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

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

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FCA Liability of Government Entities

<u>U.S. ex rel. Chandler v. Cook County</u>, 277 F.3d 969 (7th Cir. Jan 22, 2002)

The Seventh Circuit held that the False Claims Act authorizes *qui tam* suits against local governments. Moreover, the court held that municipalities are not exempt from awards of treble damages under the Act. The court rejected the contrary approach of the Fifth Circuit as inconsistent with established doctrinal differences between the legal status of states, which are sovereigns, and municipalities, which are not.

Dr. Janet Chandler brought this *qui tam* action in 1997 against the Hektoen Institute for Medical Research (Hektoen), Cook County, and Cook County Hospital (CCH). CCH had obtained a grant from the National Institute of Drug Abuse to study the treatment of drug-dependent pregnant women. The grant was later transferred to Hektoen, which is a CCH affiliate. The terms of the grant required the grantee to comply with federal regulations for research on human subjects. Chandler's lawsuit alleged that the defendants forged data pertaining to nonexistent "ghost" research subjects and submitted false progress reports to the Government. She also alleged that they failed to comply with the human subject research regulations, failed to obtain informed consent or thorough medical histories from participants, and failed to keep accurate records or provide proper care. Finally, she alleged that CCH unlawfully retaliated against her by firing her for speaking out about these abuses.

Cook County moved to dismiss, arguing that it is not a "person" subject to liability under the Act. The district court denied the county's motion, ruling that the term "person" in the Act's liability provision includes municipalities. Furthermore, the court ruled that the Act's treble damages provision is not punitive, so the traditional immunity of municipalities from punitive damages was not implicated. *See United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999), 16 TAF QR 3 (Apr. 1999). Subsequently, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000), the Supreme Court ruled that states are not "persons" for purposes of FCA *qui tam* suits, and stated that the Act's treble damages provision is "essentially punitive in nature." In light of *Stevens*, Cook County moved for reconsideration of the district court's decision.

On reconsideration, the district court found nothing in *Stevens* to alter its conclusion that the county was a "person" for purposes of FCA liability. *See United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 118 F. Supp. 2d 902 (N.D. Ill. 2000), 21 TAF QR 2 (Jan. 2001). However, in view of *Stevens* the court abandoned the position that FCA damages are not punitive. Holding that the county was immune from the imposition of punitive damages, the court dismissed the case against it. Chandler appealed.

Municipalities Are Persons Under the FCA

The Seventh Circuit reversed and remanded, ordering the district court to reinstate Cook County as a defendant. The court of appeals found that the county was indeed a "person" within the meaning of the FCA, as the district court had ruled. Section 3729 does not define "person," and the liability provision has under-gone only cosmetic changes since the Act was first adopted in 1863, so the definition of "person" has remained constant throughout the Act's history. As the Supreme Court has noted, by 1844, both private and municipal corporations were presumptively included within the meaning of "person." There is nothing in the language or structure of the Act suggesting a special exception for municipalities.

The court of appeals noted that the 1986 amendments to the FCA did not change the meaning of the term "person." The changes that were made in do not support the claim that Congress intended municipalities to be exempt from liability. The § 3733 civil investigative demand provisions define "persons" who may be targeted to include "any State or political subdivision of a State." Similarly, legislative history of the whistleblower protection provision, § 3730(h), reflects the Senate Judiciary Committee's view that "employers" subject to suit for improper retaliation would "include public as well as private sector entities." More generally, it is clear that Congress' broad purpose in 1986 was to increase the effectiveness of the Act, which it did for example by increasing the amount of damages and penalties as well as relators' awards. In the Seventh Circuit's opinion, a proper understanding of each of these changes points to the conclusion that in 1986 Congress expected municipalities to continue to be "persons" subject to suit.

Municipalities Are Not Immune from FCA Damages

The Seventh Circuit rejected Cook County's argument that it could not be sued because of the traditional, common-law immunity of municipalities from punitive damages. The court noted that the Supreme Court characterized the FCA's treble damages as punitive in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 785-86 (2000), 19 TAF QR 1 (July 2000). Therefore, the court of appeals looked for guidance to *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), where the Supreme Court was called upon to decide whether a municipality was immune from punitive damages under the federal civil rights statute, 42 U.S.C. § 1983. The *Newport* Court identified a two-part approach for evaluating a claim of immunity proffered by a municipality. The reviewing court must identify the policies that the immunity serves and then determine whether the immunity is compatible with the purposes of the statute.

The Seventh Circuit noted important differences between the punitive damages regimes of § 1983 and of the FCA. Congress provided no guidance as to the damages to be imposed under § 1983, and placed no limits on the amount of punitive damages a jury could assess. Such damages provide a windfall for a fully compensated plaintiff, and there is a danger that the municipality's deep pockets could tempt juries to make excessive awards, which would be borne by the local taxpayers in the form of increased taxes or reduced services. Under the FCA, on the other hand, damages are not highly discretionary, and are not divided into "punitive" and "compensatory" damages. At least part of the recovery will come from the monies taken by the municipality through its false claims, through which the local taxpayers have been falsely enriched at the cost of increased taxes or reduced services for the federal taxpayers. Because Congress carefully crafted a clear and consistent damages scheme for the FCA, it does not raise the concerns about the unbridled discretion of juries under § 1983 that worried the *Newport* Court.

To hold municipalities immune from the FCA's damages scheme, in the Seventh Circuit's view, would frustrate the will of Congress. The original FCA damages provision was clearly remedial, not punitive, and thus counties have been "persons" subject to suit since the Act was adopted 1863. To hold municipalities immune the court would have to conclude that by increasing the damages from double to treble in 1986, Congress silently intended to exempt municipalities. But in 1986 Congress was aware only of *Newport* and Supreme Court decisions holding that the pre-1986 double damages were purely compensatory and that municipalities are presumptively "persons." It was not until in 2000 that the Supreme Court would characterize the new treble damages as "punitive in nature." In enacting the 1986 changes, Congress did not indicate in any way that it intended to exempt municipalities. When it has desired to exempt municipalities, Congress has done so explicitly, for example in the antitrust and employment discrimination statutes.

Therefore, the court ruled, "despite the presumption against the imposition of punitive damages on municipalities, it is clear that Congress, in enacting the 1986 changes to the FCA, made a conscious choice to increase recoverable damages while in no way indicating that it wished to exempt municipalities." The FCA's carefully crafted remedial mechanism embodies a comprehensive policy of deterring fraud that is inconsistent with municipal immunity.

Fifth Circuit Approach Rejected

Cook County argued that *Stevens* compels the conclusion that municipalities are not "persons" subject to liability under the FCA, as the Fifth Circuit recently held in *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001), 22 TAF QR 1 (Apr. 2001), *cert. denied*, 122 S. Ct. 808 (2002). The Seventh Circuit rejected this approach as unsound, ruling that it is inconsistent with the essential rationale of *Stevens* and the established doctrinal differences between the status of states, which are sovereign entities, and municipalities, which are not. Central to the holding of *Stevens* was the interpretive presumption that "person" does not include the sovereign and hence does not cover states. However, the Seventh Circuit noted, "[t]he presumption cuts the other way for municipalities." Municipalities are not sovereign, and therefore absent a clear statement to the contrary, they are presumptively included in the term "person." Because the Seventh Circuit's holding on this point created a conflict with the Fifth Circuit's ruling in *Garibaldi*, its opinion in this case was circulated to the entire court. No judge in active service requested a vote to hear the case en banc.

Discovery Order Violated Privacy Regulations

Because it reinstated Cook County as a defendant in this action, the court next addressed the county's challenge to the district court's discovery order permitting Chandler's attorneys to review unredacted patient records in connection with this case. The district court had initially permitted Chandler's attorneys access only to redacted patient records, and notice was sent to the patients whose records were disclosed. However, Chandler's attorneys found that many of these records were missing or incomplete, and obtained an order allowing access to the unredacted records. Cook County obtained an emergency stay of this order pending appeal, and the appeal of the discovery order was consolidated with the appeal of the district court's ruling dismissing the county as a party.

The Seventh Circuit ruled that the discovery order violated federal statutory guarantees of privacy for substance abuse treatment records set out at 42 U.S.C. § 290dd-2 and 42 C.F.R. § 2.64. These provisions require notice to be provided to affected patients and prohibit disclosure without patient consent except to prevent loss of life or serious bodily injury. The affected patients did not receive notice of disclosure of unredacted records, and the conditions for disclosure without patient consent were not satisfied. Therefore, the district court's discovery order violated federal privacy rules.

The court noted that discovery rulings are normally not appealable, and that mandamus should not be used to circumvent the bar on interlocutory appeals of discovery orders. However, because the district court's discovery order threatened serious irreparable harm to the privacy rights of individual patients, as well as the continued effectiveness and viability of federal drug-treatment programs, the extraordinary remedy of mandamus was appropriate in this case. Accordingly, the court of appeals granted mandamus, ordering the district court to enter a new order that would satisfy both the privacy regulations and Chandler's legitimate need to view some non-confidential communications.

After the court of appeals issued this ruling, Cook County moved for a stay of the court's mandate pending the filing of a petition for certiorari in the Supreme Court. In February the court granted this motion. *See* 2002 WL 276352 (7th Cir. Feb. 15, 2002). In order to obtain such a stay, the applicant must demonstrate a reasonable probability of success on the merits and the potential for irreparable harm. Because the Seventh Circuit's ruling in January is in conflict with decisions issued by the Third and Fifth Circuits, and the issue at stake is of importance both to the Federal Government and municipalities across the country, the court ruled that the possibility that the Supreme Court could grant certiorari was "not entirely insubstantial." The court found it more difficult to predict whether there was a possibility that the Supreme Court could reverse the Seventh Circuit's decision, noting that when the decision was submitted for en banc review, no judge in active service requested a vote for rehearing. However, on the matter of irreparable injury, Cook County argued that its immunity from punitive damages was tantamount in the context of this action to an immunity from trial, and that it ought not to be put to the further expense of preparing for trial until the question of its immunity was decided definitively. The court found that consideration important. Therefore, in view of the significance of the issue, the circuit split, and the potential injury to the county, the court granted the county's motion, staying the mandate until the conclusion of proceedings before the Supreme Court.

U.S. ex rel. Dunleavy v. County of Delaware, *279 F.3d 219 (3d Cir. Jan. 29, 2002)*

The Third Circuit ruled that local governments are not amenable to suit under the False Claims Act. The court ruled that the Act imposes mandatory punitive damages, and that Congress did not express a clear intention to abrogate the common-law immunity of local governments from such damages.

Anthony Dunleavy worked as a consultant to Delaware County, advising it on regulatory requirements associated with HUD funding grants. He filed this action in 1994, alleging that the county improperly used HUD program funds for general county purposes, and knowingly failed to return the funds to HUD once it had decided not to use them for the original purpose of expanding a park. In 1995 the Government declined to intervene, concluding that no fraud had been committed. However, after conducting an audit, HUD demanded that the county repay it $1.7 million plus interest. In 1996 HUD and the county settled the dispute between them. Dunleavy was not a party to that settlement.

In 2000 the district court sua sponte directed the parties to brief the issue of the county's liability in light of *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000). The court concluded that local governments are immune from *qui tam* FCA suits, because FCA damages are essentially punitive. Accordingly, it dismissed Dunleavy's suit. *See* 2000 WL 1522854 (E.D. Pa. Oct. 12, 2000), 21 TAF QR 3 (Jan. 2001). Dunleavy appealed.

Municipalities Are Immune from FCA Damages

The Third Circuit affirmed. The court ruled that FCA damages are punitive, citing the *Stevens* Court's characterization of them as "punitive in nature." In the Third Circuit's view this language is part of the holding of *Stevens* and not dictum. The court noted that the Act's damages provision was one of the features that the *Stevens* Court relied on in "further support" of its conclusion that states are not subject to *qui tam* liability.

The court next inquired whether Congress intended to subject municipalities to FCA damages. In *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 910 (3d Cir. 1991), the Third Circuit had held (in a RICO case) that in order to subject municipalities to punitive damage awards, a statute must expressly provide for such an award against a municipality. Applying this rule, the *Dunleavy* court found "nothing on the face of the relevant portions of the FCA as originally enacted in 1863 or in its current form which evidences a clear intent of Congress to subject local governments to punitive damages under the Act." The court noted that the term "person" is not defined in the Act's liability provision. Thus, the court concluded, "this lack of clarity in the text of the Act is insufficient indicia [sic] of congressional intent to abrogate local governmental immunity from punitive damages under the FCA."

The court stated that Dunleavy and TAF argued that the original drafters' intent is immaterial in resolving the applicability of the FCA to local governments, and that the intent of the 1986 Congress should control the resolution of this matter.* The court ruled that the 1986 amendments added nothing to the meaning of the term "person," and therefore did not evidence any congressional intent to abrogate local government immunity. The court declined to decide whether the intent of the 1986 Congress was controlling or not, but rejected Dunleavy's reliance on the legislative history of the 1986 amendments, noting that the *Stevens* Court had found this legislative history to be erroneous and of questionable value.

Both Dunleavy and the Government (as amicus curiae) argued that if the court held the county immune from treble damages, it should reduce any damages award to a level that would be deemed compensatory rather than punitive. The court declined to do so, ruling that treble damages are mandatory under the FCA except in cases where the defendant voluntarily reports the fraud before the Government investigates. In order to create a second exception for local governments, the court stated that it would have to rewrite the statute, and "such redrafting is outside the traditional province of the courts." Therefore, the court

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* *Editor's Note*—In fact, both Dunleavy and TAF argued virtually the opposite: that the original drafters' intent in 1863 was to subject local governments to FCA liability, and that the 1986 amendments did not alter this original intent. See, e.g., Brief for Appellant at 19 ("In 1863, Congress intended counties to be 'persons' under the False Claims Act, and nothing since has changed that intention."); Brief Amicus Curiae of Taxpayers Against Fraud at 5 ("Local government units were included within the FCA's reference to 'persons' when the statute was enacted in 1863" and "Congress effected no change in the meaning of 'persons' when it amended other language in the FCA in 1986.")

concluded that local governments are not amenable to *qui tam* suits under the FCA. Without any extended discussion, the court also upheld the district court's dismissal of Dunleavy's claims against county employees, stating simply: "we note in passing that we agree with the District Court that an employee of a local governmental unit is not subject to suit under the Act when the employee does not personally benefit from the transaction constituting a violation of the Act."

U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District, 2002 WL 487162 (W.D.N.C. Mar. 25, 2002)

A North Carolina magistrate judge ruled that municipalities enjoy common-law immunity from suit under the FCA. The magistrate judge recommended dismissal of FCA claims against municipal defendants, but not claims against individual defendants sued in their individual capacities.

Karen Wilson, a former employee of the Graham County Soil and Water Conservation District, brought this *qui tam* action against her former employer and other municipal entities, as well as a number of individuals in their personal capacity, alleging that the defendants submitted false claims to the Government through the Emergency Watershed Protection Program. She also asserted a claim for retaliation in violation of § 3730(h). The municipal defendants (as well as individual municipal employees sued in their official capacity) moved to dismiss based on common-law municipal immunity to punitive damages, and several individual defendants named in their personal capacities also moved to dismiss, arguing that they could not be sued in their personal capacities absent an allegation that they personally benefited from the alleged false claims.

Municipalities Held Immune from FCA Damages

The magistrate judge recommended that the motion of the municipal defendants and individuals sued in their official capacity be granted, based on the doctrine of municipal immunity. The magistrate noted that the doctrine of municipal immunity developed historically out of the doctrine of sovereign immunity, first recognized at common law in the late eighteenth century. However, the magistrate observed, the doctrine of absolute municipal immunity has gradually eroded over the past two centuries. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 246 (1981), the Supreme Court held that as a general rule, punitive damages are not allowed unless expressly authorized by statute, and expressed concern about the unfairness of imposing punitive damages on innocent municipal taxpayers.

The magistrate judge acknowledged that from 1863 to 1986 the FCA provided only for remedial damages, and that the 1986 amendments did not change the definition of "persons" subject to liability. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000), the Supreme Court ruled that states are not "persons" subject to suit. In the wake of *Stevens*, federal courts have been divided as to whether municipalities are subject to *qui tam* FCA actions, with the Seventh Circuit holding that they are, and the Third and Fifth Circuits holding that they are not.

In light of the *Stevens* court's statement that FCA treble damages are "punitive in nature," the magistrate judge found that the mandatory damages in the post-1986 version of the FCA are punitive. The magistrate judge also noted that municipalities were "persons" for FCA purposes from 1863 to 1986, and that the 1986 amendments did not change the definition of the term "person." Thus, the magistrate ruled, assuming that a municipality is a "person," the issue was whether

Congress intended to subject municipalities to treble damages under the FCA.

The magistrate judge ruled that in order to subject a municipality to punitive damages, Congress must clearly express its intent to abrogate common-law municipal immunity. The magistrate noted that the Supreme Court has held that there is no municipal immunity from treble damages in civil rights actions (where the wrongful conduct was pursuant to municipal policy) nor in antitrust actions, even though neither the civil rights nor the antitrust statute expressly abrogates municipal immunity. However, the magistrate distinguished the FCA from these statutes "inasmuch as the origin of the FCA was not civic corruption and the language of the FCA is not explicit."

The magistrate judge "struggled with the implication" that his recommendation might "allow miscreants . . . to go unpunished." However, he expressed concern that a contrary ruling risked "increasing uncertainty as to whether a common-law immunity may be relied upon."

Allegation of Personal Gain May Be Required for Liability in Personal Capacity

The magistrate judge recommended denial without prejudice of the motions of the individual defendants to dismiss claims against them in their individual capacities. However, the magistrate found that these claims did not appear to satisfy the particularity requirements of Fed. R. Civ. P. 9(b), and that there was " some authority for the proposition that for individual-capacity liability to attach under the FCA, some allegation of personal gain should be made." Nevertheless, the magistrate found that dismissal was too harsh a penalty, and recommended instead that the district court allow the relator's motion to amend, so that the relator could reconsider her claims against the individual defendants in light of Rules 9(b) and 11.

FCA Liability/Releases

U.S. ex rel. Bahrani v. ConAgra, Inc., 183 F. Supp. 2d 1272 (D. Colo. Jan. 22, 2002)

A Colorado district court ruled that a general release of claims executed by a former employee in settlement of an employment termination dispute could not be enforced to bar the employee from bringing a subsequent *qui tam* action, when the Government had no knowledge of or opportunity to investigate the relator's FCA allegations before the release was executed. The court also rejected the defendants' claims that regulatory violations are not actionable under the FCA, and that the relator had failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b).

Ali Bahrani worked as a document coordinator at Montfort, Inc., where he prepared and processed documentation for the export of animal hides. In order to export animal products the exporter must obtain from the USDA an export certificate, which has a unique serial number and states the shipment's destination, the name of the exporter and consignee, a description of the shipment, and other information. According to Bahrani, if the destination or buyer changes, the USDA requires the shipper to obtain an updated replacement certificate. During the period in question the USDA reportedly charged a user fee of $21.50 both for an original certificate and for a replacement certificate.

In 1998 Montfort laid Bahrani off as part of a work force reduction. Sometime before the layoff, Bahrani had filed a charge of national origin discrimination against his employer. In 1999, Bahrani settled this claim, executing a "Full and Final Release of All Claims and Settlement Agreement" (Release) with Montfort.

In 2000, Bahrani filed a *qui tam* complaint under seal against Montfort, its parent company ConAgra, and other ConAgra entities, alleging that they routinely altered old export certificates or forged new certificates whenever the destination or buyer of a shipment changed after the original certificate was issued. Bahrani claimed that the defendants altered over 200 export certificates per week for at least ten years in order to avoid paying the user fee and incurring any delay that might result from obtaining proper certificates.

In 2001 the Government declined to intervene and the complaint was unsealed. The defendants moved to dismiss, arguing that (1) the Release barred Bahrani's claims; (2) the regulatory violations Bahrani alleged are not actionable under the FCA; and (3) Bahrani failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b).

Prefiling Release Does Not Bar *Qui Tam* Claim Where Government Had No Notice or Opportunity to Investigate

The court denied the defendants' motions. Without deciding whether the Release in fact encompassed Bahrani's *qui tam* claim, the court ruled that it was unenforceable to bar that claim. The court noted that in *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), 3 TAF QR 1 (Oct. 1995), the Ninth Circuit ruled that a release barring *qui tam* claims is generally unenforceable because it would undermine the important public policies of encouraging those with knowledge of fraud to report it and to supplement government enforcement by bringing private suits. Subsequently, in *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1996), 9 TAF QR 7 (Apr. 1997), the Ninth Circuit carved out a narrow exception to the general rule of *Green*, ruling that public policy would not bar enforcement of a release where the Government had full knowledge of the allegations and had the opportunity to investigate them before the release was executed. Thus, in order to come within the *Hall* exception, the defendants needed to show that the Government knew of Bahrani's allegations and investigated them before he executed the release in 1999.

However, the only evidence the defendants proffered in support of government knowledge was the affidavit of Montfort's former in-house counsel stating that a man identifying himself as an FBI agent told her that he was investigating a report that Montfort had altered some export certificates. Because this statement was inadmissible hearsay, it could not be considered on summary judgment. Moreover, even if the FBI agent's testimony were properly before the court, the defendants had not shown that the Government had "full knowledge" of Bahrani's allegations at the time he executed the release. Evidence that Bahrani submitted in opposition to the defendants' motion further bolstered the court's conclusion. Bahrani filed an affidavit stating that he had spoken to the FBI agent only briefly on two occasions and never provided him any specifics on the fraud, and that the Government did not contact him to follow up on his report until several months after he had executed the release.

Therefore, although the Government may have had some knowledge of the fraud before Bahrani executed the release, the defendants had not shown that it had full knowledge and an opportunity to investigate. Under these circumstances, enforcing the Release to bar Bahrani's *qui tam* claim would impair the public's interest in encouraging disclosure of fraud and supplementing federal enforcement through *qui tam* suits. These public interests override the general interest in enforcement of settlements, and therefore the Release was not enforceable to bar Bahrani's claim.

Forging of Export Certificates Actionable As Reverse False Claim

The court rejected as "specious" the defendants' argument that regulatory violations of the sort Bahrani alleged are not actionable under the FCA. The authorities on which the defendants relied merely established the unremarkable proposition that a relator may not maintain a false certification claim based on regulatory violations unless the violations encompass or are accompanied by a false certification of compliance with federal law. This proposition was irrelevant in Bahrani's case because Bahrani did not purport to base his action on false certification but rather on allegations that the defendants made "reverse false claims" in violation of § 3729(a)(7).

Complaint Satisfied Rule 9(b)

The court rejected the defendant's arguments that it should dismiss Bahrani's complaint for failure to plead fraud with particularity and to cite to the proper subsections of the FCA in pleading subject-matter jurisdiction and compliance with the Act's disclosure statement requirements. After reviewing the complaint the court concluded that it adequately set out the time, place, and nature of the alleged fraud, how it was committed, who committed it, and how it benefited the defendants. Therefore, Bahrani satisfied Rule 9(b). Similarly, Bahrani's failure to cite to the specific or proper subsections of the FCA in pleading subject-matter jurisdiction and compliance with the disclosure requirements was at most a technical or typographical error that in no way misled the defendants on either point. Therefore, the court denied the defendants' motion to dismiss.

Government Employee Relators

U.S. ex rel. Holmes v. Consumer Insurance Group, 279 F.3d 1245 (10th Cir. Feb. 19, 2002)

The Tenth Circuit held that a government employee investigating fraud allegations pursuant to her official duties may not maintain a *qui tam* suit based on those allegations. The court reasoned that permitting such suits would ignore the False Claims Act's distinction between the Government and the *qui tam* plaintiff, would frustrate the Act's purpose of discouraging parasitic suits, and would undermine federal policy barring conflicts of interest. However, the court noted that government employee *qui tam* suits might be viable under some circumstances, for example where the Government has abandoned its investigation and there has been no public disclosure, or where a federal employee acts as an insider to expose another federal employee's fraud.

In 1995 Mary Holmes, who is postmaster in Poncha Springs, Colorado, confirmed the eligibility of Consumer Insurance Group (CIG) for the per pound bulk postal mailing rate. After further investigation, however, Holmes determined that CIG was not eligible for the per pound rate because the pieces in its mailing did not satisfy minimum rate requirements. Two years later Holmes discovered that CIG was receiving the per pound rate and reported the matter first orally to her superior and then several months later in a letter to the Office of the Inspector General. The Postal Inspection Service initiated an investigation and turned the case over to the U.S. Attorney. The Government interviewed one current and two former CIG employees, revealing its suspicions to them, although it later became clear that the interviewees were already aware of the fraud. In 1998 the Postal Service commended Holmes' efforts with a letter of appreciation and a $500 award.

In 1999 Holmes filed a *qui tam* action against CIG. The Government moved to dismiss Holmes from the action for lack of subject matter jurisdiction, arguing that its revelations of the allegations to the CIG employees constituted public disclosure, and that Holmes was not an original source. The district court granted the motion, not on the public disclosure grounds advanced by the Government, but rather on the ground that the Government's ongoing investigation precluded Holmes' suit. Holmes appealed.

Government Employee Investigating Fraud Pursuant to Duties Is Not a "Person" Who May Bring Suit Under § 3730(b)

The Tenth Circuit affirmed the dismissal of Holmes, but not on the grounds advanced either by the Government or the district court. The district court erred in ruling that an ongoing government investigation is a per se bar to a *qui tam* action. Such an approach would eviscerate the public disclosure framework put in place under the 1986 amendments and reinstate the pre-1986 "government knowledge" defense. Nevertheless, the Tenth Circuit affirmed the dismissal of Holmes on the ground that a government employee who is part an ongoing government investigation of fraud is not a "person" who may bring a *qui tam* action based on that fraud under § 3730(b)(1).

The court noted that § 3730(b)(1) does not explicitly define the class of "persons" who are eligible to bring a qui tam action "for the person and for the United States Government." However, that phrase, as well as its Latin ancestor "qui tam pro domino rege quam pro se ipso in hac parte sequitur," presupposes a distinction between the Government and the individual *qui tam* plaintiff. This distinction is absent when a federal employee obtains information about fraud in the pursuit of her employment duties. In effect, such an employee obtains information as the Government. Therefore, the court ruled, such an employee cannot file an action under § 3730(b) "for the person and for the United States Government."

Holmes made inquiries and obtained information about the fraud in her capacity as postmaster. Moreover, as a postmaster she had a duty under postal regulations to report by memorandum schemes to evade payment of postage. Holmes argued that she did more than what was required, but she did not convince the court of appeals. It noted that by her own admission, Holmes did not follow the procedure prescribed by regulation by immediately submitting a memorandum to the local postal inspector in charge. Therefore, the court of appeals was not persuaded that Holmes' actions so far exceeded her duties as to entitle her to pursue a *qui tam* action.

Eleventh Circuit Approach Rejected

The Tenth Circuit rejected the approach of the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). The *Williams* court ruled that a former government employee is not barred from pursuing a *qui tam* action based upon information she acquired during her government employment, regardless of whether the Government is actively investigating the alleged fraud. Much of that court's reasoning rested on the absence of any provision in the FCA expressly precluding *qui tam* actions by government employees. In the Tenth Circuit's view, however, while the Act does not expressly authorize or preclude all such actions, it may allow some and disallow others. Where the relator is a government employee acting as part of an ongoing government investigation, the court ruled, allowing a *qui tam* action to proceed would destroy the statute's distinction between the Government and the relator, would contravene the statute's purpose, and would create impermissible conflicts of interest for federal employees pursuing such suits.

First Circuit Approach Distinguished

The Tenth Circuit distinguished its approach to the issue of federal employee relators from that of the First Circuit. In *LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), the First Circuit held that a government employee who has a duty as a condition of her employment to uncover fraud does not qualify as a *qui tam* relator because this duty prevents her from being an original source. In contrast, the Tenth Circuit held that a federal employee uncovering fraud in the course of performing her ongoing duties for the Government is not a "person" who "may bring a civil action . . . for the person and for the United States Government" under § 3730(b). Under the Tenth Circuit's approach, a federal employee who is not otherwise precluded would still be subject to the public disclosure bar, if public disclosure had occurred, and would have to establish that she was an original source.

Purposes of FCA and Conflict of Interest Prohibition Support Denial of Jurisdiction

The Tenth Circuit found support for its approach in the purposes of the FCA and its 1986 amendments, which seek to encourage private citizens with first-hand knowledge to expose fraud while barring civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud. Where a government employee has a duty to report fraud, as Holmes did, the duty to report itself assures that the Government will obtain the information. Because the Government was already undertaking an investigation, in which Holmes participated pursuant to her duties, her *qui tam* action was not prodding the Government to pursue fraud that it would not otherwise pursue. Moreover, a federal employee reporting a private company's fraud to the Government does not have the same fear of reprisal that a whistleblowing company insider might have, and thus does not need the same financial incentive to disclose information. Allowing a federal employee to pursue a *qui tam* suit under these circumstances, the court ruled, rather would contradict Congress' goal of preventing parasitical suits.

However, the court emphasized that its points regarding the purposes of the FCA did not dictate the result in this case. It raised them merely to show that its holding is consistent with the aims of the Act and its 1986 amendments.

The court also observed that allowing a government employee participating in an ongoing fraud investigation to obtain a personal stake in the investigation by filing a *qui tam* action would create a "glaring inconsistency" with federal statutes and regulations requiring federal employees to avoid conflicts of interest. The court did not believe that Congress intended to create an incentive for government employees to withhold information about suspected fraud contrary to their specific employment obligations.

Some *Qui Tam* Claims by Government Employees Remain Viable

Because allowing jurisdiction in this case would ignore the FCA's distinction between the Government and the *qui tam* plaintiff, would contravene the Act's policy of discouraging parasitic lawsuits, and would conflict with Holmes' employment obligations, the court held that she was not a proper relator and affirmed the district court's decision dismissing her from the case. However, the court emphasized that it did not hold that federal employees can never be *qui tam* plaintiffs. For example, where the Government has abandoned its investigation and there has been no public disclosure, allowing the government employee to bring a *qui tam* suit would serve the statutory purpose of revealing and prosecuting fraud that the Government has failed to pursue. Similarly, if a federal employee, like a typical whistleblower in a private company, acts as an insider to expose another federal employee's fraud against the Government, a different analysis would apply. The court declined to consider all such situations that might compel a result different from the one reached in this case, but mentioned these scenarios as examples illustrating the limits of its holding.

Dissent Rejects Restrictions on Government Employee Relators

Judge Briscoe dissented, concluding that the FCA does not prohibit *qui tam* suits by federal employees who are part of an ongoing government investigation. The dissent noted that nothing in the Act expressly precludes federal employees from filing *qui tam* suits. The dissent suggested that Congress gave no thought to this issue at the time of the 1986 amendments, and noted that it failed to enact two bills introduced in 1992 that were intended in part to address the issue of government employee relators.

The dissent found most persuasive the Eleventh Circuit's discussion of this issue in *Williams*. The *Williams* court ruled that any gap in the statute on the permissibility of government employee relators was for Congress and not the courts to fill. In the dissent's view, the Tenth Circuit majority impermissibly usurped Congress' function.

The dissent argued that the term "person" clearly encompasses all human beings, including government employees. It found that the word is not ambiguous, at least with respect to the extent that it refers to natural persons, and denied that interpreting it to include government employees would produce an absurd result. Because Holmes had direct knowledge of the alleged fraud and blew the whistle by notifying government investigators, the dissent did not regard her suit as parasitic. The dissent suggested that the majority's rule would fail to eliminate parasitic suits and would create perverse incentives for government employees to file suit before disclosing information about the fraud to any superiors or government investigators.

Section 3729(b) Knowledge Requirement

U.S. ex rel. Quirk v. Madonna Towers, Inc., 278 F.3d 765 (8th Cir. Feb. 4, 2002)

The Eighth Circuit ruled that a nursing home did not knowingly make false claims to Medicare for treatment of a patient when it believed that the patient had a legal obligation to pay for the services provided. The defendant's failure to secure a legal opinion on its billing practices, without more, could not form the basis for an FCA lawsuit.

Lowell Quirk brought this *qui tam* action against Madonna Towers, Inc., which operates a combined residential and skilled nursing facility for the elderly, alleging that the company submitted false claims to Medicare for services provided to his aunt Alice Quirk during the first 90 days of her stay in the skilled nursing facility. Upon entering the residential apartments in 1985, Alice Quirk signed a Continuing Care Agreement. The Agreement required her to pay an up-front fee in addition to the monthly rent for her residential apartment, and provided that if she were ever transferred from the residential to the skilled nursing facility, she would continue to pay only the residential fee rather than the higher skilled nursing fee for the first 90 days in the nursing facility. In 1995 she fell ill and was transferred to the skilled nursing facility. For the first 90 days in the nursing facility, Alice Quirk paid the lower residential rate, and Madonna Towers submitted claims to Medicare for services it provided to her during that time.

Lowell Quirk brought a *qui tam* action against Madonna Towers, arguing that it was illegal for the company to submit those claims because Medicare law provides that no payment may be made for services if the person receiving the services "has no legal obligation to pay." 42 U.S.C. § 1395y(a)(2). Madonna Towers argued that it did not provide Alice Quirk with free services, but rather provided for 90 "benefit" days that it agreed to treat as pre-paid in consideration for the up-front fee and monthly rent. The district court granted summary judgment to the defendant, and the relator appealed.

Defendant Did Not Knowingly Submit False Claims

The Eighth Circuit affirmed, ruling that Madonna Towers did not "knowingly" submit false claims. The company's administrator testified that he understood the up-front fee residents paid to be a form of insurance that allowed the residents to pay the lower residential rate in their first 90 days in the skilled nursing facility. Under this view, the first 90 days in the facility was not provided free, but rather in exchange for earlier payments, and thus the recipients of services during that time did have a legal obligation to pay. Company officials testified that this billing practice was generally accepted in the industry and was akin to the way long-term insurance contracts are billed. There was no evidence that anyone at Madonna Towers suspected anything was wrong with the company's billing practices.

The relator pointed to the company's failure to secure legal advice or an opinion from Medicare as evidence that it knowingly submitted false claims. The court rejected this argument, ruling that "failing to secure a legal opinion, without more, is not the type of deliberate ignorance that can form the basis for an FCA lawsuit." The declarations and depositions of company officials made it clear that they saw no reason to seek legal advice about their billing practices because they considered the practices to be acceptable standard procedure.

Therefore, because the defendant did not knowingly submit false claims, the Eighth Circuit upheld the district court's grant of summary judgment. The court noted that it did not reach the issue of whether the defendant's interpretation was legally correct, and thus did not decide whether the claims submitted were in fact false or fraudulent. The court ruled simply that they were not knowingly false or fraudulent.

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

Minnesota Association of Nurse Anesthetists v. Allina Health System Corp., 276 F.3d 936 (8th Cir. Jan 17, 2002)

The Eighth Circuit held that a *qui tam* suit is "based upon" a public disclosure whenever the allegations in the suit and the disclosure are the same, regardless of where the relator obtained the information. The court ruled that the allegations in this suit were based upon public disclosures, but found that the relator was an original source of the publicly disclosed information.

The Minnesota Association of Nurse Anesthetists (Association) brought this *qui tam* action in 1994 against a group of hospitals and anesthesiologists, alleging that the defendants submitted four types of false claims for anesthesia services: (1) billing services for "reasonable charge" reimbursement that were only eligible for lower "reasonable cost" reimbursement; (2) billing services as personally performed that did not meet the criteria for personal performance; (3) billing as if the anesthesiologist were directing fewer concurrent procedures than was actually the case; and (4) certifying that it was medically necessary for both an anesthesiologist and an anesthetist to perform procedures that an anesthetist alone actually performed. The Government declined to intervene.

Seven weeks before filing its *qui tam* action, the Association and several individual anesthetists sued many of the same defendants for federal antitrust and state law violations, alleging that they had engaged in a widespread practice of fraudulent billing of anesthesiology services, including billing for services not rendered, billing for operations at which they were not present, and inaccurately designating operations as one-on-one for Medicare purposes. These allegations were immediately reported in the local newspapers.

The district court in the *qui tam* action granted summary judgment to the defendants based on the public disclosure bar, ruling that the disclosures of allegations of fraud in the antitrust suit and the news media, as well as in an administrative audit, deprived it of subject-matter jurisdiction. The district court also ruled that the relator lacked standing to pursue its *qui tam* claim because the United States had suffered no pecuniary injury. Furthermore, the district court entered summary judgment on the merits (1) on the personal performance claims, on the grounds that ambiguities in the applicable Medicare regulations precluded a finding that the defendants "knowingly" violated the FCA; (2) on claims related to the emergence of patients from anesthesia; and (3) on the Association's conspiracy claim. The Association appealed.

Suit Was Supported By and Therefore "Based Upon" Public Disclosure

The Eighth Circuit reversed the judgment of the district court, except with respect to the conspiracy claims. The court of appeals ruled that although the allegations were based upon public disclosure, the Association was an original source and thus escaped the jurisdictional bar. The court found that the antitrust suit and the resulting newspaper articles (although not the administrative audit) amounted to public disclosure of the Association's allegations in the *qui tam* action. The court therefore inquired whether the allegations were "based upon" the public disclosure. The proper interpretation of "based upon" was a question of first impression in the Eighth Circuit, and one that has split the other federal circuits. The majority view, held by the Second, Third, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits, as well as one panel of the Seventh Circuit, is that "based upon" means "supported by," so that a suit is "based upon" public disclosure whenever the allegations in the suit and the disclosure are the same, regardless of where the relator obtained the information. The minority view, adopted by the Fourth Circuit as well as another Seventh Circuit panel, holds that "based upon" means "derived from," so that the bar prevents only *qui tam* suits that resulted from the public disclosure.

The Eighth Circuit adopted the majority view. It noted that under the minority approach, the original source exception would be superfluous, because if a suit is derived from a public disclosure, the relator's knowledge could not be independent and therefore the relator could not be an original source. Courts adopting the majority view have considered it inconceivable that Congress could have inserted an original source provision that could never have any effect.

However, the court also noted two considerable objections to the majority rule. First, the normal meaning of "based upon" is "derived from," not "supported by." If the *qui tam* allegations are not derived from the public disclosure, they are based not on the public disclosure itself, but rather on the facts that have been publicly disclosed. Second, courts taking the majority approach often reason that the Government has no need for a relator when it is already aware of the allegations of fraud. But taken to its logical conclusion, this line of reasoning would restore the old "government knowledge" defense that Congress abolished when it adopted the current version of the public disclosure bar.

Nevertheless, the court ruled, these policy objections disappear when one considers the overall design of the public disclosure provision. "The 'based upon' clause serves the concern of utility, that is of paying only for useful information, and the 'original source' exception serves the concern of fairness, that is of not biting the hand that fed the government the information." Therefore, the court concluded, the majority view, though not free of strain, is consistent with Congress' apparent policy and gives a more coherent view to the confusing language of this section of the statute than the minority view does. The court also noted that this view is consistent with its prior case law, which implicitly followed the majority approach.

Relator Was Original Source

The Eighth Circuit held that the Association was an original source of the information on which its allegations were based. In order to qualify as an original source under § 3730(e)(4)(B), the relator must have "direct and independent knowledge of the information on which the allegations are based" and have voluntarily provided the information to the Government before filing suit. While some courts have ruled that the words "direct" and "independent" mean the same thing, the Eighth Circuit ruled that they were intended to express two ideas rather than one.

"Independent" knowledge means knowledge not derived from the public disclosure. The independent knowledge requirement bars parasitic actions, but does not bar actions based on old news, where the relator independently discovers information already known to the public. (However, in the latter case the relator's share may be reduced under § 3730(d)(1)). The Association's knowledge was clearly independent of its antitrust case and the newspaper articles based on that case.

However, the "direct" knowledge requirement is more problematic. The district court held that the Association had no direct knowledge because its knowledge came from its members, citing two cases where corporations were found not to be original sources when the corporations were formed after the information had been discovered and disclosed by people who subsequently became shareholders. The Eighth Circuit rejected the district court's view, distinguishing the cases it cited on the grounds that they involved corporate plaintiffs that were not in existence at the time the information was discovered. The mere fact that corporations can act only through agents does not prevent them from having direct knowledge; corporate plaintiffs have repeatedly been held to be original sources, and there is no evidence that in 1986 Congress intended to disqualify organizational relators. Moreover, the plaintiff in this case was not a corporation but an unincorporated association, and thus had no rights or legal status separate from those of its members. Thus, the Eighth Circuit held, the Association's knowledge was not parasitic and was "direct" within the meaning of the original source provision.

The defendants argued that the Association did not have direct knowledge of their billing practices. However, the Association pleaded that its members had personal knowledge of the alleged false claims through communications with the defendants, participation in the anesthesia procedures, and familiarity with hospital records. Moreover, the court ruled, "to qualify as an original source, a relator does not need personal knowledge of all the elements of a cause of action." In this case, direct knowledge of the anesthesiologists' operating-room practices was enough: "If a relator had direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand."

Finally, the court noted that the Association sent a copy of its antitrust complaint several days after it was filed to the local Medicare office, which forwarded it to the Justice Department. Therefore, the court ruled, the Association had fulfilled the requirement that it voluntarily provide the information to the Government before filing its *qui tam* suit. The court declined to adopt the approach of the Sixth and D.C. Circuits, which requires the relator to reveal the allegations to the Government before the public disclosure in order to qualify as an original source. This additional requirement, the court ruled, has no basis in the text of the statute and would alter the carefully crafted balance that Congress struck between utility and fairness when it enacted the public disclosure and original source provisions. Therefore, the court concluded that it had subject-matter jurisdiction, because the Association was an original source.

Relator Had Standing to Pursue Qui Tam Claim

The Eighth Circuit ruled that the district court's conclusion that the relator lacked standing was based on a faulty understanding of the applicable regulations. The district court had held that the relator lacked standing because there was no pecuniary injury to the Government. After that decision, the Supreme Court ruled in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000) that a *qui tam* relator has standing as a partial assignee of the Government's damages claim. The defendants contended that if there are no damages, a *qui tam* relator does not have standing to assert the Government's claim for penalties. Both the relator and the United States (as amicus curiae) argued that a relator does have standing to assert such a claim.

The Eighth Circuit had no occasion to address this argument, because the district court erred in holding that the relator had failed to allege pecuniary injury to the Government. The district court erroneously concluded that if the anesthesiologists had not billed for medically directing the cases in question, they would have had to bill them as personally performed, which would have been even more expensive. In fact, under applicable regulations such services would only be billable on a reasonable cost basis. Therefore, the relator had clearly alleged pecuniary injury to the Government and had standing to pursue its *qui tam* claim.

Alleged Ambiguity in Regulation Did Not Preclude "Knowing" Violation

The Eighth Circuit also reversed the district court's grant of summary judgment on the personal performance claims. The district court had held that the applicable Medicare regulation was susceptible to the interpretation that an anesthesiologist need not have been continuously present in order to bill a case as personally performed, and concluded that the defendants did not know that they were presenting false claims when they billed for procedures where they were not continuously present. The 1992 regulation in question requires that in order for an anesthesiologist to bill a case in which an anesthetist was also involved as personally performed, the anesthesiologist must be "continuously involved" in the case. Up until September 1993, the defendant Allina's in-house lawyer had advised it that an anesthesiologist needed to be "continuously present" with the anesthetist to bill for personal performance. The same lawyer made inquiries with HCFA, and in September 1993 HCFA issued a memorandum stating that in order to bill a case as personally performed, the anesthesiologist "must be physically present in the operating suite while the [anesthetist] is attending the case." The defendants argued that they relied on this memorandum in concluding that they could bill for personally performing cases despite leaving the operating room as long as they remained in the operating suite, which they defined as the area in the hospital where surgery takes place. However, in April 1994 HCFA published a second memorandum in the newsletter of the American Society of Anesthesiologists, clarifying that anesthesiologists were not to leave a patient during a personally performed procedure. Therefore, the time frame within which the 1993 HCFA memorandum could have been thought to create ambiguity on this point was quite short.

Moreover, the Association alleged that the anesthesiologists fell short of the standard for personal performance in other ways besides leaving the operating room. There was testimony that anesthesiologists billed for personal performance even when they had left the building or were otherwise unavailable for emergencies, or when they were performing a concurrent case. The defendants had no grounds for believing that such conduct qualified as personal performance. Therefore, they were not entitled to summary judgment on the grounds that they did not "knowingly" bill ineligible services as personally performed.

"Emergence" and Conspiracy Claims

The Eighth Circuit also reversed the district court's grant of summary judgment on the Association's claim that the anesthesiologists failed to participate in patients' emergence from anesthesia. The Association presented extensive evidence that the anesthesiologists left after induction of anesthesia and did not return for emergence. However, the district court accepted the defendants' contention that emergence goes on for days, and therefore the anesthesiologists did not need to participate in the stabilization and recovery of patients. The Eighth Circuit commented: "Apparently the district court chose to disregard a record full of evidence contrary to its factual conclusion." Because this is impermissible on summary judgment, the court of appeals reversed.

However, the Eighth Circuit affirmed the district court's grant of summary judgment on the Association's conspiracy claim. The district court found no evidence to support that claim, and the Association presented no significant evidence to support reversal.

***U.S. ex rel. Alcohol Foundation, Inc. v. Kalmanovitz Charitable Foundation, Inc.**, 186 F. Supp. 2d 458 (S.D.N.Y. Feb. 26, 2002)*

A New York district court dismissed a *qui tam* suit seeking to hold alcoholic beverage manufacturers liable for federal payments of medical costs of treating alcohol-related diseases, on the theory that the manufacturers' advertising campaigns are "fraudulent." The court held that the suit was based on publicly disclosed allegations, and that the relator's assembly of this information into a "mosaic" by virtue of its allegedly "unique perspective" did not transform the relator into an original source of the information.

The Alcohol Foundation, Inc. filed this *qui tam* suit in 2000 against numerous defendants, including more than a dozen large manufacturers of alcoholic beverages, alleging that the defendants defrauded the Government by "inducing people to buy in quantities sufficient to damage body and brain, what they knew to be a dangerous and addictive substance for most of the 20th century." In 2001 the Government declined to intervene, and suggested that the court lacked subject matter jurisdiction over the complaint. The Government also requested that, except for the complaint, the record in this action remain permanently under seal.

Relator's Creation of "Mosaic" of Information Did Not Make It an Original Source

The court dismissed the complaint pursuant to the public disclosure jurisdictional bar. There was no dispute that this *qui tam* action was based upon factual information gleaned from published articles. But the relator maintained that while the facts were publicly disclosed, the allegation of fraud was entirely new. The relator argued that its allegations arose out of a "perspective" that it obtained by spending hundreds of hours compiling facts into a "mosaic."

The court ruled that the relator's efforts did not transform it into an "original source." It noted that in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), the Second Circuit, quoting from an earlier Third Circuit decision, held that the public disclosure bar was "designed to preclude *qui tam* suits based upon information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." Although the relator in *Kreindler & Kreindler* had conducted its own "independent investigation," this did not make it an original source, because its allegations were based at least in part on publicly disclosed allegations or transactions of which it was not an original source.

Scholarly Articles are Public Disclosures in the "News Media"

The relator argued that the scientific and scholarly works from which it developed its theory were addressed to a specialized reader base and too technical for the average layman to understand, and that therefore they could not constitute public disclosure through the "news media" under § 3730(e)(4)(A). The court disagreed, ruling that the ordinary meaning of the statutory term "news media" includes information published in scholarly or scientific periodicals, which were as accessible to any stranger to the fraud as a newspaper article would be.

Relator Failed to Identify Fraudulent Claims or Allege Proximate Causation

The court noted that the relator relied on government reports to support the proposition that the Government spends money to treat alcohol-related medical conditions. The relator's proposition that the alcohol industry has no financial incentive to curtail alcohol abuse was self-evident. Based on these two propositions, and on the virtue of its "unique perspective," the relator alleged that beverage producers and marketers had conspired to defraud the Government. This argument, the court ruled, depended on an unprecedented, expansive reading of the term "false or fraudulent claim."

The relator did not specify what particular false or fraudulent claims the defendants allegedly caused to be submitted to the Government for payment. Instead, the court stated, the relator sought to expand the scope of the False Claims Act to cover any misrepresentation that might ultimately result in the Government's payment of a bill. This approach, the court ruled, would eliminate any requirement of proximate causation in FCA cases. The court also suggested that the complaint failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b) or even to present "a short and plain statement of the claim" as required by Fed. R. Civ. P. 8. In any case, the court dismissed for lack of subject matter jurisdiction pursuant to the public disclosure bar.

Court Orders Case Unsealed

The court denied the Government's request to keep the matter permanently under seal. It noted that judicial records are presumptively to be made available to the public, especially when the documents in question have been submitted as a basis for judicial decision-making. The party requesting that the matter be kept under seal bears the burden of showing good cause, which the Government's conclusory request did not do. Therefore, the court ordered the case to be unsealed.

Section 3730(h) Retaliation Claims

Moore v. California Institute of Technology Jet Propulsion Laboratory, *275 F.3d 838 (9th Cir. Jan. 4, 2002)*

The Ninth Circuit held that an employee investigating an FCA claim engages in protected activity under the Act when (1) the employee in good faith believes, and (2) a reasonable person in the same or similar circumstances might believe, that the employer is possibly committing fraud against the Government. The court also held that to qualify as "retaliation" under the Act, an employer's conduct must be reasonably likely to deter employees from engaging in activity protected under the Act.

Michael Moore worked at the California Institute of Technology Jet Propulsion Laboratory (JPL) from 1991 to 1996 as an engineer specializing in the mechanical aspects of large antennas. During that time the Department of Defense and the National Security Administration hired JPL to investigate structural problems with two large antennas that GTE, an outside contractor, had built in Puerto Rico. JPL assigned the task to Moore, who concluded that the gears that moved the antennas needed to be replaced. The investigation led to the indictment of GTE under the Major Fraud Act, and Moore was asked to be a witness for the Government in that case.

Meanwhile, Moore also concluded that there were similar problems with the gears of an antenna that JPL was building for NASA. Moore, the gear manufacturer, and an independent expert all recommended replacing the gears. In November 1995 Moore's supervisor Chris Yung approved a lien on the transfer of the antenna indicating that the gears needed to be replaced before the antenna could be delivered to NASA. The lien was given to Allied Signal, an outside contractor, which was to release the lien once the problem had been solved. Shortly thereafter, however, Yung and others at JPL unsuccessfully attempted to convince the independent expert to reverse his recommendation. Under increased pressure to expedite the delivery of the antenna, they then sent a memo to Allied Signal stating that there was no problem with the structural integrity of the gears and no need to replace them. When Allied Signal asked for the expert's report, JPL sent it but omitted the pages where the expert recommended changing the gears.

Moore became concerned that his own employer JPL's failure to replace the gears on the NASA antenna would undermine his testimony in the Government's case against GTE. He consulted an attorney in JPL's general counsel's office who advised him to report the matter to the Assistant U.S. Attorney and indicated that he would be protected as a whistleblower against retaliation by JPL. Moore followed this advice and was referred to the NASA Inspector General. Moore also reported the matter to the head of ethics at JPL, who began an internal investigation.

Early in 1996 Yung proposed to transfer Moore to another working group and remove him from his current projects, leaving him without long-term funding and disconnecting him from the Department of Defense, the biggest customer for his specialty of large antenna mechanics. In connection with this proposal, Yung told Moore that Moore should not have gone outside the chain of command by speaking to the NASA Inspector General without first informing Yung. Yung also told Moore that there would be a downsizing at JPL. However, the head of the working group to which Yung proposed to transfer Moore objected that the proposal "sounded like retribution" and the transfer was quashed.

In June of 1996 Yung performed Moore's yearly evaluation. He told Moore that because he was not a "team player" he would be stripped of his current title and placed under an intermediate supervisor. Ultimately, however, Yung did not carry through on these threats and Moore complained about them to JPL's ethics office.

The ethics office ultimately concluded that JPL had not acted improperly with respect to the alleged gear problems in the NASA project and that Yung had not retaliated against Moore. However, the office noted that there was a personality conflict between Yung and Moore that Yung had not handled with the expected skill. After the ethics report was issued, Yung's superior drafted a "Working Agreement" between Yung and Moore that stressed the importance of the "line management chain" and suggested that Moore's current title was subject to review at the end of the next year, and that he would report to an intermediate supervisor. Moore found the draft agreement a humiliating new form of reprisal, and submitted his resignation.

Moore filed a complaint in state court alleging wrongful termination, and amended his complaint in 1998 to include federal retaliation claims under the False Claims Act and the Major Fraud Act. JPL removed the action to a federal district court, which in 2000 granted JPL's motion for summary judgment on the federal claims and dismissed the state-law claims without prejudice for lack of subject-matter jurisdiction. The court held that Moore failed to show that he was engaged in activity protected under the FCA because there was no direct relationship between JPL's allegedly false statements to Allied Signal about the structural integrity of the gears and any government disbursement to JPL. Furthermore, the court held that JPL did not retaliate against Moore because its actions toward him were not "clearly unreasonable." Moore appealed.

Relator Had Reasonable Good-Faith Belief That Employer Was Committing Fraud

The Ninth Circuit reversed. There was a genuine issue of material fact whether Moore was engaging in protected activity when he reported the suspected fraud to the NASA Inspector General. In previous decisions the Ninth Circuit had ruled that in order to come under the protection of the retaliation provisions of the FCA, "[s]pecific awareness of the FCA is not required," but "the plaintiff must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action." In this case the court clarified "that an employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government."

The court noted that JPL's contract with NASA provided for a fixed base allowance of $6 million and a discretionary incentive award of $12 million. Moore presented evidence from which a reasonable jury could conclude that he believed in good faith, and a reasonable employee in the same circumstances might believe, that JPL had lied to Allied Signal to speed up release of the lien in order to ensure timely delivery of the antenna and thereby increase the amount of the discretionary incentive award that it received from the Government. Thus, contrary to the district court's conclusion, JPL's allegedly false statement to Allied Signal was directly related to a government payment. Therefore, Moore's activity met the standard for protection under the FCA's retaliation provision.

There was also a genuine issue of material fact whether JPL knew that Moore had engaged in protected activity. Moore reported his concerns to the head of ethics at JPL, and JPL's in-house counsel, Yung, and others in the "line management chain" knew that Moore had reported the matter to the NASA Inspector General.

Retaliation Must Be Action Reasonably Likely to Deter Protected Activity

Finally, the court held, there was a genuine issue of material fact whether JPL discriminated against Moore when it proposed to transfer him without his work, eliminate his job title, and place him under an intermediate supervisor. The district court erroneously concluded that these actions did not constitute actionable retaliation because JPL's proposals were not "clearly unreasonable" and JPL "might reasonably think that they could be accepted." The district court thus analyzed reasonableness from the point of view of the employer; however, the court of appeals rejected this standard in favor of the standard it applies in retaliation actions under Title VII, which evaluates reasonableness from the point of view of the employee. Under this standard, an action may be cognizable as discrimination under the False Claims Act "if it is reasonably likely to deter employees from engaging in activity protected" under the Act.

The Ninth Circuit ruled that a reasonable jury could conclude that JPL's actions were reasonably likely to deter employees from engaging in protected activity. Although neither Yung's various proposals nor the subsequent "Working Agreement" were ever implemented, the court ruled that "the prospect of having to continuously defend his right to his work, funding, job title, reporting status, and signature authority was by itself reasonably likely to deter an employee from reporting fraud." Therefore, JPL's actions were cognizable as discrimination under the FCA, and the district court erred in granting summary judgment.

<u>Brandon v. Anesthesia & Pain Management Associates, Ltd.</u>*, *277 F.3d 936 (7th Cir. Jan. 18, 2002)

The Seventh Circuit ruled that § 3730(h) of the FCA does not preempt all state law retaliatory discharge claims based on allegations of fraud against the Government. The court suggested that an anesthesiologist who notified the physician-shareholders of the practice where he worked that he was concerned that his colleagues were illegally submitting fraudulent claims to Medicare was not acting in furtherance of an FCA action. Moreover, because the anesthesiologist had a responsibility to investigate billing reports, his employer was not necessarily on notice of potential FCA litigation.

Dr. Michael Brandon worked as an anesthesiologist at Anesthesia & Pain Management Associates (APMA). Shortly after notifying the shareholders of APMA that certain doctors in the practice seemed to be submitting false claims to Medicare, he was fired. Brandon, a Missouri citizen, then brought a diversity suit against APMA and its shareholders, all Illinois citizens, alleging retaliatory discharge under Illinois law. The jury returned a verdict of more than $2 million for Brandon. However, the district court vacated the jury verdict and granted judgment to the defendants as a matter of law, ruling that (1) Brandon failed to show that his discharge contravened a clear mandate of Illinois public policy and (2) even if the discharge did violate public policy, there were adequate alternative means for vindicating it (specifically, the anti-retaliation provisions of the FCA). Brandon appealed.

Firing Whistleblower Who Reported Medicare Fraud Violated State Public Policy

The Seventh Circuit reversed. Illinois courts have held that firing an employee for reporting illegal conduct violates public policy. The district court took the narrow view that violations of federal statutes could not provide the basis for Illinois public policy. This view was erroneous, because federal law is binding on the state under the Supremacy Clause of the Constitution, and Illinois courts have explicitly stated that preventing violations of federal law is a clearly established state public policy. Noting that Illinois courts have often entertained claims of retaliatory discharge based on violations of federal law, the Seventh Circuit concluded that Brandon's discharge violated Illinois public policy.

Internal Complaints of Fraud Not Necessarily Sufficient to Support § 3730(h) Retaliation Claim

Nevertheless, Illinois courts have hinted in dicta that an otherwise valid retaliatory discharge claim may still be rejected if an adequate alternative remedy exists. Relying on these decisions, the district court held that the FCA's anti-retaliation provision, § 3730(h), provided Brandon with an adequate alternative remedy.

The Seventh Circuit disagreed, finding that "it is unclear at best that Brandon engaged in activity that might have supported a suit under the FCA anti-retaliation provision." The court noted that in order to bring an action under § 3730(h), Brandon would need to show that (1) he was engaged in protected conduct, i.e., conduct "in furtherance of" an FCA action; (2) his employer knew he was engaged in protected conduct; (3) the discharge was motivated at least in part by the protected conduct. Although Brandon told the shareholders of APMA that he was concerned about Medicare fraud, he did not say that he thought APMA was violating the FCA and never threatened to bring a *qui tam* action. Thus it was not clear that he was acting in furtherance of an FCA claim. Moreover, Brandon's reporting of billing improprieties to the shareholders did not necessarily put them on notice of the distinct possibility of an FCA action. Because investigation of billing reports was part of the general course of his responsibilities, it was not necessarily clear to his supervisors that he was pursuing an FCA claim rather than simply acting in accordance with his employment obligations.

Therefore, the Seventh Circuit concluded, allowing a state-law remedy in this case did not trench on federal interests. The court found no evidence that Congress intended § 3730(h) to preempt all state-law retaliatory discharge claims based on allegations of fraud against the Federal Government. Moreover, the court noted, even if Brandon did have a viable remedy under § 3730(h), this is only one of many factors that Illinois courts will consider in determining whether an action for retaliatory discharge will lie. Finally, the court ruled that the district court also erred in refusing to instruct the jury on punitive damages.

Accordingly, the court of appeals reversed the district court's grant of judgment as a matter of law and reinstated the jury's verdict. The court also remanded for a jury trial on punitive damages.

Dookeran v. Mercy Hospital of Pittsburgh, *281 F.3d 105 (3d Cir. Feb. 13, 2002)*

The Third Circuit affirmed the dismissal of a § 3730(h) action, ruling that the plaintiff was not engaged in conduct protected under the False Claims Act. Because the defendants had not made a request or demand for federal funds, the court ruled that they had not made a "claim" that could form the basis of a viable FCA action.

Dr. Keith Dookeran worked as Director of Clinical Oncology at the Mercy Cancer Institute (MCI), which is part of the Mercy Hospital of Pittsburgh. Dr. Howard Zaren, the Director of MCI, asked Dookeran to prepare an application for a grant to designate MCI as a clinical center in a national study on the effectiveness of tamoxifen and roloxifene in reducing the incidence of breast cancer in post-menopausal women. Dookeran prepared the application, but because the hospital allegedly failed to commit appropriate resources to insure patient safety, Zaren refused to submit it. Mercy officials then directed Dookeran to submit the application, but he refused for the same reason as Zaren. While Dookeran was on vacation, the hospital obtained the application and submitted it under another doctor's name. When Dookeran returned, he argued that the application was false and misleading and that his intellectual property had been misappropriated. Hospital officials allegedly ignored his complaints and retaliated against him.

Dookeran brought a claim against the hospital and a number of its doctors and other employees for retaliatory discharge under § 3730(h), as well as state law claims arising out of the same facts. The district court granted summary judgment to the defendants on the ground that Dookeran was not engaged in protected conduct under the FCA, and dismissed the pendent state law claims. Dookeran appealed.

Allegedly False Application Was Not "Claim" for Federal Funds

The Third Circuit affirmed. The court noted that in order to maintain an action under § 3730(h), the plaintiff must show that he engaged in "protected conduct," that is, conduct undertaken "in furtherance of" an FCA action. While the employee need not actually file a *qui tam* suit in order to assert a claim under § 3730(h), and need not have developed a winning FCA case, there must "at least be a distinct possibility that a viable FCA action could be filed."

The court ruled that Dookeran failed this test. It held that there was no possibility that he could have filed a viable *qui tam* action because the statutory elements of § 3729 could not be met. The court noted that the FCA imposes liability for presenting a false claim for payment and for making a false statement to get a false claim paid. The Act defines a "claim" as a request or demand for federal funds.

The defendants had presented substantial uncontradicted evidence that the hospital's application to be designated a clinical center in the breast cancer study was not a request or demand for money. Even if the application had been accepted (which it was not), the hospital would have received no money. The application was simply the first step in a process that might have led (but in fact did not lead) to the payment of federal funds to the hospital.

Because the application was not a "claim," there was no possibility that Dookeran could have filed a viable *qui tam* action. Therefore, he was not acting "in furtherance of" an FCA action, and his activities were not protected under § 3730(h). Accordingly, the court affirmed the grant of summary judgment for the defendants.

U.S. ex rel. Siewick v. Jamieson Science & Engineering, Inc., 2002 WL 192374 (D.D.C. Feb. 4, 2002)

A District of Columbia district court ruled that in a § 3730(h) action against a corporate employer, the plaintiff could not name his individual supervisor as an additional defendant. The court held that an individual supervisor could not be held liable for the retaliatory acts of the corporation absent circumstances warranting piercing the corporate veil.

Dr. Joseph Siewick brought this § 3730(h) action against his employer Jamieson Science and Engineering, Inc., as well as his immediate supervisor Dr. John Jamieson, who was the company's chairman, president, and majority shareholder, alleging that the defendants wrongfully fired him for blowing the whistle on improprieties in the company's billing for government contracts. After Dr. Jamieson's death his estate was substituted as a defendant. The estate moved for summary judgment on the question whether Dr. Jamieson was Siewick's "employer" for purposes of § 3730(h). In July 2001 the court denied that motion, ruling that the question presented turned on a disputed issue of fact. The estate then moved for reconsideration in light of the subsequent decision of the court of appeals in *U.S. ex rel. Yesudian v.*

Howard University, 270 F.3d 969 (D.C. Cir. 2001), 25 TAF QR 13 (Jan. 2002).

Individual Defendant Is Normally Not "Employer" in Corporate Setting

The court granted the motion, ruling that the *Yesudian* court clarified that the question whether an individual defendant is an "employer" for purposes of § 3730(h) is legal rather than factual. A core holding of *Yesudian* was that, as a matter of law, the word "employer" as used in § 3730(h) "does not normally apply to a supervisor in his individual capacity."

The court noted that the defendant company was clearly an employer of the defendant, and suggested that there could not be more than one employer in a corporate setting. The court found it significant that the word "employer" in § 3730(h) occurs in the singular, and sought to draw a distinction between the language of that provision and other provisions of the FCA, such as the liability provisions, which refer to "any person" and thus cover "a broader class of potential defendants."

The court did not find it significant that Dr. Jamieson had the power to make hiring and firing decisions. The *Yesudian* court had observed that § 3730(h) provides for such remedies as reinstatement, "which a mere supervisor could not possibly grant in his individual capacity." However, the district court rejected the idea that *Yesudian* thereby drew a legal distinction between a "mere supervisor" and a supervisor with the power to hire and fire. The court ruled that the *Yesudian* court's observation about remedies was dictum inserted "as an apparent afterthought" after that court had already concluded that an individual supervisor cannot be held liable as an employer. Even if that statement were not dictum, the district court continued, Dr. Jamieson would still not qualify as an employer absent circumstances warranting piercing the corporate veil. Under D.C. Circuit case law, "a corporate employee acting as such acts not *as* but solely *for* the corporate employer."

Circumstances Did Not Warrant Piercing Corporate Veil

The court ruled that piercing the corporate veil to hold Dr. Jamieson's estate liable was not appropriate in this case. The court noted that the FCA does not establish a standard for holding an individual officer liable for the acts of a corporation. Although in most cases state law governs the veil-piercing question, where federal interests are implicated, as in FCA cases, federal law applies. Under D.C. Circuit precedent, Dr. Jamieson's status as a majority shareholder and corporate officer was not enough to impose individual liability on him. Rather, the D.C. Circuit requires a two-prong inquiry: (1) Is there such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist? (2) If the acts are treated as those of the corporation alone, will an inequitable result follow?

The district court concluded that Siewick's claim against Dr. Jamieson's estate failed on both prongs. On the first prong, the court held that the company maintained a separate identity from that of its chairman, noting that the board of directors that met regularly, maintained minutes, and included outsider members. As for the second prong, the court held that refusal to pierce the veil would not sanction a fraud or promote injustice. Observing that "[t]he difference between being a fraud and conducting one is important," the court ruled that "defrauding the federal government as alleged is not the same as defrauding a corporation's shareholders, and only the latter is sanctionable through the piercing of the corporate veil." Although there was some evidence that the corporation might be judgment-proof, there was no allegation or evidence that this was the result of undercapitalization or other fraud by Dr. Jamieson. Accordingly, the court dismissed the retaliation claim against his estate.

Statute of Limitations/Successor Liability

U.S. ex rel. Fisher v. Network Software Associates, Inc., 180 F. Supp. 2d 192 (D.D.C. Jan. 14, 2002)

A District of Columbia district court held that the six-year statute of limitations of § 3731(b)(1) applies in all *qui tam* actions where the Government declines to intervene. In the case of an FCA conspiracy, the court held, the six-year limitations period runs separately from each overt act in furtherance of the conspiracy. The court also held that the purchaser of the assets of a corporation may acquire the corporation's FCA liabilities if the purchaser had notice of the claim before the acquisition and there is substantial continuity in the operation of the business before and after the sale.

Kenneth Fisher brought this *qui tam* action against Network Software Associates (NSA) and Ivan and Raoul Socher on November 22, 1999. Fisher alleged that the defendants fraudulently obtained and maintained a Small Business Administration § 8(a) certification. The Government declined to intervene. The defendants moved to dismiss on statute of limitations grounds and NSA also moved to dismiss on the grounds that it was not a proper defendant under the federal law of successor liability.

Six Year Limit Applies in *Qui Tam* Actions Where the Government Does Not Intervene

At the conclusion of the motions hearing in December 2001, the court ruled orally that the six-year limitations period of § 3731(b)(1) applies in all *qui tam* actions where the Government does not intervene. The court concluded that the three-year tolling provision and ten-year limitations period of § 3731(b)(2) apply only to the Government and not to a *qui tam* relator. Accordingly, the court dismissed all allegations of violations of §§ 3729(a)(1) and (2) occurring more than six years before the complaint was filed. The issues remaining to be decided in the court's written opinion were the application of the statute of limitations to the relator's conspiracy allegations under § 3729(a)(3), and whether NSA was a proper defendant under the law of successor liability.

Statute of Limitations Runs Separately for Each Overt Act in Furtherance of Conspiracy

The parties disagreed as to when the statute of limitations begins to run on an FCA conspiracy claim. The defendants argued that the statute begins to run when the first overt act in furtherance of the conspiracy occurs, while the relator argued that it runs from the date of the last overt act. The court rejected both of these positions, noting that under D.C. Circuit case law, "the statute of limitations in a civil damages action for conspiracy runs separately from each overt act that is alleged to cause damage." Therefore, the relator could seek to prove the existence of the conspiracy through the overt acts that occurred in the six years before the suit was filed, and to recover damages for those violations, but not for violations occurring more than six years before the filing date. Although the defendants originally obtained the § 8(a) certification outside the limitations period, the relator alleged that they received contracts and acted to maintain their § 8(a) status within the six-year period.

Purchaser of Corporate Assets Inherits Predecessor's FCA Liability if Successor Had Notice of Claim Before Acquisition and Made No Major Changes in Business

The court also rejected NVA's motion to dismiss on the grounds that as the purchaser of the assets of the company that incurred the original liability, it was not a proper defendant. Generally, a purchaser of the assets of a corporation does not generally incur the seller's liabilities. However, when a claim arising from a violation of federal rights is involved, the purchaser will inherit the seller's liabilities if the purchaser had notice of the claim before the acquisition and there is substantial continuity in the operation of the business before and after the sale.

NVA contended that it could not have had notice of the claim because the FCA violations took place before its predecessor was created and Fisher's complaint was only filed and unsealed several years after NVA purchased its predecessor's assets. The court ruled that NVA construed the notice prong too narrowly. Substantial continuity in ownership and staff between the predecessor and successor may satisfy the notice prong by suggesting actual knowledge by the successor or its principals. In this case Fisher alleged that Ivan Socher controlled both NVA and its predecessor, and that he devised a scheme to obtain § 8(a) certification, incorporate NVA and purchase the assets of the predecessor corporation to obtain the benefits of the illegal certification. Assuming these allegations to be true, the court could not conclude that NVA did not have notice of the potential FCA claim, and therefore denied its motion to dismiss.

Anti-Kickback and Self-Referral Violations

U.S. ex rel. Obert-Hong v. Advocate Health Care, 2002 WL 171968 (N.D. Ill. Feb. 1, 2002)

An Illinois district court dismissed a *qui tam* complaint alleging false certification of compliance with the Stark and Anti-Kickback Acts for failure to state a claim and to plead fraud with particularity. The court ruled that the relator had not properly alleged that the defendant had violated those statutes.

John Obert-Hong worked as a physician at Advocate Health Care, a for-profit health care provider with a network of affiliated doctors and hospitals. Obert-Hong brought a *qui tam* action against Advocate and its subsidiary South Suburban Hospital (SSH), alleging that they violated the Anti-Kickback Act, 42 U.S.C. § 1320a-7b, and the Stark Physician Self-Referral Act, 42 U.S.C. § 1395nn, by paying commercially unreasonable amounts to acquire practices, signing doctors to contracts requiring them to refer patients to SSH, and paying the doctors a percentage of fees collected for referred patients. Obert-Hong alleged that the defendants violated the FCA by falsely certifying compliance with the Anti-Kickback and Stark laws when they submitted claims to federal healthcare programs. He also alleged that the defendants engaged in upcoding.

The defendants moved to dismiss for failure to plead fraud with particularity pursuant to Fed. R. Civ. P. 9(b). The district court granted the motion and dismissed the relator's suit without prejudice. *See* 2001 WL 303692 (N.D. Ill. Mar. 28, 2001). The relator filed an amended complaint, and the defendants again moved to dismiss, arguing that the alleged practices did not violate the Anti-Kickback and Stark laws, and that the amended complaint still failed to plead fraud with particularity.

Conclusory Allegations of Commercially Unreasonable Payments Are Insufficient to Support an FCA Claim

The district court granted the defendants' motion. The court noted that the Anti-Kickback Act does not prohibit hospitals from acquiring medical practices, so long as they do not overpay for them in order to induce the doctors to make future referrals. Thus, to comply with the statute, the hospital must simply pay fair market value for the practice's assets. The relator's complaint offered nothing more than conclusory allegations that the hospital's payment was commercially unreasonable: it did not identify what assets were purchased, their purported value, or the amounts actually paid. Such conclusory allegations did not satisfy the particularity requirement of Rule 9(b) as they did not give the defendants notice of what was unreasonable about the acquisitions. Similarly, the relator failed to provide particular factual support for his allegations that perquisites provided to doctors after the acquisition were commercially unreasonable.

The Stark Act also prohibits certain financial relationships between referring physicians and referee hospitals, but the statute contains an exception for isolated transactions. In the court's view, "[p]urchasing a doctor's practice outright would seem a quintessential example" of an isolated transaction. Therefore, the relator had failed to allege facts showing that the hospital's acquisitions violated the Anti-Kickback and Stark Acts.

Mandatory Referral Provisions in Employment Contracts Are Not Illegal

The court rejected the relator's argument that provisions in the employment contracts of Advocate doctors requiring them to refer their patients to Advocate hospitals were illegal inducements. The court ruled that the "Stark and Anti-Kickback statutes are designed to remove economic incentives from medical referrals, not to regulate typical hospital-physician employment relationships." The court noted that both statutes include explicit employee exceptions. While any compensation in a non-employee context could be considered an inducement, employee compensation falls within the bona fide employee exception unless it is specifically related to referrals. As long as compensation is not contingent on the volume or value of referrals, there is no economic incentive for doctors to refer a patient to a particular hospital.

Obert-Hong argued that Advocate's compensation of its doctors was based on the value of their referrals, but after reviewing the contracts, the court disagreed. The contracts provided that the doctors would receive a percentage of receipts for professional services. This percentage depended on the value of the work performed by the individual doctor, not the value of any referrals. Although the contracts did not fix specific compensation amounts in advance, it provided a formula that was independent of any referrals, and that is all that the statute requires.

The court also ruled that Obert-Hong's allegations were insufficient to support his claim of upcoding. Obert-Hong cited only a single example where a review board reduced the coding of a claim. There was nothing to suggest that that single incident was intentional, much less that there was a general pattern of upcoding. Because the relator failed to allege specific facts supporting his claims of upcoding, kickbacks, and self-referral, the court granted the defendants' motion to dismiss.

Attorneys' Fees

Pfingston v. Ronan Engineering Corp., *2002 WL 417248 (9th Cir. Mar. 19, 2002)*

The Ninth Circuit held that the False Claims Act does not authorize the award of attorneys' fees against another attorney. The court affirmed the district court's grant of summary judgment to the defendant, but vacated an award of attorney's fees against the relator's attorney, and remanded for findings of fact on the award of fees.

Douglas Pfingston worked for a subcontractor of Fleming Engineering Company on a project undertaken by the Los Angeles Metropolitan Transportation Authority (MTA), with federal funding, to replace underground fuel storage tanks and construct a fuel leak detection system. Upon inspecting the leak detection system shortly after its completion in 1995, Pfingston observed that the system was operational, although it was not properly certified by local authorities, and that fuel was leaking, but the system failed to shut off the flow of fuel as it was designed to do. Pfingston reported the matter to supervising project engineer Tanzeem Rizvi, who allegedly responded that Pfingston had opened a "can of worms" and should "back off." Pfingston continued to press his complaint with the FBI and various other government agencies and was soon fired.

In 1997 Pfingston filed a *qui tam* action under the Federal and California False Claims Acts against the MTA and its contractors, alleging that the MTA failed to disclose a known, serious design defect in the leak detection system when applying for federal funds, and falsely promised that the tanks would be properly certified by state and local authorities before becoming operational. The Government declined to intervene and the MTA moved for summary judgment and attorneys' fees. The district court granted the MTA's motions, but contrary to the MTA's request, the court specifically ordered that the attorneys' fees be paid by Pfingston's attorney. Pfingston appealed, and his attorney appealed the award of attorneys' fees.

Relator Failed to Make Prima Facie Case That Claims Were False or Fraudulent

The Ninth Circuit affirmed the district court's grant of summary judgment against Pfingston, but vacated its award of attorneys' fees against his attorney. The court of appeals noted that Pfingston's observation that the detection system was malfunctioning and that the tanks were operating without proper certifications fell far short of setting forth a prima facie case under the FCA. In particular, Pfingston's observations did not show that the MTA made a "false or fraudulent" statement to the Government at the time it obtained funding. Therefore, the court concluded that summary judgment was properly granted. The court of appeals ruled that the district court had properly excluded Pfingston's accounts of his conversations with Rizvi as inadmissible hearsay, and did not abuse its discretion in denying Pfingston a continuance when he failed to conduct discovery diligently.

FCA Does Not Authorize Award of Attorneys' Fees Against Another Attorney

The Ninth Circuit vacated the district court's award of attorneys' fees against Pfingston's attorney. The court of appeals noted that § 3730(d)(4) of the FCA provides that a court may award attorneys' fees against the plaintiff if the "action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." This standard, the court remarked, is directly analogous to the standard for the award of fees to a prevailing defendant in federal civil rights cases brought under 42 U.S.C. § 1988.

The court observed that the FCA does not indicate that fees may be awarded against an attorney. Moreover, the analogous standard for attorneys' fees pursuant to 42 U.S.C. § 1988 does not authorize the award of fees against an attorney. Therefore, in the absence of any indication that Congress intended a contrary result, the Ninth Circuit concluded that the FCA does not authorize an award of attorneys' fees against another attorney.

The court of appeals remanded for the district court to consider whether attorneys' fees were warranted in this case. The district court had provided no explanation as to why fees were warranted, why the amount awarded was appropriate, or why the fees were to be paid by the attorney. The court of appeals stressed that the district court was required to make detailed findings in support of any award. Noting that "[t]he award of fees under the False Claims Act is reserved for rare and special circumstances," the court of appeals stated that it was "far from convinced" that this case presented such circumstances.

Rule 9(b)

U.S. ex rel. Duquette v. Centennial Health Care Corp., No. 96-75710 (E.D. Mich. Mar. 27, 2002)

In an unpublished decision, a Michigan district court denied a motion to dismiss a *qui tam* complaint pursuant to Fed. R. Civ. P. 9(b), finding that the relator had provided the defendants with sufficient notice of the substance of her claim to enable them to respond appropriately. The court upheld not only the relator's allegations regarding abuses at the Michigan facility where she worked, but also similar (but less completely documented) allegations of abuses nationwide, reasoning that a relaxed Rule 9(b) standard applies when the specific details relevant to the allegations are arguably in the possession of a corporate defendant.

Carol Duquette worked as an administrator from 1991 to 1996 at the Hilltop Nursing Home, which is run by the Centennial Health Care Corporation. During her employment at Hilltop, Duquette allegedly discovered that Centennial was padding time reports for nursing and staff services provided to Medicare patients in order to inflate the amount of reimbursement it received from the Government. In 1996 Duquette filed a *qui tam* action against Centennial and related entities, alleging that the defendants were submitting false claims not only at Hilltop, but also at another Michigan facility, the Cypress Manor Nursing Home, and at many other facilities throughout the United States. The Government declined to intervene. The defendants moved to dismiss, arguing that Duquette failed to plead her claims for fraud with particularity as required by Fed. R. Civ. P. 9(b).

The court denied the defendants' motion, ruling that Duquette had satisfied the requirements of Rule 9(b). The court noted that, as interpreted in the Sixth Circuit, Rule 9(b) only requires a fraud plaintiff to allege the time, place, and content of the alleged misrepresentation; the fraudulent intent of the defendants; and the resulting injury. Moreover, the Sixth Circuit has indicated that Rule 9(b) is to be read in conjunction with Rule 8, which calls for a short and concise statement of the facts supporting the allegations.

The court noted that Duquette had presented a detailed set of facts supporting her allegation that time reports were being falsified at Hilltop and Cypress Manor. Duquette detailed the pressure she received from her superiors to meet certain targets when billing for Medicare patients, and the way in which she allegedly learned that cost reports submitted to Medicare were being falsified. Upon reviewing these allegations, the court found that Duquette had adequately pled the time, place, and content of the alleged misrepresentations relating to services provided at Hilltop and Cypress Manor.

Duquette provided less factual support for her allegations of similar abuses at Centennial nursing homes nationwide. Thus, in the court's view, the defendants' Rule 9(b) motion with regard to these allegations presented a closer question. However, these allegations depended on information arguably in the possession of the defendants, in particular, Centennial's alleged use of a targeted ratio of Medicare to non-Medicare nursing costs as a yardstick by which to measure the performance of its facilities nationwide. In cases where the relevant information is already in a corporate defendant's possession, the court held, a more lenient application of the particularity requirement of Rule 9(b) is appropriate. In such cases it may be sufficient for the complaint to allege common practices rather than to list specific dates and times of submission of false claims. Because it found that Duquette had sufficiently put the defendants on notice regarding the substance of her claims against them, the court denied their motion to dismiss.

U.S. ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Construction Co., 2002 WL 73230 (N.D. Cal. Jan. 9, 2002)

In January 2002 a California district court granted summary judgment to the defendants in a case involving allegations of false certifications of compliance with the Davis-Bacon Act. In 1994 the C.W. Roen Construction Co. was awarded a federally-funded contract with the city of Santa Rosa to undertake a wastewater treatment plant improvements project. The project was governed by the Davis-Bacon Act, 40 U.S.C. § 276a, and applicable regulations, which require contractors to pay prevailing wage rates and to submit weekly certifications of compliance with this requirement to the Government.

In 1992 the Plumbers' Union and the Laborers' Union had signed a "jurisdictional agreement" resolving the classification of piping work on Northern California water treatment plant projects. The 1992 Agreement provided that Plumber-Steamfitter-Pipefitter prevailing wages were to be paid to all employees who perform piping work. In 1994, Frank Conte, the Department of Labor Wage and Hour Division District Director in San Francisco, wrote a letter to the Plumbers' Union's counsel stating that the 1992 Agreement established the prevailing practice in Northern California for classification of work done on water treatment plants. In 1996 Conte sent a second letter to the union's counsel confirming that the relevant job classifications were as set out in the 1992 Agreement. However, in 1997 John Fraser, the acting administrator of the Wage and Hour Division, notified the union's counsel that the Department of Labor had reexamined its position and concluded that it could not enforce the 1992 Agreement because there were indications that the agreement had not been followed in practice.

In 1996 the union filed its *qui tam* action under seal against Roen, one of its officers, and an employee. The Government declined to intervene. In 1997 the district court entered summary judgment for the defendants, but the Ninth Circuit reversed, holding that the FCA does extend to false claims regarding the payment of prevailing wages, and remanded for further proceedings to ascertain (among other things) the manner in which the Department of Labor may determine prevailing wage rates and job classifications and the effect of the Department's repudiation of earlier wage-rate determinations on the falsity of previously submitted certifications. *See* 183 F.3d 1088 (9th Cir. 1999). In 2001 the union filed a renewed motion for summary adjudication of the defendants' liability, and the defendants filed a cross motion for summary judgment.

The court granted summary judgment to the defendants. The court ruled that there was a genuine issue of material fact whether Conte as District Director had the authority to issue a prevailing wage determination. This ruling foreclosed the possibility of summary adjudication in the union's favor.

The court then examined whether Conte's letters could have constituted a binding determination of prevailing wage rates (assuming he had the proper authority). The parties disagreed over the requirements governing Department of Labor determinations of prevailing wage rates and job classifications. The defendants argued that the applicable procedure is set out in 29 C.F.R. § 5.11, while the union argued that the applicable procedure is set out in § 5.13. The court noted that the facts of this case are almost identical to those in *United States ex rel. Plumbers and Steamfitters*

Local Union No. 342 v. Dan Caputo Co., 2001 WL 1042168 (N.D. Cal. Sept. 4, 2001), 24 TAF QR 36 (Oct. 2001). Like the *Caputo* court, the court in this case ruled that because § 5.11 by its own terms "sets forth the procedure for resolution of disputes of fact of law concerning payment of prevailing wage rates, overtime pay, or proper classification," that section, and not § 5.13, sets forth the administrative procedure by which wage classification determinations must be made. Because the union did not dispute that the Conte letters were not issued in accordance with the § 5.11 procedures, those letters did not constitute binding agency determinations.

Alternatively, the court ruled that even if the union was correct and § 5.13 provided an alternate procedure to § 5.11, the procedural requirements of § 5.13 were not complied with. Thus there existed no binding Department of Labor determination that the defendants could have violated during the relevant period of time. Therefore, the court granted the defendants' motion for summary judgment.

***U.S. ex rel. Bhatnagar v. Kiewit Pacific Co.*, 2002 WL 54756 (9th Cir. Jan. 14, 2002)**

In January 2002 the Ninth Circuit reversed the district court's grant of summary judgment to a corporate defendant in a *qui tam* action based on allegations that it submitted false claims on a construction contract partially funded by the Federal Highway Administration. Ashok Bhatnagar, an engineer with the California Department of Transportation (Caltrans) filed this action against Caltrans and Kiewit Pacific Co. in 1998. The Government declined to intervene. Caltrans moved to dismiss, and Kiewit moved for summary judgment. In 2000, the district court granted both motions. The court ruled that Caltrans, as a state agency, was not subject to FCA liability under *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000). The court granted summary judgment to Kiewit on the grounds that Bhatnagar's suit was based on a contract dispute and not false claims. *See* 2000 WL 1456940 (N.D. Cal. Sept. 22, 2000), 20 TAF QR 15 (Oct. 2000). Bhatnagar appealed the grant of summary judgment to Kiewit.

In a brief unpublished disposition, the Ninth Circuit reversed. Viewing the evidence in the light most favorable to Bhatnagar, the court concluded that Kiewit's actions could implicate more than a dispute over contract interpretation. Thus genuine issues of material fact existed such that a reasonable jury could return a verdict for Bhatnagar. Therefore, the district court erred in granting summary judgment.

***U.S. ex rel. Hansen v. Cargill, Inc.*, 2002 WL 89723 (9th Cir. Jan. 22, 2002)**

In January 2002 the Ninth Circuit affirmed the dismissal of a *qui tam* complaint pursuant to the public disclosure jurisdictional bar. The district court had found that there had been public disclosure of allegations substantially similar to those in Hansen's complaint, and that Hansen did not qualify for the original source exception because he did not have direct knowledge of the fraud. Hansen appealed.

In a brief unpublished decision, the Ninth Circuit affirmed. The court ruled that because prior disclosures in the news media were substantially similar to the allegations in Hansen's complaint, the district court correctly held that the public disclosure bar was triggered. The Ninth Circuit also concluded that because Hansen did not have first-hand knowledge of the fraud, the district court's ruling that he was not an original source was correct.

***U.S. v. Larry Reed & Sons Partnership*, 280 F.3d 1212 (8th Cir. Jan. 24, 2002)**

In January 2002 the Eighth Circuit affirmed an award of damages in an FCA case based on allegations of cotton crop insurance fraud. The Government sued the Larry Reed & Sons Partnership alleging that it sought insurance coverage for the loss of a cotton crop in 1993 when in fact the land in question was not planted during that season. The jury found that the partnership and the individual partners did indeed submit false claims, and the district court awarded treble damages and civil penalties totaling around $300,000. The partnership appealed, contending that the jury's damages award was based on insufficient evidence and that the district court abused its discretion in admitting certain testimony.

In an unpublished opinion, the Eighth Circuit affirmed. Although the jury's award exceeded the amount initially specified in the complaint, the Government presented evidence that the partnership received proceeds not only directly from the partnership's fraudulent claim (as specified in the complaint), but also from the partners' contributions to the partnership's funds from their individual fraudulent claims. Viewing the complaint as constructively amended to conform to the proof, the court of appeals declined to disturb the jury's award, which was based on sufficient evidence. Furthermore, the court ruled, the district court did not abuse its discretion in admitting the challenged testimony. Therefore, the court of appeals affirmed the district court's decisions and the jury's damages award.

***In re Genesis Health Ventures, Inc.*, 272 B.R. 448 (Bankr. D. Del. Jan. 24, 2002)**

In January 2002 a Delaware bankruptcy court granted the debtors' motion for summary judgment on the proof of claim of a *qui tam* relator who alleged that the debtors defrauded Medicare by failing to credit returned pharmaceuticals. R. Steven Scherfel, the principal of the Cherry Hill Convalescent Center in New Jersey, filed the *qui tam* action in New Jersey district court 2000, asserting that Neighborcare Pharmacy Services, Inc. and its parent company Genesis Health Ventures, Inc. failed to provide credit for pharmaceuticals returned by patients at Cherry Hill. In 2001 the Government declined to intervene and Scherfel filed a proof of claim in Genesis' and Neighborcare's Delaware bankruptcy action. Asserting that Scherfel's claim lacked legal merit, the debtors moved for summary judgment to estimate the claim at zero.

The bankruptcy court granted the motion, concluding that there was no statutory, regulatory, or policy basis for an FCA claim in New Jersey based on failure to credit returned pharmaceuticals. The court noted that applicable Medicare statute and federal and New Jersey Medicare regulations contain no provisions regarding reimbursement requirements or credits for returned drugs. Similarly, no provision in the pharmacy's provider agreement or any official written state policy required such credits. A representative of the state agency that administers Medicaid in New Jersey issued a letter in 1998 recognizing that the state did not regulate the crediting and return of unused medications. The debtors also pointed to a 1985 audit report from HHS OIG stating that federal regulations "do not require that . . . appropriate credits be made to Medicaid if the drugs are recovered," although the report suggested that such credits ought to be required. In response to that report, however, HCFA concluded that no regulatory amendments were necessary.

The court ruled that Scherfel could not prevail on a theory of "legally false" certification. There was no express certification, and following *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), 25 TAF QR 6 (Jan. 2002), the court held that there could be no implied false certification unless the provider is expressly required by statute or regulation to comply in order to be paid. Because applicable statutes and regulations do not specifically condition payment on the provision of credits for returned drugs, the legally false certification theory did not apply.

Morover, the court ruled, Scherfel could not prevail on a theory of "factually false" certification, which involves an incorrect description of goods and services provided. There was no question that the pharmacy provided the products and services for which it claimed reimbursement. In the absence of any specific statutory, regulatory, or contractual obligation to provide credits for returned drugs, there was no basis for imputing to the debtors the requisite scienter for FCA liability. The fact that the debtors made some payments to Medicaid for credits for returned drugs after they filed their Chapter 11 petitions did not provide the necessary scienter, the court ruled. Even if those payments were made in direct response to Scherfel's *qui tam* suit, they did not establish the knowledge of falsity necessary to support an FCA claim.

Scherfel also did not produce sufficient factual support for his contention that the debtors violated the FCA by failing to credit Medicaid for returned drugs in jurisdictions outside New Jersey. The court found Scherfel's evidence on this point at best "merely colorable" and "not significantly probative." Thus, it was not sufficient to raise a genuine issue of material fact. Scherfel's mere suspicions about the debtors' practices in other states, the court ruled, were not enough to support a fishing expedition. Accordingly, the court granted the debtors' motion to estimate Scherfel's proof of claim at zero.

***U.S. ex rel. Mayfield v. Lockheed Martin Engineering & Sciences Co.*, 186 F. Supp. 2d 711 (S.D. Tex. Feb. 13, 2002)**

In February 2002 a Texas district court granted summary judgment to the defendant in a *qui tam* action based on allegations of false cost report submissions to NASA, ruling that the *qui tam* claims were barred either by res judicata or by the public disclosure rule. Mayfield oversaw the preparation of financial reports as an employee of Lockheed for five years beginning in 1989. He complained to his superiors that data submitted in financial reports to NASA were fictitious because they underestimated certain costs. Mayfield alleges that he was laid off in March 1995 as a result of these complaints.

Several months later, Mayfield filed a wrongful discharge suit against Lockheed in Texas state court. After the trial court granted Lockheed's motion for summary judgment, a state court of appeals affirmed and the Texas Supreme Court denied review. Mayfield then filed his *qui tam* action in federal court and Lockheed again moved for summary judgment.

The district court noted that under the doctrine of res judicata, a judgment on the merits by a court of competent jurisdiction is conclusive for the parties not only as to every matter which was offered and received to sustain or defeat the claim, but also as to any other matter which could have been offered for that purpose. There was no question that the parties were identical in both suits, that the state court was a court of competent jurisdiction, and that it had rendered a final judgment on the merits. Thus the only issue remaining under the Texas law of res judicata was whether the same cause of action was involved in both cases.

Under Texas law, a different cause of action is one that proceeds not only on a sufficiently different legal theory but also on a sufficiently different factual footing. The district court found that Mayfield's *qui tam* suit arose from the same operative facts as those at issue in the prior state court lawsuit, and that the *qui tam* and state law claims could have formed a "convenient trial unit" in the state court proceedings. Therefore, the court concluded that res judicata precluded litigation of Mayfield's *qui tam* claims to the extent that they were based on conduct complained of in the state court action.

Res judicata did not bar Mayfield from litigating claims arising out of conduct not complained of in the prior state court action. However, the district court ruled that the public disclosure provision barred jurisdiction over those later-arising claims. Those claims were still based, at least in part, on facts disclosed in the state court action, and therefore they were based upon publicly disclosed allegations. Moreover, because Lockheed laid Mayfield off before he filed his state court action, he was not an original source with respect to any wrongful conduct occurring subsequently. Therefore, the district court ruled that it lacked jurisdiction over the portion of Mayfield's suit that was not barred by res judicata. Accordingly, it granted Lockheed's motion for summary judgment.

***U.S. ex rel. Stewart v. Louisiana Clinic*, 2002 WL 257690 (E.D. La. Feb. 22, 2002)**

In February 2002 a Louisiana district court ruling on the defendants' motions to dismiss a *qui tam* complaint for failure to comply with Fed. R. Civ. 9(b) granted most of the motions, with leave to amend, but denied the motions of two defendants with respect to certain specific claims. The court also denied two separate motions to dismiss pursuant to the public disclosure bar.

Mary Jane Stewart, Jr. and Margaret Catherine McGinity filed this action in 1999, alleging that the Louisiana Clinic and several of its doctors billed Medicaid and Medicare for unreasonable and unnecessary services and made false statements in connection with requests for payment. In 2001 the Government declined to intervene. The defendants each moved to dismiss under Rule 12(b)(6) on the grounds that the relators failed to plead fraud with particularity as required by Rule 9(b). Furthermore, the clinic and one other defendant moved to dismiss pursuant to the public disclosure bar the relators' claims that the clinic engaged in "zoning" (i.e., submitting bills falsely describing the location of the services performed in order to increase the level of reimbursement). The clinic also moved to dismiss all of McGinity's claims based on the public disclosure bar.

The court ruled that most of the relators' allegations failed to satisfy Rule 9(b). The allegations of upcoding included specific examples with names, locations, and dates of treatment, but they did not explain how or why the codes used were false. In the case of the "zoning" allegations, the court ruled that allegations against one doctor detailing three specific instances of zoning did satisfy Rule 9(b), but dismissed the zoning claims against the clinic itself and the other doctors. Similarly, the court let stand specific allegations that one doctor improperly waived co-payments for patients who did not meet the financial hardship criteria involved in that example, but dismissed pursuant to Rule 9(b) conclusory allegations of similar conduct against the clinic and the other doctors. The court dismissed allegations that doctors billed for unnecessary services, because, although the relators provided two examples of such billing, they failed to explain what services were billed and what were actually provided. The court also dismissed allegations that one doctor billed for services performed by medical assistants, ruling that the complaint failed to state that the doctor knowingly billed for such services. The court granted the relators twenty days' leave to amend their complaint to cure these deficiencies.

The court denied the defendants' motions to dismiss pursuant to the public disclosure bar. The clinic and one other defendant argued that the court lacked jurisdiction over the zoning allegations because a Blue Cross representative informed clinic employees in a 1998 office visit that they should use separate geographic codes for offices outside New Orleans. The court ruled that even if the office visit could somehow be construed as a governmental investigation, which is doubtful, there was no indication that the representative's disclosure was "public."

The clinic also argued in a separate motion that McGinity was not an original source because she had no direct access to the relevant information, and therefore must have based her claims on information obtained from Stewart. The clinic urged that the hypothetical conversation or communication through which McGinity obtained the information from Stewart should be construed as public disclosure. The court rejected this argument, ruling that a communication between the two relators could not possibly qualify as a government investigation or report or any other source listed in the statute. Therefore, the court had jurisdiction over the claims of both relators.

***U.S. ex rel. Adrian v. Regents of the University of California*, 2002 WL 334915 (N.D. Cal. Feb. 25, 2002)**

In February 2002 a California district court dismissed claims against a state entity and its employees and ordered claims against the remaining defendants transferred to the Western District of Louisiana. Donald Patrick Adrian was the principal owner of Icon Industrial Controls Corporation, which entered into a research and development agreement with the Lawrence Livermore National Laboratory to develop software codes for use by the Departments of Energy and Defense. Adrian brought a *qui tam* suit against the Board of Regents of the University of California (which operates the Livermore Lab), a number of Livermore employees (all sued in their official capacity), and LCMS, a Livermore subcontractor, as well as another company, BioMed, which allegedly created LCMS to receive the subcontract. Adrian alleged that Livermore Lab and several Livermore employees diverted money received under the DoE contract to other projects, and caused further overbilling by intentionally supplying Adrian with a defective version of the product developed under the contract. Adrian also alleged a kickback scheme between Livermore and LCMS, with the participation of BioMed. The Board of Regents moved to dismiss the claims against Livermore and its employees. The remaining defendants moved to transfer the case to Louisiana.

The district court granted both motions. It noted that several months after Adrian filed his *qui tam* suits, the Supreme Court barred *qui tam* suits against states and state agencies in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000). The Ninth Circuit has repeatedly held that the Board of Regents is an arm of the State of California, and has done so specifically in cases where the Board was sued as the operator of the Livermore Lab. Therefore, Livermore Lab is a state agency, and thus under *Stevens* it is not a proper defendant in a *qui tam* suit. Similarly, Adrian advanced no argument that the Livermore employees should be treated any differently than their employer. Accordingly, the court dismissed Adrian's claims against Livermore and its employees.

The court also granted the motion of LCMS and BioMed to transfer the case to Louisiana. The court noted that the case could have been brought in Louisiana, because venue is proper under the FCA wherever any defendant can be found, and all of the remaining defendants were located in Louisiana. The plaintiff's choice of forum was entitled to little deference, because the operative facts did not occur within the original forum and that forum had no interest in the parties or the subject matter. Moreover, the court ruled, "a plaintiff's choice of forum is *not* given substantial weight when the plaintiff is a *qui tam* relator, asserting the rights of the United States government" (emphasis in original). Transfer would be more convenient to the parties and the witnesses, because all of the defendants and most of the witnesses were either in Louisiana or closer to Louisiana than to California. Because the case was still at a very early stage of litigation, any inconvenience to the plaintiff or to the interests of justice from the transfer would be minimal. Finally, most of the sources of proof, including all of LCMS' and BioMed's records, and apparently Icon's records as well, were in Louisiana. Accordingly, the court granted the remaining defendants' motion to transfer.

***U.S. ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787 (10th Cir. Mar. 4, 2002)**

In March 2002 the Tenth Circuit granted the defendants' petition for rehearing for the limited purpose of modifying the court's opinion issued last fall in this case, *see* 265 F.3d 1157 (10th Cir. 2001), 24 TAF QR 14 (Oct. 2001), and ordering a limited remand to the district court. In its opinion last year, the court upheld the district court's ruling that the relator James Stone was an "original source" for the purposes of the FCA's public disclosure jurisdictional provision, because he satisfied the two statutory prongs requiring (1) direct and independent knowledge of the information upon which his allegations were based and (2) voluntary disclosure of the information underlying his claim to the Government before filing suit. Upon reconsideration, the Tenth Circuit found that the record did not reveal specific findings of fact to support its conclusion that Stone made a voluntary disclosure satisfying the second prong. Therefore, the court remanded to the district court for the limited purpose of conducting further proceedings in order to make findings of fact and conclusions on the voluntary disclosure issue. The court of appeals directed the district court to transmit its additional findings upon conclusion of those proceedings, so that the court of appeals, which continued to retain jurisdiction, could make a final disposition of the appeal.

***U.S. ex rel. Humphrey v. Franklin-Williamson Human Services, Inc.*, 2002 WL 378461 (S.D. Ill. Mar. 11, 2002)**

In March 2002 an Illinois district court denied the defendant's motion to dismiss in a *qui tam* action based on allegations of Medicaid fraud. Tenna Humphrey brought this action under the federal FCA and the Illinois Whistleblower Reward and Protection Act against Franklin-Williamson Human Services, Inc. (FWHS), a medical service provider, alleging that FWHS caused false claims to be submitted to the Government on behalf of patients who were participating in both the federal Medicaid Spenddown Program and the Illinois Grant

Assisted Fee (GAF) Program.

Under the Medicaid Spenddown Program, patients who do not initially qualify for Medicaid (because their income and assets exceed the Medicaid threshold) become eligible for Medicaid assistance once they have incurred medical costs sufficient to bring their income and asset level below the Medicaid threshold (the so-called "spenddown obligation"). Such a patient must show documentary proof to the Illinois Department of Public Aid (IDPA) that he has incurred the spenddown obligation before receiving Medicaid assistance. The documentary evidence may consist either of receipts for money actually paid, or of bills for charges incurred but not yet necessarily paid.

Independently of the Medicaid Spenddown Program, the Illinois GAF program provides additional assistance to some patients through state grants. Under this program, the provider (in this case FWHS) enters into a GAF agreement with the patient, under which the patient is liable for reduced payments for services. State grants then pay the provider the difference between the actual charge to the patient and the Medicaid allowable rate.

Humphrey alleged that when FWHS served a patient enrolled in both the Spenddown and GAF programs, it prepared a statement indicating that the patient was liable for the Medicaid allowable rate rather than the much lower rate agreed to under the GAF agreement. FWHS then instructed the patient to submit that statement to the IDPA to be credited toward the spenddown obligation, and not to submit receipts for the much lower amounts that they actually paid pursuant to the GAF agreement. Therefore, Humphrey alleged, FWHS caused patients to submit statements that were false, because they asserted that the patients were liable for the Medicaid allowable rates when they were really only liable for the GAF rates. Thus FWHS was able to obtain Medicaid reimbursement for claims that would not have been paid absent the allegedly false statements.

FWHS moved to dismiss for failure to state a claim. It argued that its claims were not false or fraudulent, but rather were perfectly legal under 42 U.S.C. § 1396(a)(17)(D), which provides that a Medicaid applicant's medical expenses incurred but reimbursed by a public program should count toward the spenddown obligation:

> A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . provide for flexibility in the application of such standards with respect to income by taking into account . . . the costs (whether in the form of insurance premiums or otherwise and regardless of whether such costs are reimbursed under another program of the State or political subdivision thereof) incurred for medical care . . .

FWHS argued that this provision should be read to include situations in which a patient is technically not reimbursed but instead is able to avoid incurring liability in the first place for certain costs by virtue of a state program. Therefore, FWHS argued, the claims in question were not false or fraudulent, and thus it could not possibly have "knowingly" caused false claims to be submitted.

The court rejected FWHS' interpretation of the statutory and regulatory Medicaid scheme. It held that "incur" means to take on a liability, and "reimburse" means to repay a person for money that the person has already spent. Therefore, § 1396(a)(17)(D) only requires states to take into account for spenddown purposes costs for which a patient becomes liable and for which he pays but is repaid by state grants. Thus, it did not apply to the GAF patients at issue in this case, who did not become liable for or pay more than their GAF payments.

Therefore, because FWHS' billing practices apparently violated Medicaid statutes and regulations, Humphrey had adequately alleged that FWHS knowingly caused false or fraudulent claims to be submitted to the Government. Thus the court denied FWHS' motion to dismiss. However, the court indicated that a motion for summary judgment later in the proceedings would undoubtedly present the question whether the Government's prior knowledge of FWHS' allegedly false claims vitiated Humphrey's FCA claims.

Kupiec v. St. John Hospital & Medical Center, Inc., 2002 WL 448164 (6th Cir. Mar. 20, 2002)

In a brief unpublished opinion, the Sixth Circuit affirmed the district court's grant of summary judgment to the defendant in a wrongful termination action that included claims under § 3730(h), the FCA's whistleblower protection provision. The district court ruled that the plaintiff Patricia Kupiec was not engaged in protected activity, and that even if she was, she had not put her employer on notice that she was engaged in such activity. The court of appeals declined to issue a full written opinion, which in its view would have been duplicative in light of the district court's thorough analysis, and affirmed for the reasons stated in the district court's opinion.

U.S. ex rel. Giles v. Pratt, 2002 WL 464895 (9th Cir. Mar. 21, 2002)

In a brief unpublished opinion, the Ninth Circuit vacated the district court's grant of default judgment against the defendant in a *qui tam* action, holding that the lower court abused its discretion by refusing to conduct a hearing or take evidence on the amount of damages before determining that no damages should be awarded. The court of appeals ruled that the district court correctly held that damages should be based on the actual loss suffered by the Government, but erred in failing to allow an evidentiary hearing to determine the amount of that loss. However, the court of appeals ruled, the district court did not abuse its discretion in awarding penalties of $10,000 per defendant after determining that the false claims submitted by each defendant related to a single "project" per defendant. The Ninth Circuit remanded to the district court to permit the relator to submit evidence relevant to the determination of damages.

SPOTLIGHT

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

***QUI TAM* STATISTICS**
October 1, 1986 - September 20, 2001
U.S. Department of Justice

U.S. RECOVERIES IN *QUI TAM* CASES

FY	Qui Tam Cases Filed	Recoveries in Qui Tam Cases U.S. Intervened in or Otherwise Pursed	Recoveries in Qui Tam Cases U.S. Declined	Total Recoveries
1987	33			
1988	60	$355,000	$35,431	$390,431
1989	95	$15,111,719	$0	$15,111,719
1990	82	$40,483,367	$75,000	$40,558,367
1991	90	$69,705,771	$69,500	$69,775,271
1992	119	$134,099,447	$994,456	$135,093,903
1993	132	$171,438,383	$5,978,000	$177,416,383
1994	222	$379,646,074	$1,822,323	$381,468,397
1995	277	$245,463,627	$1,813,200	$247,276,827
1996	363	$124,565,203	$14,033,433	$138,598,636
1997	533	$622,746,381	$7,136,144	$629,882,525
1998	470	$432,748,410	$29,290,385	$462,038,795
1999	481	$454,273,097	$62,509,047	$516,782,144
2000	366	$1,197,446,987	$1,103,847	$1,198,550,834
2001	300	$1,073,771,643	$117,393,094	$1,191,164,737
TOTAL	3623	$4,961,855,109	$242,253,860	$5,204,108,969

RELATOR SHARE RECOVERIES

Relator share recoveries in cases U.S. intervened in or otherwise pursued	$745,050,350
Relator share recoveries in cases U.S. declined	$63,453,359
TOTAL	$808,503,709

This table reports only those amounts recovered by relators as their share of the Government's recovery in False Claims Act cases. In addition, relators have recovered hundreds of millions of dollars in subsection (h) and other personal claims.

RECOVERIES IN HEALTH & HUMAN SERVICES AND DEFENSE DEPARTMENT CASES

	Cases Filed	United States Recovery	Relator Share Recovery
Health and Human Services	1,786	$2,884,203,725	$421,238,427
Defense	1,128	$1,360,354,153	$239,851,282

INTERVENTION DECISIONS AND CASE STATUS

	Active	Settlement or Judgment	Dismissed; No Recovery	Inactive	Unclear	Totals
U.S. Intervened or Otherwise Pursued	129	404	12	5	0	550
U.S. Declined	307	112	1,374	32	92	1,917
Dismissed Before Election						429
Under Investigation						727
						3,623

ALLEGATION: FALSIFYING LOAN APPLICATIONS

U.S. v. Alvarez *(C.D. Cal.)*

In January 2002, the United States filed a False Claims Act suit against Jaime Alvarez and various family employees, alleging that they misrepresented buyers' qualifications on mortgage loan applications. Defendants allegedly helped potential home buyers to obtain mortgages from the Mortgage Assistance Program of the San Bernardino Economic Development Agency, which provides loans for a portion of the home's price from federal funds.

ALLEGATION: FALSE CLAIMS FOR PHYSICAL THERAPY

***U.S. ex rel. Darling v. HealthSouth*, No. 8:00CZ416-T-26** *(M.D. Fla.)*

In January 2002, the DOJ reportedly intervened in a False Claims Act suit alleging that the company billed for services as though performed by a therapist when in fact an unlicensed employee who worked in a janitorial capacity performed them. The suit also alleges that the company billed for one-on-one treatments when therapists were working with clients in groups. The relator, John Darling, is a former patient of the treatment center who filed a lawsuit against the center in 1998 claiming that a rehabilitation treatment was incorrectly administered and left him permanently disabled. Two similar false claims suits have been filed against the company in Texas and Alabama. Attorneys Barry Cohen and David Tirella represent the relator. Assistant U.S. Attorney Latour Lafferty is handling the case for the Government.

ALLEGATION: FALSIFYING DEATH CERTIFICATE

U.S. v. Venezia *(D. Mass.)*

In January 2002, the United States filed a False Claims Act suit against David Michael Venezia, alleging that the former MIT student falsified his own death certificate to avoid paying $23,000 in federal student loans. Prior to faking his death, according to the Government, Venezia deferred payment on the loan by telling federal loan officers that he was unemployed. In fact, he was working at the Army's Natick Labs. Venezia also allegedly lied on an application form in order to receive an Army scholarship. In addition, the Government has brought criminal charges against Venezia.

ALLEGATION: UPCODING AND OVERBILLING

U.S. ex rel. Trombetta v. EMSCO Billing Services, Inc., No. 96 C 266 (N.D. Ill.)

In March 2002, DOJ intervened in a *qui tam* suit alleging that EMSCO Billing Services, National Emergency Services, NES Holdings, Dr. Robert Tetik and his ex-wife Bonnie Tetik overbilled Medicare and Medicaid millions of dollars for emergency room physician services at hospitals in the Chicago area. According to the complaint, the Tetiks instructed their staff to systematically inflate bills submitted to Medicaid. NES acquired EMSCO in 1994, but Dr. Tetik remained chief executive until 1997. Linda Trombetta, a former EMSCO employee, brought this *qui tam* suit in 1996. HHS OIG and the FBI are investigating the matter. Steven Cohen and Tracy Netzel of Cohen Wolkoff, LLC (Chicago) are representing the relator. Assistant U.S. Attorney Carole Ryczek is representing the Government.

ALLEGATION: PROMOTING DRUG FOR UNAPPROVED PURPOSES

***U.S. ex rel. Franklin v. Pfizer, Inc.*, No. 96-CV-11651 (D. Mass.)**

In March 2002, a *qui tam* lawsuit was unsealed alleging that Parke-Davis, a subsidiary of Pfizer Inc. caused false claims to be submitted to government health programs for Neurontin, an epilepsy drug. According to the complaint, Parke-Davis avoided seeking FDA approval for using Neurontin for "off-label" purposes, such as treatment of mania, bi-polar disorder, anxiety, and panic disorder, in order to avoid the additional costs of proving that the drug was safe for those purposes. However, the company allegedly hired technical writers to draft articles for medical journals touting the use of the drug for the "off-label" purposes to further its marketing strategy. The relator alleges that Parke-Davis knew that these actions would inevitably cause the submission of false claims to Medicaid. The *qui tam* suit was brought by David Franklin, a former employee of Parke-Davis. Attorneys Thomas Greene, Thomas Hoffman and Michael Tabb of Greene & Hoffman (Boston) are representing the relator. At the time this issue of the *Quarterly Review* was going to press, DOJ had still not decided whether or not to intervene in the suit.

U.S. v. Curative Health Services Inc. (S.D.N.Y.)

U.S. ex rel. Lanni v. Curative Health Services Inc., No. 00-2584 (D.D.C.)

U.S. ex rel. Parslow v. HCA-The Healthcare Co., No. 99-3338 (D.D.C.)

In January 2002, Curative Health Services, an HCA-related wound care company, reportedly agreed to pay **$16.5 million** to settle allegations that it caused hospitals to disguise marketing expenses as management fees on Medicare cost reports from 1993 to 1998. Mickey Parslow, a former CFO at an HCA hospital, filed suit in 1998 in Florida, and Francesco Lanni, a Curative employee, filed in New York. In the *qui tam* suits, HCA and non-HCA hospitals were named as defendants. The claims against Curative and the non-HCA hospitals originally filed in Florida and New York were consolidated in the Southern District of New York. The claims against Curative and HCA were transferred to the District of Columbia for consolidation with a multi-district litigation proceeding involving all actions against HCA. The non-HCA hospitals were released from the lawsuit. Other false claims allegations are still pending against HCA hospitals, and an HCA subsidiary pled guilty in a related criminal case. Henry Paul represented Mr. Parslow and Lesley Ann Skillen of Getnick & Getnick (New York City) represented Mr. Lanni. The FBI, HHS, and DCIS investigated the matter. Assistant U.S. Attorneys Deborah Yeoh and Kathy Marks represented the Government in the New York case. Assistant U.S. Attorneys Lawrence Casper, David Leviss, and Jonathan Diesenhaus represented the Government in the District of Columbia case.

U.S. v. Allina Health System (D. Minn.)

U.S. ex rel. Koenes v. Allina Health System (D. Minn.)

U.S. ex rel. Grove v. Allina Health System (D. Minn.)

In January 2002, DOJ announced that Allina Health System had agreed to pay **$16 million** to settle allegations that the company fraudulently overbilled three government health care programs. The Government alleged that the company double billed and upcoded for services provided between 1994 and 2001. This settlement also resolved three *qui tam* actions. Jeanne Koenes, a former billing officer, filed suit in 1998, and Scott Grove, a former auditor who still works for the company, filed two whistleblower suits in 1999. The relators' shares were $1.12 million each. Robert Hajek represented Mr. Grove. HHS OIG and the Minnesota Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorney Gerald Wilhelm represented the Government.

U.S. v. University Physicians Inc. (D. Md.)

In January 2002, DOJ announced that University Physicians Inc. had agreed to pay **$8.3 million** to settle allegations that the company submitted false claims for payment to Medicare between January 1993 and June 1996. The Government alleged that the company submitted claims without sufficient documentation and upcoded claims. University Physicians Inc. is a consortium of nineteen clinical practice groups comprised of University of Maryland physicians. HHS OIG investigated the matter as part of the Physicians at Teaching Hospitals or PATH project. Assistant U.S. Attorney Tamera Fine represented the Government.

***U.S. ex rel. Kessler v. American Postal Workers Union*, No. CAB-98-3547 (D. Md.)**

In January 2002, the American Postal Workers Union (APWU), AFL-CIO, National Health Services (NHS), and United Payors & United Providers, Inc. (UP) reportedly agreed to pay **$2.2 million** to settle allegations that the companies conspired to inflate their contracts with kickbacks and then filed false claims with the Government, mainly the Office of Personnel Management (OPM). The Government alleged that APWU's Health Plan contracted with NHS for case management and pre-certification services and paid for those contracts from its cost containment, or "off-formula," budget. Concurrently, APWU contracted with UP to obtain discounts from UP's provider network and paid for those contracts using benefit expenses. Then, the defendants conspired to inflate those contracts with kickbacks that NHS and UP paid to APWU. APWU used the kickbacks to supplement its administrative, or "formula," expenses in violation of its budget ceilings imposed by OPM and the Federal Acquisition Regulations. Andrea Kessler, a former manager for APWU, filed this *qui tam* action in 1998. Andrew Grosso (Washington, D.C.) represented the relator. The relator's share was 18 percent or $394,740. OPM OIG investigated the matter. Assistant U.S. Attorney Roann Nichols represented the Government. .

***U.S. v. St. Mary's Hospital* (D. Colo.)**

In January 2002, DOJ announced that St. Mary's Hospital and Medical Center had agreed to pay **$1.2 million** to settle allegations that the hospital submitted false claims to Medicare and Medicaid. The Government alleged that the hospital "upcoded" pneumonia claims to obtain higher reimbursements. Additionally, the hospital will pay $27,000 to the state of Colorado to settle related claims. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorney Michael Theis represented the Government

***U.S. ex rel. Harper v. Quorum Health Group*, No. CV-98-TMP-3218-M (N.D. Ala.)**

In January 2002, DOJ announced that Quorum Health Group's successor company, Triad Hospitals of Dallas, and a Quorum subsidiary, Gadsen, Alabama Regional Medical Center have agreed to pay **$428,343** to settle allegations that the company defrauded Medicare. The Government alleged that from 1993 to 1997 the companies improperly charged Medicare for the salaries of five employees who performed no work, for payments to a former hospital physician that were never actually made, and for payments to two individuals performing services for outside physicians. Jan Harper and Martha Baker, former managers at Quorum, and Diane Brittan, a former secretary, filed this *qui tam* suit. HHS OIG investigated the matter.

***Marcus Meyer, O.D.* (D. Colo.)**

In January 2002, Marcus Meyer, O.D., reportedly agreed to pay **$162,296** to settle allegations that he submitted false claims to Medicaid. The Government alleged that Dr. Meyer, through the Abba Eye Care clinics he owned and operated, filed false claims for sensorimeter testing performed on patients who came to the clinics for eye examinations. According to the Government, the tests should have been included with the exams and should not have been billed separately. The Colorado Medicaid Fraud Control Unit investigated the matter. Assistant U.S. Attorney Michael Theis represented the Government.

***In re: Rotech Medical Corp.*, Nos. 00-389-00-826 (Bankr. D. Del.)**

In February 2002, DOJ announced that Rotech Medical Corp. agreed to pay **$17 million** to settle allegations that it fraudulently overbilled government health care programs for respiratory equipment, supplies and services. The Government alleged that from 1995 to 2000 Rotech submitted false claims to Medicare, Montana Medicaid, the Department of Veterans Affairs, and Indian Health Service programs. Allegations against the company included: submitting forged and falsified documents to bill the Government for durable medical equipment like oxygen cylinders; duplicate claims; claims for undelivered items; claims for medically unnecessary drugs and equipment; claims for treating deceased patients; claims that were arbitrarily inflated due to a lack of competition; and claims for oxygen services and equipment based upon self-qualifying tests that violated federal payment regulations. In February 2000, Rotech filed for bankruptcy under Chapter 11. The terms of the settlement agreement are part of Rotech's reorganization plan. The FBI, HHS, and the Montana Divison of Criminal Investigations investigated the matter. Assistant U.S. Attorney Leif Johnson represented the Government.

***U.S. ex rel. Campbell v. Brown & Root Services Corp.*, No. 97-CV-1541 (E.D. Cal.)**

In February 2002, Brown & Root Services Corp. reportedly agreed to pay **$2 million** to settle allegations that it intentionally made false statements to the Army Corps of Engineers when negotiating a contract. Allegedly, the company directed construction cost estimators to inflate the quantity and quality of materials to be used in fulfilling a job order contract for the former Fort Ord military installation in California. Dammen Campbell, a former employee, filed this suit in 1997.

***U.S. v. Ogilvy & Mather North America* (D.D.C.)**

In February 2002, DOJ announced that Ogilvy & Mather North America agreed to pay **$1.8 million** to settle allegations that it overcharged the Office of National Drug Control Policy (ONDCP), also known as the Drug Czar's Office. The Government alleged that the company, which is the U.S. subsidiary of one of the largest advertising agents in the world, had overcharged ONDCP in 1999 and 2000 for labor costs on a contract to provide advertising services. The Defense Contract Audit Agency and the Office of Counsel of ONDCP investigated the matter.

***U. S. ex rel. Razin v. Christus St. Joseph Hospital* (C.D. Cal.)**

In February 2002, DOJ announced that St. Joseph's Hospital in Houston agreed to pay **$1.56 million** to settle allegations that the hospital failed to disclose an overpayment made by Medicare. The Government alleged that the hospital knowingly retained an overpayment of $798,000 for indirect medical education expenses. When the hospital discovered the overpayment, it wrote a letter to its consulting firm, Healthcare Financial Advisors (HFA) stating that it intended to keep the funds. Mark Razin, a former employee of HFA, filed this *qui tam* action. The relator's share was approximately 25 percent or $392,250. Stephen Meagher of Phillips & Cohen (San Francisco) represented the relator. HHS OIG investigated the matter. Assistant U.S. Attorney Wendy Weiss represented the Government.

***U.S. v. Poudre Valley Health Care, Inc*. (D. Colo.)**

In February 2002, DOJ announced that Poudre

Valley Health Care, Inc. (PVHC) agreed to pay **$952,302** to settle allegations that the company, which operates a hospital in Fort Collins, Colorado, submitted false claims to Medicare. According to DOJ, PVHC physicians improperly billed for services performed by residents and interns. The settlement is the result of a voluntary self-audit performed under the Physicians at Teaching Hospitals (PATH) initiative of HHS OIG. The initiative encourages teaching hospitals to examine their own billing practices under Medicare to and participate in a self-audit review under protocol established by HHS OIG. The Office of Audit Services of HHS OIG investigated the matter. Assistant U.S. Attorney Michael Theis represented the Government.

***U.S. v. Rogers*, No. 1:97-CV-461 (E.D. Tenn.)**

In March 2002, DOJ announced that Gayle Rogers and the estate of her late husband, Tom Rogers, agreed to pay **$15.25 million** to settle allegations that he filed false claims with Medicare. The Government alleged that Tom Rogers and his management company, Alpha Medical Inc., submitted false claims to Medicare for the company's fees for servicing a network that he created of home health agencies owned by his relatives, his best friend, and others who were indebted to him. Medicare would not have paid the fee if it had known about the relationships between the management company and the network. Medicare's rule against paying fees that result in profit when there is a controlling relationship is designed to protect Medicare from unscrupulous demands for excessive fees. The FBI and HHS OIG investigated the matter. Assistant U.S. Attorney Matthew Morris represented the Government.

***U.S. v. Intertek Testing Services Environmental Laboratories*, No. 3-01CR-318-D (N.D. Tex.)**

In March 2002, DOJ announced that Intertek Testing Services Environmental Laboratories agreed to pay **$8.7 million** to settle allegations that the company did not fulfill contractual testing requirements. Intertek tested air, liquid and soil samples for hazardous substances. The EPA's OIG, Department of the Air Force, Army Corps of Engineers and the Department of the Navy investigated the matter.

***U.S. v. ESICORP Inc.* (D.S.C.)**

In March 2002, ESICORP Inc. reportedly agreed to pay **$2.2 million** to settle allegations that it improperly filed claims for employees' travel and living expenses while they worked at the Aiken, South Carolina nuclear site. The Government alleged that ESICORP claimed about $1 million in reimbursements between July 1991 and December 1993 for travel and lodging for about 100 employees from out of state, even though those employees had purchased homes in the area.

***U.S. v. Medical Store Ltd.* (D. Vt.)**
***U.S. v. Yankee Medical Inc.*, No. 2:02-CV-58 (D. Vt.)**

In March 2002, The Medical Store, Ltd., reportedly agreed to pay **$60,000** and Yankee Medical Inc. reportedly agreed to pay **$35,000** to settle allegations that they fraudulently billed Medicare and Medicaid. Allegedly, the companies improperly billed for durable medical equipment provided to residents of a skilled nursing facility. Direct Medicare payment for durable medical equipment is not authorized for beneficiaries residing in a skilled nursing facility because the cost is included as part of the Medicare reimbursement to the nursing home. HHS OIG investigated these matters. Assistant U.S. Attorneys Peter Hall and Joseph Perella represented the Government.

***U.S. v. Rosen*, No. 1:02-CV-60 (D.Vt.)**

In March 2002, James Rosen and his psychological service, Behavioral Therapy and Psychotherapy Center, reportedly agreed to pay **$35,000** to settle allegations that they improperly billed Medicare and Medicaid under Rosen's name for psychological counseling services provided by a student intern. Allegedly, the billing was for counseling services performed by the student intern at another center when Rosen was not on those premises or when he was out of the state. The Vermont Medicaid Fraud Control Unit of investigated the matter. Assistant U.S. Attorneys Peter Hall and Joseph Perella represented the Government.

Correction: The law firm of Barmasse & Cohen did not represent Michael Torres in *U.S. ex rel. Torres v. Twining Laboratories of Southern California Inc.*, No. 98-CV07708 (C.D. Cal.) as reported in the last issue of the *Quarterly Review*, 25 TAF QR 34 (Jan. 2002). The firm of Louis J. Cohen, P.C. (Calabasas, California) represented Mr. Torres.

TAF NEWS

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

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Acknowledgments

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