmington*, 166 F.3d at 861).

61. *Id.* (citing U.S. ex rel. Cantekin v. University of Pittsburgh, 192 F.3d 402, 408 (3d Cir. 1999)).

> One of Congress' concerns [however] in allowing *qui tam* claims based on information that the government already possessed was that suits would be brought after the government exposed the questionable activity and that a *qui tam* plaintiff would beat the government to the punch, thereby sharing in the proceeds of the suit without having ever played a role in exposing the wrongdoing. . . .
>
> Given this legislative intent, the problem with the Seventh Circuit's Opinion in *Farmington* is two fold. First, the disclosure which took place in *Farmington*, . . . was made to the government privately as opposed to being made to the public or even available to the public. Such a scenario was not what Congress intended to guard against when drafting § 3730(e)(4)(A). . . .
>
> Second, the Seventh Circuit appears to have confused the requirement that a relator disclose information about a possible suit to the government before proceeding (31 U.S.C. § 3730(b)) with the jurisdictional bar as presented by § 3730(e)(4)(A). . . .
>
> Third, from a public policy perspective, Congress' motivation for enacting § 3730(e)(4)(A) weighs against the *Farmington* holding. As explained earlier, Congress was concerned that viable suits were not being heard because the government was unable or unwilling to pursue them. A finding that disclosure to a responsible government actor triggers the requirements of § 3730(e)(4)(A) has the ability to negate Congress' desire to enable any whistle blower to bring these suits by making it considerably more difficult for relators to pursue a claim when only the government knows of the information giving rise to the claim. Thus, the Seventh Circuit's holding has the potential to take us back to the same situation Congress sought to correct with the 1986 amendments.[62]

Based upon this analysis, the *Brennan* curt ruled that the defendant's voluntary disclosures to the Government were not "public."[63] Certainly, *Brennan* gives relators an excellent analysis of the issue, albeit in an unpublished district court decision.

D. The "Source" Requirement—A Potential Shield From Dismissal for Relators in Jurisdictions That Follow *Bank of Farmington*

Although defendants in jurisdictions following *Bank of Farmington* now have every incentive to win a proverbial "race to the government" with information regarding FCA violations, disclosing defendant's potential reward from having created a "public disclosure"—potential dismissal of a meritorious claim—may not result if it jumps the

62. *Id.* at *3–4.

63. *Id.*

gun by notifying the government too soon—specifically, before an investigation has been undertaken by the Government. Such a result can occur where the defendant has not met the Public Disclosure Bar's "source requirement."

Pursuant to the source requirement, only disclosures made "in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media" can qualify as "public disclosures."[64] Most circuits have narrowly construed this list to be exhaustive.[65]

Significantly, in *Bank of Farmington*, the Court ruled that the defendant satisfied the "source requirement" because the telephone inquiry to the Bank President by the FmHA official was an "investigation," albeit an informal one.[66] Notably, the *Brennan* Court, seizing upon the "source requirement," found that where a defendant voluntarily provides information to the Government *before* an investigation has been opened by the Government, even under *Bank of Farmington,* such disclosures are not public.[67] Accordingly, the *Brennan* Court concluded that the defendant's pure voluntary disclosures to Medicaid were not in fact pursuant to an "investigation" and thus the Public Disclosure Bar was not triggered by the same.[68] Thus, under the significantly difficult regime of *Bank of Farmington*, a ray of hope may exist for deserving relators.

III. CONCLUSION

As with many issues regarding interpretation of the FCA, a defendant's voluntary disclosures to the Government prior to the filing of a *qui tam* lawsuit are "public" under the FCA's Public Disclosure Bar (31 U.S.C. § 3739(e)(4)(A)) is the subject to some conflicting law. Specifically, the dispute centers on whether a disclosure must actually have been made available to the public through some affirmative act, or whether merely providing information to the Government will trigger the bar.

The "mere disclosure" line of cases, exemplified by *United States v. Bank of Farmington*, has held that a disclosure is rendered "public" merely by making it to a "competent" government official. The *Farmington* Court, in making this ruling, erroneously concluded that the only purpose of the public disclosure bar is to prevent relators

64. 31 U.S.C. § 3730 (e)(4)(A).

65. *See e.g.*, U.S. ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990); Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861, 870 (4th Cir. 1999); U.S. ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 744 (3d Cir. 1997); U.S. ex rel. Doe v. John Doe Corp., 960 F.2d 318, 323 (2d Cir. 1992); U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1499–1500 (11th Cir. 1991); U.S. ex rel. Burns v. A.D. Roe Co., Inc., 186 F.3d 717, 725 (6th Cir. 1999); *see also Bank of Farmington,* 166 F.3d at 860.

66. 166 F.3d at 862, explaining further that,

investigations need not be as formal as the "multifaceted investigation" in *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir.1992). They may be informal or casual inquiries so long as they are undertaken by authorized officials with official purposes. *See, e.g., O'Connor v. Chicago Transit Authority*, 985 F.2d 1362, 1364 (7th Cir.1992) (informal administrative inquiry by whistleblower characterized as an investigation). A police officer, hearing a peculiar noise in a dark shop, investigates by gingerly shining a flashlight inside and asking, "What's up?" This is essentially what [the FmHA official] did in his phone call.

67. 2003 WL 715750 at *2.

68. *Id.*

from bringing suit where the Government already has the information—a position expressly overruled by the 1986 amendments to the FCA.

Thus, not surprisingly, there are courts which have found that a disclosure by the defendant to the Government is not a public disclosure unless that disclosure was also either made available to the public or, at the very least, potentially available to the public. Notably, a District Court in *United States ex rel. Brennan v. The Devereux Foundation*, in a well reasoned opinion, specifically addressed and rejected *Bank of Farmington*, noting the specific textual and policy problems with the *Bank of Farmington* opinion.

Further, as noted by the *Brennan* Court, even under *Bank of Farmington's* expansive interpretation of "public," in order to trigger the bar, the disclosure must be made pursuant to one of the "sources" enumerated in the Public Disclosure Bar. Most relevant to cases of voluntary disclosures to the Government by a defendant is the "in an investigation" source. To the extent a voluntary disclosure is made to the Government before an investigation has been launched by the Government, it will not meet the "source requirement" and will not be considered "public."

Accordingly, sound interpretation of the FCA dictates that if a disclosure is made to the Government, but the public at-large is not around to hear it, it did not make a sound and it was not public.

Department of Justice Statistics

October 1, 1986–September 30, 2005

FRAUD STATISTICS—OVERVIEW

October 1, 1986–September 30, 2005

Civil Division, U.S. Department of Justice

FY	New Matters[1]		Settlements & Judgments[2]					Relator Share Awards[3]		
			Non Qui Tam[2]	Qui Tam						
	Non Qui Tam	Qui Tam	Total	Where U.S. Intervened or Otherwise Pursued	Where U.S. Declined	Total	Total Qui Tam and Non Qui Tam	Where U.S. Intervened or Otherwise Pursued	Where U.S. Declined	Total
1987	361	66	86,479,949	0	0	0	86,479,949	0	0	0
1988	246	60	172,843,696	355,000	35,431	390,431	173,234,127	88,750	8,638	97,388
1989	236	95	197,202,180	15,111,719	0	15,111,719	212,313,899	1,446,770	0	1,446,770
1990	256	82	193,239,367	40,483,367	75,000	40,558,367	233,797,734	6,590,936	20,670	6,611,606
1991	243	90	270,945,467	69,705,771	69,500	69,775,271	340,720,738	10,667,537	18,750	10,686,287
1992	357	119	136,862,236	134,099,447	994,456	135,093,903	271,956,139	24,196,648	259,784	24,456,432
1993	329	132	187,234,076	171,438,383	5,978,000	177,416,383	364,650,459	25,636,134	1,756,902	27,393,036
1994	291	222	706,187,897	379,646,074	1,822,323	381,468,397	1,087,656,294	70,112,579	538,897	70,651,476
1995	236	277	279,522,866	245,463,627	1,813,200	247,276,827	526,799,693	46,475,379	517,238	46,992,617
1996	187	363	247,357,271	124,565,203	14,033,433	138,598,636	385,955,907	22,193,539	3,896,058	26,089,597
1997	185	533	468,549,359	622,666,381	7,136,144	629,802,525	1,098,351,884	65,938,921	1,981,346	67,920,267
1998	119	470	151,585,794	432,813,410	29,225,385	462,038,795	613,624,589	69,660,944	8,527,750	78,188,694
1999	141	481	196,613,009	454,268,984	62,509,047	516,778,031	713,391,040	49,414,054	17,593,462	67,007,516
2000	96	367	367,887,197	1,202,552,907	1,814,847	1,204,367,754	1,572,254,951	183,600,387	391,733	183,992,120
2001	88	309	494,496,974	1,175,104,715	125,726,963	1,300,831,678	1,795,328,652	187,475,850	30,294,843	217,770,693
2002	63	320	113,692,470	1,066,606,748	29,866,186	1,096,472,934	1,210,165,404	159,198,889	5,593,086	164,791,975
2003	93	334	703,003,368	1,429,086,502	87,140,070	1,516,226,572	2,219,229,940	308,280,386	19,322,900	327,603,286
2004	113	415	115,656,023	556,072,685	9,474,879	565,547,564	681,203,587	109,627,498	2,433,638	112,061,136
2005	100	394	276,794,983	1,119,347,507	22,396,229	1,141,743,736	1,418,538,719	160,199,544	6,175,933	166,375,477
Total	3,740	5,129	5,366,154,182	9,239,388,430	400,111,093	9,639,499,523	15,005,653,705	1,500,804,745	99,331,628	1,600,136,373

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

2. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.

3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Fraud Statistics—Health & Human Services[1]

October 1, 1986–September 30, 2005
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements & Judgements[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	14	4	11,361,826	0	0	11,361,826
1988	9	9	1,382,675	355,000	88,750	1,737,675
1989	20	15	350,460	5,099,661	50,000	5,450,121
1990	28	12	12,202,500	903,158	119,474	13,105,658
1991	23	13	8,670,735	4,741,340	861,401	13,412,075
1992	30	17	9,821,640	2,192,478	446,648	12,014,118
1993	22	39	12,523,165	142,800,000	21,576,000	155,323,165
1994	43	80	381,635,015	16,564,684	2,752,827	398,199,699
1995	27	94	96,290,779	86,498,324	15,237,303	182,789,103
1996	20	204	63,059,873	52,876,698	9,624,568	115,936,571
1997	49	298	354,371,325	565,978,803	56,744,071	920,350,128
1998	36	287	40,107,920	257,320,610	47,807,528	297,428,530
1999	29	310	38,000,792	404,488,079	42,554,782	442,488,871
2000	37	223	208,899,015	708,090,743	113,594,529	916,989,758
2001	36	180	435,849,179	758,362,679	131,789,429	1,194,211,858
2002	24	197	74,117,427	935,922,512	149,173,648	1,010,039,939
2003	26	217	536,834,879	1,296,419,238	279,707,112	1,833,254,117
2004	28	276	34,816,447	474,575,690	97,346,065	509,392,137
2005	36	270	206,021,548	905,707,805	121,700,163	1,111,729,353
Total	537	2,745	2,526,317,200	6,618,897,502	1,091,174,298	9,145,214,702

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

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

3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.

4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Fraud Statistics—Department of Defense[1]

October 1, 1986–September 30, 2005
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements & Judgements[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	245	18	27,897,128	0	0	27,897,128
1988	138	36	149,136,213	33,750	8,437	149,169,963
1989	128	40	154,588,297	10,002,058	1,394,770	164,590,355
1990	77	45	118,915,978	21,699,713	3,795,720	140,615,691
1991	79	50	227,813,245	57,242,000	8,636,300	285,055,245
1992	78	64	62,603,695	129,294,456	23,874,784	191,898,151
1993	94	55	83,968,840	31,812,641	5,291,923	115,781,481
1994	62	96	222,799,421	361,385,206	67,285,578	584,184,627
1995	54	103	110,498,386	149,504,237	29,617,461	260,002,623
1996	44	135	78,085,099	63,347,938	12,991,758	141,433,037
1997	45	146	30,734,273	52,370,622	9,172,921	83,104,895
1998	29	78	71,063,139	145,277,685	20,041,579	216,340,824
1999	33	109	27,211,319	18,577,833	3,394,779	45,789,152
2000	10	77	53,007,693	124,696,475	20,893,416	177,704,168
2001	11	74	17,472,751	165,641,285	28,279,241	183,114,036
2002	16	72	9,561,543	42,665,096	8,235,954	52,226,639
2003	11	78	107,337,000	193,018,638	42,686,070	300,355,638
2004	16	99	10,098,491	17,941,119	2,764,889	28,039,610
2005	13	97	19,049,935	93,711,552	19,904,255	112,761,487
Total	1,183	1,472	1,581,842,446	1,678,222,304	308,269,835	3,260,064,750

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

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

3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.

4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

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

October 1, 1986–September 30, 2005
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements & Judgments[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	102	12	47,220,995	0	0	47,220,995
1988	99	20	22,324,808	1,681	200	22,326,489
1989	88	46	42,263,423	10,000	2,000	42,273,423
1990	151	33	62,120,889	17,955,496	2,696,412	80,076,385
1991	141	38	34,461,487	7,791,931	1,188,586	42,253,418
1992	249	57	64,436,901	3,606,969	135,000	68,043,870
1993	213	66	90,742,071	2,803,742	525,113	93,545,813
1994	186	105	101,753,461	3,518,507	613,071	105,271,968
1995	155	134	72,733,701	11,274,266	2,137,853	84,007,967
1996	123	163	106,212,299	22,374,000	3,473,272	128,586,299
1997	91	366	83,443,761	11,453,100	2,003,275	94,896,861
1998	54	168	40,414,735	59,440,500	10,339,588	99,855,235
1999	79	153	131,400,898	93,712,119	21,057,955	225,113,017
2000	49	165	105,980,489	371,580,535	49,504,175	477,561,024
2001	41	134	41,175,045	376,827,714	57,702,023	418,002,759
2002	23	122	30,013,500	117,885,326	7,382,373	147,898,826
2003	56	136	58,831,489	26,788,697	5,210,103	85,620,186
2004	69	180	70,741,084	73,030,755	11,950,182	143,771,839
2005	51	184	51,723,500	142,324,379	24,771,059	194,047,879
Total	2,020	2,282	1,257,994,536	1,342,379,717	200,692,240	2,600,374,253

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

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

3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.

4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Fraud Statistics
Qui Tam Intervention Decisions & Case Status
As of September 30, 2005
Civil Division, U.S. Department of Justice

	Active	Settlement or Judgment	Dismissed	Inactive	Unclear	Total
US Intervened	58	823	44	2	13	940
US Declined	384	177	2,716	6	5	3,288
Under Investigation						901
						5,129