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

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

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

TAF Education Fund

Board of Directors
Peter Budetti, *Chairman*
Fred Anderson
Albert Campbell
Joseph Gerstein
Neil Getnick
Gregory Lawler
John Phillips
Linda Sundro
Gregory Wetstone

President's Council
James Helmer, *Chairman*
James Alderson
Neil Getnick
Kenneth Nolan
John Phillips
Scott Powell

Advisory Committee
Erika Kelton
Mark Kleiman
Candace McCall
Timothy McInnis
Philip Michael
Marc Raspanti

Professional Staff
James Moorman, *President and CEO*
Amy Wilken, *Associate Director*
Joseph E. B. White, *Staff Attorney,* Quarterly Review *Editor*
Patrick Burns, *Communications Director*
Anthony Cotto, *Legal Resources Administrator*
Carmen Ruffin, *Office Administrator*
Takeia Garner, *Executive Assistant*

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

Copyright © 2005 TAF Education Fund. All Rights Reserved.

TABLE OF CONTENTS

FROM THE EDITOR vii

Recent False Claims Act & *Qui Tam* Decisions 1

I. FALSE CLAIMS ACT LIABILITY 3

A. Fraud-in-the-Inducement Theory of Liability
- *U.S.* ex rel. *Bettis v. Odebrecht Contractors of California, Inc.*, 393 F.3d 1321 (D.C. Cir. Jan. 11, 2005)

II. STATUTORY INTERPRETATIONS 7

A. Section 3729(a)(2) Presentment Requirement
- *U.S.* ex rel. *Sanders v. Allison Engine Company*, 2005 WL 713569 (S.D. Ohio Mar. 11, 2005)

B. Section 3730(c) Government Dismissal of *Qui Tam* Actions
- *U.S.* ex rel. *Ridenour v. Kaiser-Hill Company, L.L.C.*, 397 F.3d 925 (10th Cir. Feb. 9, 2005)

III. JURISDICTIONAL ISSUES 17

A. Section 3730(e)(4) Public Disclosure Bar and Original Source Exception
- *U.S.* ex rel. *Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. Jan. 28, 2005)

B. Section 3732(b) "Same Transaction or Occurrence" Requirement
- *U.S.* ex rel. *Anthony v. Burke Engineering Company*, 356 F. Supp. 2d 1119 (C.D. Cal. Feb. 18, 2005)

C. Survivability of FCA *Qui Tam* Claims
- *U.S.* ex rel. *Estate of Botnick v. Cathedral Healthcare System, Inc.*, 352 F. Supp. 2d 530 (D.N.J. Jan. 12, 2005)

IV. FALSE CLAIMS ACT RETALIATION CLAIMS 25

A. Section 3730(h) Retaliation Claims
- *U.S.* ex rel. *Lang v. Northwestern University*, 2005 WL 670612 (N.D. Ill. Mar. 22, 2005)

B. Statute of Limitations for FCA Retaliation Claims
- *U.S.* ex rel. *Hinden v. UNC/Lear Services, Inc.*, 2005 WL 639679 (D. Hawaii Mar. 15, 2005)

V. COMMON DEFENSES TO FCA ALLEGATIONS 27

A. Materiality Requirement
- *U.S.* ex rel. *A+ Homecare, Inc. v. Medshares Management Group, Inc.*, 400 F.3d 428 (6th Cir. Mar. 10, 2005)

VI. FEDERAL RULES OF CIVIL PROCEDURE 31

A. Rule 9(b) Failure to Plead Fraud with Particularity
- *U.S.* ex rel. *Brooks v. Lockheed Martin Corp.*, 2005 WL 841997 (D. Md. Mar. 22, 2005)
- *U.S.* ex rel. *El-Amin v. The George Washington University*, 2005 WL 485971 (D.D.C. Feb. 25, 2005)
- *U.S.* ex rel. *King v. Alcon Laboratories, Inc.*, 2005 WL 20372 (N.D. Tex. Jan. 4, 2005)

B. Rule 26(b) Discovery Scope and Limits
- *U.S.* ex rel. *Fisher v. Network Software Associates*, 2005 WL 417746 (D.D.C. Feb. 22, 2005)

C. Rule 60(b)(6) Relief from Final Judgment
- *U.S.* ex rel. *Garibaldi v. Orleans Parish School Board*, 397 F.3d 334 (5th Cir. Jan. 17, 2005)

VII. LITIGATION DEVELOPMENTS 37
- *United States v. Parkins*, 2005 WL 348355 (4th Cir. Feb. 10, 2005)
- *U.S.* ex rel. *Prevensik v. The United States Patent & Trademark Office*, 2005 WL 691875 (D.D.C. Mar. 24, 2005)
- *U.S.* ex rel. *Urbanek v. Quest Diagnostics Incorporated*, 2005 WL 78931 (E.D. Pa. Jan. 12, 2005)

Interventions & Suits Filed/Unsealed 39

Judgments & Settlements 43

Legislative Update 51

TAFEF Comments on Medicare Modernization Act Final Rules
Amy Wilken, TAFEF Associate Director

Developments in the Law 55

The Jury Is Still Out: Taxability of Contingency Fees Paid to Relator's Counsel

Joseph E. B. White, TAFEF Staff Attorney

Legal Analysis 65

Death Cancels Everything But Truth: Survivability of False Claims Act *Qui Tam* Claims

Neil V. Getnick, Lesley Ann Skillen and Richard J. Dircks

Legal Ethics 83

Of Third Rails and Rabbit Trails: The No-Contact Rule and the McDade Amendment in *Qui Tam* Lawsuits

Frederick M. Morgan, Jr.

Outside of the Law 113

The False Claims Act & The Cone of Silence

Patrick Burns, TAFEF Director of Communications

In Their Own Words 119

Roger L. Ediger

Lessons From the Frontlines 125

Pursuing Medicare Anti-kickback Act Violations Administatively as an Alternate Remedy Under § 3730(C)(5)

Candace S. McCall

In the Spotlight 133

Game Theory and the Civil False Claims Act: Iterated Games And Close-Knit Groups

Pamela H. Bucy

Upcoming Legal Battles 155

Piecing Together A Scattered Puzzle Of Fraud: Honor The True Intent Behind The False Claims Act's Original Source Exception

Joseph E. B. White

The Big Picture 165
DOJ *Qui Tam* Statistics, Fiscal Years 1987–2004

2004–2005 TAFEF Donors 173

FROM THE EDITOR

If you don't explain where you stand on an issue, your opponent will explain for you!" barked Sam Dash, legendary Georgetown Law professor and former chief counsel of the Senate Select Committee on Watergate. Professor Dash has now passed away, but this stern warning, the only lesson I remember from my law school days, is still ringing in my ears.

I have shared this quote with you before. Just six months ago, in a *Quarterly Review* issue devoid of articles, I expressed my hope for a stronger FCA community of fellowship, partnership, and scholarship, countering the mounting verbal barrage from some of the Act's most egregious violators.

Today, those dedicated to fighting fraud against the Government have rallied together, offering each other support, advice, and encouragement. Indeed, in this issue of the *Quarterly Review*, nearly a dozen people, both in and out of the relators' bar, have added their voice to the ongoing debate.

Fittingly, in an article entitled, "Game Theory and the Civil False Claims Act," Pamela Bucy examines the "close-knit" FCA community, encouraging greater cooperation between government and *qui tam* attorneys. A renewed sense of community appears in this issue, as evident by the following articles:

- In a moving dedication, Neil Getnick, Lesley Skillen, and Richard Dircks analyze the issue of the survivability of *qui tam* claims.
- Amy Wilken provides insight behind TAFEF's comments on recent Medicare legislation.
- Rick Morgan outlines the ethical balance formed by the no-contact rule and the McDade Amendment.
- Jeb White maps the legal landscape on the issues of the original source exception and the taxability of contingency fees.
- Patrick Burns examines the often-overlooked role of the media in promoting *qui tam* actions.
- Candace McCall documents the unprecedented steps she took in obtaining a recent settlement.
- Roger Ediger shares his personal story of being a "relator-victim."
- Department of Justice releases statistical data behind FCA prosecutions and settlements.

Professor Bucy correctly characterized the FCA community, and this *Quarterly Review* is a manifestation of this "close-knit" group's dedication to fighting fraud. Now, academics, government attorneys, whistleblowers, relators' counsel, and concerned citizens have a central forum to add their voice to the ongoing legal debate. Fraudfeasors, thank you for the offer, but we can now speak for ourselves.

Sincerely,
Jeb White
jwhite@taf.org

Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1–MARCH 31, 2005

FALSE CLAIMS ACT LIABILITY

A. Fraud-in-the-Inducement Theory of Liability

U.S. *ex rel*. Bettis v. Odebrecht Contractors of California, Inc., 393 F.3d 1321 (D.C. Cir. Jan. 11, 2005)

The D.C. Circuit affirmed a lower court's decision to grant a contractor's motion for summary judgment in a *qui tam* action. The court of appeals ruled that the relator failed to show that the contractor fraudulently induced the Government to award a contract to it by submitting a bid that did not conform to industry standards, by reaffirming its bid during a bid protest, or by making promises regarding cost-saving devices.

In March 1993, the U.S. Army Corps of Engineers solicited bids for construction of the Seven Oaks Dam and Appurtenances in San Bernardino County, California. The Corps divided the construction project into 150 separate bid items, allowing contractors to submit a unit price for each bid item. The winning bidders were bound by their proposed unit prices and assumed the risk that their bid was too low.

Odebrecht Contractors of California submitted the lowest bid of $167,777,000, beating out the next closest bid of Tutor Saliba Corporation by nearly $29 million. During the course of construction, however, Odebrecht requested and received several "equitable adjustments," which are used to keep a contractor whole when the Government modifies the contract or, under some Government contracts, for changed circumstances. *See* 48 C.F.R. §§ 52.243–4, 52.243–5 (2003). Overall, the Corp was satisfied with Odebrecht's work on the project, awarding the contractor its "Civil Works Construction Contractor of the Year Award."

In 1999, Alva Bettis, a former project scheduler for a consulting firm retained by the Corps to monitor the project's progress, filed an FCA *qui tam* action against Odebrecht. When the Government declined to intervene in the case, Bettis proceeded with the action. Bettis, under a fraud-in-the-inducement theory of FCA liability, alleged that Odebrecht fraudulently induced the Corps to award it the contract. Specifically, Bettis maintained that Odebrecht submitted an intentionally low bid with the intention of seeking adjustments to the price after winning the contract. Odebrecht filed a motion seeking summary judgment.

The district court granted summary judgment for Odebrecht, ruling that Bettis's claim failed as a matter of law, for his claim rested on "the flawed legal argument that he can prevail on a mere showing that [1] [Odebrecht] fraudulently induced [the Corps] to enter into the contract by submitting a low bid intending to seek additional monies, and [2] that [Odebrecht] obtained monies above and beyond the contract price." According to the lower court, when the allegations rest on a *deflated* bid price, there must be a showing that the actual claims submitted under the contract were themselves false. Alternatively, the district court maintained that, as a matter of fact, Bettis had failed to offer "facts upon which . . . permit an inference that [Odebrecht] fraudulently

induced [the Corps] to sign the contract by submitting a bid that it knew or should have know was false, intending to seek subsequent adjustments." Bettis appealed the decision.

While the D.C. Circuit shied away from addressing the salient legal issue raised by the case, the court did outline the key legal arguments for reversing the district court's decision. In particular, the D.C. Circuit walked the reader through Bettis's and the United States', as *amicus curiae*, challenges to the district court's legal standard for establishing a fraud-in-the-inducement claim in the context of an allegedly fraudulent low bid. First, highlighting the prominent Supreme Court case *United States* ex rel. *Marcus v. Hess*, 317 U.S. 537 (1943), the court of appeals noted that the courts have traditionally employed a "fraud-in-the-inducement" theory to establish FCA liability for each claim submitted under a government contract obtained by fraud, even in the absence of evidence that the claims were fraudulent in themselves.

Second, the D.C. Circuit recognized that the legislative history underlying the 1986 FCA amendments supports the fraud-in-the-inducement theory. Specifically, Congress, summarizing the existing FCA case law, stated that "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

Even given the existing case law and applicable legislative history outlined by the D.C. Circuit, the district court concluded that, while claims submitted under a contract obtained after a fraudulently *inflated* bid are actionable even though the claims are neither false nor fraudulent themselves, the court held that, where it is alleged that the defendant has submitted a fraudulently *deflated* bid, it must be shown not only that the low bid was fraudulent but also that one or more requests for payment under the contract induced by the low bid were themselves fraudulent. *See United States* ex rel. *Bettis v. Odebrecht Contractors of Cal., Inc.*, 297 F. Supp. 2d 272, 279–83 (D.D.C. 2004), 34 FCAQR 10 (Apr. 2004). The lower court reasoned that "it would be nonsensical and illogical" and "contrary to . . . the FCA's goal of protecting the public fisc to punish a defendant for submitting a low bid even if the defendant knows or should have known that he cannot perform at that price." *Id.* at 280–81.

Again, without explicitly endorsing the United States' challenges to the lower court decision, the D.C. Circuit noted the Government's argument: "[T]here is no basis in the text of the FCA for distinguishing between a fraudulently inflated bid and a fraudulently deflated one . . . FCA liability should attach to claims under *any* fraudulently induced contract." Concluding that the case fails as matter of fact, as opposed to law, the D.C. Circuit decided to take a pass on this legal issue.

After weighing the evidence proffered by Bettis, the D.C. Circuit, agreeing with the district court, concluded that there were no material facts in dispute and the undisputed facts were insufficient to permit a reasonable conclusion that Odebrecht fraudulently induced the Corps to award it the contract. Specifically, the court of appeals rejected the relator's claims that Odebrecht fraudulently induced the Corps "(1)

by submitting a bid that did not conform with industry standards for accuracy; (2) by falsely reaffirming its bid despite its awareness of rising costs; and (3) by falsely claiming its intention to employ certain cost-saving devices during construction." Assessing the evidence surrounding each allegation, the D.C. Circuit agreed with the lower court's factual determination. Thus, the court of appeals affirmed the decision on this ground alone.

A. Section 3729(a)(2) Presentment Requirement

U.S. *ex rel.* Sanders v. Allison Engine Company, 2005 WL 713569 (S.D. Ohio Mar. 11, 2005)

In a non-intervened FCA *qui tam* jury trial, an Ohio district court granted the defendants' motion for judgment as a matter of law, agreeing that the relators failed to satisfy the FCA's supposed Section 3729(a)(2) "presentment requirement." The court also rejected the relators' "implied certification" theory of FCA liability, ruling the relators' offered no evidence of a "continuing certification" under the defendants' contractual agreement with the Government.

In the case at bar, Allison Engine Company signed a subcontractor agreement with Bath and Ingalls, prime contractors who had contracts directly with the Government. The relator filed an FCA *qui tam* action against Allison under Section 3729(a)(2) of the FCA, which attaches liability to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id.* The defendants, interpreting Section 3729(a)(2), argued that the relators failed to show that a false or fraudulent claim was actually presented to the Government by the defendants. The relators argued that the Section does not include a "presentment requirement"; alternatively, adequate "presentment" evidence was presented to the jury.

Court's Interpretation of Case Law Demands a Section 3729(a)(2) Presentment Requirement

In granting the defendants' motion, the district court first cataloged the nine circuit court decisions that supposedly agreed with the court's demand for an FCA "presentment requirement." *See, e.g., United States v. Rivera,* 55 F.3d 703, 709 (1st Cir. 1995) (holding that "the statute attaches liability not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"); *United States v. Schmidt,* 386 F.3d 235, 243 (3rd Cir. 2004) (holding that, "In order to prove a claim under § 3729(a)(2), a plaintiff must also show that the defendant made or used (or caused someone else to make or use) a false record in order to cause the false claim to be actually paid or approved."); *Harrison v. Westinghouse Savannah River Company* 176 F.3d 776, 785 (4th Cir. 1999) (finding that the FCA "at least requires the presence of a claim—call upon the government fisc—for liability to attach"); *United States v. Southland Management Corp.,* 326 F.3d 669, 675 (5th Cir. 2003) (holding that, "Although § 3729(a)(2) prohibits the submission of a false record or statement, it does so only when the submission of the record or statement was done in an attempt to get a false claim paid. There is no liability under this Act for a false statement unless it is used to get [a] false claim paid."); *Yuhasz v. Brush Wellman,* 341 F.3d 559, 564–65

(6th Cir. 2003) (dismissing FCA case because relator was "unable to identify a specific claim submitted directly to the United States by a prime contractor" who incorporated the subcontractor's work into the finished product that was then sold to the Government); *United States of America* ex rel. *A+ Homecare, Inc. v. Medshares Management Group, Inc.*, No. 02- 6545, slip op. at 13 (6th Cir. Mar. 10, 2005) (ruling Section (a)(2) liability "attaches only where the claim itself is false or fraudulent and the false record or statement is being used 'to get' that false claim paid"); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998) (finding that "only those actions by a claimant which have the effect of causing the United States to pay out money it is not obligated to pay are actionable"); *United States v. Kitsap Physicians Service*, 314 F.3d 995, 996 (9th Cir. 2002) ("It seems to be a fairly obvious notion that a False Claims Act suit ought to require a false claim."). Conversely, the district court was unable to locate case law supporting the relators' reading of Section 3729(a)(2).

Court Refuses to Distinguish *Totten*

The district court was also particularly swayed by a recent D.C. Circuit ruling, *United States* ex rel. *Totten v. Bombardier Corp.*, 380 F.3d 488, 492–93 (D.C. Cir. 2004), 36 FCAQR 9 (Jan. 2005), which concluded that Sections 3729(a)(1) and (a)(2) require a false or fraudulent claim to be presented to the Government. Noting that the relators' argument closely mirrored the dissent outlined in *Totten*, the court dissected the controversial D.C. Circuit decision.

In *Totten*, the majority read a "presentment requirement" into subsection (a)(2), even though the language did not include the "presented to an officer or employee of the United States" language etched in subsection (a)(1). However, the *Totten* dissent and the relators in the case at bar, argued that the majority's reading conflicts with the plain text of the Act and is directly contrary to the applicable legislative history.

Mocking the *Totten* dissent's argument, the district court sided with the *Totten* majority's conclusion that by adding the "by the government" language, Congress was referring back to the presentment requirement of Subsection (a)(1). Adding credence to its reading, the district court observed that the two subsections used to reside in one awkward sentence, thus Subsection (a)(2) is the "direct descendant of a clause that could only be read in conjunction with what is now Section 3729(a)(1)..."

The district court noted that the legislative history that is most damaging to the court's reading addresses an earlier version of the Act that did not include the "by the government" language of Section 3729(a)(2). In turn, the court decided to cast a jaundiced eye on the most telling legislative history. In particular, the district court ignored that the Senate Judiciary Committee added a new definition of "claim" in response to earlier court holdings that a fraud against the grantee does not include a fraud against the Government.

The district court also refused to accept the relators' attempt to distinguish the *Totten* decision. Specifically, the relators pointed out that, unlike the case at bar, in *Totten*, the Government gave a block grant to a grantee and, while the grantee was regularly paying "subcontractors," there was no requests going from the grantee to the

Government. The district court saw no difference between the case at bar and *Totten*, noting that in both cases, there was no proof that a claim was ever presented to the Government.

Thus, refusing to deviate from the dicta outlined in *Totten*, the district court announced that a violation of Subsection (a)(2) of the FCA requires a showing that a false or fraudulent claim has been submitted to an officer or employee of the United States Government.

Court Rejects Relators' "Implied Certification Theory" Argument

The district court also refused to accept the relators' alternative argument that the jury actually viewed evidence of a false claim being presented to the Government. The relators based their argument on the "implied certification" theory of FCA liability announced in *United States* ex rel. *Augustine v. Century Health Services Inc.*, 289 F.3d 409, 415 (6th Cir. 2002) (holding that "a false implied certification may constitute a false or fraudulent claim even if the claim was not expressly false when it was filed. Instead, liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned"), 27 FCAQR 6 (Oct. 2002).

Most importantly for the case at bar, the "implied certification" theory is only "applied where the underlying statute or regulation expressly states that payment is conditioned upon compliance with the underlying statute or regulation." *Id*. at 414 (citing *Mikes v. Straus*, 274 F.3d 687, 700 (2nd Cir. 2001), 25 FCAQR 6 (Jan. 2002)).

The relators maintained that invoices were submitted to the Government under a solicitation award agreement with the Government; however, the district court found no evidence that there was a "continuing duty to comply with any 'regulations' let alone certify its compliance with any 'regulations,'" especially because the agreement did not specifically condition payment of each invoice on a particular quality metric. Thus, the district court, granting the defendants' motion, ruled that there was no legally sufficient basis for a reasonable jury to find for the relator.

B. Section 3730(c) Government Dismissal of *Qui Tam* Actions

U.S. *ex rel*. Ridenour v. Kaiser-Hill Company, L.L.C., 397 F.3d 925 (10th Cir. Feb. 9, 2005)

The Tenth Circuit affirmed a Colorado district court's dismissal of a *qui tam* action, holding that the False Claims Act does not require the Government to intervene before moving to dismiss. The court of appeals also ruled that the Government's dismissal of the action had a rational relationship with the purported governmental objectives of protecting classified information from disclosure. According to the court, the relators failed to meet their burden to show the Government's motion to dismiss was fraudulent, arbitrary and capricious, or illegal.

The relators, who formerly performed security work at Rocky Flats, a former nuclear weapons manufacturing facility, filed an FCA *qui tam* action, challenging claims for payment the defendants made under a government contract. Specifically, the relators alleged that EG & G, Wakenhut, and Kaiser-Hill were paid for security measures they either did not provide or did not satisfy minimal standards.

After the Government investigated the allegations for nearly two years, the Government declined to intervene in the action, and the case was unsealed on December 14, 1999. In April of the following year, the Government requested the Department of Energy be added to the service list, so the Government could be kept aware of the progress of the suit. On July 5, 2000, the Government filed a status report, raising concerns about the handling of classified information. At the status hearing, the Government announced it was filing a motion to dismiss the case, which it did on August 21, 2000.

The Government, arguing their motion should be granted, maintained that the ongoing lawsuit was delaying cleanup of the facility and compromising national security by risking inadvertent disclosure of classified information. The relators, opposing the dismissal, claimed the Government was seeking dismissal for fraudulent and arbitrary and capricious reasons and the reasons for dismissal were not rationally related to a legitimate government purpose. Furthermore, the relators, pointing to the language of 31 U.S.C. § 3730(c)(3), maintained that the Government could not seek dismissal of the case without first intervening in the matter. In turn, the relators sought discovery regarding the Government's stated reasons for dismissal and endeavored to subpoena the "most knowledgeable" government witness regarding the Government's reasons for dismissal.

The lower court denied the relators' requests. Pursuant to 31 U.S.C. § 3730(c)(2)(A), a magistrate judge conducted a five-day evidentiary hearing, in which the Government stipulated for purposes of the hearing that the Relators' claims were meritorious. Even then, the magistrate recommended the Government's motion to dismiss be granted. The district court, adopting the magistrate's recommendation, dismissed the claims with prejudice. The relators appealed the decision.

FCA Does Not Require Intervention Before Government Moves to Dismiss

The Tenth Circuit affirmed the district court's decision. The relators' argued that the Government must intervene under Section 3739(c)(3) before moving to dismiss under Section 3730(c)(2)(A). While the magistrate determined the FCA did not contain this requirement, the district court disagreed. Nonetheless, the district court construed the Government's motion to dismiss as including an "implied motion to intervene," agreeing that good cause existed in the case to dismiss the action. The Tenth Circuit, however, adopting the magistrate's rationale, declined to construe the FCA as requiring intervention for cause before dismissal, for "a plain reading of the statute does not require it, canons of statutory construction do not support such a result, and . . . such a reading would render the FCA constitutionally infirm."

As an initial matter, the court of appeals noted that the FCA language provides "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).

Failing to identify anything in statutory language as requiring government intervention before dismissal, the Tenth Circuit quickly moved to the legislative history. The court of appeals reviewed the Senate report incident to passage of the measure addressing the purpose of late intervention. The report states that "in those situations where new and significant evidence is found and the Government can show 'good cause' for intervening, paragraph (2) provides that the court may allow the Government to take over the suit." S. Rep. 99-345, at 26–27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291–92. According to the court, this language "suggests the purpose of late intervention is to pursue litigation, not dismiss it."

The Tenth Circuit, then turned to the existing case law, pointing to a recent D.C. Circuit decision, *Swift v. United States*, 318 F.3d 250, 251 (D.C. Cir. 2003), 30 FCAQR 30 (Apr. 2003), in which the court held the Government need not first intervene in a *qui tam* action before moving to dismiss it. The *Swift* decision specifically noted that the language of Section 3730(b)(2) only makes intervention necessary if the Government decides to "proceed with the action." The D.C. Circuit stressed: "Ending the case by dismissing it is not proceeding with the action."

Lastly, the Tenth Circuit, raising a constitutionality argument, determined that the Government could be "unconstitutionally hamstrung by a requirement, as urged by Relators, to intervene with a showing of good cause before moving to dismiss a *qui tam* action." The court of appeals conceded that the *qui tam* provisions have previously passed constitutional muster, particularly because the Government "retain[ed] the unilateral power to dismiss an action notwithstanding the objections of the person." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (*en banc*) (quotation marks omitted), 23 FCAQR 1 (July 2001). However, according to the Tenth Circuit, the *qui tam* provisions would violate the constitutional bounds if the courts "condition[ed] the Government's right to move to dismiss an action in which it

did not initially intervene upon a requirement of late intervention tied to a showing of good cause."

Thus, ever mindful of not "unnecessarily" binding the Government, the Tenth Circuit read the FCA as not requiring the Government to intervene with a showing of good cause before moving to dismiss an unsealed *qui tam* action.

Sequoia Standard of Review Adopted

The court of appeals then turned its attention to the standard of review of a government motion to dismiss a *qui tam* action under Section 3730(c)(2)(A). Again, highlighting the D.C. Circuit's *Swift* decision, the Tenth Circuit noted that the D.C. Circuit considers the Government's decision to dismiss as "nearly unreviewable." Indeed, the *Swift* decision dismisses Section 3730(c)(2)(A)'s "opportunity for a hearing" language as "simply intended to provide a forum for the relator to try to convince the Government not to dismiss the case." *Id.* at 253.

The Tenth Circuit then focused its attention on *Sequoia v. Baird-Neece*, 151 F.3d 1139 (9th Cir. 1998), 14 FCAQR 9 (July 1998), a case in which Government also moved to dismiss under Section 3730(c)(2)(A), over the relators objections. In *Sequoia*, the Ninth Circuit established the following standard for testing whether dismissal by the Government is appropriate: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." *Id.* at 1145. Under the *Sequoia* test, if the Government satisfies this two-step test, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* According to the Tenth Circuit, because this test "recognizes the constitutional prerogative of the Government under the Take Care Clause, comports with legislative history, and protects the rights of relators to judicial review of a government motion to dismiss," the present court adopted this test for the Tenth Circuit.

Dismissal Rationally Related to Valid Government Purpose

Applying its newly adopted standard to the case at bar, the Tenth Circuit determined that the lower court did not abuse its discretion in dismissing the *qui tam* action. While the relators and the Government agree that protecting classified information from disclosure and the timely closing of the contaminated Rocky Flats facility are valid governmental objectives, the relators argued that dismissal of the action does not bear a rational relationship to these stated objectives.

After a five-day hearing, the lower court disagreed with the relators, ruling the Government demonstrated that classified documents required in the litigation would present a risk of inadvertent disclosure, implicating national security. Borrowing language from an earlier *Sequoia* decision, the Tenth Circuit noted that to establish a rational relation to a valid governmental purpose, "[t]here need not be a tight fitting relationship between the two; it is enough that there are plausible, or arguable, reasons supporting the agency decision." *United States* ex rel. *Sequoia Orange Co. v. Sunland*

Packing House Co., 912 F. Supp. 1325, 1341 (E.D. Ca.1995) (quotation marks omitted), 3 FCAQR 24 (Jan. 1996). The Tenth Circuit ruled that the Government met the test in the case at bar.

According to the court, the Government also demonstrated that the litigation would delay the clean-up and closure of Rocky Flats by diverting the focus of security planners and management from the clean-up effort, by requiring the reassignment of personnel from the project to review classified documents for declassification or redaction in aid of litigation, and by placing an added financial burden on the project through a requirement to shift funds from clean-up to litigation. Thus, the court ruled that the Government satisfied the *Sequoia* test by offering a "plausible, or arguable" reason for dismissal.

Government's Motion Was Not Arbitrary or Capricious

Under the *Sequoia* test, the "burden [now] switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia v. Baird-Neece,* 151 F.3d at 1145, 14 FCAQR 9 (July 1998). The relators maintained that the Government's motion was fraudulent, for "it was motivated by a desire to spare DOE embarrassment over security lapses at Rocky Flats." While the lower court found evidence of "innocent cross-employment between the DOE and its contractors," the court found no evidence that the DOE "prevailed upon the Department of Justice to dismiss the action for improper purposes." The Tenth Circuit, agreeing with the district court's findings, concluded that the relators failed to show that the Government's motion was "fraudulent, arbitrary and capricious, or illegal."

District Court Did Not Abuse Its Discretion

The Tenth Circuit then turned its attention to issues surrounding the relators' discovery requests. After hearing of the Government's motion to dismiss, the relators supposedly sought documentation that contained classified information. However, the lower court, fearing disclosure of classified information, stayed discovery and limited the relators' proof to their own witnesses and cross-examination of government witnesses. The Tenth Circuit, reviewing the discovery rulings for abuse of discretion, ruled the lower court did not abuse its discretion in limiting discovery.

The lower court, via a magistrate ruling *in limine*, had also quashed the relators' subpoena of the Government's person most knowledgeable about its motion to dismiss. The government witness had indicated that she would apply the "deliberative process privilege at the hearing to any communications between government agents that were pre-decisional or deliberative relative to the motion to dismiss." The relators objected to the ruling, for it was a "legitimate inquiry into the subjective motivation of the Government" in filing its motion to dismiss.

The Tenth Circuit rejected relators' argument, ruling the lower court was correct to quash the subpoena, for Fed. R. Civ. P. 39(b)(6), the provision under which the subpoena was issued, authorizes a subpoena for deposition, and not in-court testimony.

In analyzing the "deliberative process privilege," the court of appeals borrowed from an earlier decision:

> "[It] rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government."

Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1251 (10th Cir. 2002) (quoting *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (quotations and citations omitted)). The relators, however, argued that the privilege should not be allowed in this instance, for the relators sought to establish the Government's motivation, for which other courts have refused to accept the privilege. *See, e.g.*, In re*: Subpoena* Duces Tecum *Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279 (D.C. Cir. 1998). The Tenth Circuit rejected the relators' reliance on the D.C. Circuit opinion, pointing out that in this particular D.C. Circuit decision, the court did not allow inquiries into the Government's subjective motivation for a decision. Indeed, the D.C. Circuit outlined an exception: "When a party challenges agency action as arbitrary and capricious, the reasonableness of the agency's action is judged in accordance with its stated reasons. Agency deliberations not part of the record are deemed immaterial." *Id.* at 1279 (citation omitted). Thus, the Tenth Circuit, echoing the district court's reasoning, ruled the lower court correctly applied the deliberative process privilege in the matter at bar.

In summary, the Tenth Circuit, in affirming the lower court decision, held that the FCA does not require the Government to intervene prior to moving to dismiss a *qui tam* action. The court of appeals, explicitly adopting the *Sequoia* standard for reviewing the Government's motion to dismiss, also found that the Government had met its burden under the *Sequoia* standard. Lastly, the court held that the lower court did not abuse its discretion in its discovery or *in limine* rulings.

Dissent Would Require Intervention Before Allowing Government Motion to Dismiss

Judge Eagan dissented from the majority, expressing his views that the FCA does require the Government to intervene prior to moving to dismiss a *qui tam* action. Eagan also read 31 U.S.C. § 3730(c)(3) as requiring the Government to intervene upon a showing a good cause before moving to dismiss the *qui tam* action, where the Government had declined to intervene during the sixty-day seal period.

Eagan maintained that a plain reading of the statute supports his position. According to the dissent, the majority narrowly interpreted the provision of the statute which permits the Government to dismiss a *qui tam* action, 31 U.S.C. § 3730(c)(2)(A), and totally disregarded the surrounding provisions and the context in which the dismissal provision appears. The dissent pointed out that "subsection (c)(2) contains limitations

applicable only to subsection (c)(1), the provision relating to the Government's election to proceed with the action. By their terms, subsections (c)(1) and (c)(2) do not apply where the government elects not to proceed during the seal period." Thus, according to the dissent, the majority removes the provision addressing late intervention, even though Congress intended to provide for later intervention by the Government.

In further support of his reading, Eagan argued that the legislative history cited by the majority discusses the circumstances of the case at bar: "In those situations where new and significant evidence is found and the Government can show 'good cause' for intervening, paragraph (2) provides that the court may allow the Government to take over the suit." S. Rep. 99-345, at 26–27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5292.

Lastly, Judge Eagan rejects the majority's concerns over the potential unconstitutionality of the relators' proposed statutory reading. The dissent notes that the FCA does not vest absolute control in the Executive Branch where the Government "effectively abdicates its duty to control the litigation by failing to intervene initially within the seal period or to show good cause for late intervention." Thus, while conceding that the Government had shown good cause to intervene in this particular case, the dissent refused to adopt the legal standard adopted by the majority.

JURISDICTIONAL ISSUES

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

U.S. *ex rel.* Paranich v. Sorgnard, 396 F.3d 326 (3d Cir. Jan. 28, 2005)

The Third Circuit affirmed a Pennsylvania district court's dismissal of a *qui tam* complaint under the FCA public disclosure bar, ruling the relator's complaint was based on public disclosures that contained allegations or transactions of the alleged fraud. While the court agreed that the relator's knowledge of the alleged fraud was not derived exclusively from the public disclosures, the court ruled that the relator did not qualify as an original source under the FCA public disclosure bar's original source exception.

Dr. Stephen Paranich, a chiropractor, leased four Matrix electrical nerve stimulating devises, which work by pulsating electricity to the nerves of the patient at various frequencies through electrodes attached to the patient's body. Paranich was submitting Medicare claims for treatments involving the Matrix devise under the CPT code for "nerve block injections," reimbursing at rates of $150 to $350 per procedure. While Paranich recognized that the CPT code for "electronic stimulation" was at rates of $35 to $80 per procedure, Paranich maintained that Matrix advised him to submit claims under the "nerve block injection" CPT code. In turn, Medicare reimbursed Paranich at the higher rate.

In June 1997, Dr. Deborah McMenamin, a former employee of Paranich's clinic, contacted the FBI to report that Paranich was overbilling Medicare for the Matrix procedures. On October 22, 1997, the Government served a grand jury subpoena on Paranich requiring him to produce all documents and billing information related to the Matrix procedures.

Subsequently, Paranich's attorney, Kenneth Haber, investigated the Matrix device, ultimately discovering that Transamerica Occidental Life Insurance Company, the carrier and administrator for the Medicare program in Southern California, had previously held a hearing and published information advising providers not to bill Matrix device procedures under the CPT code for nerve blocking injections. In October 1998, submitted a FOIA request seeking a report of the Transamerica hearings.

Earlier, on May 20, 1998, a group of doctors in Southern California had filed a state court action against Matrix alleging fraud with respect to the recommended CPT billing codes. The action had also named Irwin as a defendant. Eventually, however, the state court granted Irwin's motion for summary judgment, concluding that Irwin was not responsible for Matrix's activities. Irwin was also named as a defendant in a similar state court action in California, which was voluntarily dismissed in August 1998.

On December 21, 1998, Paranich filed his original *qui tam* complaint, and in October 2000, Paranich amended his complaint to add a new defendant, Irwin Leasing

Corporation, formerly Affiliated Capital Corporation, a company that finances the purchase of medical equipment. Paranich alleged the defendant induced him to file false Medicare reimbursement claims for chiropractic treatment using their equipment, specifically a medical device called the Matrix. Irwin denied any wrongdoing and further maintained that the matter was barred under the FCA public disclosure bar, for the allegations Parnanich raised were previously disclosed and he was not the original source, for it was his attorney's investigation that disclosed the alleged fraud and the uncovered information was not "independent" of the public disclosures. The lower court, granting Irwin's motion for summary judgment, agreed the FCA public disclosure bar prevented the court from having subject matter jurisdiction. Paranich appealed the decision to the Third Circuit.

The Third Circuit, affirming the district court's decision, agreed that the allegations had been previously disclosed and Paranich was not an original source as defined by the FCA's original source exception to the FCA public disclosure bar. In reaching its ultimate conclusion, the court refused to analyze the nuances of the FCA original source exception, namely whether Paranich's knowledge was "direct" given the role his attorney played in the investigation. Instead, the court of appeals focused on the FCA original source exception requirement that the source must *voluntarily* provide the information to the Government. 31 U.S.C. § 3730(e)(4)(B).

FCA Public Disclosure Bar Applies

First, before diving into the original source exception analysis, the Third Circuit verified that the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), applied to the case at bar. The court of appeals observed that to qualify as a public disclosure under the FCA, the disclosure must "(1) issue from a source or occur in a context specifically recognized by the Act, and (2) be sufficient to support the conclusion that the information contained therein is now public within the meaning of the Act."

Given the explicit precedent in the Third Circuit, the court of appeals quickly determined that there were public disclosures in this case at bar. First, pointing to its previous decisions on the issue, the court ruled that the state court actions and the FOIA report qualified as public disclosures. Specifically, in *United States* ex rel. *Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991), the Third Circuit read the FCA public disclosure bar broadly to include criminal, civil, or administrative *litigation*, "encompass[ing] the full range of proceedings in a civil lawsuit." *Id.* at 1156. In particular, paraphrasing the *Stinson* holding, the Third Circuit held that the "disclosure of discovery material to a party who is not under any court imposed limitation as to its use constituted a public disclosure within the context of a criminal, civil, or administrative hearing."

Recognizing that other circuits have disagreed with the *Stinson* holding, the Third Circuit maintained that the issue of whether a *complaint* in a civil action qualifies as a public disclosure is much less controversial, for it is, except in rare occasions, available and accessible to the public. Regardless of support from the other circuits, the Third

Circuit steadfastly maintained that a complaint in a civil action is sufficiently public to fall within the Act's definition of a public disclosure.

As for the FOIA report obtained by the relator's attorney, the court of appeals recited its language in *United States* ex rel. *Mistick PBT v. Hous. Auth.*, 186 F.3d 376 (3d Cir. 1999): "[T]he disclosure of information in response to a FOIA request is a 'public disclosure.'" *Id*. at 383. Thus, the Third Circuit ruled that the FOIA report obtained by Haber was a public disclosure.

After determining that a public disclosure took place, the court of appeals then turned its attention to whether the public disclosure contained "allegations or transactions" of fraud as defined in Section 3730(e)(4)(A), the FCA public disclosure bar. Agreeing with the lower court, the Third Circuit ruled that the complaints from the state court actions contained allegations of fraud regarding the defendant's billing policy, even if the state courts never ruled that the claims against Irwin had merit. In turn, the court of appeals concluded that the "allegations or transactions" of fraud had been publicly disclosed.

The next step in the FCA public disclosure bar analysis was determine whether the relator's action was "based upon" the public disclosure of allegations or transactions of fraud. Mirroring the interpretation adopted by several other circuits, the Third Circuit reaffirmed its interpretation of "based upon" to mean "supported by" or "substantially similar to," not "actually derived from." Without much discussion, the court of appeals determined that this element was satisfied, noting that the complaints in the two state actions set out the same allegations against a common defendant, namely Irwin. In turn, the Third Circuit concluded that all of the elements of the FCA public disclosure bar where present in the matter at bar, so the lower court lacked subject matter jurisdiction unless the relator qualified as an original source under Section 3730(e)(4)(B).

Relator Is Not an Original Source

The Third Circuit observed that for Paranich to qualify as an original source, he must have (1) direct and (2) independent knowledge of the information on which the allegations were based and, (3) most importantly for the case at bar, have *voluntarily* provided the information to the Government before filing the action. Finding that Paranich failed to satisfy the third element of the original source exception, the court of appeals noted that they did not need to analyze the first two elements. However, because the Third Circuit believed the lower court erred in focusing on the relator's limited involvement in his counsel's investigation, the court of appeals provided an examination of Section 3730(e)(4)(B)'s "direct and independent knowledge" definition.

Dissecting the language of the FCA original source exception, the Third Circuit reiterated its earlier definition of "direct" to mean "marked by absence of an intervening agency, instrumentality, or influence: immediate." *Stinson*, 944 F.2d at 1160 (quoting Webster's Third New International Dictionary 640 (1976)). The lower court had determined that Paranich's knowledge was not "direct," for he had depended upon the investigative activities of his attorney. The district court also concluded that because

Paranich's attorney only learned of the relevant information after discovering the two prior state actions, the knowledge was clearly derivative of these prior public disclosures and not "direct and independent," as defined by the original source exception.

The Third Circuit disagreed with the lower court's application of the "direct" knowledge requirement, for it neglected to credit Paranich with direct knowledge of a billing scheme in which he was personally *involved*. The court of appeals also emphasized that Paranich's attorney was acting as Paranich's agent, not *intervening* agent, as such. Refusing to dive deeper into the particulars of this case, the Third Circuit warned the lower courts not to adopt a blanket rule barring relators who use an agent to conduct further investigation into a fraudulent scheme.

Providing additional insight into the "independent" knowledge definition of the original source exception, the Third Circuit interpreted this requirement to mean, "knowledge of the fraud cannot be merely dependent on a public disclosure." Disagreeing with the district court, the court of appeals found that Paranich's knowledge did not derive exclusively from the public disclosures. Indeed, as the court pointed out, his initial knowledge was from his own personal experiences, independent of public disclosures. As proof, the court of appeals pointed to letters Haber sent to the FBI, months before the FOIA report was released and the state court actions were even filed. Thus, the Third Circuit concluded that Paranich's knowledge was "independent" of the public disclosures.

Relator Did Not Voluntarily Provide Information to the Government

The last element of the original source exception—that the relator voluntarily provides the information to the Government before filing the *qui tam* action—ultimately prevented Paranich from qualifying as an original source under Section 3730(e)(4)(B). In the case at bar, Paranich provided information after the Government subpoenaed certain documents. Subsequent to the subpoena, Paranich's attorney also conducted his own investigation and provided additional information to the Government that was not requested in the subpoena.

The Tenth Circuit noted that if only subpoenaed information were provided to the Government, the issue would require little discussion—Paranich would not qualify as an original source. However, the question became more complicated in the case at bar, for *some* of the information was supplied to the Government that was not required under the subpoena. Because the Tenth Circuit has never detailed what it means to provide information "voluntarily," the court borrowed from the other circuits.

First, the court of appeals highlighted the Ninth Circuit decision *United States* ex rel. *Fine v. Chevron USA Inc.*, 72 F.3d 740 (9th Cir. 1995) (*en banc*), 4 FCAQR 7 (Jan. 1996). In *Fine*, the relator, a former employee of the Office of the Inspector General at the Department of Energy, filed several *qui tam* actions based on investigations he had conducted during his employment at the DOE. The Ninth Circuit ruled that the relator did not qualify as an original source, for he did not voluntarily disclose the information to the Government; instead, he had provided the information as part of his job responsibilities as a government employee.

While the relator in *Fine* argued that the "provision of information to the government should be held to be voluntary unless compelled by a subpoena," the *Fine* majority found that this was not the "only situation in which the voluntary disclosure requirement would bar a *qui tam* suit following a public disclosure." *Fine*, 72 F.3d at 744.

Second, the Tenth Circuit pointed to an Eighth Circuit decision, *United States* ex rel. *Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995), 1 FCAQR 2 (Apr. 1995), in which the relator provided the information to a HUD investigator *after* the investigator approached the relator with the allegations. The Eighth Circuit held that one who provides information only in response to a government inquiry does not satisfy the "voluntary" requirement of the Section 3730(e)(4)(B).

Lastly, the court of appeals mentioned *United States* ex rel. *Stone v. AmWest Savings Association*, 999 F. Supp. 852 (N.D. Tex. 1997), 12 FCAQR 2 (Jan. 1998), in which a district court interpreted "voluntary" to mean "uncompensated" or "unsolicited," not "uncompelled." *Id.* at 857. In *Stone*, the court determined that the relator did not voluntarily provide the information, for he waited until he secured criminal immunity before providing pertinent statements to the Government.

Based on its review of the existing case law, the Tenth Circuit concluded that the Paranich did not voluntarily provide information to the Government. Equating the present situation to a relator-federal government employee charged with investigating fraud, the court of appeals determined that "the incentive of a *qui tam* action as an antifraud device is lost and the putative relator's further participation in the government's investigation is necessarily fueled by other forms of self-interest." Thus, according to the Tenth Circuit, even though Paranich provided the Government with information not specifically detailed in the subpoena, the subpoena colored the subsequent disclosures with a taint of compulsion. "In short, while it may be appropriate legal strategy for the subject of a subpoena in a fraud investigation to cooperate with the government and provide additional information in an attempt to shift attention to a properly implicated third party, it is contrary to the policies of the *qui tam* actions to allow that individual . . . to be . . . clothed with the imprimatur of being an 'original source.'"

Thus, the court of appeals, affirming the lower court's decision, concluded that the FCA public disclosure bar prevented the court from asserting subject matter jurisdiction in the case at bar.

B. Section 3732(b) "Same Transaction or Occurrence" Requirement

U.S. *ex rel.* Anthony v. Burke Engineering Company, 356 F. Supp. 2d 1119 (C.D. Cal. Feb. 18, 2005)

In an action involving alleged federal and state FCA violations, a California district court denied a defendant's motion to dismiss the state claims. The court held that, under the FCA's jurisdictional provision Section 3732(b), the "same transaction or occurrence" requirement was satisfied by allegations that the employer created a system or scheme of false claims. Borrowing the "logical relationship test" from the Second Circuit, the district court was tasked with determining "'whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.'" *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987) (quoting *Harris v. Steinem*, 571 F.2d 119, 123 (2d. 1978)).

In the case at bar, the district court observed that the defendant used the same computerized system to manage the alleged scheme of submitting false claims to both federal and state entities. Given the "logical relationship" between the claims, the court ruled that it had jurisdiction over the state claims, even though there was no single instance of federal and state entities being involved in the same submission.

C. Survivability of FCA *Qui Tam* Claims

U.S. *ex rel.* Estate of Botnick v. Cathedral Healthcare System, Inc., 352 F. Supp. 2d 530 (D.N.J. Jan. 12, 2005)

A New Jersey district court granted a relator's estate's application for attorney fees and a percentage of the recovery of an FCA settlement. In particular, the court ruled that the relator's claim to a portion of the damages award and reimbursement of attorney fees survived his death. The district court, pointing to the Supreme Court's century-old decision on the "survivability" of claims, stated the issue turns on whether the action is "penal," such that it terminates upon the death of the plaintiff, or "remedial," which survives the plaintiff's death. *See* Ex parte *Schreiber*, 110 U.S. 76 (1884). After reviewing the Supreme Court's *Chandler* decision, in which the Court touted the "remedial" role of the FCA, and the legislative history underlying the Act, which indicates a strong legislative intent to incentivize relators, the district court ruled that an FCA *qui tam* action is remedial and thus survives the relator's death.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

U.S. *ex rel.* Lang v. Northwestern University, 2005 WL 670612 (N.D. Ill. Mar. 22, 2005)

In a *pro se* action alleging various state and federal law violations, including allegations under the federal FCA, an Illinois district court granted in part and denied in part the defendants' motions to dismiss. Agreeing with the Seventh Circuit's ruling in *U.S.* ex rel. *Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004) (ruling that a *pro se* relator cannot bring a *qui tam* claim under the FCA), 35 FCAQR 77 (Oct. 2004), the district court dismissed the relator's *qui tam* claims. However, because the court recognized that relator's FCA retaliation claims were personal claims, not claims of the Government, the district court took a closer look.

The defendant-employer argued that a relator can sue for retaliation under the FCA only against her employer, and only if her underlying protected activity involved reporting a false claim made by *that same* employer. The district court, however, rejected the defendant's argument, noting that the FCA contains no language requiring proof that the retaliation was for protected activity involving a false claim by that same employer.

The non-employer-defendants sought dismissal of the FCA retaliation claim on the grounds that they were not the relator's employer. The court granted dismissal for the individual defendants, citing *Yesudian* ex rel. *United States v. Howard University*, 270 F.3d 969, 972 (D.C. Cir. 2001) (holding that a supervisor cannot be an "employer" for purposes of an FCA retaliation claim), 25 FCAQR 13 (Jan. 2002). As for the non-employer entity, the relator argued that it was her "*de facto* employer" and, as such, should be held liable under the Act. The court, refusing to rule out this legal argument, stated that, because it could not "say that it is apparent beyond doubt that [the relator] will be unable to show that [non-employer entity] was her *de facto* employer," the court refused to dismiss the FCA claim against this particular defendant.

B. Statute of Limitations for FCA Retaliation Claims

U.S. *ex rel.* Hinden v. UNC/Lear Services, Inc., 2005 WL 639679 (D. Hawaii Mar. 15, 2005)

In a settled *qui tam* action, in which the relator subsequently sought to relitigate the dismissed FCA claims, a Hawaii district court ruled that the legal principle of *res judicata* barred the relator from relitigating his *qui tam* claims. The court also ruled that, under the binding authority of the Ninth Circuit's decision in *Lujan v. Hughes Aircraft Company*, 162 F.3d 1027, 1034 (9th Cir. 1998) (holding that Congress did not include a statute of limitations provision for FCA retaliation claims, so the courts must apply the "most closely analogous statute of limitations under state law"), the relator's FCA retaliation claim was untimely, for the "most closely analogous" Hawaii Whistleblowers' Protection Act's 90-day limitations period had expired before the relator had even filed his complaint.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Materiality Requirement

U.S. *ex rel.* A+ Homecare, Inc. v. Medshares Management Group, Inc., 400 F.3d 428 (6th Cir. Mar. 10, 2005)

In a Government-intervened FCA *qui tam* action, the Sixth Circuit affirmed a Tennessee district court's decision to enter judgment, upon jury verdict, in favor of the relator and the Government and to remit the damages award to reflect the actual damages incurred by the Government and then to trebled the damages. While the court ruled that false statements or conduct were required to be material to the false claim to hold a person liable under the FCA, the court of appeals found that, in this case, fraudulent pension expenses submitted on Medicare cost report forms were "material" within the meaning of the False Claims Act. In assessing the whether the false statements were "material" within the meaning of the FCA, the Sixth Circuit adopted the more lenient "natural tendency" standard.

In June 1993, A+ Homecare, Inc., an owner of several home health-care facilities and agencies, sold Trevecca Home Health Services, Inc. (THHS) to Stephen H. Winters, President, CEO, and sole member of the board of directors for Medshares Management Group, Inc. (MMGI). After purchasing THHS, Winters retroactively adopted MMGI's employee retirement plan to THHS for the entire 1993 fiscal year. By retroactively adopting the plan, a deferred profit sharing and stock bonus plan, THHS was permitted to make a yearly pension contribution on behalf of its employees.

Under Medicare regulations, qualified home health agencies, such as THHS, are reimbursed through a fiscal intermediary for the reasonable costs associated with providing medical treatment to qualified Medicare beneficiaries. Under 42 C.F.R. 413.24(a), to receive reimbursement from a Medicare intermediary, the service provider "must provide adequate cost data." *Id.* The alleged FCA violations in the case at bar center on THHS's claimed pension expense for its employees in the Medicare cost reports submitted to the fiscal intermediary.

In particular, the FCA violations involved the submission of an allegedly fraudulent Interim Rate Report (IRR), a quarterly report filed with the Medicare fiscal intermediary for the reimbursement of real and estimated costs, and an allegedly fraudulent Final Cost Report, a finalized version of the previously filed IRR. A+ Homecare Inc., as former owners of THHS, was cognizant of THHS's correct employee figures for fiscal year 1993. Despite A+ Homecare's warnings, Winters calculated THHS's salary expense on fraudulently inflated employment numbers.

In October 1997, A+ Homecare filed a *qui tam* action against MMGI, THHS, and Winters. The relator alleged that the defendants knowingly included a false pension expense of $527,019.30 in an IRR and $620,952.39 in the Final Cost Report and

presented them to the Government "for payment or approval" or "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government," in violation of 31 U.S.C. 3729(a)(1) & (a)(7). The Government ultimately intervened in the matter. Subsequently, THHS and MMGI declared bankruptcy, so the district court stayed the case against those two defendants, but allowed the action to continue against Winters.

In January 2001, Winters filed a motion for summary judgment, but the court allowed the case to proceed to trial, where a jury found Winters liable under the FCA and awarded damages in the amount of $1,061,138.80. The court, pursuant to the Government's request, remitted the jury award to $602,565.43, which was then trebled under the FCA to $1,807,696.29. After the district court refused the defendant's request for a new trial, the defendant appealed the decision to the Sixth Circuit.

FCA Includes a Materiality Requirement

The Sixth Circuit affirmed the lower court decision. Pointing to decisions outside of the Sixth Circuit, the defendant maintained: "[M]ateriality is [a] prerequisite to a finding of liability under Section (a)(7) of the FCA." In turn, the defendant argued that the district court erred when it denied his summary judgment motion on the grounds that the pension expense on the Cost Report was immaterial.

Recognizing this issue as a matter of first impression, the court of appeals observed that several courts have suggested that the FCA includes a materiality requirement. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003) (*en banc*) (Jones, J. concurring), 31 FCAQR 2 (July 2003); *United States* ex rel. *Costner v. URS Consultants, Inc.*, 317 F.3d 883, 887 (8th Cir. 2003); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732–33 (7th Cir. 1999); *United States* ex rel. *Berge v. Bd. of Tr.*, 104 F.3d 1453, 1459 (4th Cir. 1997), 9 FCAQR 11 (Apr. 1997); *United States v. TDC Mgmt. Corp.*, 24 F.3d 292, 298 (D.C. Cir. 1994), 27 FCAQR 21 (July 2002). Even though the Sixth Circuit recognized that the Act does not expressly require a materiality element, the court decided to read an implied requirement into the Act. In support of its holding, the court of appeals, utilizing the three-step framework established in *United States v. Wells*, 519 U.S. 482, 490–92 (1997), analyzed the applicable statutory language, the legislative history, and the underlying purpose of the law.

First, in dissecting the Act's statutory language, the court of appeals highlighted *Neder v. United States*, 527 U.S. 1, 20 (1999), in which the Court concluded that the federal crimes of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and bank fraud, 18 U.S.C. § 1344, include a materiality requirement, even though the statutes do not expressly mention "materiality." The Supreme Court concluded that by using the term "fraud," Congress surely intended to incorporate the "well-settled meaning at common law," which included proof of materiality. *Id.* at 21–23. Thus, the Court reached its conclusion that "we must *presume* that Congress intended to incorporate materiality unless the statute otherwise dictates." *Id.* (emphasis in original) (internal quotation omitted).

Likewise, the Sixth Circuit, underlining the "false or fraudulent" language included in the FCA, extrapolated: "A false statement within a claim can only serve to make the entire claim itself fraudulent if that statement is material to the request or demand for money or property." *United States* ex rel. *Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 624 (S.D. Tex. 2001), 25 FCAQR 3 (Jan. 2002). Reaching into the Fifth Circuit casebooks, the Sixth Circuit proclaimed: "The express connection of a false statement with 'getting' a false claim paid [as drafted in 31 U.S.C. 3729(a)(2)] is tantamount to requiring that the false statement be material to the payment decision." *Southland Mgmt. Corp.*, 326 F.3d at 679 (Jones, J. concurring). Lastly, the court of appeals recited the language of the reverse FCA provision, 31 U.S.C. 3729(a)(7), which imposes FCA liability on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." The Sixth Circuit espoused, "once again, liability does not arise from merely making a false statement, but rather from making a false statement to conceal, avoid, or decrease an obligation owed to the Government. A false statement can only avoid or decrease an obligation if that statement is material to the money or property owed to the Government." Thus, the court of appeals, agreeing with the defendant, concluded that FCA text demands a materiality requirement before liability attaches.

Second, the Sixth Circuit interpreted the words "false" and "fraudulent" in light of the common-law meaning of the statutory terms. Once again quoting from *Neder*, the court of appeals observed, "The common law could not have conceived of 'fraud' without proof of materiality." *Neder*, 527 U.S. at 22. In turn, by penning the term "false or fraudulent" to modify the word "claim," the Sixth Circuit postulated that Congress most certainly intended to incorporate the "well-settled meaning of common-law fraud, including a materiality element," into the FCA.

Third, rummaging through the legislative history underlying the Act, the Sixth Circuit noted that, with regards to reverse FCA claims, the Senate report states that the FCA was amended "to provide that an individual who makes a *material misrepresentation* to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money." S.Rep. No. 99-345, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5283 (emphasis added). Therefore, the court of appeals construed Congress's intent as only attaching FCA liability to those false statements which are *material* to the fraudulent claim itself. Thus, the Sixth Circuit held that materiality is implicitly an element of liability under the FCA.

Claims Were Material Under "Natural Tendency" Standard Adopted by the Court

The Sixth Circuit then announced the standard by which materiality should be reviewed under the FCA. Borrowing, one more time, from the Supreme Court's *Neder* decision: "In general, a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder,* 527 U.S. at 16. In turn, the Sixth Circuit adopted the "natural tendency" test for FCA claims, rejecting the Eighth Circuit's more stringent "outcome

materiality" test, which requires a showing that the alleged fraudulent actions had "the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due." *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998), 15 FCAQR 15 (Oct. 1998).

Weighing the benefits of the two tests, the court noted that the "natural tendency" standard "focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered." *United States* ex rel. *Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916–17 (4th Cir. 2002), 33 FCAQR 2 (Jan. 2004). Such a standard, according to the court, is more consistent with the plain meaning and underlying purpose of the Act, which attaches liability upon *presentment* of a false or fraudulent claim, rather than *actual payment* on that claim. 31 U.S.C. § 3729(a)(1). Likewise, a Section 3720(a)(7) reverse FCA claim requires the intent to conceal, but is silent on the result. 31 U.S.C. § 3729(a)(7).

Applying the newly adopted "natural tendency" standard to the case at bar, the Sixth Circuit determined that the pension accrual on the Cost Reports were material, for it had the "natural tendency to influence or [was] capable of influencing the government's funding decision." *Harrison*, 352 F.3d at 917.

Lower Court Correctly Denied New Trial Request

The Sixth Circuit also rejected the defendant's argument that the district court erred in denying Winters's motion for a new trial. Quickly determining that there was sufficient evidence to assess liability and damages, the court then turned to the question of whether a new trial should be awarded because of juror confusion. Specifically, Winters argued that he should be entitled to a new trial because the jury was in a state of confusion, demonstrated by the fact that it awarded $1,061,138.80 in damages to the Government.

Reminding the parties of its holding in *Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 637 (6th Cir. 2000), the court of appeals ruled that a district court "may grant a new trial under Rule 59 . . . if the damages award is excessive, or if the trial was influenced by prejudice or bias, or otherwise [was] unfair to the moving party." *Id.* The court also noted that "where verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power, a motion to alter or amend a judgment, for new trial . . . if timely made, is not discretionary." *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970).

While the defendant cited *Hopkins* in support of his position that the court abused its discretion, the Sixth Circuit proclaimed that, "because there was no inconsistency between the verdict and the damages award . . . the district court did not abuse its discretion by remitting the award and denying Winters's motion for a new trial." The court further explained: "The jury was not confused as to Winters's liability under the FCA, but rather miscalculated the extent of the harm to the Government. Therefore, we conclude that *Hopkins* does not apply." Thus, the court of appeals affirmed the lower court decision.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. *ex rel.* Brooks v. Lockheed Martin Corp., 2005 WL 841997 (D. Md. Mar. 22, 2005)

In an FCA *qui tam* action, a Maryland district court granted the defendants' motion to dismiss, ruling the relator failed to satisfy the particularity requirement of Fed. R. Civ. P. 9(b). The court, in assessing the allegations raised in the relator's complaint, stated that the relator failed to provide the necessary details regarding the allegedly fraudulent claims. Instead of identifying any specific fraudulent claims that were actually submitted to the Government, the relators, according to the court, "relie[d] on conclusory allegations of fraudulent invoices," failing to identify the time periods or subject matter of the invoices, much less the person who submitted the allegedly fraudulent invoices. The court also faulted the relator's complaint for failing to apprize each defendant of the specific nature of its alleged participation in the fraud, instead "lump[ing] all of the Defendants together without identifying the person, or the corporation, making the alleged misrepresentations." While the court granted the defendants' motion to dismiss, the court did grant the relator twenty-one days to file an amended complaint that complied with Rule 9(b).

U.S. *ex rel.* El-Amin v. The George Washington University, 2005 WL 485971 (D.D.C. Feb. 25, 2005)

A District of Columbia district court issued an order granting in part and denying in part a defendant-hospital's motion to dismiss in an FCA *qui tam* action. While ruling that the *qui tam* relators had standing to bring a case where the relators suffered no injury in fact, the district court dismissed claims involving employees not specifically named in the relators' complaint. The court ruled that Fed. R. Civ. P. 9(b) requires the particular names of those parties making actual representations to the Government unless that information is entirely within the defendant's control.

Four former George Washington University Certified Registered Nurse Anesthetists (CRNAs) filed a *qui tam* **action against the University, alleging that, from 1989 to 1995, the University violated the Act by submitting false or fraudulent Medicare reimbursement claims. Specifically, the relators alleged that the University's hospital submitted upcoded claims for services provided by hospital anesthesiologists.**

The Medicare regulations distinguish between "physician services" and "medically supervised" services, providing a higher reimbursement rate for the former. The regula-

tions also restrict anesthesiologists seeking reimbursement to involvement in no more than four procedures at a time. According to the relators, the University regularly submitted reimbursement claims for "physician services," but only "medically supervised" services were actually provided. They also alleged that individual University anesthesiologists submitted claims that covered more than four procedures at a given time.

The University, filing a motion to dismiss, urged the court to dismiss claims in the relators' complaint, which charge the University with falsely billed procedures in which anesthesiologists directed others in the provision of anesthesia as "personally performed." The defendant also sought dismissal of all claims based on the conduct of *non*-named anesthesiologists. Lastly, the defendant requested dismissal of all claims based on fraudulent misreporting of the number of concurrently conducted anesthesiology procedures.

The district court denied the motion to dismiss with respect to the personal performance claims, but granted the motion with respect to the non-named anesthesiologists and the false concurrency claims.

FCA Relators Had Standing

The district court, rejecting the defendant's bases for dismissing the personal performance claims, held that the relators had standing to assert the personal performance claims, even though the relators suffered no injury in fact. The court observed that, in *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens*, 529 U.S. 765, 771–78 (2000), 19 FCAQR 1 (July 2000), the Supreme Court was faced with the issue of whether the FCA *qui tam* provision comported with the injury-in-fact requirement where the relator asserts no direct injury to himself. According to *Stevens*, "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim" and that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id*. at 773. Thus, the district court quoted, "the United States' injury in fact suffices to confer standing" on relators. *Id*. at 774. Lastly, and perhaps most relevant to the case at bar, the district court noted that a violation of the laws of the United States causes "injury to its sovereignty." *Id*. at 771. Here, because the relators allege a violation of the laws of the United States, the court determined that the injury in fact requirement posed no barrier to their suit.

Rule 9(b) Requires Names of Fraudulent Actors

The district court, concluding that the allegations failed to satisfy the Rule 9(b) particularity requirement, dismissed the claims involving non-named anesthesiologists. The relators' third amended complaint specifically named fifteen anesthesiologists, but the additional catchall "among others" failed to name the other people allegedly involved in the fraudulent activity.

The court stated that the main purpose of Rule 9(b) was to ensure that the defendants had adequate notice to prepare their defense; the court agreed with the defendant that this purpose was not satisfied by the relators' complaint. Indeed, the

court was only able to point to one case where specificity regarding the identities of individual actors was not required, *United States* ex rel. *McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114 (D.D.C. 2003), 30 FCAQR 45 (Apr. 2003). In *McCready*, the relators alleged a hospital and a healthcare management intermediary violated the FCA by improperly coding provider services and by extending inpatient hospital stays. In that case, the court rejected the defendants' Rule 9(b) motion, even though the complaint alleged that doctors and "unkown Does" participated in the fraudulent scheme.

In the case at bar, the court distinguished *McCready*. According to the court, "it is distinguishable from he case at hand because it is unclear what role the 'unknown Does' were alleged to have played in the purported schemes." The court placed a finer point on the distinction: "While a claimant cannot reasonably be expected to include the identity of every actor who plays an administrative role in a scheme, the law still requires a complaint to plead the identities of the parties making actual representations unless that information is entirely within the defendant's control." In this matter, a case in which the relators had specifically mentioned in an earlier hearing that the *named* doctors were the sole source of the action, the court ruled that Rule 9(b) had not been met with regards to the *non*-named anesthesiologists.

In a detailed analysis of the controlling Medicare regulations dealing with concurrency claims, the court ruled that the allegations of false concurrency claims failed to satisfy the Rule 9(b) particularity requirement. Furthermore, noting that the court had previously allowed the relators two prior occasions to satisfy Rule 9(b), the court refused to grant leave to amend.

Thus, the district court ordered the dismissal of claims based on the actions of unnamed anesthesiologists and allegations of false concurrency reporting.

U.S. *ex rel.* King v. Alcon Laboratories, Inc., 2005 WL 20372 (N.D. Tex. Jan. 4, 2005)

A Texas district court, granting a defendants' motion to dismiss a relator's complaint, ruled that the complaint failed to satisfy Rule 9(b). The court, citing *United States* ex rel. *Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (stating that evidence of an actual false claim is the "*sine qua non* of a False Claims Act violation"), 27 FCAQR 14 (July 2002), concluded that the relator neglected to identify any actual false claims submitted to the Government, as required under the FCA. The court, highlighting the relator's two previous attempts to satisfy Rule 9(b)'s particularity requirement, concluded that it would be futile to allow another opportunity to amend.

B. Rule 26(b) Discovery Limits and Scope

A District of Columbia district court, granting in part and denying in part a *qui tam* relator's request for a scheduling order, held that the relator who brought the action based on a claim that defendant-contractors falsely certified their eligibility to participate in Section 8(a) program of the Small Business Administration as small, disadvantaged businesses would not be permitted additional discovery in response to the defendant's motion for partial summary judgment in order to seek information regarding the defendants' "small business" status under other federal regulations, as such information was not relevant to claims and defenses raised in the suit. Pointing to the language of Fed. R. Civ. P. 26(b)(1), the court noted that a party is only entitled to additional discovery if the information sought is relevant to the claims or defenses asserted in the case.

In this case, the court determined that the relator's claims were only based on the defendants' alleged false representations of their Section 8(a) eligibility, not their status as a "small business." Thus, the court ruled that, unless the relator moved to file an amended complaint that included these additional allegations, the relator could not seek information regarding the defendants' "small business" status.

C. Rule 60(b)(6) Relief from Final Judgment

U.S. *ex rel.* Garibaldi v. Orleans Parish School Board, 397 F.3d 334 (5th Cir. Jan. 17, 2005)

The Fifth Circuit, reversing a Louisiana district court's decision to re-enter an earlier verdict judgment against the defendant, held that the circumstances of the case were not extraordinary and did not justify reopening a final judgment. The court of appeals ruled that a subsequent change in the case law after entry of judgment does not constitute "exceptional circumstances" under Fed. R. Civ. P. 60(b)(6) and is not sufficient grounds for relief from final judgment.

William Garibaldi and Carlos Samuel, the suspended director of the Orleans Parish School Board's audit department and a discharged auditor, brought a *qui tam* action against the board, alleging that rates charged to federal programs for federal unemployment insurance violated the False Claims Act. A district court jury returned a verdict in favor of the plaintiffs for $22,800,000, plus $7,850,000 for false claims. Subsequently, the district court issued an Amended Judgment reducing the award to $21,899,856, plus $100,000 for false claims. The relators were awarded 12.5 percent of the proceeds.

The school board appealed the decision. The Fifth Circuit, ruling that the board as a local government unit was not subject to FCA liability, vacated the judgment and rendered judgment against the plaintiffs. *United States* ex rel. *Garibaldi,* 244 F.3d 486 (5th Cir. 2001). The relators' certiorari petition to the Supreme Court was denied.

On March 10, 2003, the U.S. Supreme Court held that counties are subject to liability under the FCA. *United States* ex rel. *Chandler v. Cook County*, 538 U.S. 119 (2003), 30 FCAQR 1 (Apr. 2003). Notably, the Supreme Court's *Chandler* decision referenced the Fifth Circuit's *Garibaldi* decision, along with other contrasting decisions, as proof that a split existed among the circuits.

On May 12, 2003, the relators in the case at bar filed a Rule 60(b)(6) motion for relief from the final judgment entered by the Fifth Circuit. The lower court, granting the motion and re-entering the original verdict against the school board, concluded that the change in decisional law impacted by the Supreme Court's *Chandler* decision created extraordinary circumstances justifying relief the Fifth Circuit's earlier dismissal. According to the lower court, the Fifth Circuit's earlier *Garibaldi* decision was an "integral part" of the Supreme Court's decision-making process, necessitating the court to grant the relators' Rule 60(b)(6) motion. The school board appealed.

Necessary "Extraordinary Circumstances" Not Present for Relief

The Fifth Circuit reversed the district court's decision. The court of appeals, dissecting the language of Fed. R. Civ. P. 60(b)(6) and borrowing from *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747–48 (5th Cir. 1995), ruled that in the absence of "extraordinary circumstances," a change in controlling decisional law after the finality of a judgment does not warrant reopening the judgment. The Fifth Circuit determined that the existing circumstances were not "extraordinary," for "this case is not materially

distinguishable from the 'ordinary' case in which a subsequent change in controlling law is not held to justify relief from a prior final judgment under Rule 60(b)(6)."

Conversely, the lower court had concluded that "extraordinary circumstances" were created when the Supreme Court, in *Chandler*, held that local governments are "persons" subject to FCA liability. The district court noted that the Supreme Court had specifically singled out the *Garibaldi* decision as being in direct conflict with another circuit court's decision, ultimately producing a split in the circuits that necessitated the Court's *Chandler* decision. Thus, the district court reasoned, "[b]ut for *Garibaldi*, there would not have been the two to one split" giving rise to the *Chandler* "grant of writs," and "the fact that these . . . cases were all under consideration at substantially the same time . . . played a role" as "an integral part" in the "[Supreme Court's] decision making process." Thus, the lower court ruled that the circumstances of the matter at bar fell within the "extraordinary circumstances" recognized by *Batts v. Tow-Motor Forklift Co.*, as justifying Rule 60(b)(6) relief when "a subsequent court decision is closely related to the case in question, such as where the Supreme Court resolves a conflict between another circuit ruling and that case occurs." *Batts*, 66 F.3d at 748, n.6.

The Fifth Circuit, however, ruled that the case at bar was not atypical of the many instances in which the Supreme Court renders a decision resolving a split in the circuits. Indeed, as the court of appeals pointed out, "After almost every resolution of a circuit conflict there is a losing litigant somewhere who could argue similarly for reopening his case because it was decided erroneously in light of the subsequent Supreme Court decision."

The Fifth Circuit quickly downplayed the statement from *Batts* that relief from judgment may be appropriate where the subsequent decision is closely related to the judgment from which relief is sought, "such as where the Supreme Court resolves a conflict between another circuit ruling and that case." The court of appeals labeled the statement as mere dicta, lacking the necessary legal weight to control the outcome of the case at bar. Furthermore, the Fifth Circuit noted that a circuit split existed even without the earlier *Garibaldi* decision, so the decision was not essential to the Supreme Court's resolutory *Chandler* decision.

Lastly, the court of appeals warned: "[A]n extraordinary situation justifying relief from judgment is not created every time the Supreme Court lists a case as one that merely contributed to a split between the circuits. This factor should not be dispositive of a Rule 60(b)(6) motion." Reiterating its language from an earlier decision, the court emphasized: "[T]he discretion of the district court is not unbounded, and must be exercised in light of the balance that is struck by Rule 60(b)(6) between the desideratum of finality and the demands of justice." *Seven Eleves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981). In this particular case, the court of appeals concluded that, in this particular case, the principle of finality reigned supreme. Thus, the Fifth Circuit reversed the district court's decision.

LITIGATION DEVELOPMENTS

<u>United States v. Parkins</u>, 2005 WL 348355 (4th Cir. Feb. 10, 2005)

The Fourth Circuit, in an unpublished *per curiam* decision, affirmed a West Virginia district court's decision granting summary judgment in favor of the Government in an FCA action. The court, refusing to elaborate into its rationale, merely cited the lower court's reasoning. *See United States v. Parkins,* No. CA-02-1094-2 (S.D. W. Va. Feb. 20, 2004; July 1, 2004).

<u>U.S. *ex rel.* Prevensik v. The United States Patent & Trademark Office</u>, 2005 WL 691875 (D.D.C. Mar. 24, 2005)

In an FCA *qui tam* action, a District of Columbia district court granted the defendants' unopposed motion for a change of venue. The court ordered the case transferred to the United States District Court for the Eastern District of Virginia.

<u>U.S. *ex rel.* Urbanek v. Quest Diagnostics Incorporated</u>, 2005 WL 78931 (E.D. Pa. Jan. 12, 2005)

In an FCA *qui tam* action, a Pennsylvania district court granted the defendant's motion for summary judgment to which no response had been filed. Pointing to Local Rule of Civil Procedure 7.1(c), the district court observed that it could accept as true all material facts asserted and properly supported as referenced in the summary judgment motion. The court granted the motion after confirming that the plaintiffs had failed to identify a single false payment under the FCA. Thus, the district court dismissed the relators' complaint with prejudice.

Interventions and Suits Filed/Unsealed

JANUARY 1–MARCH 31, 2005

***U.S.* ex rel. *Health Outcomes Technologies v. Hallmark Health System Inc.*, (D. Mass.)**

In December 2004, the court ordered all documents filed in the Government's FCA case unsealed, finding that unsealing the documents in the action was necessary for the defendant-hospitals to prepare answers and to defend themselves. This *qui tam* suit was originally filed in 1996.

***U.S.* ex rel. *Piacentile v. Beverly Enterprises, Inc.*, (W.D. Ark.)**

In February 2005, the court unsealed the *qui tam* complaint of New Jersey physician Joseph Piacentile. Piacentile's complaint alleges that nursing home operators Beverly Enterprises Inc., Hillrom Co., National Patient Care Systems, and Hanger Orthopedic group received millions of dollars by fraudulently billing Medicare and other federal Health Care programs for services, including prosthetics, orthotics, and fluidized therapy beds. Piacentile also contends that the defendants violated the Medicare Anti-Kickback Statute and Medicare Self-Referral Statute. Joseph Paul Smith (Fayetville, AR) represents the relator. The Government has not yet decided whether to intervene in the lawsuit.

***Blanton v. Biogen Idec U.S. Corp.*, (D.D.C.)**

In February 2005, former employee Lisa Blanton filed a complaint in the U.S. District Court for the District of Columbia, alleging that Biogen Idec U.S. Corp. gave physicians drug pricing discounts and drug samples in violation of the Medicare anti-kickback statute. In particular, Blanton alleges that Biogen, in an effort to "jump-start" the sales of some drugs, gave physicians free samples and discounted the price of its drugs to physicians not reimbursed by Medicare or Medicaid. Blanton also alleges that she was wrongfully terminated, in violation of 31 U.S.C. 3730(h).

***U.S. v. Fleming*, (S.D. Tex.)**

In March, 2005, the DOJ filed a civil suit seeking forfeiture of more than $1.8 million allegedly obtained by Rhonda Fleming, the owner of a medical supply and billing company, in a Medicare fraud scheme. The Government alleges that Fleming billed Medicare in excess of $3.8 million for services and equipment that were never delivered.

***U.S. v. Kadir*, (E.D. Mo.)**

In March 2005, the DOJ announced that it had filed a False Claims Act action against Saadoon Kadir, MD, and North County Diagnostic and Interventional Radiology, Inc. for fraudulently billing Medicare. The Government alleges that Dr. Kadir and North County Radiology submitted and conspired to submit false and fraudulent billings to Medicare for dialysis fistula maintenance. The Government, alleging it suffered damages in excess of $250,000, is seeking equitable relief, damages, and penalties under the False Claims Act.

Judgments and Settlements

JANUARY 1–MARCH 31, 2005

U.S. ex rel. *Issa v. Cleveland Clinic Foundation*, (S.D. Fla)

In January 2005, the DOJ announced that Cleveland Clinic Florida Hospital had agreed to pay **$2.75 million** to settle allegations of Medicare fraud. The Government alleged that, from 1993 to 2001, Cleveland Clinic billed Medicare for patient observation services that did not qualify for reimbursement. Former employee Sherri Issa filed this *qui tam* suit in 1999. The relator's share was $500,000, or approximately 19 percent. Joseph Pappacoda (Fort Lauderdale) represented the relator.

U.S. v. Novartis Nutrition Corp., (S.D. Ill.)

In February 2005, the DOJ announced that pharmaceutical manufacturer Novartis Nutrition Corp. (NNC), a wholly owned subsidiary of Novartis Finance Corporation, had agreed to pay **$44.7 million** to settle allegations of fraud in the marketing of its feeding tube nutritional products. The government alleged that NNC caused others to submit false claims for enteral pumps and agreed to provide enteral nutrition infusion pumps to suppliers for free in exchange for the suppliers' agreements to buy related enteral therapy products from NNC. As part of the settlement agreement, NNC has entered into a five-year corporate integrity agreement to reform the sales and marketing practices of its enteral feeding operations. The FBI, the USPS, and HHS OIG investigated the matter. Assistant U.S. Attorney Gerald Burke represented the Government.

[Editor's Note: In addition to the civil settlement by NNC, Novartis Finance Corporation subsidiary OPI Properties, Inc. agreed to a criminal settlement and fine of $4.5 million for felony audit obstruction charges related to the same matter. Assistant U.S. Attorney Andrew Lay represented the Government in the criminal aspect of the case.]

U.S. v. Florida International University, (S.D.Fla)

In February 2005, the DOJ announced that Florida International University (FIU) had agreed to pay **$11.5 million** to settle allegations of overbilling the Department of Energy. The Government alleged that, from 1995 to 2003, FIU mischarged costs and overbilled the DOE under several contracts and grants dealing with testing and developing environmental technologies in the Hemispheric Center for Environmental Technology. DOE OIG and HHS OIG investigated the matter.

U.S. v. L-C Associates, (D. Conn.)

In February 2005, the DOJ announced that L-C Associates and its owner Frank Chuang had agreed to pay **$3.4 million** to settle allegations of fraud on Federal Highway Administration contracts. The Government alleged that L-C inflated the corporation's overhead rate by including on corporate payrolls for people who were not, in fact, employees of the corporation. DOT OIG, IRS OIG, and the FBI investigated the matter. Assistant U.S. Attorneys William Nardini, Maria Kahn, and Alan Soloway represented the Government.

[Editor's note: In addition to the civil settlement, Frank Chuang pled guilty to two counts under the criminal False Claims Act and one count of tax evasion arising out of the same matter.]

***U.S. v. University of Pennsylvania*, (E.D. Pa.)**

In February 2005, DOJ announced that the University of Pennsylvania and the Children's National Medical Center had agreed to pay **$1.03 million** to settle claims of false statements and claims to the NIH, FDA, and Institutional Review Boards. The Government alleged that a gene therapy study conducted by the defendants from July 1998 to September 1999 that received funding from the NIH and the FDA had produced toxicities in humans that should have resulted in study termination. Additionally, the defendants' consent forms and processes failed to disclose all anticipated toxicities. The settlement agreement also places restrictive controls on the clinical research activities of the three named investigators, Drs. James Wilson, Mark Batshaw, and Steven Rapier. Associate U.S. Attorney James Sheehan and Assistant U.S. Attorney David Hoffman represented the Government.

***U.S.* ex rel*. Salzman v. Fresno County*, (E.D. Cal.)**

In February 2005, the DOJ announced that Fresno County and the Fresno County Human Health System had agreed to pay **$376,000** to settle allegations of Medicare fraud. The Government alleged that Fresno County billed Medicare for mental health services provided by caseworkers and other non-physician staff as though physicians had provided those services. Psychiatrists Dr. Barnett Salzman and Dr. Jerome Lance filed this *qui tam* action in August 2001. The relators' shares have not yet been determined. HHS OIG investigated the matter. Assistant U.S. Attorney Kirk Sherriff represented the Government.

***U.S. v. Professional Service Industries, Inc.*, (D. Del.)**

In February 2005, the DOJ announced that Professional Service Industries, Inc. (PSI) had agreed to pay **$260,000** to settle allegations of fraud against the Department of Transportation. The Government alleged that, from 1994 to 1997, PSI contracted to provide consulting services on construction projects, then proceeded to bill the Government for testing that never took place, for the work of "certified welding inspectors" who were not certified, and for inflated labor hours. DOT OIG investigated the matter. Assistant U.S. Attorneys Rudolph Contreras and Patricia Hannigan represented the Government.

***U.S.* ex rel *Robinson v. Northrop Grumman Corp.*, (N.D. Ill.)**

In March 2005, the DOJ announced that Northrop Grumman Corporation had agreed to pay **$62 million** to settle allegations of fraud in connection with multiple defense contracts. The Government alleged that Northrop fraudulently accounted for material purportedly used in performance of multiple defense contracts and fraudulently inflat-

ed costs of the SP-3 radar jamming program for the B-2 Stealth Bomber. Former test engineer Rex Robinson and auditor James Holzrichter filed this *qui tam* suit in 1989. The Government intervened in October 2001. The relators' share was $12.4 million or about 20 percent. Michael Behn of Futterman & Howard (Chicago) represented the relators. Assistant U.S. Attorney Linda Wawzenski represented the Government.

U.S. v. Harlan Sprague Dawley Inc., **(D. Md.)**

In March 2005, the DOJ announced that Harlan Sprague Dawley, Inc. had agreed to pay **$7.2 million** to settle claims that it sold mice to the National Institutes of Health that did not meet federal researchers' specifications. The Government alleged that the company failed to disclose repeated tests showing that a rodent strain it provided under contracts with the National Institute on Aging had been compromised. The settlement reimburses expenses for feeding and housing the mice, as well as the cost of government-funded research that was "negatively affected" by the use of the mice and damages the Government might have obtained had it filed a lawsuit against the company. As part of the settlement, the U.S. Attorneys' office agreed not to file suit under the False Claims Act.

U.S. v. Arthur D. Little, **(D. Mass.)**

In March 2005, the DOJ announced that Arthur D. Little (ADL), now known in Chapter 11 Proceedings as Dehon, Inc., has agreed to pay **$6.5 million** to settle claims of fraudulent overhead charges on various government contracts. The Government alleged that ADL caused false and inflated claims to be submitted pursuant to its government contracts by using a rate based upon ADL's higher overhead costs for its commercial lines of work, as compared to its government work, in violation of federal regulations and applicable accounting standards. DCIS, EPA OIG, DOT OIG, and the FBI investigated the matter. Assistant U.S. Attorney Sara Bloom represented the Government.

U.S. v. Gaetano Calise, **(D.R.I)**

In March 2005, the DOJ announced that Rhode Island podiatrist Dr. Gaetano Calise had agreed to pay **$200,000** to settle claims of Medicare fraud. The Government alleged that, from January 1998 to September 2004, Dr. Calise had fraudulently billed Medicare for services to nursing home patients that he never provided.

U.S. v. Stickney, **(D. Vt.)**

In March 2005, it was reported that Dr. Peter Stickney had agreed to pay **$126,000** to settle allegations of Medicare fraud. The government alleged that, from January 1996 to September 2001, Stickney submitted improper claims for payment to Medicare for services that were inadequately documented or otherwise unsupported and thus deemed medically unnecessary. Dr. Stickney fully cooperated with the investigation and has taken steps to remedy his billing problems, according to the DOJ.

U.S. v. PharMerica Inc.

In March 2005, the HHS OIG announced that PharMerica Inc. had agreed to pay **$6 million** to resolve allegations it paid illegal kickbacks in exchange for Medicare and Medicaid referrals. The HHS OIG charged that PharMerica paid $7.2 million for Hollins Manor I LLC in Roanoke, VA, in 1997 in return for a commitment from the seller to refer its long term care Medicare and Medicaid business for seven years. HHS OIG said the purchase price was grossly inflated considering the small facility and a nearly nonexistent operating history. The settlement, which includes a five-year corporate integrity agreement, is the OIG's largest kickback civil monetary penalty settlement.

[Editor's note: In actuality, this case, which began as a qui tam suit, represents a remarkable collaborative effort between government and qui tam attorneys. Candace McCall, the relator's counsel, documents the complete story in the "Lessons from the Frontlines" section. As for the qui tam portion, there was a settlement for $4.25 million, and the relator's share was 20.5 percent. The overall case settled for $10.1 million, plus attorney fees, expenses, and costs. In addition, there were two criminal convictions.]

***U.S. v. West Coast Medical Supply Corp.*, (D. Ore.)**

In March 2005, the DOJ announced that Portland-based West Coast Medical Supply Corp. had agreed to pay **$2.07 million** to settle allegations of Medicare fraud. The Government alleged that West Coast, a durable medical equipment supplier, repeatedly filed claims for equipment it never actually provided.

[Editor's Note: Efiong Okon, president and owner of West Coast, pled guilty to kickback charges for his offer to pay cash remuneration to three persons in order to induce them to refer individuals to his company.]

***U.S. v. University of Medicine and Dentistry of New Jersey*, (D.N.J.)**

In March 2005, the DOJ announced that the University of Medicine and Dentistry of New Jersey had agreed to pay **$1.4 million** to settle claims that faculty doctors overbilled for patient services. The Government alleged that, between July 1995 and June 1996, faculty doctors billed Medicare for services, in which the physicians were not actually present. Assistant U.S. Attorney Stuart Minkowitz represented the Government.

***U.S.* ex rel*. Moore v. Mid-West Podiatry and Associates*, (E.D. Mo.)**

In March 2005, the DOJ announced that Mid-West Podiatry and Associates had agreed to pay **$575,000** to settle allegations of Medicare fraud. The Government alleged that, from 1995 to 2003, Mid-West Podiatry used a computer system that automatically generated information and caused claims to be upcoded for greater reimbursement. The relator was a former podiatrist employed by Midwest. The relator's share has not yet been determined. Assistant U.S. Attorney Joseph Landolt represented the Government.

***U.S.* ex rel. *Gorumba v. Seattle Cancer Treatment and Wellness Center*, (W.D. Wash)**

In March 2005, DOJ announced that the Seattle Cancer Treatment and Wellness Center had agreed to pay **$478,000** to settle claims of Medicare fraud. The Government alleged that, from September 2001 to June 2002, physicians at the cancer treatment center upcoded evaluation and management services and billed take-home drugs as infusions. Former Physician's Assistant Jeffrey Gorumba brought this *qui tam* suit in 2002. The relator's share was $95,600, or 20 percent. Stephen Teller of Teller & Associates (Seattle) represented the relator. HHS OIG and DCIS investigated the matter. Assistant U.S. Attorney Peter Winn represented the Government.

***U.S. v. Family Medical Management Services, Inc.*, (D. Ore.)**

In March 2005, the DOJ announced that Family Medical Management Services, Inc. (FMMS) had agreed to pay **$400,000** to settle claims of Medicare and TRICARE fraud. The Government alleged that FMMS submitted claims to Medicare certifying that its medical director had met with and operated on patients when, in fact, nurse practitioners performed the procedures.

***U.S.* ex rel. *Quaicoe v. Center for Pain Management, PLLC*, (S.D. Tex.)**

In March 2005, it was reported that the Center for Pain Management, PLLC (CPM) and its primary treating physician Tajul Chowdhury had agreed to pay **$180,000** to settle allegations of Medicare fraud. The Government alleged that CPM was using Medicaid and Medicare provider numbers that belonged to its anesthesiologists without their permission and that Dr. Chowdhury was billing for procedures he was not qualified to perform and did not perform. The two former anesthesiologists whose Medicare provider numbers were used, Sannichie Quaicoe, M.D. and Shahid Rashid, M.D., filed this *qui tam* suit. The relators were represented by Tim McInnis and Brian Kenney.

***U.S.* ex rel. *DeNino v. Poehlman*, (D. Vt.)**

In April 2005, the DOJ announced that former University of Vermont professor of medicine Eric Poehlman, Ph.D. had agreed to pay **$180,000** to settle allegations of fraud involving federal research grants. The Government alleged that, from 1992 to 2002, Poehlman falsified and fabricated research data in federal grant applications and academic articles. Former research assistant Walter DeNino filed this *qui tam* suit. Phillip Michael of Goodkind, Labaton, Rudoff & Sucharow, LLP (New York) represented the relator. The relator's share was 12 percent, or $21,600. Assistant U.S. Attorney Carol Shea represented the Government.

[Editor's Note: In addition to the civil settlement, Dr. Poehlman pled guilty to making material false statements in a research grant application to the NIH.]

Legislative Update

TAFEF Comments on Medicare Modernization Act Final Rules

TAFEF COMMENTS ON MEDICARE MODERNIZATION ACT FINAL RULES

Amy Wilken, Associate Director

In the past couple of years TAFEF has filed comments on a number of proposed and interim CMS regulations involving, among other things, record keeping requirements for drug manufacturers and health plans. In December we reported that CMS had finalized a 10-year record-keeping requirement for manufacturers participating in the Medicaid drug rebate program. 69 Fed. Reg. 68815-01, 2004 WL 2680624 (F.R.).

On January 28, CMS published the final rules implementing the Medicare Modernization Act. 70 Fed. Reg. 4194 and 4588. We are pleased to report that CMS also has adopted TAFEF's recommendation to extend the record retention requirement for Part D program sponsors and Medicare Advantage program providers.

MEDICARE PART D PROGRAM

Under the new Medicare Part D program, Medicare beneficiaries will have the option of paying a monthly premium and enrolling in a private plan that offers prescription drug coverage. Medicare will make payments to participating plans on behalf of the beneficiaries who choose to enroll. In addition, Medicare will provide subsidies to employers that sponsor qualified retiree prescription drug plans.

TAFEF urged that the record retention requirement for Part D and retiree drug plan sponsors be extended from a proposed 6 to 10 years, to better allow for the discovery and investigation of FCA violations. CMS adopted TAFEF's recommendation as to Part D plan sponsors, 42 CFR 505(d) and (e)(4) at 70 Fed. Reg. 4556–4557, noting that FCA enforcement was the reason for the change and citing the Medicaid rebate record retention rules as precedent.

CMS did not adopt TAFEF's recommendation as to retiree drug plan sponsors. It did, however, require the retiree drug plan sponsor to maintain the pertinent records "longer than 6 years if it knows or should know that the records are the subject of an ongoing investigation, litigation, or negotiation involving civil, administrative, or criminal liability. 42 CFR 423.888(d)(2) at 70 Fed. Reg. 4580.

MEDICARE ADVANTAGE PROGRAM

The Medicare Advantage program will replace the current Medicare + Choice program under Part C of Medicare. Under the new MA program, Medicare payment rates to private health plans will be increased in an effort to increase the number of beneficiaries who receive coverage through these plans.

CMS adopted TAFEF's recommendation that MA organizations must retain records for 10 years from the last contracting period or audit, whichever is latest. 42 CFR 422.504(e)(4) at 70 Fed. Reg. 4737.

OTHER TAFEF RECOMMENDATIONS

TAFEF made a number of other recommendations aimed at ensuring that the FCA may be utilized to the fullest in protecting the integrity of these programs. These included recommendations requiring the certification of data that determine Medicare payments and strengthening compliance plans.

While CMS did not adopt these recommendations, it did not weaken the rules either. To read TAFEF's comments in their entirety, go to www.taf.org/comments.htm.

Developments in the Law

The Jury Is Still Out: Taxability of Contingency Fees Paid to Relator's Counsel

THE JURY IS STILL OUT: Taxability of Contingency Fees Paid to Relator's Counsel

Joseph E. B. White

With the recent enactment of the American Jobs Creation Act of 2004 (AJCA),[1] future False Claims Act relators will no longer face the double taxation issue that has plagued *qui tam* settlements. Specifically, Section 703 of the AJCA, titled Civil Rights Tax Relief, amends Section 62(a) of the Code, allowing for above the line deduction of "attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving . . . a claim of a violation of (the False Claims Act)."[2] The result is that, for future FCA settlements, relators can deduct their attorney's fees from their gross income.[3] Unfortunately, this tax option is only available for FCA claims settled after October 23, 2004, the effective date of the AJCA.[4] For *qui tam* settlements inked before this date, the double taxation issue remains an open issue, particularly after the recent United States Supreme Court decision *Commissioner of Internal Revenue v. Banks*.[5]

Win or lose, the recent *Banks* decision was finally going to resolve the split in the circuits on the issue of the taxability of contingency fees paid to relator's counsel. On January 24, 2005, the Court released its decision to the world, but the jury remains out on the FCA issue. While Court ruled that the contingent portion of lawsuit settlements and awards are taxable to the client even if the money goes directly to the attorney, the Court explicitly refused to extend the ruling to *qui tam* relators.[6] Pointing to the arguments raised in the Taxpayers Against Fraud Education Fund (TAFEF) *amicus curiae* brief,[7] the Court made a blanket statement that the holding does not apply to the "instance where a relator pursues a claim on behalf of the United States."[8]

So, with the Supreme Court taking a pass on the issue and the AJCA only applying to settlements after a certain date, some relators are now rummaging through the existing case law to find support for their position. The good news is that, while the Court did not broadcast an ironclad endorsement for the relator's position, the judicial nod to the TAFEF brief offers some comfort and direction for future litigants. Given the level of interest and confusion surrounding this issue, TAFEF has republished the section of the *amicus curiae* brief cited by the Supreme Court:

1. American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. (2004).
2. *Id.*
3. *See* 26 U.S.C. § 62(a) (2000).
4. *See* H.R. 4520 at § 703.
5. 125 S.Ct. 826 (2005).
6. *Id.* at 829.
7. *Id.*
8. *Id.*

I. UNDER NO CIRCUMSTANCES SHOULD THE CONTINGENCY FEE PORTION OF A *QUI TAM* AWARD BE INCLUDED IN THE TAXABLE INCOME OF A FALSE CLAIMS ACT RELATOR

Even if the Court concludes that plaintiffs such as Banks and Banaitis must pay tax on contingency fee amounts paid to their lawyers, *amicus curiae* TAF respectfully submits that the Court should explicitly recognize that the taxation of contingency fee payments made to lawyers representing FCA relators presents an entirely distinct question, not presented in this appeal. Furthermore, as explained below, FCA relators should not be taxed on contingency fee payments.

A. An FCA Relator Does Not Advance His Own Cause of Action, But Is Merely an Assignee of the Government's FCA Claim

The Government's central argument in these cases proceeds from the following premise:

> There is no doubt that, under any view of state law, respondents were the sole plaintiffs in their causes of action and would have been required to include the entire taxable proceeds from those causes of action in their gross income if the proceeds had been paid directly to them. Indeed, by their nature, the basis of respondents' claims was the recovery of lost income.
>
> Pet. Br. at 16. Given that respondents were the "sole plaintiffs" seeking "the recovery of lost income,"—they are the ones, according to the Government, who "actually earned the income," and hence must "remain[] taxable" on that income even though it is paid to their lawyers. Pet. Br. at 16 (emphasis added) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 604 (1948)).

This premise is wholly inapposite to the *qui tam* context. An FCA relator is never "the sole plaintiff" and could never possibly be expected to include "the entire taxable proceeds" in his gross income. Unlike the typical plaintiff advancing his own cause of action, the *qui tam* plaintiff is advancing a cause of action on behalf of the United States Government. *See, e.g.*, 31 U.S.C. § 3730(b)(1) (2004) (authorizing *qui tam* action "in the name of the Government"). Indeed, in upholding the relator's Article III standing to bring a *qui tam* action, this Court relied specifically upon "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 773 (2000). In so doing, the Court made clear that the *qui tam* relator is not advancing his own cause of action based upon his own injury, but is instead advancing the Government's cause of action based upon its injury. *See id*. at 774 (it is "the United States' injury in fact [that] suffices to confer standing on [the *qui tam* relator]").

A *qui tam* relator's sole interest in an FCA suit is the statutory bounty, which ranges from 15 to 25 percent of any damages recovery for cases in which the Government intervenes, and from 25 to 30 percent for cases in which the Government does not intervene. 31 U.S.C. § 3730(d) (2004). These amounts represent assignments of the Government's damages; the relator is merely an assignee of these amounts, and therefore does not "earn" them or claim entitlement to them in the same way that he could an award of his own damages. Even if the Government elects not to intervene, so that the relator and his lawyer do all of the work required to uncover the fraud and to successfully litigate the claim to judgment, the relator clearly could not be taxed on the entire amount of that judgment, since it belongs to, and will be paid over to, the Government. Indeed, requiring a *qui tam* relator to include in his taxable income the "entire proceeds" of an FCA recovery would nullify the financial incentives underlying the *qui tam* provisions, for the tax bill on the entire recovery would substantially exceed the bounty.

Moreover, Congress explicitly provided that the amount of the *qui tam* bounty should vary depending upon the relator's contribution to a successful outcome. 31 U.S.C. § 3730(d). Since the relator's contribution to the ultimate outcome will depend in large part on the work and skill of the relator's lawyer, in a very real sense the *qui tam* bounty is "earned" to that extent by the lawyer, and not by the relator. Indeed, by mandating a higher bounty in cases in which the Government declines to intervene, Congress recognized the added value in such cases of the skill and hard work of the relator's lawyer, who therefore can be understood to have solely "earned" that amount. In contrast to the typical case of a plaintiff advancing his own cause of action, in the FCA context it is simply not possible to assert that the relator is the party who "earns" or "is the source of" the ultimate damage recovery.

In addition, unlike the typical plaintiff (and unlike respondents here), the *qui tam* relator is not seeking "the recovery of lost income." Pet. Br. at 16. A plaintiff suing for, say, breach of contract or employment discrimination seeks to recover amounts that should have been paid to that plaintiff, and that would have been taxable to that plaintiff had they been properly paid. This fact has been relied upon as supporting the conclusion that the plaintiff must be taxable on the full amount of any damage award, without reduction for contingency fee payments. *See, e.g., Kenseth v. Commissioner*, 259 F.3d 881 (7th Cir. 2001) (settlement proceeds were "lost income" and hence taxable to the plaintiff). By contrast, the FCA relator seeks an award of damages to compensate for losses suffered solely by the Government, which is the "real party in interest." *See, e.g., United States v. Health Possibilities*, 207 F.3d 335, 341 (6th Cir. 2000) ("Nor does the right to 'conduct' the action annul the government's status as the real-party-in-interest in *qui tam* litigation."). An award or settlement arising out of an FCA case represents the repayment of money that should have been paid solely to the Government, and that would therefore not have been taxable to any party had it been properly paid in the first place. Thus, the damages the FCA relator seeks to recover are not designed to compensate the relator for the loss of income which would have been taxable had it been rightfully paid. Accordingly, the Government's logical predicate for requiring

plaintiffs to pay tax on the contingency fees paid to their lawyers is inapplicable in the FCA context.

B. Congress Has Explicitly Provided for the Assignment of FCA Claims

In explaining the "assignment of income" doctrine, the Government sets forth the following distinction:

> Thus, where a taxpayer assigns income-producing property to another, thereby relinquishing all control over it, that taxpayer gives up the power to use that property in such a way as to realize a gain. But where a taxpayer retains control over an income-producing asset, that taxpayer has the power to gain through the satisfaction of assigning its income to whomever he pleases. Such a gain is gross income.

Pet. Br. at 22 (citing *Horst*, 311 U.S. at 117).

Applying this principle to the context of a plaintiff advancing his own cause of action, the Government argues that such a plaintiff ultimately retains "the sole power to assert and settle [his] cause[] of action." Pet. Br. at 25. In other words, the Government equates a plaintiff's control over his cause of action with "retain[ed] control over an income-producing asset," arguing that because a plaintiff's assignment of a portion of the income that might be generated from that controlled "asset" must be disregarded for tax purposes.[9] Because the Government takes this position irrespective of the rights that state law might attribute to the lawyer who receives a contingency fee interest, it is implicitly asserting that a plaintiff can never assign a portion of his cause of action itself (i.e., his "income producing asset") to his attorneys. In other words, at least for federal tax purposes, the Government asserts that a plaintiff's cause of action is "nonassignable."

This argument cannot be applied to the FCA relator. A *qui tam* relator, in contrast to a plaintiff advancing his own cause of action, is litigating a claim that Congress has already decided to partition and assign. Since the entirety of any award or settlement recovered under the FCA is based solely upon the damages suffered by the Government, the bounty paid to the *qui tam* relator is, by definition, an assignment of the Government's FCA claim. Indeed, in upholding the Article III standing of private relators to bring FCA claims, this Court explicitly recognized that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vermont Agency of Natural Res.*, 529 U.S. at 773 (emphasis added). Thus, even if this Court accepts the Government's assertion that, for federal tax purposes, a plaintiff's cause of action is "nonassignable," it must recognize that such an assertion simply cannot be made with respect to an FCA claim: since Congress has

9. The *Cotnam* court, however, explained why it is incorrect to hold that a plaintiff who exchanges a contingency fee promise for legal services has "fully enjoyed the benefit of his (her) economic gain represented by his (her) right to receive income." 263 F.2d at 126. "[W]here the only economic benefit to the taxpayer [from the assignment] was as an aid to the collection of a part of an otherwise worthless claim," the assignment of income doctrine "can have no just or realistic application." *Id.*

already assigned a portion of the FCA claim to qualifying relators, it necessarily follows that the FCA claim is "assignable."[10]

C. The Tax Law Should Not Distinguish Between FCA Assignments Made to Other Relators and Those Made to Lawyers

It is a common practice under the *qui tam* provisions of the FCA for multiple relators to file suit with respect to the same or similar wrongdoing. While there are first-to-file rules in the FCA that prohibit "tag along" cases, it is very often the case that two or more whistleblowers will combine their knowledge regarding the defendant's wrongdoing and join forces in challenging it. For example, in some circumstances, it may be that no one relator has sufficient knowledge to allege an FCA violation with the particularity required under Fed. R. Civ. P. 9(b), and therefore two or more relators are necessary for a valid FCA complaint to be filed. In other instances, multiple different *qui tam* complaints may be filed, and the various relators will subsequently decide that it is in their mutual interest to combine forces, rather than to undertake costly litigation over whether the later-filed complaints should be viewed as separate cases or as prohibited "tag alongs."

In any event, it is commonplace, especially in large cases, that more than one relator will receive a portion of the FCA statutory bounty. Ordinarily, the relators will agree among themselves as to the respective shares of the overall bounty that each should receive. TAF is not aware of a single instance in which the IRS has asserted that one relator in a multiple-relator case must be required to include the entire amount of the statutory bounty in his or her taxable income. Nor can we imagine how such an assertion could ever be successfully advanced: First, where multiple relators have agreed to divide the statutory bounty among themselves, the IRS would have absolutely no basis for asserting that one of those relators should be deemed to have first received the entire amount. Second, requiring any single relator to include the entire amount of a divided bounty in his or her taxable income would massively reduce the incentive structure that Congress so carefully put into place in amending the FCA in 1986.

Thus, it appears established that the 15 to 25 percent bounty paid to qualifying *qui tam* relators (or 25 to 35 percent in nonintervened cases) may be divided and assigned among multiple relators without triggering the "assignment of income" doctrine. And if relators A and B may divide and assign the FCA's statutory bounty without exposing either one of them to federal tax liability on the full amount, then it follows that relator A may make the same kind of assignment to his lawyer. Stated differently, if the tax law's "assignment of income" doctrine does not disregard A's assignment of some portion of the *qui tam* bounty to relator B, then it also should not disregard A's assignment of that same interest to his lawyer.

10. Moreover, because the Government is the "real party in interest," an FCA relator does not have the "control" over an FCA case that a plaintiff has over his own cause of action. *See generally United States v. Health Possibilities*, 207 F.3d 335, 341 (6th Cir. 2000) (voluntary dismissal by *qui tam* plaintiff could not be approved without Attorney General's consent); *see also United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 50 (4th Cir. 1992) ("[T]he United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf."). For this reason, too, federal tax law should not disregard an FCA relator's assignment of an interest in the ultimate FCA award.

Furthermore, at least two circuits have held that a relator is not legally permitted to bring an FCA case without a lawyer. *See United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004) ("pro se relator cannot prosecute a *qui tam* action, because he is acting as an attorney for the government" (emphasis added)); *United States v. Onan*, 190 F.2d 1 (8th Cir. 1951) (same). And, as a practical matter, the lawyer rather than the relator often must invest the greater resources into prosecuting an FCA case. Given these two realities, it would be manifestly unfair for the tax law to disregard a relator's assignment of an interest in the *qui tam* award to his lawyer, and to treat the relator as being "in sole control" of the entire case.

D. Public Policy Concerns Dictate That FCA Contingency Fees Should Not Be Taxed to FCA Relators

Finally, there are gravely important public policy concerns relating to the question of how to tax contingent legal fees in the FCA context that are not raised in the present case.[11] Congress has explicitly provided a financial incentive to encourage whistleblowers to step forward and to bring suit in order to vindicate the public interests protected by the statute. *See generally United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996) (1986 amendments' expansion of jurisdiction over *qui tam* actions reflects Congress' "concern that the government was not pursuing known instances of fraud.") (citation omitted); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995) ("Congress instituted the *qui tam* provisions of the FCA to encourage private citizens to expose fraud that the government itself cannot easily uncover."). *United States v. NEC Corp.*, 11 F.3d 136, 139 (11th Cir. 1993) ("The purpose of the *qui tam* provisions is to provide individuals with incentive to inform the government of fraudulent activity and to compensate such relators for the time and expense of coming forward with such information.").[12]

Congress surely intended FCA relators to pay income tax on any amounts actually received under the FCA. But Congress likely did not intend to substantially drain the statutory bounty of its force as an incentive by requiring FCA relators to pay income tax on amounts that they do not actually receive.

For example, consider an FCA case in which the statutory award to the *qui tam* relator is $1 million. Under the Government's tax scheme, the relator's bounty would likely net out to approximately $250,000. The calculation is straightforward. The relator pays a $400,000 tax on the full $1 million (this assumes a 40 percent combined federal and state tax rate). He then pays an additional $350,000 (35 percent) to his lawyer, a fee which would not be unreasonable in light of the considerable investment and risk ordinarily associated with FCA cases.[13] If the $350,000 contingency fee paid

11. These concerns are similar to those raised by statutory causes of action with respect to which Congress has provided that the "prevailing party" may recover attorney fees and costs. *See Amici Curiae* Brief of Mountain States Legal Foundation, *et al.*, Nos. 03-892 and 03-907 (U.S. filed Aug. 18, 2004).

12. Indeed, the FCA itself provides that successful *qui tam* relators, in addition to being entitled to the statutory bounty, are also entitled to recover attorney fees and costs. 31 U.S.C. § 3730(d)(1)–(2) (2004).

13. The lawyer then pays a $140,000 (40 percent) tax on his $350,000 portion of the award, leaving him with $210,000. Thus, the total net, after-tax return to the two individuals responsible for bringing the FCA action would be $460,000, less than half the $1 million bounty.

to the lawyer is not taxable to the relator, his taxable income is $650,000 and his net bounty is thus approximately $390,000. Obviously, the effect of the tax regime advanced by the Government in this case would dramatically reduce the financial incentive offered to *qui tam* relators to come forward—often at great personal expense and professional risk—to blow the whistle on those who are defrauding the Government.

CONCLUSION

For the forgoing reasons, the Court should affirm the decisions below, or, at a minimum, reserve the question whether FCA relators must pay income tax on any portion of a statutory bounty paid to their lawyers under a contingency fee agreement.

Legal Analysis

Death Cancels Everything But Truth:
Survivability of False Claims Act Qui Tam Cases

DEATH CANCELS EVERYTHING BUT TRUTH:[1] Survivability of False Claims Act *Qui Tam* Claims

Neil V. Getnick, Lesley Ann Skillen and Richard J. Dircks

Getnick & Getnick
Counsellors at Law
620 Fifth Ave
Rockefeller Center
New York, NY 10020

DEDICATION

This article is dedicated to our friend and client, George Couto. George died on November 18, 2002, at the age of 39, approximately one month before his Medicaid fraud case against the pharmaceutical giant Bayer Corp., brought on behalf of the United States under the federal False Claims Act, was settled in principle for a record sum of nearly a quarter of a billion dollars. He fought his case to the very end.

When the settlement of the case was formalized, here is what the *Boston Globe* reported on April 17, 2003, under the headline, "Dying Executive Drove Landmark Medicaid Case":

> The record Medicaid fraud settlement against two major drug companies, announced yesterday by federal officials, was set in motion by a whistle-blowing executive from Boston who helped nail down the case as he was dying of cancer last fall.
>
> George Couto, a former mid-level executive at Bayer Corp., in charge of marketing its antibiotic Cipro, had alleged for several years that the company overcharged the government insurance program for the poor by more than a $100 million for Cipro and for Bayer's high-blood pressure drug Adalat. As the government closed in on Bayer, Couto was diagnosed with terminal pancreatic cancer.
>
> 'He had to brace himself to undergo a grueling cross-examination with weeks ticking down on his life,' said his attorney, Neil Getnick of New York City. 'His doctor had told him that any stress could significantly shorten his life. Despite that fact, he made the decision that he was going to see this case through to the end.'
>
> …Bayer pleaded guilty to violating the Prescription Drug Marketing Act and paid a $5.6 million criminal fine. In addition, the company agreed to pay $251 million to settle civil allegations it violated federal law that requires drug companies to give the Medicaid program the lowest price charged to any customer.…

People like George Couto have become the new heroes of corporate America. He was unable to get his concerns addressed internally at his company. More and more whistleblowers are corporate executives just like George—people with a huge investment in remaining loyal to the company. People like that are driven to go outside the company not primarily by outside forces, but by an inability or unwillingness on the company's part to address illegal or unethical conduct internally.

The message for corporate executives who find themselves in George's position is that they are now empowered with a powerful federal statute enabling them to do the right thing and see justice done.

The message for corporate America is that by championing integrity and transparency, corporations can improve their bottom line, maintain a positive image, and avoid legal problems.

This article is based on the memorandum of law in support of the motion we brought to substitute George's estate as the relator in his case after his death. Because both the Government and the defendant, by then both committed to the agreed upon settlement in principle, assented to that motion, it was granted without the need for the court's opinion on the underlying argument in favor of the survivability of *qui tam* actions. Here is that argument updated to include the key cases decided since then, most notably the Supreme Court's ruling in the *Chandler* case. It is our hope that our analysis will prove to be of help to relators' families and their counsel should this issue arise in the future.

When a whistleblower files a False Claims Act *qui tam* claim, he or she almost never asks: "What happens to my claim if I die before it is resolved?"

Perhaps this is because few of us tend to dwell on the subject of death—particularly our own—or perhaps because the assumption is that the claim survives. While the interests of justice (in our view) dictate that it should, the survivability of *qui tam* claims has become mired in a jurisprudential debate rooted in a 19th century common law rule originally applying to the demise of defendants. As a district court in Oklahoma observed in 1997, applying this analysis to the tripartite circumstances of a *qui tam* case is like "asking whether a chicken is a mammal or a fish."[2]

While only four reported cases have ruled on the issue of survivability in the *qui tam* context (three in favor, one against), two Supreme Court cases decided in the last five years have materially affected the issue without having directly (or even indirectly) addressed it. Added to this complexity are policy considerations and the extent to which a rule on survivability serves the purpose and intent of the *qui tam* law.

As *qui tam* relator's counsel, we have twice come face to face with this question. In one case, our client was an elderly Medicare beneficiary who died before the case was resolved.[3] In the second, our client was a 39-year-old corporate executive who was diagnosed with pancreatic cancer two years into the case and passed away three weeks before settlement-in-principle (but not before he bravely faced cross examination by his former employer, the pharmaceutical company Bayer, in a deposition held to preserve his testimony).[4] In both cases we were able to substitute another party as the *qui tam* plaintiff: in the first, the relator's widow, who received a 21 percent share of the recovery, and in the second, his estate, which received a 24 percent share of the federal portion of the recovery.

This article reviews the cases and argues that not only the judicial precedents, but the interests of justice and the Congressional purpose behind the *qui tam* right of action, dictate that *qui tam* claims should survive the death of the relator.

REMEDIAL OR PENAL? THAT IS THE QUESTION.

Substitution Upon the Death of a Party is governed by Rule 25 of the Federal Rules of Civil Procedure. This provides that a court may order the substitution of a deceased party, upon motion made within ninety days of the suggestion of death on the record, "if a party dies and the claim is not extinguished thereby."[5]

The False Claims Act, 31 U.S.C. § 3729–3733 ("FCA"), does not speak directly to the survivability of a *qui tam* action. Therefore, the federal common law applies. Under federal common law, as decided in Schreiber v. Sharpless, 110 U.S. 76, S. Ct. 423, 28 L. Ed. 65 (1884), the general rule is that an action survives the death of a party if it is remedial and not penal in nature.

---

1. William Hazlitt (1778–1830), British essayist, The Spirit of the Age (1825), on the death of Lord Byron.
2. United States *ex rel.* Semtner v. Medical Consultants, Inc., 170 F.R.D. 490, 495 (W.D. Okla. 1997).
3. U.S. *ex rel.* Hertz v. Delray Community Hospital and Tenet Healthcare Corp., No. 13-194-023890-1 (S.D. Fla.) The substitution order was granted in March 2000 and the settlement reach in April 2001.
4. U.S. *ex rel.* Estate of George Couto v. Bayer Corporation, No. 00-10339-PBS (D. Mass.) The relator's estate was substituted in January 2003. In April 2003 Bayer settled the action for $251 million and paid a $5 million criminal fine.
5. Fed. R. Civ. P. 25(a)(1).

It is this debate that has governed how the courts have addressed the question of the survivability of *qui tam* claims. The rationale behind the remedial/penal rule is less obscure when one appreciates that it was crafted for circumstances in which the defendant was the decedent. What purpose can there be in punishing a dead person? On the other hand, if the cause of action is remedial, it would be unfair to a plaintiff to extinguish a right to recover damages from the heirs of a defendant at whose hands the plaintiff had suffered injury.

The aptness of this rule for plaintiffs nonetheless has been largely unchallenged by counsel who have briefed the issue and (for the most part) courts that have decided it. As the Oklahoma district court referred to earlier observed:

> It is questionable whether the common law as adopted and crafted in the federal courts is defensible. Without comment the courts apply the penal/remedial test to all questions of survival regardless of the decedent's status as plaintiff or defendant. The Court notes that the jurisprudential bases for applying a penal/remedial test to survivorship following the death of a defendant, as in Schreiber, may not carry over to instances in which the plaintiff is the decedent. Clearly, once the defendant has died it is no longer possible to fully accomplish a statute's retributive goals. Yet, a plaintiff continues to be deserving of remedial compensation from a defendant or her estate regardless of the defendant's continued viability, while the survival of the plaintiff is irrelevant to whether the defendant continues to be worthy of punishment. Therefore, a rule of abatement that accounts for the position of the decedent in the litigation is far more defensible that the present party-neutral rule. Nonetheless, as the parties have not briefed this core issue, and the Court finds that any change in such a long-standing common-law rule is better decided in the circuits' chambers, the Court will not attempt to remedy the rule's deficiencies in the present order.[6]

The fate of *qui tam* cases when the relator has died, therefore, have turned upon the remedial/penal rule.

IS THE FCA REMEDIAL OR PENAL?

The Supreme Court in 1943 described the FCA, saying: "The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly." United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n. 5, 87 L. Ed. 443, 63 S. Ct. 379 (1943) (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885).[7]

6. Semtner, 170 F.R.D. at 493 n.2.

7. See also, United States v. Bornstein, 423 U.S. 303, 315, 46 L. Ed. 2d 514, 96 S. Ct. 523 (1976).

In enacting the 1986 amendments to the FCA, Congress likewise stated that: "False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages."[8]

In Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000), however, which concerned whether states are "persons" capable of being sued under the FCA, the Supreme Court, in finding that they were not, stated that the FCA treble damages and penalty provisions in the statute as amended are essentially punitive in nature.[9]

Just three years later, in Cook County v. United States *ex rel.* Chandler, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003), which concerned whether counties and municipalities are "persons" capable of being sued under the FCA, the Supreme Court, in finding that they were, stated that the FCA's treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.[10]

How is the *qui tam* action survivability issue to cope with this apparently shifting target? The following paragraphs discuss the cases pre-Stevens, post-Stevens and post-Chandler, and finally present an analysis of where the question should lie today.

PRE-STEVENS: A *QUI TAM* ACTION IS REMEDIAL, OR IS IT A FISH?

United States ex rel. Neher v. NEC Corp., 11 F.3d 136 (11th Cir. 1994) is the only circuit court case to directly address *qui tam* survivability. While adopting the penal/remedial rule, the Court of Appeals for the Eleventh Circuit recognized that "a statute can be remedial as to one party, yet penal as to another."[11]

The issue for the court was thus whether "the FCA is remedial or penal with respect to the recovery of the *qui tam* relator."[12]

The court held that a *qui tam* action is remedial because a relator suffers substantial harm and the *qui tam* provisions of the FCA are intended to remedy that harm. *Qui tam* relators typically suffer emotional strain, lost employment opportunities and financial burdens as a result of the time and expense of bringing the suit.

The court relied on a three-part test articulated in Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir. 1977) in deciding that the FCA was remedial as to the relator: "(1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by statue is wholly disproportionate to the harm suffered."[13]

First, the court opined that "a relator suffers substantial harm and the *qui tam* provisions of the FCA are intended to remedy that harm," including emotional strain,

8. See, S. Rep. No. 99-345 at 30–31 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5295–96.
9. 529 U.S. at 784.
10. 538 U.S. at 130–31.
11. 11 F.3d at 137, n.1.
12. 11 F.3d at 137, emphasis added.
13. 560 F.2d 206, 209 (internal citation and quotation omitted). Murphy did not involve the death of a party. Instead, the question in Murphy was whether a bankrupt's cause of action against a lending company pursuant to the Truth in Lending Act, 15 U.S.C. § 130(2)(a)(A), would pass to the bankruptcy trustee.

harm to employment and financial burdens as result of the time and expense involved in bringing the case.[14]

Second, the court rejected the argument that the recovery runs only to the general public, instead finding that the recovery runs to the United States government *and* the relator, as compensation for the harm to his employment and for his time and expenses.[15]

Third, the court found that the recovery sought by the relator was not disproportionate to the harm "typically suffered" as a result of the defendant's fraudulent conduct. The court stated: "Because the harm suffered by a *qui tam* relator is often the type that is difficult or incapable of measurement, Congress chose to compensate these individuals by rewarding them a percentage of the government's recovery."[16] Then, relying on 31 U.S.C. § 3730, providing that the relator's recovery varies "depending upon the extent to which the person substantially contributed to the prosecution of the action," the court stated, "the fact that the relator's award is proportionate to the harm he suffered as a consequence of the action further demonstrates the statute's remedial purpose."[17]

Finally the court stated that it believed "the underlying purpose of the FCA will best be served by allowing *qui tam* actions to survive the death of the relator."[18] The court identified as one of the FCA's primary purposes encouraging individuals with knowledge to come forward to the government with information about fraud.[19]

In the next case to be decided, United States *ex rel.* Semtner v. Medical Consultants, Inc., 170 F.R.D. 490 (W.D. Okla. 1997), an Oklahoma district court declined to follow the reasoning in NEC, *supra*, but reached the same final conclusion of survivability. The court decided that a *qui tam* action cannot be characterized as either remedial or penal, but still survives the death of the relator because a *qui tam* action is derivative of the claims of the government. Since the parties in the case had agreed that the government's claims were remedial, the claim survived. The court also relied heavily on the statutory structure and legislative history of the FCA encouraging relators to come forward and pursue FCA actions.

In a sharply-reasoned judgment, the court questioned whether the penal/remedial test should apply at all when the decedent is the plaintiff, noting that in Schreiber, supra—the Supreme Court decision regarded as seminal on the subject—the decedent was the defendant. The court held that the claims of the *qui tam* plaintiff survive although they are neither penal nor remedial.

> After reviewing the status of the *qui tam* relator under the traditional survivorship tests, the Court concludes the relator and her claims do not fit within the definition of either penal or remedial, and therefore, the only rational characterization of the relator's claim must be de-

14. 11 F. 3d at 138.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* (citing S. Rep. No. 99-345, 99th Cong., 2d Sess. 2 (1986), U.S. Cong. & Admin. News 1986, p. 5266).

> rived from the underlying claim of the government. As the parties do not contest the remedial nature of the government's claim, the action does survive and the personal representative should be substituted in the stead of the decedent relator.[20]

The court took issue with the NEC court analysis of harm suffered by the relator, concluding that the FCA is not intended to remedy such harm.[21] The court went on to explain its view of the improper fit of the penal/remedial test to the *qui tam* FCA action.

> The defendants as well as the court of appeals in NEC appear to assume that there is a universe of actions that is filled entirely and exclusively with two subsets of claims—remedial and penal. The defendants implicitly argue that so long as they can prove it is not remedial, the claim must be penal by process of elimination. The Court refuses to accept this assumption for the role of the *qui tam* relator. The Murphy analysis presented by the parties and their efforts to categorize the relator result in an artificial attempt to place a square peg in a round hole. Both parties clearly identify in their arguments what is so evident in the legislative history and structure of the *qui tam* provisions of the FCA: the relator is a mechanism of enforcement. The relator's recovery is not compensation for damages nor is it a penalty to be imposed upon the defendants; it is a lure. Her ultimate claim is not even against the defendants, but against the government for a share of the award. *Qui tam* is not a cause of action, it is a means of pursuing the government's cause of action. The parties have fallen into an understandable myopia trying merely to apply the majority rule to the facts of the case. However, the results are asking whether a chicken is a mammal or a fish.[22]

Finally, the court cited the statutory structure and the history of the *qui tam* provisions of the FCA in support of its ruling: (i) Congress sought to provide an incentive for individuals to come forward with information and prosecute claims which might not be initially efficient for the government to pursue;[23] (ii) the government sought to remedy the lack of resources in the federal enforcement scheme by giving individuals incentive to pursue claims, regardless of the government's involvement, so that individuals would litigate claims that the government would not;[24] and (iii) Congress sought to have individuals act as overseers of actions in which the government has joined because it believed that the participation of private plaintiffs at all phases of the litigation would lead to a greater number of recoveries for the government.[25]

20. *Id.*
21. 170 F.R.D. at 494–95.
22. 170 F.R.D. at 495.
23. *Id.* (citing S. Rep. No. 99-345 at 1-2, 1986 U.S.C.C.A.N. at 5266).
24. *Id.* (citing S. Rep. 99-345 at 7 1986 U.S.C.C.A.N. at 5272).
25. *Id.* (citing S. Rep. 99-345 at 25–26, 1986 U.S.C.C.A.N. at 5290–91).

Thus prior to the muddying of the waters in Stevens, the survivability of a *qui tam* action could be approached from two sides, both of which were likely to come out well for the relator: the *qui tam* action would survive either because it was remedial as to the relator, whose investment of time, effort and risk was a compensable commodity, or it survived—notwithstanding that the *qui tam* action could not be characterized as remedial, or punitive or anything else along those lines—because the claims of the government in an FCA action were remedial, and the *qui tam* action was derivative of the claims of the government.

POST-STEVENS: A *QUI TAM* ACTION MIGHT BE REMEDIAL, BUT NOT IN THIS CASE.

As stated earlier, In Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000), which concerned whether states are "persons" capable of being sued under the FCA, the Supreme Court, in finding that they were not, stated that the FCA treble damages and penalty provisions in the statute as amended are essentially punitive in nature.

In United States *ex rel.* Harrington v. Sisters of Providence in Or., 209 F. Supp. 2d 1085 (D. Or. 2002), the Oregon District Court, in a three page decision, dismissed the non-intervened *qui tam* FCA case of a deceased relator pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on the grounds that (i) following the decision of the Supreme Court in Stevens in 2000, the FCA is penal as to the defendant, (ii) this finding does not conclude the analysis since an action may be penal as to one party and remedial as to the other, and (ii) the FCA was not remedial to the relator in the present action because the complaint contained no allegations of personal or substantial harm to the relator. The Harrington court relied in part on the decision of the Eleventh Circuit Court of Appeals in NEC, *supra*.

The relator, an attorney who was appointed by the court to serve as the conservator of a patient at the defendant hospital, filed his action in 1998. The government declined to intervene. In April 2002, the relator died during the pendency of a Fed R. Civ. P. 9(b) motion to dismiss and defendants moved to dismiss for lack of subject matter jurisdiction. Relying on the federal common law principle that remedial actions survive the death of a party while penal actions do not, the court stated that, "the court's task is to determine whether the FCA is remedial or penal in nature."[26]

In reaching its decision, the court first relied on Stevens, and post-Stevens cases from the Third, Seventh, and Fifth Circuits, as well as a case from the Northern District of California, in concluding that "courts consider the FCA damages and penalty provisions to be punitive in nature, at least with respect to the *qui tam* defendant or for purposes of state *qui tam* liability."[27]

The court then went on to hold that characterizing the FCA as punitive with respect to the defendant does not fully resolve the issue. Citing NEC, the court observed

26. 209 F. Supp 2d at 1087.
27. *Id.* at 1087–88, emphasis added.

that "a statute can be remedial as to one party, yet penal as to another."[28] The court observed that the NEC court based its decision, at least in part, on the belief that the *qui tam* relator suffers substantial personal harm that the *qui tam* provisions are intended to redress. The court then acknowledged that the *qui tam* action might be remedial, but it was not remedial in the present case because the relator had not included any allegations to support such finding in his complaint.

> Assuming that the NEC Corp. analysis survives Vermont Agency and that in certain special cases, the Ninth Circuit might agree with the Eleventh Circuit that the *qui tam* provisions of the FCA may properly be characterized as remedial, the claim in the present case contains no allegations of personal or substantial harm to the relator, only harm to the public interest.[29] (emphasis added)

The Oregon court, therefore, was only prepared to recognize that *qui tam* actions were survivable in "certain special cases"—of which the case before it was not one because the remedial aspects of the relator's claim had not been specifically pled. The court's insistence that this fact-specific analysis be spelled out in the complaint is not supported by the decision of the Circuit Court in NEC which (properly in our view) recognized that the remedial aspects of the FCA as to the relator are built into the statute in the sliding relator share compensation scale of 15 to 30 percent.[30]

Post-Stevens, therefore, a case brought by a deceased relator who could not show personal or substantial harm, on the Harrington analysis, was in peril. While the Harrington court was prepared to recognize that survivability might be determined by focusing on whether the *qui tam* claim was remedial in a particular case, the court did not have to reach that issue because any such remedial factors in the case before it had not been specifically pled. The decision is a narrow one, and in our view, has limited precedential authority.

POST-CHANDLER: A *QUI TAM* ACTION IS REMEDIAL. PERIOD.

As stated earlier, in Cook County v. United States *ex rel.* Chandler, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003), which concerned whether counties and municipalities are "persons" capable of being sued under the FCA, the Supreme Court, in finding that they were, stated that the FCA's treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.

One reported case has tackled the *qui tam* survivability issue since the Supreme Court's decision in Chandler in 2003. In United States *ex rel*. Botnick v. Cathedral Health Systems, 352 F. Supp. 2d 530 (D.N.J. 2005), the New Jersey District Court, in a three page decision, held that a deceased relator's claim survives his death. The court relied on the Chandler ruling that the FCA is both remedial and punitive, in particu-

28. *Id.* at 1088.
29. *Id.*
30. 31 U.S.C. § 3730(d)(1) and (2).

lar on the court's observation that the *qui tam* action was the "most obvious" indication that the FCA has a remedial component. The court also relied on the legislative history indicating an intent by Congress to encourage relators to come forward.

In Botnick the relator filed suit in 1997, the government intervened in 2001, the relator died in 2002, and the case was settled in 2003. The relator's estate, which had been substituted (presumably in *ex parte* proceedings) in 2003, sought a share of the proceeds. The defendant objected.

The court made no distinction between the plaintiff, the government or the defendant in its discussion of whether the FCA was remedial or punitive. The relator having conceded that, since Stevens, "a punitive action would not survive Botnick's death,"[31] the court moved on to consider the impact of Chandler on the Stevens ruling. Holding that Chandler governed the case before it, the court said:

> The Chandler Court backed away from the blanket ruling in Stevens that the FCA was solely penal in nature and instead held that, "while the tipping point between pay-back and punishment defies general formulation. . . the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive," 538 U.S. at 130. The Court went on to note that "the most obvious indication that the treble damages ceiling has a remedial place under [the FCA] is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action." Id. at 131. As the Supreme Court specifically cited the provision for a relator's recovery of a percentage of any FCA award as an indication of the remedial aspects of the statute, this Court agrees with Botnick's estate that it would follow that a relator's recovery constitutes a remedial action rather than a penal one.[32]

The court also took into account the FCA's legislative history "indicating a strong intent on the part of Congress to create incentives for relators such as Botnick to come forward, see Chandler, 538 U.S. at 133 ('because Congress was concerned about pervasive fraud . . . [it] enhanced the incentives for relators to bring suit')"[33] in deciding that the action is remedial and survived the relator's death.

Perhaps in view of the relator's concession that, under Stevens, the claim would not survive (notwithstanding that Stevens only dealt with the punitive/remedial dichotomy as to the defendant), the court did not engage in the analysis of whether a claim could be remedial as to one party and punitive as to another. The court's ruling can be read as endorsing the position that the FCA is always remedial as to the relator. Since the court decided that Botnick's claim survived his death on the basis of the Chandler Court's specific reference to the *qui tam* recovery as the most obvious remedial component in the government's recovery, it follows that the *qui tam* action is

31. 352 F. Supp. 2d at 532.
32. *Id.*
33. *Id.*

remedial independently of any factors relating to an individual relator. On the Botnick analysis, it would never be necessary to determine whether a particular relator had suffered a compensable harm (as in NEC and Harrington) because the *qui tam* action, following the Supreme Court in Chandler, is by definition remedial.

This view has much merit. However, in light of the checkered history of the *qui tam* survivability question, it may not be the final word on the subject.

Arguments in Support of the Survivability of *Qui Tam* Claims.

Both judicial precedent and policy considerations support various arguments in favor of the survivability of the *qui tam* claim beyond the death of the relator.

First, it is well recognized that the FCA is not punitive as to the relator. Thus Stevens, *supra*, does not bear upon the issue of the survivability of a *qui tam* action, even apart from Chandler which recognized both a remedial and punitive element in the FCA. Second, since Chandler specifically referenced the *qui tam* action as "the most obvious indication" that the FCA has remedial aspects, the *qui tam* action is remedial. While earlier courts (specifically, NEC and Harrington), analyzed specific compensable aspects of the relator's claim, e.g., harm to employment, time and expense involved in bringing the suit), Chandler recognizes that the *qui tam* action is remedial per se. Third, following NEC and Harrington, the *qui tam* claims of individual relators who have suffered specific compensable harm are remedial. Fourth, the history and purpose of the FCA support the survivability of relator's claim. Fifth, the government is the real party in interest in a *qui tam* action and thus the relator's death should not extinguish his or her claim.

Arguments One Through Three: The FCA is Remedial as to the Relator.

It is well recognized that a cause of action can be remedial as to one party and penal as to another.[34] While the Court in Stevens held that the FCA was punitive as to the defendant,[35] it did not explore the role of the relator or even touch upon it. Therefore, Stevens has no bearing on the issue of whether a *qui tam* action survives the relator's death.

No court had held that a *qui tam* action is punitive as to the relator. The Eleventh Circuit Court of Appeals in NEC recognized that the relator's claim in an FCA case is remedial. The court in Semtner argued that the *qui tam* action may well be neither penal nor remedial. In Harrington, the court cited NEC approvingly and held that the *qui tam* provisions of the FCA may be remedial (but not, however, in the case before it). In Botnick, the court held that, following Chandler, the relator's claim is remedial per se.

A rational analysis of the *qui tam* action also leads to the view that it is not punitive. As the court in NEC observed, the relator's presence can in no way "punish" the

34. NEC 11 F.3d at 137, n. 1; Harrington, 209 F. Supp. 2d at 1088.

35. In Stevens, the question whether the FCA is punitive was raised by the majority as further support for the conclusion that the majority had already reached, i.e., that States are not subject to *qui tam* liability. The issue is dealt with in a single short paragraph. Stevens, 529 U.S. at 784–85.

defendant because the recovery from the defendant is the same whether the relator is there or not: "The FCA's *qui tam* provisions do not act as a penalty; rather, they provide incentive to government 'whistle blowers' and compensate such individuals for their time and trouble."[36] Further, while the FCA does mandate the payment of attorneys fees directly to the relator, attorneys fees are not punitive but are merely intended to reimburse the relator for fees and costs "necessarily incurred."[37]

If a *qui tam* action is not punitive, then it is either wholly or partially remedial, or neither penal nor remedial. While the latter position was taken in Semtner, the Oklahoma district court's attempt to contrive a new phenomenon that is not a cause of action at all but a "lure," or a "mechanism of enforcement," while intriguing, is out on its own in the caselaw.[38] That the *qui tam* action is remedial is supportable both on the Botnick analysis (holding that the action was remedial because "the Supreme Court [in Chandler] specifically cited the provision for a relator's recovery of a percentage of any FCA award as an indication of the remedial aspects of the statute"[39]) and on the NEC analysis, to the extent that the relator suffers substantial harm which the *qui tam* provisions are intended to remedy. This includes emotional strain, impact on employment, and financial burdens arising from the time and expense of bringing the lawsuit.[40]

As the NEC court recognized, the remedial nature of the *qui tam* action is demonstrated by the fact that *qui tam* recovery is governed by a statutorily-mandated percentage range of between 15 percent and 25 percent, which is designed to compensate the relator for his or her "substantial contribution" to the underlying FCA action.[41] Indeed, the DOJ's own relator share guidelines identify the very factors that the court in NEC saw as relevant in determining the appropriate reward that the relator should receive within the 15 to 25 percent range. Item 8, for example, provides for an increase in relator share if the relator "provided substantial assistance during the investigation and/or pre-trial phases of the case," and Item 14 provides for an increase if "the filing of the complaint had a substantial adverse impact on the relator." The relator share is also subject to increase if "the relator was an excellent, credible witness" at his deposition or trial (Item 9), and if "the case went to trial" (Item 12)—the last two items describing a level of commitment by relators that necessarily involves additional time, risk and expense on their part.

In U.S. ex rel. Alderson v. Quorum Health Group, 171 F. Supp. 2d 1323, in which the court awarded the relator a 24 percent share of the recovery, the criteria upon which the court focused most heavily were the relator's "extraordinary commitment" of time and energy, the "unusual length and complexity" of the legal proceedings, and "the hardship endured by Alderson and his family" during the currency of the case.[42]

36. NEC, 11 F.3d at 139.
37. 31 U.S.C. § 3730(d)(1).
38. 170 F.R.D. at 495. Semtner, in declining to ascribe any remedial component to the *qui tam* action, arguably fails to acknowledge what is inherent in the statute: a percentage range of recovery for the relator that is designed to compensate the relator according to the extent to which he or she has invested time, trouble, hardship and risk.
39. Botnick, 352 F. Supp. 2d at 532.
40. See NEC, 11 F.3d at 138.
41. *Id.* See 31 U.S.C. § 3730(d)(1).
42. 171 F. Supp. at 1338.

Congress, the court noted "has chosen a mechanism calculated to encourage potential relators to undertake the risk and enervating hardship often attendant to FCA litigation."[43] Alderson's *qui tam* action, amongst other things, had "a disruptive and divisive effect" on Alderson and his family, "including dispiriting financial hardship and the burden of the confidentiality obligations governing the case."[44] The court observed that Alderson's experience "illustrates vividly Judge Learned Hands's cautionary observation that 'as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.' 'The Deficiencies of Trials to Reach the Heart of the Matter,' 1921, in Lectures on Legal Topics, 3:89, 105 (1926)."[45]

The court in Harrington, it should be noted, erred in finding that such factors must be specifically pled in the complaint, since the FCA, the legislative history, the DOJ's guidelines, and the caselaw set forth the criteria for determining the level of compensation the relator will receive.

Where does this leave the relator who has not suffered significant emotional strain, damage to employment, financial burdens, or investment of time? Such a relator will be rare, but is conceivable: not all relators are corporate insiders, not all relators are actively involved in the government's investigation, not all relators are deposed or give evidence to the grand jury, and not all FCA cases go to trial. If the analysis of whether a *qui tam* claim is remedial stops with NEC, then it is possible to conceive of a court declining to uphold the survivability of the claim of a deceased relator who did not, in fact, suffer "substantial harm." In that case, the Botnick analysis, relying on Supreme Court authority in finding that the *qui tam* claim is remedial independently of the circumstances of the individual relator, supports the survivability of the claim.[46]

Additional compelling policy-based arguments also support of the survivability of a *qui tam* action.

Arguments Four and Five: FCA Policy Supports Survivability.

As the courts in NEC,[47] Semtner[48] and Botnick[49] observed, the history and purpose of the FCA support the survivability of the relator's claim.

The legislative history of the 1986 amendments to the FCA provide two major policy hooks supporting survivability. The first is that the statute was intended to encourage private citizen suits. The second is that private citizen suits were intended to supplement the government's resources, permitting them to go forward in the absence of government intervention.

The FCA is designed to provide a framework for fighting fraud against the federal government through a combination of private and public enforcement. The Senate Re-

43. *Id.* at 1341.
44. *Id.* at 1328.
45. *Id.* at 1338 n. 43
46. Semtner also found that the *qui tam* claim is remedial independently of the circumstances of the individual relator, although via a different route.
47. NEC, 11 F.3d at 139.
48. Semtner, 170 F.R.D. at 495.
49. Botnick, 352 F. Supp. 2d at 532.

port accompanying the 1986 amendments to the FCA described the Act's purpose as not only providing the "Government's law enforcers with more effective tools," but also encouraging "any individual knowing of Government fraud to bring that information forward."[50] The Senate stated that "only a coordinated effort of both the Government and the citizenry will decrease the wave of defrauding public funds."[51] The committee's overall intent in amending the *qui tam* provisions of the FCA was to "encourage more private enforcement suits."[52]

Private citizens will be discouraged from bringing information to the government if the effort and risk involved in bringing a *qui tam* action will go unrewarded in the event of their demise. A rule against survivability would not serve the underlying purpose of the FCA to encourage more private enforcement suits.

Potential relators who are elderly or ill, in particular, would be less likely to bring information forward if their claims were extinguished upon their deaths. Indeed, since 1999 the Department of Health and Human Services has actively sought to encourage elderly citizens to examine their Medicare statements of benefits and to report any fraudulent billing to the Government.[53] Such persons should not be treated differently from potential relators who are lucky enough to be younger and/or enjoy good health, nor should a rule against survivability discourage them from coming forward.

By enacting the amended FCA in 1986, Congress sought both to provide incentives to individuals to come forward with information <u>and</u> to supplement federal enforcement resources by encouraging them to pursue and litigate claims on behalf of the government.[54] It was envisioned that a relator would be able to bring, and prosecute on behalf of the government, actions that for some reason the government could not effectively bring on its own.[55] The FCA provides that if the government declines to intervene, the relator has the right to conduct the action alone.[56]

If defendants were able to obtain dismissal of meritorious non-intervened actions upon the death of the relator, these intended goals of the FCA would not be served. The government declines to intervene in *qui tam* actions for a variety of reasons, many of which have nothing to do with the merits of the case. Sometimes, for example, the government declines to intervene because it simply lacks the resources to pursue the case, and/or chooses to rely on the resources of the relator to do so. If such actions were extinguished upon the relator's death, not only would the FCA's goals not be served, but the government would lose the benefit of those meritorious claims. As the

50. S. Rep. No. 345, <u>reprinted</u> <u>in</u> 1986 U.S.C.C.A.N. at 5266–67.
51. *Id.*
52. *Id.* at 5288–89.
53. See http://www.cms.hhs.gov/providers/fraud/hmfraud1.asp. "The Medicare program needs its 39 million beneficiaries to act as 'eyes and ears' in spotting mispayments," said the then HHS Secretary in launching the "Who Pays? You Pay!" campaign. This law firm brought what is believed to be the first successful *qui tam* suit brought by a Medicare beneficiary who learned of the alleged fraud by scrutinizing his own bills and statements. In that case, which was filed in 1995, the relator did, in fact, die before the settlement, which was reached in 2001. In 2000, his wife was successfully substituted as the *qui tam* plaintiff and received a relator share payment from the DOJ. <u>U.S. ex rel. Hertz v. Delray Community Hospital and Tenet Healthcare Corp.</u>, No. 13-194-023890-1 (S.D. Fla.) The substitution order was granted on March 15, 2000, and the settlement reached in April 2001.
54. <u>See</u>, S. Rep. No. 345, <u>reprinted</u> <u>in</u> 1986 U.S.C.C.A.N. at 5272.
55. *Id.* at 5266.
56. 31 U.S.C. § 3730(b)(4)(B) and (c)(3).

court in Semtner stated: "The legislative history clearly reveals that Congress believed the participation of private plaintiffs at all phases of the litigation would lead to a greater number of recoveries for the government and possibly in higher amounts—the ultimate goals of the 1986 amendments." [57]

Furthermore, from a practical point of view, a rule that would promise defendants an automatic reprieve in the event of the relator's death would encourage defendants to use delaying tactics to prolong proceedings in the hope that a relator who is elderly or terminally ill will die before the action can be settled or tried.

Related to these compelling policy considerations is the nature and quality of the *qui tam* action itself. A *qui tam* action is brought in the name of the government. It can only be dismissed with the written consent of the Attorney General.[58] The courts have consistently found that the United States Government is the real party in interest in *qui tam* FCA actions. This is true whether the Government has intervened in the action or not. Recognition by the courts that the Government is the real party in interest has been used as the basis for rulings that, among others, support standing for relators against constitutional challenges, reject state claims of sovereign immunity from suit by private citizens, and permit the government to challenge a relator/defendant settlement without intervening in the action.[59]

As the real party in interest, the government's claim against the defendant in an FCA action should continue despite the death of the relator. For example, if the relator dies during the government's investigation and prior to intervention, should the cause of action be automatically extinguished and the government thereby lose the benefit of the relator's timely filing within the relevant statute of limitations? FCA cases typically are highly complex and the government must dedicate substantial time and resources to "diligently . . . investigate" the allegations as required under the FCA.[60] It is not unusual for an FCA action to be under investigation for several years pending an intervention decision, during which time the relator may die. In that event, should the government have to re-file the action, potentially losing many years of damages or even the action in its entirety if the statute of limitations has run? In effect, the government would be investigating the relator's case under threat that it may be extinguished at any time.

CONCLUSION

Three of the four reported cases on the survivability of *qui tam* claims—NEC, Semtner and Botnick—have upheld the viability of the claim. In the fourth case, Harrington, the court found against the relator, but only because the relator had failed to plead certain facts in his complaint, and thus the case must be regarded as limited to the facts—as well as being now subject to the Supreme Court's ruling in Chandler. The fact that the courts in each case reached their decisions via different analytic routes

57. 170 F.R.D. at 496.
58. 31 U.S.C. § 3730(a).
59. See, John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.01[C].
60. 31 U.S.C. § 3730 (a).

offers greater flexibility to the survivors of relators faced with the unfortunate task of securing the future viability of the *qui tam* claim after the relator's death.

The jurisprudential history of this issue is perhaps more complex than is justified by the issue itself, since the policy considerations are really rather straightforward. As the court summed it up in NEC:

> One of the FCA's primary purposes is to encourage individuals knowing of government-related fraud to come forward with that information. By minimizing the obstacles faced by *qui tam* plaintiffs, we believe that this type of government "whistleblowing" will be further encouraged.[61]

A rule on survivability that would extinguish the relator's claim on his or her death would indeed present such an obstacle. Though the death of the relator is rare, the impact of such a rule on the willingness of individuals to go the *qui tam* route in the first place would be far-reaching.

Permitting a relator's claim to survive the death of the relator is consistent with, and supportive of, the underlying purpose and goals of the FCA.

61. NEC, 11 F.3d at 139.

Legal Ethics

Of Third Rails and Rabbit Trails:
The No-Contact Rule and the McDade Amendment
in *Qui Tam* Lawsuits

OF THIRD RAILS AND RABBIT TRAILS: The "No-Contact Rule" and the McDade Amendment in *Qui Tam* Lawsuits

Frederick M. Morgan, Jr.[1]

INTRODUCTION[2]

Litigators know that they may not contact persons represented by counsel without going through that attorney. This "no contact" rule is a trial lawyer's metaphoric third rail: Violating it may result in litigation sanctions up to and including disqualification, as well as formal ethics charges which can impact a lawyer's license and reputation. The first part of this article considers the application of the rule in the fairly complex arena of *qui tam* lawsuits. It then examines the bizarre implications of the no-contact rule with respect to government attorneys who are subject to the "McDade Amendment," a federal law which has mucked up the ability of the United States to investigate False Claims Act cases to the point, in some instances, of effective paralysis. McDade and its bizarre consequences in *qui tam* and other cases are the "rabbit trails" of the title.

Those who labor in the Augean stables of *qui tam* litigation under the False Claims Act know that there are few similarities between such cases and any other lawsuit.[3] This is so for many reasons. The complaint is filed under seal, and may remain under seal for many years. Counsel for a plaintiff-relator generally is highly limited in her ability to investigate, much less conduct discovery, during the seal period; rather, the investigation is turned over to a non-party, the United States, which may or may not choose to reveal the existence of the investigation (or even the lawsuit, by way of a "partial unsealing") to the defendant. On the other hand, before making its statutorily required intervention decision,[4] the Government will often endeavor to conduct sufficient investigation, albeit without formal discovery, in order to negotiate a pre-intervention settlement. Thus, an appreciable fraction False Claims Act cases reach their terminus with no discovery, and often without any meaningful opportunity by the relator to explore the facts through examination of witnesses or review of documents.

1. Rick Morgan represents relators in *qui tam* cases. He is with Volkema, Thomas, Miller, Burkett, Scott & Merry LPA in Cincinnati, Ohio.

2. This article evolved from a panel discussion at the October 2004 False Claims Act seminar sponsored by Taxpayers Against Fraud. Other panelists included former Texas judge John A. Clark, Department of Justice Ethics Officer David Long, retired Department of Justice Assistant Branch Director Stephen D. Altman, and District of Columbia Bar Association Ethics Counsel Ernest T. Lindbergh. Mr. Lindbergh has since published an article entitled "*Qui Tam* Relators' Counsel and Rule 4.2" (*Washington Lawyer*, December 2004), which discusses the D.C. Bar's rules of contact with represented parties applicable to government counsel.

3. The fable of the Augean stables may sound familiar to any student of *qui tam* litigation. The fifth Herculean labor assigned to Heracles was to clean the massive and foul royal stables of King Augea in a single day. Heracles proposed to the king that if he achieved the impossible, he receive a tithe of the royal cattle, and the king agreed. Heracles succeeded, of course, and the King disputed his entitlement to the prize, denying that he had made the promise and sending Heracles to a court of arbitration. Upon hearing the evidence, the arbiters found for Heracles and awarded him one-tenth of the king's herds. Apollodorus, Apollodorus: The Library, Sir James G. Framer trans. (Loeb Classical Library, 1921).

4. 31 U.S.C. § 3730(b)(2).

The *qui tam* relator is asserting a federal right, assigned by statute, serving as what some courts call a "private attorney general,"[5] and is in a nebulous way representing the United States.[6] Relators are full parties entitled to "unrestricted participation" even when the Government intervenes,[7] and "shall have the right to conduct the action" when it does not.[8] On the other hand, the Government has "absolute discretion" whether or not to intervene in a *qui tam* case,[9] and claims for itself equally unconstrained discretion to dismiss a case in which it has not intervened or to dismiss outright a case over the relator's objection.[10]

The defendant's position in a *qui tam* case also is unique and awkward. A False Claims Act defendant typically is a large and powerful corporation. It stands accused of false claims or fraud, but may be unaware of the allegations for months, or often years, after the lawsuit is filed.[11] It may be held liable for the conduct of low-level employees under the principle of *respondeat superior*,[12] and it may well have a *qui tam* relator with an undisclosed lawsuit pending against the company working on the factory floor or in the executive offices.[13]

Finally, the three-cornered relationship created by *qui tam* laws yields unusual challenges for the Government and its litigation attorneys. They do not represent the relator; indeed, a not-inconsequential (but, one hopes, dwindling) minority view the relator as merely a witness whose credibility is tainted by financial interest.[14] That

5. *Compare* Manning v. Util. Mut. Ins. Co., 254 F.3d 387, 394 (2d Cir. 2004) (*qui tam* relator is "private attorney general" because "private citizens . . . receive part of the recovery") *with* United States v. Halper, 490 U.S. 435, 451 (1989) ("In contrast to the plaintiff in a private-attorney-general action, the private party in a *qui tam* action brings suit in the name of the United States and shares with the Government any proceeds of the action").

6. The Seventh and Eighth Circuits have held that "a *pro se* relator cannot prosecute a *qui tam* action, because he is acting as an attorney for the government." United States ex rel. Lu v. Ou, 368 F.3d 773, 775 (7th Cir. 2004), *citing* United States v. Onan, 190 F.2d 1, 4 (8th Cir. 1951) (relators "acted as attorneys for the United States").

7. 31 U.S.C. § 3730(c)(2); United States *ex rel*. Roby v. The Boeing Company, 995 F. Supp. 790, 795 (S.D. Ohio 1998).

8. 31 U.S.C. § 3730(c)(3).

9. United States *ex rel*. Truong v. Northrop Corp., 728 F. Supp. 615, 621 (D.D. Cal. 1989).

10. Swift v. United States, 318 F.3d 250, 253 (D.C. Cir.), *cert. denied*, 539 U.S. 944 (2003). *But see* United States *ex rel*. Sequoia v. Sunland Packing House Co., 912 F. Supp. 1325 (E.D. Ca. 1995) (applying arbitrary-and-capricious standard of review to Government's decision to dismiss). Notably, there is relatively uniform judicial agreement that the Government does not have unfettered discretion to settle a case over the relator's objection without a judicial fairness hearing. *E.g*., United States *ex rel*. McCoy v. California Medical Review, Inc., 133 F.R.D. 143 (N.D. Cal. 1990) (permitting discovery into basis for settlement where relator was excluded from negotiations).

11. The writer has personal experience with cases, which remained under seal for three and five years prior to any notice to the defendant. While such seal periods have given rise to a good bit of tooth-gnashing and hair-rending on the part of defense counsel, courts have to date declined to penalize the Government in connection with lengthy seal periods. *E.g*., *In re* Cardiac Devices *Qui Tam* Litig., 221 F.R.D. 318, 355–56 (D. Conn. 2004).

12. *E.g*., United States *ex rel*. O'Keefe v. Mcdonnell Douglas Corp., 961 F. Supp. 1288 (E.D. Mo. 1997) (contractor may be liable for labor mischarging by hourly employees); United States v. O'Connell, 890 F.2d 563, 568–69 (1st Cir. 1989) (liability may be imposed on corporation for acts of one-third owner and general manager); Grand Union Co. v. United States, 696 F.2d 888, 890–91 (11th Cir. 1983) (knowledge of check-out cashiers, who accepted food stamps for ineligible items, could be imputed to corporation); United States v. Hangar One, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977) (liability may be imposed based on acts of employees acting within scope of authority for purpose of benefiting corporation; employees involved need not have substantial authority or broad responsibility); United States v. Incorporated Village of Island Park, 888 F. Supp. 419, 437–38 (E.D.N.Y. 1995) (municipal corporation may be liable for clerk's illegal manipulation of federal housing program); United States v. Truong, 860 F. Supp. 1137, 1138–39 (E.D. La. 1994) (corporation may be liable based on cashier's illegally trading cash for food stamps).

13. It is not unusual for relators to continue working at the defendant's place of business long after a *qui tam* lawsuit is filed.

14. For a discussion of the views of government investigators and counsel toward relators and relators' counsel, permit me to commend Frederick M. Morgan, Jr. and Jennifer M. Verkamp, *Notes from the Field: Practicalities of the* Qui Tam *"Working Relationship" Under the 1986 False Claims Act Amendments*, 29 False Claims Act and *Qui Tam* Quarterly Review 31 (Taxpayers Against Fraud Education Fund, January 2003), *available at* http://www.taf.org/quarterly.htm.

said, the vast majority of government counsel recognize the value added to their efforts by credible relators and their attorneys, but must nonetheless balance the interests of their own clients, and their ever-burgeoning caseloads, in allocating their time and resources. They must be vigilant to ensure that evidence provided by relators was gathered in a manner which does not compromise its usefulness; must guard against receipt of privileged materials, and of course must bear in mind that a "government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."[15]

In sum, most *qui tam* cases involve high stakes and are complex, lengthy, hotly contested and fiercely fought. Current non-management and former management and non-management employees frequently have knowledge of information directly relevant to the relator's allegations, whether by relator's counsel or government lawyers or investigators. Former employees are of particular interest. As one commentator has observed, "[f]ormer employees know where the bodies are buried" and "often possess information and documentation critical to, if not determinative of, a matter in litigation."[16] With discovery deferred for years by virtue of the False Claims Act's seal requirement and inevitable pretrial skirmishes, it is irresponsible for relators' counsel to allow potential sources of highly valuable evidence to wither on the vine, or for that matter move, forget, or expire.

This issue has recently become dramatically more important to all actors in False Claims Act cases because of the McDade Amendment, a statute which subjects attorneys and investigators for the government to what may be a conflicting web of state ethics requirements, including the "no-contact" Rule 4.2. Seizing on confusion over the implications of the Amendment and the concern on the part of government counsel that a misstep will wreak professional havoc, counsel for corporate defendants have been emboldened to make ever-broader assertions of blanket representation of current and former employees. McDade deters government counsel from authorizing investigators to conduct witness interviews. Given this environment, counsel for relators must give closer consideration to when and how to conduct such interviews themselves in the face of blanket-representation assertions, weighing the risk that invaluable evidence may be lost, forgotten, or undiscovered against the risk that an adversary will use even wholly-proper contacts to distract attention from a defendant's conduct. It is a thesis here that McDade works against early evaluation and resolution of *qui tam* cases and thwarts the flow of information from corporate employees to federal investigators in a way which Congress surely could not have intended.

15. Gray Panthers v. Schneider, 230 U.S. App. D.C. 219, 716 F.2d 23, 34 (D.C. Cir. 1983), *quoting* Model Code of Professional Responsibility EC 7-14 (1981).

16. Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Privileges,* 81 Neb. L. Rev. 868, 869 (2003).

BACKGROUND

Lawyers always have been expected, first as a matter of courtesy[17] and for the past century as a matter of ethical stricture, not to contact parties to a dispute who they know to be represented by counsel.[18] The most common formulation of the "no contact" or "anti-contact" rule, as it is variously called, is found in Rule 4.2 of the Model Rules of Professional Conduct, the present iteration of which provides:[19] In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[20]

Nearly all False Claims Act cases involve corporate defendants which act only through their employees or agents. With respect to organizational defendants, Rule 4.2 is usually implemented with recourse to the drafters' commentary. Prior to 2002, the official comment identified three categories of persons with whom contact was prohibited:

> 1) persons having managerial responsibility on behalf of the organization, 2) any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability, and 3) any other person whose statement may constitute an admission on the part of the organization.[21]

While the 2002 version of Model Rule 4.2 was barely changed from its predecessor, the drafters completely rewrote the comment.[22] It now reads:

17. Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 325 (1992).

18. The "no-contact" or "anti-contact" rule reportedly originated in 1836, in the form of a suggestion for decorous conduct by attorneys. At this writing, it has been the formal position of the American Bar Association for more than a century. The history of the rule is canvassed in ABA Formal Opinion 95-396, as well as in many journal articles. *E.g.*, Sapna K. Khatiwala, *Toward Uniform Application of the "No-Contact" Rule: McDade is the Solution*, 13 Geo. J. Legal Ethics 111, 113–15 (1999).

19. Model Rules of Professional Conduct Rule 4.2 (1983). DR 7-104(A)(1) of the Model Code of Professional Responsibility [hereinafter the "Model Code"] is substantially identical to Rule 4.2. The earliest formulation of the rule is that found in the ABA's Canons of Professional Ethics No. 9 (1908). *See generally* John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. Rev. 683 (1979).

20. The quoted version of Rule 4.2 was promulgated by the ABA's "Ethics 2000 Commission." The only changes from the prior Model Rule 4.2 was the addition of "or a court order" after "authorized to do so by law." While it may in some cases be helpful to the private practitioner to have the propriety of seeking a court order to permit otherwise-prohibited contacts made explicit, the "primary reason for adding the reference to a court order was to reassure the [Department of Justice] that it could seek judicial relief from the Rule when it was needed." Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part III)*, 70 Tenn. L. Rev. 643, 675 (2003). Professor Pierce, a member of the Ethics 2000 Commission, authored a trilogy of articles devoted solely to the Commission's activities regarding Rule 4.2. In addition to the foregoing, *see (Part I)*, 70 Tenn. L. Rev. 121 (2002) and *(Part II)*, 70 Tenn. L. Rev. 321 (2003). The stated purpose of these three articles was

> to provide state bar associations and state supreme courts with a solid foundation for deciding whether to retain their current rule, adopt the New Rule, or to construct their own variation on the basic theme of the no-contact rule[.]

Part III at 643. The fact that it required three lengthy articles spanning hundreds of pages to lay the matter out demonstrates the complexity of interpreting and applying this one-sentence Rule.

21. *E.g.*, Humco, Inc. v. Noble, 31 S.W.3d 916, 920 (Ky. 2000).

22. Model Rules of Prof'l Conduct R. 4.2 (2002), Comment 7. The Ethics 2000 Committee adopted the word "constituent" to refer to employees, agents, and others associated with a corporation or other party.

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization, who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

The extent to which the elimination of reference to persons "whose statement may constitute an admission on the part of the organization" constitutes a meaningful change remains to be seen, as Ethics 2000 is only beginning to be adopted.[23]

The single sentence of Rule 4.2 has engendered a remarkable amount of litigation and extensive scholarly comment. Some of the interest in cases interpreting the Rule doubtless is driven by lawyerly rubbernecking, as every Rule 4.2 case presents an intriguing war story with the outcome rarely certain.[24] However, there also is something deeper. The no-contact rule embodies a fundamental tension between its guiding principle—that, as the Ethics 2000 Commission recognized, the Rule "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter"[25]—and another important principle: That the "basic cornerstone of our judicial system is the unimpeded flow of information between adversaries to encourage the early detection and elimination of both undisputed and meritless claims."[26]

As so much has been written and is easily available with an Internet search engine, the goal here is merely to provide colleagues with an overview of the issues which Rule 4.2 poses for the three corners of the *qui tam* triangle, and to provide relators' counsel with some insight into the problems faced by their government counterparts under McDade.

GENERALLY-ACCEPTED RULE 4.2 PRINCIPLES[27]

Rule 4.2 and the Current Employee

By its terms, Rule 4.2 applies only to those persons who are "represented by another lawyer in the matter." In the case of a corporation, most courts reason that counsel

23. The Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, in a February 2005 opinion, adopted the Ethics 2000 comment as its official interpretation of existing Rule 4.2. Op. 2005–3 (February 4, 2005). The Board said that the change would clarify the rule, but did not offer further explanation.

24. Courts have observed that the case-by-case analysis, which pervades the no-contact jurisprudence, "is wasteful of judicial resources, runs the risk of treating similarly situated litigants differently, and . . . fails to provide attorneys with any practical standard by which to conduct discovery." Wagner v. City of Holyoke, 183 F. Supp. 2d 289, 292 (D. Mass. 2001), *quoting* Siguel v. Trustees of Tufts College, 1990 WL 29199, at *4 (D. Mass. Mar. 12, 1990).

25. American Bar Association Ethics 2000 Commission, Official Comment 1 to Rule 4.2 (2002).

26. United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257, 262 (N.D. Ohio 1997).

27. This section heading must be taken with a grain of salt. While there are indeed general principles of conduct with respect to Rule 4.2 contacts, there are too many variations thereon to catalog. At risk of belaboring the point, practitioners need to exercise caution if they are anywhere near the margins of Rule 4.2.

are precluded from contacting only those persons who have the authority to bind the adverse corporation. This is frequently expressed in some variant of a control group test. For example, the Massachusetts Supreme Court recently read Rule 4.2 to "ban contact only with those employees who have the authority to 'commit the organization to a position regarding the subject matter of representation.'"[28] Indeed, it appears that only one court has held that all current employees are "represented parties" under Rule 4.2, and that California Supreme Court decision was subsequently withdrawn[29] and replaced with a definition of "party" which squares with the majority rule.[30] These definitions apply only when someone is employed at the time of the communication under review.[31]

A variation on current-employee analysis, the "managing-speaking agent test," has gained acceptance in several jurisdictions.[32] It recently was adopted by the Nevada Supreme Court in a case which arose after plaintiff's counsel in an employment-discrimination case against a restaurant was sanctioned by a federal district court for contacting the restaurant's executive chef, who corroborated the plaintiff's allegation that she had been hired, and then fired because she became pregnant; the defendant contended that she had never been hired. The sanctions included evidentiary preclusion and monetary fines imposed on counsel.

On appeal, the Ninth Circuit certified to the Nevada Supreme Court the question whether Nevada "applied the portion of the commentary to Model Rule 4.2 barring *ex parte* contact with an employee 'whose statement may constitute an admission on the part of the organization.'" The Nevada court answered this certified question in the negative, concluding that the proper inquiry is not whether the employee's statements could constitute an admission, but whether he could bind the defendant corporation.[33]

28. Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College, 764 N.E.2d 825, 833, 436 Mass. 347, 355 (Mass. 2002).

29. Hewlett-Packard Co. v Superior Ct. (Jensen), 205 Cal App 3d 43, 252 Cal Rptr 14 (4th Dist. 1988), *review denied, opinion ordered withdrawn*, 1988 Cal. LEXIS 299 (1988).

30. Cal. Disc. Rule 2-100 provides:

> For purposes of this rule, a 'party' includes: (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization . . .

Id.

31. Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp., 6 Cal. App. 4th 1256, 1262 (1992) (holding that Paragraph B of rule 2-100 is intended to apply only to persons employed at the time of the communication); Continental Ins. Co. v. Superior Court, 32 Cal. App. 4th 94, 119 (1995) (same). California "clearly" has no proscription against communications with former employees. Packard Bell NEC, Inc. v. Aztec SYS., 2001 U.S. Dist. LEXIS 11194, *19 (C.D. Cal. 2001).

32. The leading "managing-speaking agent test" case is *Wright by Wright v. Group Health Hosp*., 103 Wash. 2d 192, 691 P.2d 564 (1984). The *Wright* court reasoned that "[t]he best interpretation of 'party' in litigation involving corporations is only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, i.e., those employees who have 'speaking authority' for the corporation . . . It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts. Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to bind the corporation." *Id*. at 569.

33. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237, 1240 (Nev. 2002).

> [T]he managing-speaking agent test restricts contact with those employees who have 'speaking' authority for the organization, that is, those with legal authority to bind the organization. Which employees have 'speaking' authority is determined on a case-by-case basis according to the particular employee's position and duties and the jurisdiction's agency and evidence law.

The court articulated the rationale of the managing-speaking agent test:[34]

> an employee does not "speak for" the organization simply because his or her statement may be admissible as a party-opponent admission. Rather, the inquiry is whether the employee can bind the organization with his or her statement. Also, an employee for whom counsel has not been retained does not become a "represented party" simply because his or her conduct may be imputed to the organization; while any confidential communications between such an employee and the organization's counsel would be protected by the attorney-client privilege, the facts within that employee's knowledge are generally not protected from revelation through *ex parte* interviews by opposing counsel.

The Ninth Circuit recognized that the Nevada Supreme Court's answer "dramatically changes the landscape of our case."[35] The chef had not been actively involved in the decision to hire the plaintiff, and so counsel's contacts with him did not violate Rule 4.2; the sanctions were reversed.[36]

Finally, it is important to note that Rule 4.2 has no application where a current employee of a corporate defendant—even a manager or an employee whose statements would constitute an admission—has retained her own counsel, and that attorney consents to the contact.[37] This fact underscores that the purpose of Rule 4.2 is not to give counsel to an organization control over the flow of information to its adversary, but to

> protect[] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.[38]

34. *Id*. at 1248.
35. Palmer v. Pioneer Inn Assocs., 338 F.3d 981, 987 (9th Cir. 2003).
36. *Id*. at 988–89.
37. This is implicit in Rule 4.2's application to persons "know[n] to be represented by another lawyer in the matter." It is stated explicitly in the Comment to Florida's Rule 4.2: "If an agent or employee of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule." Lang v. Reedy Creek Improvement Dist., 888 F. Supp. 1143, 1144 (M.D. Fla. 1995).
38. American Bar Association Ethics 2000 Commission, Official Comment 1 to Rule 4.2 (2002). The Utah iteration of Rule 4.2 includes this comment: "The purpose of this Rule is to foster and protect legitimate attorney-client relationships. It seeks to guard against inequities that exist when a lawyer speaks to an untrained lay person." Utah Rules of Prof'l Conduct R. 4.2 cmt. (2002).

This does not, of course, authorize inquiry into privileged communications the employee may have had with the corporation's attorneys.

Rule 4.2 and the Former Employee

Although Rule 4.2 itself makes no distinction between current and former employees, the courts have generally—but not always—held that contacts with former employees *at any level* are not prohibited. These holdings generally reason "that Rule 4.2 was not meant to prevent the flow of information, even if damaging, but to preserve the positions of the parties in the adversarial system and to maintain the protections obtained by employing counsel."[39] The American Bar Association has agreed formally for almost fifteen years,[40] and Comment 7 to the Ethics 2000 revision to Rule 4.2 explicitly states that "[c]onsent of the organization's lawyer is not required for communication with a former constituent."[41]

While the majority rule appears to be that all former employees are outside the purview of Rule 4.2 and its equivalents, there are some variations, usually focused on prior supervisory responsibility or some variant of control-group membership. In particular, courts have extended the no-contact rule to former employees who "'have been extensively exposed to relevant trade secrets, confidential client information, or similar confidential information of another party interested in the matter.'"[42] However, former employees are not brought within the attorney-client relationship "solely because the person's own acts done, when the person was a member, might later be a basis for holding the organization liable."[43]

39. P.T. Barnum's Nightclub v. Duracell, 766 N.E.2d 729, 732 (Ind. App. 2002); *accord*, *e.g.*, *Humco*, 31 S.W.3d at 920; H.B.A. Mgmt, Inc. v. Estate of Schwartz, 693 So. 2d 541, 546 (Fla. 1997); Continental Ins. Co. v. Superior Ct., 32 Cal. App. 4th 94, 37 Cal.Rptr.2d 843, 858-59 (Cal. App. 1995).

40. ABA Committee on Prof'l Ethics & Prof'l Responsibility, Formal Op. 91-359, at 3 (1991) states:

> While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers, [sic] the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation. Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

41. Model Rule 4.2, Comment 7 (American Bar Assn. 2002).

42. Rockland Trust Company v. Computer Associates International, 1999 U.S. Dist. LEXIS 2008 (D. Mass., Feb. 19, 1999), *quoting* Camden v. State of Maryland, 910 F. Supp. 1115, 1121 (D. Md. 1996), *quoting in turn* proposed Section 162 of the Restatement of the Law Governing Lawyers.

43. Curley vs. North American Man Boy Love Ass'n, 2003 U.S. Dist. Lexis 12482 (D. Mass. Mar. 31, 2003).

While a few examples are provided in the margin,[44] certain former employees fall within ambit of Rule 4.2.[45] The nuances from jurisdiction to jurisdiction are beyond the scope of this paper. Litigators will obviously ensure that they are familiar with the rules applicable to the jurisdictions in which they practice. The stakes of not doing so are chillingly high: "[O]ne inappropriate step by counsel in contacting a litigant's former [or current] employees may result in sanctions such as disqualification of counsel, exclusion of evidence . . . , monetary penalties, and initiation of disciplinary action."[46]

Rule 4.2 Issues in *Qui Tam* Litigation

Although there are hundreds of reported *qui tam* decisions since the reinvigoration of the False Claims Act in 1986, few have dealt squarely with Rule 4.2 issues. One which did is *United States* ex rel. *O'Keefe v. McDonnell Douglas Corp*.[47] *O'Keefe* addresses the Rule in the context of investigative activities by government counsel, but it serves well to demonstrate the interface between Rule 4.2 and all False Claims actors. Because it may be the most directly relevant decision on the books, it warrants detailed scrutiny.

The United States intervened in Daniel O'Keefe's case against Lockheed, in which he alleged that Lockheed engaged in mischarging of labor hours in connection with the A-12 Advanced Tactical Aircraft and several other weapons systems.[48] Government investigators sent a questionnaire "to defendant's current and former employees . . . at the direction of the Government's attorneys" which asked "whether the em-

44. ***Former employees not within ambit of Rule 4.2:*** FleetBoston Robertson Stephens, Inc. v. Innovex, Inc., 172 F. Supp. 2d 1190, 1193 (D. Minn. 2001); Houck v. Hardee's Food System, Inc., No. 5:98-CV-373-BR(2), 1999 U.S. Dist. LEXIS 6856, at 3–5 (E.D.N.C. Mar. 23, 1999); Turnbull v. Topeka State Hospital, 185 F.R.D. 645, 652 (D. Kan. 1999); E.E.O.C. v. General Motors Corp., 77 Fair Empl. Prac. Cas. (BNA) 267 (E.D. Mo. June 4, 1998); United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257, 261 (N.D. Ohio 1997); Goff v. Wheaton Industries, 145 F.R.D. 351, 354-55 (D.N.J. 1992); Humco, 21 S.W.3d at 920; *Barnum's Nightclub*, 766 N.E.2d at 737; H.B.A. Management, Inc. v. Estate of Schwartz, 693 So. 2d 541, 546 (Fla. 1997); Continental Insurance Co. v. Superior Court, 37 Cal. Rptr. 2d 853, 858–859 (Ct. App. 1995); *Wright by Wright*, 103 Wash. 2d at 201, 691 P.2d at 569 ("former employees cannot possibly speak for the corporation"). ***State bar association opinions to the same effect:*** Conn. Bar Ass'n, Informal Op. No. 99-43 (1999); Ohio Bd. of Comm'rs. on Grievance and Discipline, Op. 96-1 (1996); Ark. Bar Ass'n Ethics Comm., Ethics Op. 91-1 (1991); Fla. State Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 88-14; Ill. State Bar Ass'n, Op. No. 85-12 (1985); South Carolina Bar Ethics Advisory Comm., Advisory Op. 01-01 (2001); Or. State Bar Ass'n Bd. of Governors, Formal Op. 1991-80 (1991).

All former employees within ambit of Rule 4.2: Pub. Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037, 1042 (D.N.J. 1990). This opinion, while never reversed, has been widely criticized. *E.g*., Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 86 (D.N.J.1991).

45. *E.g.*, Weeks v. Independent Sch. Dist. No. I-89, 230 F.3d 1201, 1208 (10th Cir. 2000) (applying Oklahoma law, utilizing "speaking authority" test); Jones v. Daily News Publ'g Co., 2001 U.S. Dist. LEXIS 5349 (V.I. Mar. 16, 2001) (disqualifying counsel due to contact with former employee's decision-making role in the underlying termination); Spencer v. Steinman, 179 F.R.D. 484, 491 (E.D. Pa. 1998) (weighing test including position held, knowledge of communications with counsel, and time since termination); United States v. Housing Authority of Town of Milford, 179 F.R.D. 69, 72 (D. Conn. 1997); *In re* Prudential Ins. Co., 911 F. Supp. 148 (D.N.J. 1995) (applying control-group test to former employees); *Camden*, 910 F. Supp. at 1121.

46. Becker, *supra* n.15, 81 Neb. L. Rev. at 875. The Nevada Supreme Court observed that "[s]anctions for violating the rule have included disqualification of counsel, monetary sanctions, exclusion of information obtained by *ex parte* contact, prohibition on the use of such information at trial, and production to the organization's counsel of information obtained by *ex parte* contact, including all or part of the work product connected with the contact." Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d at 1240.

47. 961 F. Supp. 1288 (E.D. Mo. 1997).

48. The details of the mischarging allegations are described in an earlier opinion. United States *ex rel*. O'Keefe v. Mcdonnell Douglas Corp., 918 F. Supp. 1338, 1341 (E.D. Mo. 1996).

ployee ever engaged in mischarging of labor, and, if so, at the direction of whom."[49] Following such contacts, Lockheed sought both a protective order and evidentiary sanctions against the Government.[50] The court's resolution of these issues amounts to a primer on Rule 4.2.

First, the court focused on that portion of the Official Comment to Rule 4.2 which precludes contact with persons "whose act or omission in connection with [the] matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."[51]

The court then recognized that in order to "determine whether defendant's employees are persons whose acts or omissions may subject defendant to liability, the Court must refer to the substantive law"—that is, the False Claims Act.[52] The court identified the issue as being whether Lockheed could be "held civilly liable under the False Claims Act for the acts or omissions of its current employees who were involved in the alleged mischarging," canvassed the relevant statutes and case law, and concluded that it could.[53]

This properly-reasoned approach to the question of civil liability under the False Claims Act triggers the conclusion that, under the no-contact rule, contacts with current employees regarding whether they personally engaged in labor mischarging runs afoul of Rule 4.2, and the court so concluded. Importantly, however, it further held: "'*[S]ome current employees may be only 'fact witnesses' who hold factual information about what they observed others doing*.'"[54] This distinction is critical because it means that, in a jurisdiction where Rule 4.2 and its comment apply, current, non-management employees with percipient knowledge of fraudulent practices can properly be interviewed by counsel or investigators employed by the relator or the United States.[55] This con-

49. 961 F. Supp. at 1291. The Government justified its contacts with current and former employees on the basis that Rule 4.2 had no application. The reasons for this seemingly surprising, but in fact wholly understandable position are described more fully *infra* at 15–16.

50. As summarized by the court:

> Defendant seeks an order (1) barring the Government from contacting its current employees ex parte about the subject matter of this litigation; (2) requiring the Government to give defendant 10 days notice before contacting any former employee concerning the subject matter of this action; (3) requiring the Government to provide defendant with a list of all employees it has contacted ex parte since intervening in this action; (4) requiring the Government to provide defendant with all information obtained from its employees in this manner; and (5) barring the Government from using any documents or information obtained through ex parte contacts.
>
> 961 F. Supp. at 1291.

51. *Id*. at 1291, *quoting* Comment, Rule 4.2. Both Rule 4.2 and its Comment governed the issues at bar because the court applied Missouri's Code of Professional Responsibility, noting that it had been adopted by the federal court by way of local rule. Further, Rule 4.2 and the comment had been adopted by the Missouri Supreme Court, thus making them applicable to counsel practicing before the United States District Court. This concatenation of adoption is not universal, but is sufficiently common as to represent a majority approach.

52. 961 F. Supp. at 1291. This holding provides insight into the concepts of imputation of conduct and admission of liability, and also demonstrates one of the delicacies of Rule 4.2 analysis. For an employee is no more than a percipient witness, there is no reason to tip the scale away from the streamlined truth-search to the more cumbersome model of attorney involvement; however, if an employee's testimony may in and of itself shift the balance toward or away from liability, then the presumptions of fairness associated with attorney representation become more significant.

53. *Id*. at 1292–93.

54. *Id*. at 1293 (emphasis supplied), *quoting* Terra Int'l, Inc. v. Mississippi Chem. Corp., 913 F. Supp. 1306, 1321 (N.D. Iowa 1996).

55. A similar result was reached in *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (N.Y. 1990).

clusion also demonstrates the balance between expedient and untainted fact-finding and the right to counsel.[56]

Finally, the court evaluated the extent to which, in light of its conclusion regarding imputation of employee misconduct to a False Claims Act defendant, contacts with former employees were consistent with Rule 4.2.

The court recognized that Rule 4.2 has no application at all to contacts with former employees.[57] It nonetheless held that "because the statements of some of defendant's former employees may subject defendant to liability . . . some limits should be placed on the Government's access to these employees."[58] In an attempt to fashion an appropriate remedy, the court directed that when the Government conducted *ex parte* interviews with former employees, it maintain copies of "statements, notes, or answers to questionnaires obtained as a result" and provide them to defendant on 10 days' notice.[59]

O'Keefe highlights important questions in the analysis of Rule 4.2 questions in the *qui tam* context: The extent to which actions of low-level employees can be "imputed to" the corporation for purposes of imposing liability on it, and the question whether statements of an eyewitness who saw another employee engage in conduct which supports an alleged violation of the False Claims Act can constitute an admission against interest by the corporate defendant. However, the court's decision that contacts with former employees should be regulated because they could expose the corporation to liability is problematic. "Rule 4.2 protects only the attorney-client privilege and not the underlying facts,"[60] and so is not designed "to protect a corporate party from the revelation of prejudicial facts."[61]

There is little doubt that the actions of a low-level employee will have an impact on the defendant's False Claims Act liability where the conduct supports the claim that the defendant intended to cheat on a government contract. However, it paints too broadly to use this point to conclude that any current employee who is knowledgeable

56. The only other *qui tam* case scrutinizing Rule 4.2 in the context of corporate employees appears to be *United States and State of Florida* ex rel. *Mueller v. Echerd Corp*., 35 F. Supp. 2d 896 (M.D. Fla. 1999). In *Mueller*, the court held that the United States could not interview outside the presence of counsel current employees whose actions the United States might later argue to be corporate admissions. The court did not separate out those employees who were not believed to have participated in the alleged wrongdoing, and the opinion does not disclose whether the plaintiffs raised that question. While *Eckard* necessarily results in heightened concern on the part of counsel practicing in the Middle District of Florida, it is not inconsistent with *O'Keefe*, as it addresses only current employees whose statements would constitute admissions.

57. *Id*. at 1295. The practitioner should note, however, that some courts have held, with respect to former "control group" or "speaking authority" personnel, that former employees may not be contacted, even in jurisdictions where Rule 4.2 applies. Several cases are identified above, *supra* n. 31.

58. *Id*. However, practitioners should be aware of *Rockland Trust Company v. Computer Associates International*, 1999 U.S. Dist. LEXIS 2008 (D. Mass., Feb. 19, 1999), where the district court held that an interview of a former employee regarding her actions during the employment period—which is, presumably, the reason almost any former employee would be of interest to counsel—may trigger that provision of the Rule 4.2 comment which refers to "any other person whose act or omission . . . may be imputed to the organization." The short answer to this concern is that the ABA and many state bar associations have simply determined that former employees are not within the ambit of the Rule.

59. Because the court recognized that Rule 4.2 was not at issue with respect to former employees, these limits can only be viewed through the lens of the general judicial authority to control discovery; notably, most of the required information would be obtained by an adversary using routine discovery methods, the principal differences being the attorney's notes, the contents of which would doubtless be influenced by the prospect that they would be turned over, and truncation of the response period from 30 to 10 days.

60. Clark v. Beverly Health & Rehab. Servs., 440 Mass. 270, 276, 797 N.E.2d 905, 910 (Mass. 2003).

61. Dent v. Kaufman, 185 W. Va. 171, 175, 406 S.E.2d 68 (1991).

about conduct underlying False Claims Act allegations is one whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability" and therefore a represented party under Rule 4.2.

Consider a union welder who works for a producer of valves for use in nuclear submarines who knows that, at the instruction of his boss, he failed to use proper procedures in manufacturing the valve. He knows two things: That improper methods were used, and that their use was directed by the company's management. However, his conduct was simply following the orders of his superiors; it is the conduct of the superiors who hatched the scheme, and those who submitted the false claims, which actually creates liability. There is a strong, but as-yet-untested, argument that using the attorney-client privilege as a means of preventing interviews of employees who did what they were told is not in keeping with the spirit of Rule 4.2.[62]

Rule 4.2 and Relator's Counsel

Several relevant challenges may arise in the course of a lawyer's representation of a *qui tam* relator during the seal period. Absent authority to the contrary in a particular jurisdiction, there appears to be little reason, as far as the no-contact rule is concerned, for relator's counsel to refrain from otherwise-appropriate interviews with any former employee of a defendant. Such was the conclusion in *O'Keefe*, where the Court recognized the possibility that the acts of former employees "may subject the defendant to liability[.]" However, absent precisely-controlling state authority, *e.g*. the Kentucky Supreme Court's square holding in *Humco*, 31 S.W.3d at 920, prudent practitioners will exercise discretion in seeking to interview former employees who were in the control group or exercised corporate speaking authority, or whose actions while employed are closely intertwined with establishing liability.[63]

Moreover, it is necessary to provide what amounts to a "Miranda warning," advising the former employees that the attorney represents a party in an adversary position to the corporation and that the employee is under no obligation to speak to counsel and has the right to seek his or her own counsel or speak to the corporation's attorney.[64] Of course, while a *qui tam* case is under seal, the fact that there is a lawsuit cannot be revealed.[65] But counsel is certainly able, if she chooses, to advise that she

62. Support for this analysis is found in the definition of "impute," that being to "relate to a particular cause or source" or "attribute the fault or responsibility for" an event. Merriam-Webster's Dict. of Law (1996).

63. The question whether such interviews are consistent with the seal is highly situational and, particularly where the defendant is believed to be unaware of the lawsuit, the possibility that the interview will trigger suspicions on the defendant's part must be given paramount consideration; this is not, however, a function of the no-contact rule, but is instead a prudential analysis to be conducted on a case-by-case basis.

64. This obligation derives not just from common sense, but also from Model Rule 4.3, which requires that the contacting attorney make clear her role in the pending litigation or other matter that inspired the contact. "Under this rule, the lawyer must make clear to the unrepresented employee the lawyer's role in the case, including the nature of the case, the identity of the lawyer's client, and the fact that the person's former or current employer is an adverse party." Brown v. St. Joseph's County, 148 F.R.D. 246, 254 (N.D. Ill. 1993). ABA Formal Op. 91-359 (1991) requires that lawyers "punctiliously comply" with Rule 4.3's requirements when contacting a party's former employees, and courts agree. *E.g*., Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991) (adopting requirement of "punctilious compl[iance]").

65. To further complicate matters, it will sometimes be the case that a former or current employee is separately represented by his own lawyer, who advises relator's counsel that the witness is not represented by the corporation's counsel; such a person may even be interested in becoming a co-relator. In such a situation, it is necessary at some point to advise the poten-

represents a client who has a claim adverse to the former employer's interests. In most cases, such contacts will have been suggested by the relator based upon his knowledge of the former employee's probable willingness to talk.[66]

What of the current employee who, knowing or suspecting that the relator is the cause of what appears to be an investigation of the employer, comes to the relator and asks to speak to "someone" about their knowledge of misconduct? Of course, in the unlikely event that such a person is in a control-group or decision-making role, then the contact cannot occur—although the relator can certainly relate to counsel what is said.[67] Such situations become far more dicey when the chatty coworker begins to recite information he or she has obtained from the employer's counsel. The ABA has determined, and it is universally accepted, that a lawyer may not, absent the rarest of circumstances, question *any* current or former employee, other than his own client, regarding privileged communications with corporate counsel.[68]

However, interviews with anxious-to-talk current employees who are outside the purview of Rule 4.2—for example, where the relator is a worker on the factory floor or a hospital billing clerk or nurse—should be viewed as generally permissible, so long as the law of the forum is not inconsistent with such contacts. First, counsel must be careful not to talk to employees regarding conduct which may trigger corporate liability by way of imputation or admission. As a practical matter, again using *O'Keefe* as a guide, this means that only those employees who witnessed, but did not participate in, fraudulent conduct are possible interview candidates. Close consultation with the relator prior to such contacts is critical, and counsel should be prepared to terminate the interview at the first sign that the witness was a participant, rather than an observer. The Rule 4.3 "Miranda" warning is equally significant in this context; any substantive discussion must be prefaced with identification of the lawyer, the client, and the facts that the lawyer represents the client in a context adverse to the employer, that the employee is entitled to seek her own counsel, that the employee is under no obligation to participate in the interview, and that privileged material should not be divulged.[69] Again, it is highly unlikely that *qui tam* counsel will make such contacts absent careful vetting with the relator.

An analytically related issue that does not directly implicate Rule 4.2 arises when the current or former employee has documents which are relevant to the case but may

tial co-relator that a lawsuit exists, but prior to such a revelation, a confidentiality agreement should be entered into. Such situations raise considerable difficulties for the practitioner and must be approached with a great deal of caution and study.

66. I must caveat that the legitimacy of this approach is a studied personal view that has not, to my knowledge, been judicially examined. However, to hold otherwise would be to conclude that the seal provision precludes relator's counsel from conducting any open investigation of her client's claims at all, and that proposition is consistent neither with the purpose of the seal or with the lawyer's obligations to her client.

67. This is in no way, however, to suggest that relator's counsel can task the relator to engage in such contacts. Rather, relators who remain in the workplace should be instructed that they are not to initiate any contacts with such persons, but is free to listen to what is said if an approach is initiated by the other employee. Another, perhaps more difficult situation is when the relator is told by another employee what the corporation's attorneys have said about the investigation; however, this is an issue of privilege, rather than the no-contact rule.

68. ABA Formal Opinion 91-359.

69. "We note that an attorney who abuses the interview process by inquiring into privileged matters, or even by permitting an employee to refer to confidential communications without immediately warning the employee that such communications are protected and should not be disclosed, is subject to appropriate sanctions." *Palmer*, 59 P.3d at 1248 n.65.

be privileged. This topic is beyond the present task except to note that the documents must be returned or, if the case is under seal, isolated without being examined beyond what is necessary to recognize their privileged nature.[70]

Rule 4.2 and *Qui Tam* Defense Counsel

Rule 4.2 is relevant to several aspects of the defense attorney's job. While the most common implications of the Rule relate to efforts by opposing counsel to interview current or former employees, there are others as well. For example, if the relator remains employed after the defendant is made aware of both the case and the relator's identity—a situation which is increasingly common as the result of the practice of "partially unsealing" complaints to afford the defendant an opportunity to address the relator's allegations—then the corporation's counsel who wishes to interview the relator must choose whether to forego the interview or conduct it in the presence of relator's counsel.[71]

The fourth Official Comment to the Ethics 2000 revision of Rule 4.2 (which was the first Comment to the previous iteration), states that "the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter."[72]

Given the nearly-indelible line which Rule 4.2 draws with respect to contacts with an adversary's management personnel, there is a through-the-looking-glass quality in the fact that a person litigating a case involving the Government may seek *ex parte* contact with government employees who are the clients of the Government's lawyer in the case.[73] Such contact generally is viewed as part of the constitutional right to "petition for redress of grievances" provided by the First Amendment.[74] The American Bar Association addressed this constitutional issue in Formal Opinion 97-408, which states:

> Model Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel, with an important exception based on the constitutional right to petition and the

70. "A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them." American Bar Association Formal opinion 92-368 (1992).

71. Instructive in this context, the district court in *Dondore v. NGK Metals Corp*., 2001 U.S. Dist. LEXIS 6268 (E.D. Pa. 2001) held that a corporate defendant in an environmental class-action case could engage in *ex parte* contact with its own former management employees who were putative class members only if the former employee opted out of the class.

72. Model Rule 4.2, Comment 4 (American Bar Assn. 2002).

73. This analysis applies to counsel for both defendants and *qui tam* relators. Practicalities intrude here, however, because defense counsel, who represent what is often a company with ties to the Government that predate and will likely long survive a single lawsuit, have a much easier time gaining access to relevant decision-makers. This situation is further complicated in some cases by the unfortunate and needless perception on the part of government managers that a *qui tam* case is a *sotto voce* accusation of malfeasance or neglect on their part, a perception fostered by the understandable defense strategy of asserting that government actors validated conduct alleged to violate the FCA.

74. *E.g.*, Assoc. of the Bar of the City of New York, Op. 1988-8, 4 Lawyer's Manual on Prof'l Conduct (ABA/BNA) 300-01 (Aug. 24, 1988).

> derivative public policy of ensuring a citizen's right of access to government decision makers. Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication.

The right-to-petition analysis results in the conclusion that Rule 4.2 does *not* apply to government "control group" personnel; rather, precisely those personnel "who have authority to take or to recommend action" are *excluded* from the rule. The Formal Opinion further provides:

> In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel.

Application of Rule 4.2 to contacts with government nonlawyer personnel is in arguably an uncomfortable fit, since few if any are able to bind the Government and the Government typically is not estopped from renouncing statements of lower-level employees, meaning that such a person is unlikely to be able to make a binding admission.

Defense lawyers also should consider whether their efforts to assert blanket attorney-client relationships constitute the false assertion of an attorney-client relationship.[75] Rule 4.2 is not intended as "a throwback to an era in which corporations could completely dominate and control their employees in a litigation matter."[76] Nonetheless, assertions of blanket representation of both current and former employees appear to be increasingly common, and are in fact recommended by at least some commentators.[77] However, criticism of blanket-representation assertions are coming under increased scrutiny and criticism, an observation highlighted by the recent observation of the Ohio ethics authority that "[c]orporate counsel's assertion of blanket representation of the corporation and all its corporate employees is bluster. It is inappropriate."[78]

75. Rule 4.2 "is an ethical rule, not a rule through which corporate parties should gain the ability to control the flow of information to their adversaries." Thomas W. Biggar, *Discovery and Ethics: Dilemma in Interviewing Corporate Employees*, 1 Nev. L. Rev. 1, 5 (1998). One court was "unpersuaded by [a corporate] plaintiff's assertion that Rule 4.2 shrouds every custodian, cafeteria worker and receptionist simply in light of their mantle as 'corporate employee.'" University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990).

76. Weider Sports Equip. Co. v. Fitness First Inc., 912 F. Supp. 502, 509 (D. Utah 1996).

77. *E.g.*, John G. Moriarty, Jr., *Health Care Fraud Investigations in Virginia:* Ex Parte *Government Interviews of Current of Former Health Care Provider Employees*, Health Law News (Virginia Bar Assn. Health Law Section, June 2000).

78. Ohio Board of Comm'rs on Grievances and Discipline, Opinion 2005-3 at 203 (2005).

Finally, issues are beginning to arise regarding whether preparation of witnesses with whom there is no attorney-client relationship is an unprivileged communication[79] or an interference with the proper administration of justice. While these issues may not arise directly under Rule 4.2, they relate closely to its reach.

Rule 4.2, the Government Lawyer, and the McDade Amendment

Any discussion of the application of Rule 4.2 to government lawyers must include analysis of a federal statute enacted in 1999. The McDade Amendment, also known as the Ethical Standards for Federal Prosecutors Act, is short and simple. It provides:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.[80]

In turn, discussion of the McDade Amendment necessarily includes the tumultuous (in a lawyerly sort of way) events of the decade preceding its enactment. So, a bit of history is in order.

The question of which lexicon of professional conduct govern attorneys is, for the private bar, occasionally complex but usually straightforward. The situation was not so clear for lawyers representing the Federal Government. Government lawyers dispatched from Washington to the several federal district courts tend not to be licensed in those courts or the states in which they are sited, and while there are "local counsel" in the offices of the several United States Attorneys, taking their time for babysitting duty might be viewed as inefficient. More important, however, were two much larger concerns. First, the Government claimed for its attorneys the right to have, or to advise investigators to have, contact with represented parties in the context of undercover investigations. Second, the Government viewed, and probably still views, the matter as triggering constitutional concerns, because the Supremacy Clause prevents the states from legislating against the Federal Government.[81]

---

79. Inappropriate assertions of blanket representation are beginning to come to roost. In *United States* ex rel. *Hunt*, et al. *v. Merck-Medco Managed Care, LLC.*, et al., 340 F. Supp. 2d 554 (E.D. Pa. 2004), the plaintiffs moved to compel testimony from a former employee of the defendants regarding her conversations with corporate counsel in preparing for her deposition. The employee disavowed the existence of an attorney-client relationship with counsel, but defendant nonetheless instructed her not to answer. The court compelled testimony regarding all conversations between defense counsel and the former employee regarding the nature of the case, her descriptions to counsel of her interviews with government personnel, descriptions or summaries of the testimony of other witnesses, and conversations during deposition breaks.

80. 28 U.S.C. § 530(b).

81. Leis v. Flynt, 439 U.S. 438, 442 (1979) (per curiam) (footnote omitted). There is, however, a strong countervailing consideration—that the Government, as a juridical fiction, must be represented by an attorney, that attorneys must be licensed, and that licensure must be under the auspices of a state licensing scheme. With respect to the long history of state regulation of the legal profession, the Supreme Court has observed:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They are also responsible for the discipline of lawyers.

Id. at 442.

These issues were particularly important in cases where the Government was concerned either that a prelitigation investigation would be compromised by the presence of lawyers, as where the Government uses undercover or surreptitious investigative techniques to investigate persons who have invoked their right to counsel. An equally important concern was that the presence of a lawyer for an organization would have a detrimental effect on the recollection of a witness. Such cases included organized-crime investigations where the defendant was represented by "family" lawyers, but also included cases where a corporation's counsel asserted that he represented corporate officers or employees with whom the Government wanted to speak.

The tension between Rule 4.2 and the goal of effective criminal and civil investigations came to a head when, in 1998, the United States Court of Appeals for the Second Circuit ruled that an Assistant United States Attorney violated the no-contact rule by directing an undercover informant to make contact with an arson suspect who was a defendant in a Medicare fraud case related to the arson.[82]

Hammad had a galvanic effect in the halls of Justice. On June 8, 1989, Attorney General Thornburgh addressed a memorandum to "All Justice Department Litigators" entitled "Communication with Persons Represented By Counsel."[83] The "Thornburgh Memorandum" noted that many decisions had approved contacts with undercover informants who were represented by counsel; that "family lawyer" situations either jeopardized investigations or placed informants at significant risk; and "that the Supremacy Clause of the Constitution does not permit local and state rules to frustrate the lawful operation of the federal government."[84] The following lengthy excerpt merits the *qui tam* practitioner's attention:

> The conflict between the Department's law enforcement objectives and the expanding interpretation of DR 7-104 and Model Rule 4.2 is not confined to the area of criminal law enforcement. The Department also has the statutory duty to investigate violations of certain civil statutes, and defense lawyers have attempted to use these same "ethical rules" to impede such investigations. *The problem has commonly arisen in the context of the False Claims Act, which provides that the Attorney General "diligently shall investigate" violations of the Act. In cases involving allegations against corporations and other organizations, Civil Division attorneys have attempted to fulfill that duty by interviewing individual employees without contacting the Company's attorney. A restrictive application of these local bar rules would enable company counsel to control the government's access to the company's employees, whose statements or acts or omissions could bind the corporation under the Federal Rules of Evidence and the expansive view of respondeat superior. In that way, company counsel have attempted to thwart meaningful contact*

82. United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871.
83. The "Thornburgh Memorandum" is attached as an exhibit to the district court's opinion in *In the Matter of John Doe*, 801 F. Supp. 478, 489–93 (D. N.M. 1992).
84. *Id.*, *reprinted at* 801 F. Supp at 492.

> *between the government and the individual employee and have, in a very real sense, created an obstacle to the ability of the employee to communicate freely with law enforcement officials, as mandated by the False Claims Act.*[85]

The Attorney General then articulated departmental policy:[86]

> It is the clear policy of the Department that in the course of a criminal investigation, an attorney for the government is authorized to direct and supervise the use of undercover law enforcement agents, informants, and other cooperating individuals to gather evidence by communicating with any person who has not been made the subject of formal federal criminal adversarial proceedings arising from that investigation, regardless of whether the person is known to be represented by counsel.

Shortly thereafter, the Department promulgated regulations designed to implement that statement of policy. The *O'Keefe* court summarized the regulations as follows:

> The regulation covers the subject of communications between DOJ attorneys and represented persons and parties. Under the regulation, '[a] communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual.' *Id*. § 77.10(a). The regulation defines controlling individual as 'a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.' Id. The regulation states that 'communications . . . pursuant to this part are intended to constitute communications that are 'authorized by law' within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct . . . and analogous state and local federal court rules.' *Id*., § 77.12. Finally, the regulation provides:
>
>> This part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts.[87]

85. *Id*. (emphasis supplied).
86. *Id*.
87. 961 F. Supp. at 1293 (quoting 28 C.F.R. Part 77).

The response of the defense bar to the Thornburgh Memorandum and regulations was vitriolic. The doctrine came under fire in Congress, where a House of Representatives subcommittee wrote:[88]

> We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules of the Federal Courts before which they appear. While recognizing that it is ultimately the courts who finally decide disputes over such authority, we nevertheless urge reconsideration and withdrawal of the Attorney General's June 8, 1989 memorandum, 'Communication with Persons Represented by Counsel.'

The judicial reaction was more pointed. *In the Matter of John Doe*[89] involved a misconduct charge against an Assistant United States Attorney in the District of Columbia. Doe engaged in communications with a defendant who was represented by counsel. The trial court referred Doe to the District of Columbia's disciplinary board. However, Doe was admitted to the bar only in New Mexico, and the D.C. Board referred the complaint against Doe to the New Mexico disciplinary board. Doe, asserting that the grievance proceeding was the equivalent of a case against him in state court for discharging his duties as a federal officer, removed the grievance to the United States District Court. The referenced opinion arose in the context of the disciplinary board's motion to remand. Doe raised the Thornburgh Memorandum as justification for his conduct. In the course of granting the remand motion, the court said:[90]

> It is understandable that an AUSA would construe the Thornburgh memorandum to permit or even mandate unethical behavior. But it is "alarming" the principal law enforcement officer of this country would issue a memorandum purporting to authorize unethical behavior. Because this memorandum invites continuing unethical behavior, it must not be tolerated.

Not surprisingly, a contemporaneous commentator noted that in 1992, "[p]rofessional ethics rules [had] become the vortex of an increasingly bitter conflict between federal law enforcement officials and the defense bar, generally supported by state bar associations, together with the American Bar Association."[91] Indeed, Thornburgh felt compelled to respond in writing to the criticism of the doctrine which bore his name, arguing that it was "designed to tell prosecutors that the Department would stand by them as long as their actions comported with out lawful and authorized practice, and

88. Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, *Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required*, H.R. Rep. No. 986, 101st Cong., 2d Sess. at 32 (1990).
89. 801 F. Supp. at 488.
90. *Id*. at 487.
91. Roger C. Cramton and Lisa K. Udell, *Symposium: State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 292 (1992).

that the Department was prepared to give advice in each instance where the conflict was perceived."[92]

Other forces were also gathering. In May 1992, the United States Attorney for the Eastern District of Pennsylvania secured an indictment against Joseph McDade, a Pennsylvania Republican and attorney who had since 1963 served as a United States Congressman and was the Chairman of the Defense Subcommittee and ranking minority member of the House Appropriations Committee. The indictment charged McDade with racketeering, conspiracy, accepting illegal gratuities disguised as campaign contributions, and falsification of financial disclosures. The charges resulted from alleged cash payments and free private-jet travel, basketball tickets, furniture, golf clubs and vacation trips, and sham law school scholarships provided for his son,[93] by a half-dozen defense contractors whose contracts with the United States were the business of the Subcommittee.

McDade did not dispute many of the facts alleged by the Government, but proclaimed his innocence of criminal wrongdoing. He also attacked the tenor of the Government's investigation, asserting that federal investigators turned his life into a "living nightmare"—that they had twice subpoenaed all of his records, "sent out dragnet summonses to people all over the country," "harassed contributors," and that FBI agents even "accosted me in the dark at my house at 6:00 in the morning."[94]

McDade's colleagues in Congress came vigorously to his defense, joining him in asserting that the indictment was trumped by the Constitution's Speech and Debate Clause and that only Congress could discipline its members.[95] That position was rejected by the trial judge. The United States Court of Appeals for the Third Circuit affirmed, clearing the way for trial. At trial, McDade testified that he had committed only honest mistakes, and after three days of deliberation, the jury acquitted him.[96] He was reelected to his House seat three months later, and became chairman of the Appropriations Committee.

Smarting over his treatment by the Executive Branch prosecutors and investigators,[97] Chairman McDade sponsored a bill in Congress to, he said, "ensure fair treatment [of investigative targets] by prosecutors."[98] The Amendment came to final vote amid of intense focus on the Independent Counsel Law, the investigation by Independent Counsel Kenneth Starr of President Clinton and in particular his interview of Monica Lewinsky,[99] the acquittal of Congressman McDade, and the 1996 conviction

92. Richard Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 Judicature 290 (1991).

93. Joseph McDade, Jr. now serves as Deputy General Counsel for Dispute Resolution, Office of the General Counsel, United States Air Force, and is a member of the United States Senior Executive Service.

94. Roll Call, May 7, 1992.

95. The Legal Intelligencer, March 19, 1993.

96. Morning Edition (NPR), August 2, 1996.

97. "McDade maintained he was the victim of an investigation run amok, damaged personally and politically by prosecutorial intimidation and recklessness." Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 Geo. J. Legal Ethics 707, 724 n.2 (2001).

98. Lounsberry, Emilie, *So-called 'McDade Law' Turns Tables on Prosecutors*, The Philadelphia Inquirer, July 30, 2000.

99. The Lewinsky interview and the postulate that it was an important factor in mobilizing bipartisan support for the McDade Amendment are discussed at some length in Khatiwala, *supra* n.16, 13 Geo. J. Legal Ethics 111.

on mail fraud charges of prominent Congressman Daniel Rostenkowski. McDade was able to muster considerable support for his so-called "Citizen Protection Act."[100]

As these storms were brewing, the *O'Keefe* court examined the question whether or not the regulations which implemented the Thornburgh Memorandum allowed attorneys representing the United States in a *qui tam* case to contravene Rule 4.2 and contact current McDonnell Douglas's employees. *O'Keefe*'s treatment of the issue is neither dissimilar from that of other courts confronted with these challenges to their authority, nor surprising:

In the event, the McDade Amendment was passed on October 21, 1998, as part of the Omnibus Budget Reconciliation Act of 1988, was passed as part of a bill "Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999. In that 1,602-page bill, the McDade Amendment appears between a provision rescinding unobligated funds for the Travel and Tourism Administration and one creating the National Whale Conservation Fund.[101] Then–Chairman of the Senate Judiciary Committee Patrick Leahy, later said that the Amendment "was slipped into a massive omnibus appropriations bill, or some of us call it 'ominous' appropriations bill[.]"[102]

The bill also ordered the Attorney General to promulgate implementing regulations, which occurred.[103] The regulations include a detailed definition of the term "attorney for the government,"[104] which make clear that an attorney for a *qui tam* relator cannot be considered an "attorney for the government" for McDade Amendment purposes. Ironically, the McDade Amendment did resolve the Supremacy Clause issues

---

100. Considerable irony attaches to the fact that McDade's "Citizen Protection Act" achieved legislatively an objective sought by the late labor leader Jimmy Hoffa, in the case of whose prosecution the Supreme Court refused to attach the Sixth Amendment's right to counsel prior to the filing of a charge. *Hoffa v. United States*, 378 U.S. 478 (1964). An excellent examination of the historical and constitutional context of the McDade Amendment is that of Douglass, John G., *Jimmy Hoffa's Revenge: White-Collar Rights under the McDade Amendment*, 11 Wm. & Mary Bill of Rts. J. 123 (2002).

101. 16 U.S.C. § 3703(f)(1).

102. Panel Two of a Hearing of the Senate Judiciary Committee, June 6, 2002 (Comments of Sen. Leahy), ___ Cong. Rec. ___, 2002 FDCHeMedia, Inc. Political transcripts, *reprinted in* Federal News Service June 6, 2002.

103. 28 C.F.R. § 77.1 states:

> (a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to provide a comprehensive, clear and uniform set of rules governing the circumstances under which the Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association *Model Rules of Professional Conduct*, while eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state and federal courts and by bar association organizations and committees.

Id.

104. 20 C.F.R. § 77.2(a) provides:

> The phrase "attorney for the government" means the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel for the DEA and any attorney employed in that office; the Chief Counsel for ATF and any attorney employed in that office; the General Counsel of the FBI and any attorney employed in that office or in the (Office of General Counsel) of the FBI; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515;

expressed in the Thornburgh Memorandum, because Congress determined that federal lawyers and agents would be subjected to the strictures of state law.

Only a few cases have addressed whether particular conduct was consistent with state law as made applicable to federal attorneys by the McDade Amendment, and it is fairly unhelpful. In two opinions by the same judge, government lawyers or investigators taped represented parties; the recording was held justified by the "authorized by law" exception to Rule 4.2.[105] In others, however, application of McDade has led to suppression of evidence.[106] In another case, an Assistant United States Attorney spoke to a corporate bookkeeper who had been subpoenaed to the grand jury; although corporate counsel asserted that he represented the bookkeeper, she in fact wished to testify that counsel sought to convince her to perjure herself and that his presence was intimidating to her. The district court held that the AUSA had violated California's no-contact rule,[107] a finding which was overturned on appeal on the basis that "when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, Rule 2-100 does not bar discussions between the employee and the attorney."[108]

This holding, which undoubtedly came as cold comfort to the accused AUSA, rather clearly demonstrates that federal prosecutors are in a different role than private attorneys—a reality which the McDade Amendment precisely forecloses. The only post-McDade case which relates to *qui tam* actions held that a prosecutor did not violate Rule 4.2 by contacting, in a criminal investigation, the employee of a defendant in a sealed, as-yet-unintervened *qui tam* case.[109]

THE PRACTICAL IMPACT OF THE MCDADE AMENDMENT ON THE GOVERNMENT ATTORNEY'S FALSE CLAIMS ACT PRACTICE

McDade is a chimera lurking over the heads of any lawyer who represents the United States in litigation, but especially those who engage in criminal or civil prosecution of corporate defendants. Doe demonstrates the likelihood that a government lawyer will be licensed in a jurisdiction different from those in which she practices, and many

> any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; and any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The phrase attorney for the government also includes any independent counsel, or employee of such counsel, appointed under chapter 40 of title 28, United States Code. The phrase attorney for the government does not include attorneys employed as investigators or other law enforcement agents by the Department of Justice who are not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

Id.

105. United States v. Brown, 356 F. Supp. 2d 470 (M.D. Pa. 2005); United States v. Grass, 239 F. Supp. 2d 535, 543 (M.D. Pa. 2003).

106. *E.g.*, United States v. Bowman, 277 F. Supp. 2d 1239 (N.D. Ala. 2003), *vacated upon guilty plea*, 2003 U.S. Dist. LEXIS 24817 (N.D. Ala., Sept. 9, 2003).

107. United States v. Talao, 1999 U.S. Dist. LEXIS 10871 ((N.D. Cal., June 17, 1999).

108. United States v. Talao, 222 F.3d 1133, 1140 (9th Cir. 2000).

109. United States v. Joseph Binder Schweizer Emblem Co., 167 F. Supp. 2d 862, 866 (E.D.N.C. 2003).

government lawyers practice in courts all around the country.[110] The McDade amendment subjects her to the disciplinary standards "in each State where such attorney engages in that attorney's duties." "[S]ubjecting federal prosecutors to the application of vaguely written disciplinary rules can cause unanticipated results and real problems for federal law enforcement."[111]

Does that mean that a government lawyer licensed in Ohio working on cases in five other states is with respect to every action she takes bound by the disciplinary rules of Ohio and of each of those five states, depending on which case she is working? Perhaps. Is her supervisor, whose name appears on papers filed in every state in the Union, bound by the disciplinary rules of all 50 states? Perhaps.

Similarly, consider a case venued in Cincinnati, staffed by five Department of Justice attorneys, two with offices in Ohio and licensed there, one with an office in Washington, D.C., who is licensed in Pennsylvania and Virginia; one based in Washington who is licensed in New York and New Jersey, and one based in Washington who is licensed in California and the District of Columbia. Is each of them governed by the Disciplinary Codes of Ohio, Pennsylvania, Virginia, New York, New Jersey, California, and the District of Columbia? Surely not; but if not, is each then bound by the Codes of both Ohio and each of their states of licensure? Apparently so. One of them could be precluded from a contact with a witness while their colleague is not. For example, the District of Columbia permits contacts with all current employees except those who "hold or exercise the power or authority to decide, by conduct or admission, the organization's position(s) in the matter."[112]

More questions arise. Must a government lawyer licensed in a jurisdiction which does not permit contacts with former control-group employees refrain from suggesting to a lawyer without that restriction should interview such a witness, lest she be accused of doing through another what she cannot do herself?

In each of these cases, the answer appears to be "maybe." The "maybe" highlights the *in terrorem* effect of the McDade Amendment: It is reasonable to assume that lawyers want to do the right thing, do not wish to have their ethics challenged, and certainly do not want to live through even a baseless disciplinary proceeding. One commentator summed it up nicely: "No federal prosecutor wants to be the poster child for the McDade Amendment."[113]

As a result, it appears that teams of government lawyers tend to agree that they all are bound by the Rule 4.2 standards to which the most cautious of them feels bound to ascribe; lawyers being lawyers, this will likely be the most cautious approach possible. Not surprisingly, the writer is unaware of any opinion in which a court had addressed any of these issues.

110. For example, in a four-year stint with the Department of Justice, the writer, with Ohio licensure, appeared in court or depositions in at least a dozen states and the District of Columbia.

111. Casey, Paula J., *Regulating Federal Prosecutors: Why McDade Should be Repealed*, 19 Ga. St. U.L. Rev. 395, 424 (2002). Prof. Casey's article provides considerable detail of the case, well-known to many McDade-regulated lawyers, of *In re Gatti*, 330 Ore. 517, 8 P.3d 976 (Ore. 2000), where the Oregon Supreme Court held that no Oregon lawyer (or investigator working for a lawyer) could engage in undercover activity.

112. District of Columbia Bar Legal Ethics Comm. Op. 287, Ex Parte *Contact with Former Employees of Party Opponents*, *citing* District of Columbia Bar Legal Ethics Comm. Op. No. 129 (1983).

113. Radack, *supra* n.68, 14 Geo. J. Legal Ethics at 721.

Presumably because of this lack of judicial guidance, some government attorneys have suggested that McDade governs not merely their own Rule 4.2 analysis, but that of relators' counsel as well. The thesis is that because relators' counsel may be viewed as the "agent" of the United States, government attorneys are potentially responsible for any activities they undertake.

Given the ineluctable fact that relator's counsel are bound by the constraints of their own ethical responsibilities and that relators' counsel do not work for the United States, it would be unexpected to find support for it in the cases, the language or legislative history of the McDade Amendment, or any ethics opinion, and indeed none has been identified by the author. Moreover, this position obviously does not reflect the policy of the Department of Justice, which as matters of both policy and practicality could not consider itself responsible for the actions of lawyers who represent third parties.[114] Nonetheless, while it is obvious that relators' counsel are free to act in accordance with controlling principles and rules of ethics and obligated by their own duties to their clients to investigate their case appropriately, concern by government counsel that relator's counsel may be treated as an agent of the Government has occasionally led federal actors to refuse to examine information resulting from contacts with low-level current and former corporate employees, and even to suggest that relators themselves are bound by the perceived strictures of McDade.

In short, passage of the McDade Amendment has had a significant chilling effect on the way federal investigators and lawyers are able to do their jobs in False Claims Act cases. By way of personal anecdote, the writer is counsel of record in one case where a highly-skilled government litigating team has, as a result of the McDade Amendment, acceded to the defendant's assertion of blanket representation of all current *and former* employees at a corporation's manufacturing facility, although many employees did not participate in the alleged misconduct, but are merely witnesses, and the case is pending in a jurisdiction which explicitly excludes former employees from the reach of Rule 4.2. As a consequence, investigators have been unable to meet with countless employees who have expressly expressed the desire to "talk with somebody" without setting up an interview with defense counsel—a process which is, gently stated, cumbersome and which affords defense counsel weeks within which to "prepare" the employee for the interview.

The deleterious effect of the McDade amendment on the investigation itself, the willingness of witnesses to come forward, the morale of the investigators involved in the case, and the morale of the relators themselves cannot be overestimated.[115] Whether

114. While there obviously is a practical concern that the Government's investigation or its lawsuit may be impacted by the conduct of a relator or her counsel, this is as a matter of law not a question of legal ethics; rather, it merely reminds practitioners that they must be careful to conduct themselves within the boundaries of Rule 4.2 lest the Government be unable to utilize evidence they have developed.

115. Thornburgh Memorandum, *reprinted in* Doe, 801 F. Supp at 492. This result is so consistent with what Attorney General Thornburgh predicted in 1989 that his observation bears repetition:

> A restrictive application of these local bar rules [in *qui tam* cases] would enable company counsel to control the government's access to the company's employees, whose statements or acts or omissions could bind the corporation under the Federal Rules of Evidence and the expansive view of respondeat superior. In that way, company counsel have attempted to thwart meaningful contact between the government and the individual employee and have, in a very real sense, created an obstacle to the ability of the employee to communicate freely with law enforcement officials, as mandated by the False Claims Act.

the McDade Amendment has already led to significant False Claims Act cases being abandoned by the United States is open to question, there can be little debate that it has significantly complicated many such investigations and has put some at genuine risk.

MOUNTING CRITICISM OF MCDADE

Efforts to repeal the McDade Amendment began shortly after its passage,[116] and a significant volume of commentary has called for its repeal.[117] While no one suggests that lawyers working for the Federal Government should be immune from disciplinary regulation, "federal prosecutors have obligations and responsibilities that differ from those of private practitioners and even from other government attorneys."[118]

This proposition is supported by eloquent criticism of the McDade Amendment from an especially interesting quarter in the form of her June 2002 testimony before the Senate Judiciary Committee by Coleen Rowley, Chief Counsel to the Federal Bureau of Investigation's Minneapolis Field Office.[119] Ms. Rowley, sometimes referred to as the "FBI Whistleblower," had written a lengthy memorandum to the Director of the Bureau in which she asserted that the Bureau had stymied efforts by field agents to investigate Zacarais Moussaoui, the alleged "20th hijacker" on September 11, 2001.[120]

Agent Rowley's memorandum landed her on the cover of *Time* magazine,[121] and shortly thereafter in the Judiciary Committee's witness chair. She was introduced by fellow Iowan Charles Grassley, the Senate sponsor of the 1986 Amendments to the False Claims Act. Rowley's Senate testimony focuses on her perceptions of problems within her agency, but she also made a point of asserting that the McDade Amendment was one of the two most significant legal impediments to the FBI's antiterrorism efforts. She suggested that Congress was not "fully aware of the adverse ramifications to law enforcement" when it enacted the Amendment, and added:

> At the present time, the adverse impact [of the Amendment] is greatest upon all forms of white collar crime including Ponzi schemes, other types of frauds, public corruption, etc., but all types of other criminal enterprises, organized crime/drug cartels, and even violent

116. Senator Orrin Hatch first attempted to amend McDade in 1999. Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999). After the destruction of the World Trade Center in 2001, Senator Patrick Leahy introduced a bill to amend the McDade legislation. Professional Standards for Government Attorneys Act of 2001, S. 1437, 107th Cong. (2001). When Senator Leahy failed to get his provisions included in the antiterrorism legislation referred to as the "Patriot Act," an attempt was made to attach the Federal Investigation Enhancement Act of 2001, H.R. 2506, 107th Cong. (2001) to the Foreign Appropriations bill. Each of these efforts to modify the McDade amendment failed. *Cf.* Elkan Abramowitz & Barr A. Bohrer, *In the Name of Counter-Terrorism*, 226 N.Y. L.J. 89 (2001).

117. *E.g.* Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should be Repealed*, 19 Ga. St. L. Rev. 395 (2002); Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 Geo. J. Legal Ethics 707.

118. Casey, *supra* n.80 at 423.

119. Special Agent Rowley's June 6, 2002 Senate Judiciary Committee testimony appears in the Congressional Record (citation unavailable at this writing), and is available online at http://judiciary.senate. gov/testimony.cfm?id=279&wit_id=628.

120. A redacted version of Agent Rowley's memorandum to FBI Director Robert Mueller is available online at http://www.zpub.com/notes/rowleymemo.html.

121. Time, May 2002.

> criminals have benefited from the law. It is only a question of time until terrorists also learn to take advantage of this law, as they apparently have with other facets of our American laws and privileges.[122]

That McDade is also a problem in civil cases or prosecutions of corporate insiders is equally clear. Professor Douglass's *Hoffa's Revenge* article asserts that

> it is far from clear that a no-contact rule—which generally serves to inhibit disclosure of information regarding the conduct of corporate insiders—should be regarded as a tool that protects the 'corporate' interest. It is worth considering, at least, whether the interests of shareholders specifically, and the investing public generally, would be better served by a rule that promotes candid disclosure.[123]

What began as a fight for perceived justice by one angry congressman has become a dramatic impediment to federal criminal and civil investigations and resulting prosecutions. Anyone close to such matters on a regular basis knows for a fact that these consequences are felt on a daily basis by virtually every field agent. Whether Special Agent Rowley's dire predictions come true of not, it is apparent that there are very serious policy considerations at play which should be resolved on a basis far more thoughtful than whether or not a particular state's bar rules apply to a team of federal lawyers and investigators.

A MODEST PROPOSAL FOR REFORM

False Claims Act enforcement, as well as enforcement of the criminal laws of the United States, is being impaired by operation of a statute conceived of the frustration of a single Congressman. It may well be that certain prosecutors or investigators acted overzealously in connection with Mr. McDade, or in connection with other investigations. But the problem is reminiscent of babies and bath water: The concerns of McDade-affected government counsel in some cases significantly inhibits effective investigation, especially where overzealous defense lawyers are willing to stand on the invocation of blanket representation. The result is at best delay and at worst frustration of the search for truth which, after all, animates our nation's legal system. The statute should be either repealed or modified to provide that the attorney is bound by the ethics standards of the district court in which she is appearing, but that in no event should government counsel be prevented from engaging in legitimate law-enforcement techniques reasonably calculated to yield evidence of potentially-criminal conduct. This modification would at least ensure that all lawyers on a litigation team would be bound by the same rules, and the throwing-up-of-hands which *de facto* cedes control to the most-restrictive jurisdiction would be alleviated.

122. Agent Rowleys' view that the effects of McDade are more profound in the criminal than in the civil context reflects the common wisdom of those involved with prosecutions, but the impact on civil cases is sufficiently significant that the proposition is open to question for anyone who believes that seeking to redress fraud against the taxpayers is a significant enforcement priority.

123. 11 Wm. & Mary Bill of Rts. J. at 149.

Additionally, the Government should act to ensure that its lawyers feel empowered to interview those current and former employees with whom contacts are permitted by the relevant disciplinary code. Firm opposition should be lodged to defense counsel's invocation of blanket representation by (1) demanding that the position be modified to reflect what is legally and ethically appropriate; (2) asserting that communications with witnesses with whom there is no retention agreement are not privileged; (3) if necessary, seeking early judicial review, and (4) permitting investigators to conduct themselves in accordance with the ethics requirements of the jurisdiction where the case is pending. This can be accomplished simply by causing the cognizant Assistant United States Attorney to be the supervising counsel for the investigator.

Such policies will go a long way toward reaching balance assuming McDade remains the law of the land, although there is ample basis to conclude that it should not.

CONCLUSION

All attorneys must abide by appropriate standards of ethics. Whether wisely or not, lawyer ethics remains, to a decreasing but still-significant extent, a patchwork quilt, and the no-contact rule represents the profession's best effort at balancing the search for the truth with the right to counsel. That it is not a one-size-fits-all resolution is shown by both the variations across state lines, and the raft of cases and commentary which Rule 4.2 generates. However, that Rule 4.2 is pretty good at its job is demonstrated by the fact that the massive effort toward revision engaged in by the Ethics 2000 Commission resulted in the addition of three words.

As to the attorney representing the United States of America, outrage has been expressed at the proposition that they should not be subjected to at least the same strictures as private lawyers. After all, carved in stone over the doorway to the Attorney General's office: "The United States wins a case whenever justice is done one of its citizens in the courts."[124] But "justice" is open to interpretation and debate, and there is ample basis to conclude that justice is *not* done the taxpayers when a company's fraudulent practices go unpunished because government attorneys and investigators cannot use accepted investigative techniques for fear that they will be forced to defend themselves before an ethics tribunal.

The False Claims Act is too important a vehicle for the redressing of fraud against the taxpayers, and the purported problems addressed by the McDade Amendment too ephemeral, to permit the latter to emasculate the former. McDade encourages obstructive conduct and frustrates the truth-finding process on which the legal system is based.

Congress should, as many have said, remedy the situation. In the meantime, the Department of Justice should aggressively oppose assertions of blanket representation or current employees in order to prevent McDade from becoming nothing more than a license to abuse the attorney-client privilege as a screen to prevent detection of fraud.

124. Luther A. Huston, The Department of Justice 78 (1967). The saying is apparently derived from the observation of John G. Sargent, who served as Attorney General of the United States from 1925–29: "The United States wins a case whenever justice is done one of its citizens in the courts."

Outside of the Law

The False Claims Act & The Cone of Silence

THE FALSE CLAIMS ACT & THE CONE OF SILENCE

Patrick Burns, TAFEF Director of Communications

One of the more endearing features of the 1960s secret agent parody TV series "Get Smart" was the "Cone of Silence," which was lowered from the ceiling whenever the lead character—Maxwell Smart—wanted to tell his boss a secret. The False Claims Act has its own Cone of Silence—a court-ordered seal that is supposed to keep a newly filed False Claims Act case secret. The purpose of the seal is three-fold: 1) Companies are protected from wild charges that may not have any substance but which could, nonetheless, impact stock prices and personal reputations; 2) The investigation is strengthened because the Government can gather evidence before it is destroyed or personnel are intimidated into silence; and 3) The relator or "whistleblower" is protected from retribution and ostracization–a particularly important factor in those cases where he or she is still employed by the alleged fraud-feasing company.

While the seal is a very important feature of a False Claims Act case, it is a tool that can change sides as the case progresses to final resolution. At some point in every case, the Government has more-or-less completed its investigation, the company knows about the scope of the investigation and may have identified the whistleblower, and settlement talks may have begun. What is the purpose of maintaining the seal? In truth, there is no public good for maintaining the seal at this point; this is not to say there is not a private good.

To be blunt, publicly traded companies fear negative publicity and some companies may be willing to pay a premium to have a case announced and settled in a single day, at the end of the week, and preferably in a crowded news cycle—a "crisis news" technique sometimes referred to as "dumping the trash." Was it an accident that the Department of Justice announced a $325 million settlement with Gambro Health Care on December 30, 2004—the very last day of the year, when most reporters and readers were struggling to take down the Christmas tree and get ready for the New Year? "That's not something I can comment on," said the U.S. Attorney handling the case.

Some attorneys believe the seal prevents them from talking about the case at all. This is not true. The seal only covers the fact that there is a case and who the relator's are, and who the lawyer is; it does not cover the broad nature of the fraud that underlies the case, which is often widely held knowledge. After all, in most large "business plan" frauds, hundreds of people may know about the fraud and be participating in it. Again, what is sealed in a False Claims Act case is the existence of a filed *qui tam* action, not the facts of the alleged fraud. In other words, an attorney cannot acknowledge that there is a legal case, cannot say he is the lawyer for the relator, and cannot name the relator; however, he can explain the underlying facts that support the case.

However, just because an attorney can talk to a reporter about the facts underlying a case does not mean he should. Careful thought should be given to the tradeoffs. What

is it you are trying to do? How will this benefit your client? What are the potential downsides and blowbacks?

Early on in a case, the general rule of thumb is complete silence. You do not want to compromise an investigation and, as discovery rolls forward, new information may be uncovered which may enable you and your relator to amend and expand your original complaint. At this stage of the litigation, the less said the better. Even after a company knows the broad nature of an FCA investigation, it does not pay to give too much specific information to the press, as such information will be watched carefully by opposing counsel trying to scope out the depth of the case you will be able to substantiate in court.

Another factor is that publicly traded companies have considerable incentive to settle cases before they take a serious and sustained public-relations hit that may impact stock prices or derail contracts with potential customers. Once a case comes out from under seal—and the full scope of a fraud becomes evident—the damage is largely done and avoidance of negative publicity is a smaller factor in settlement negotiations.

Beyond settlement negotiation strategies, another factor has to do with potential blowback from the U.S. Attorney or the Department of Justice in Washington, D.C. As a *qui tam* attorney, you want to be seen as a reliable confidant of the U.S Attorney. In an ideal world, you want to be able to frame the case to the advantage of your client and to know all of the Government's concerns, as well as their investigation and negotiation strategies. If the U.S. Attorney thinks you may break confidence, he or she will understandably be slow to share information or let you inside their perimeter.

Blowback can come from the bench as well. While some judges thrive on the press, others loathe it, and caution and prudence need to be observed. As a general rule, when in doubt say nothing—talk to the press only on background, or use a third party (like Taxpayers Against Fraud) to communicate key points about your case to the press.

If a case has been partially unsealed, talking with a reporter may make some sense, especially if this is done on background close to the time a case is likely to be settled. Which reporters are likely to be interested in your case? In most cases, fewer reporters than you think. Though your legal case may have consumed a good part of your life and your relator's life for the last few years, most cases have a relatively low news value. Of the 98 False Claims Act cases settled last year, 25 were settled for under a million dollars, and 49 were settled for under $2 million. Only two cases were settled for sums in excess of $100 million. Unless these smaller cases are tied into a larger pattern of fraud or a larger story about the False Claims Act, they are going to remain local or industry-specific cases.

The reality is that the press does not always welcome FCA news stories. In fact, many of the largest False Claims Act cases remain business page stories, and too many of these remain mired at the local level. One reason for this is that the Department of Justice does an abysmal job in terms of press relations. Alternatively, some U.S. Attorneys publish no press releases at all on their web sites, while almost none go to the trouble of appending complaints or settlements, which are the "meat and bones" of a

good news story. Whistleblowers are infrequently named in DoJ press releases, and relators' counsel are rarely noted. In fact, many DoJ press releases give only a cursory account of the fraud or describe it in such a confusing manner that you are left wondering how much money was stolen, what Government program was cheated, and what percentage of the fines were apportioned to civil counts versus criminal counts.

In truth, plaintiffs' counsel cannot afford to let the DoJ and the defendant frame the case and explain it. One side, the Department of Justice, often does not care enough about a settled case to devote the time and resources necessary to make it a news story, while the other side, the fraudfeasor, is interested only in downplaying the scope of the fraud.

If you are a *qui tam* attorney with a case approaching resolution, it pays to spend a little time preparing to tell your story. At the very least, news accounts about your current case might generate a lead for your next successful *qui tam* action. A few weeks before your case comes to final resolution, take the time to do a Lexis Nexis or Westlaw search, gathering the names and contact information of reporters that have covered similar cases or that have written about the industry in question. Are there specialty or trade publications that cover the issue? Where is the company headquartered?

Most write-ups about False Claims Act cases end up on the business page, but look too for reporters that cover specialty beats like health care policy or the defense industry. If the company is publicly traded, stock-market reporters may be interested in getting the "inside skinny."

Now that you have developed a decent press list, complete with names and email addresses, you are ready to think about telling your story. This is best done on paper, and it should be as <u>short</u> and as <u>simple</u> as possible. Packaging a case so that it is short, interesting, simple and relevant is not always easy, as those of you that have tried to explain "yield burning" or "marketing the spread" in twenty words or less have found out.

Reporters are very busy people and generally very smart. What they need to know is whether your story has news value. In other words, why is this case important? Why will their readers (or listeners or viewers) care about it? What makes this case new or remarkable? Remember that reporters have no duty to tell your story—their only concern is readership. The simple truth is that a story must be entertaining or interesting to gain readership. In addition, because of the high commodity of advertising space, editors typically limit news stories to 700 words or less, so your story must be clear and concise.

I suggest taking a stab at writing the news story you would like to see in print. Write it at the right length (no more than 700 words), complete with title, quotes, and a description of the fraud, and a description of the settlement. Work especially hard on writing the opening paragraph and the one that follows it. These paragraphs are the ones that will hook the reporter, the reporter's editor, and (ultimately) the newspaper reader. Remember, you are competing for the reporter's time just as the reporter will be competing for the reader's time.

Once you have written your draft news article, rewrite it in the form of a 100–200 word "pitch" email designed to generate interest (and calls) about the case. Obviously,

you cannot give an exhaustive accounting of the fraud or recovery, but you should be able to summarize the story in a few lines and put it in perspective. Is this case part of a growing or emerging pattern of fraud? Is the core program facing budget cutbacks? Is safety an issue? Is this the first case of its type?

Most reporters will talk to several people before writing a story. Help the reporter—and yourself—by providing the name and telephone number of sympathetic and knowledgeable experts who might be willing to comment on your case. A local business-ethics professor might be a good interview, as might an industry expert, a fellow member of the False Claims Act bar, or the staff at Taxpayers Against Fraud.

Finally, remember that "today's news is tomorrow's fish wrap." To tell your story successfully, you need to prepare well in advance. You do not want to be caught flat-footed at the end of the race, and you do not want the opposition to get a head start while you are still tying your shoes in the blocks. Prosecution of a False Claims Act case may begin in a Cone of Silence, but the public good is fully served only when success is trumpeted as loudly as possible.

In Their Own Words

IN THEIR OWN WORDS...

Roger L. Ediger

On March 7, 2002, while a third year law clerk at Mitchell and DeClerck, PLLC, the law firm I now work for, I read the Federal False Claims Act ("FCA") for the first time. While I had heard of "whistleblowers" in the past, I was only vaguely familiar with how "private attorneys general" could seek justice on behalf of the federal government. On that eventful day in March, I read the FCA, and then closed my door to the hallway, considering what I believed I had read and its application to violations of federal law I was aware of.

Shortly after reading the FCA for the first time, I began researching what constitutes a false claims case, and how one goes about filing and prosecuting the action. As a student at the University of Oklahoma College of Law, I checked out *Advising the Qui Tam Whistleblower* by Robin Page West. I found in this book, as well as in other publications, the mention of two general types of relators, the Relator Witness, and the Relator Investigator. My role in the *United States of America ex rel Roger L. Ediger v. Gold Banc Corporation* fits both of these types of descriptions. However, there is possibly a third classification of Relator, the Relator Victim. While I had firsthand knowledge of false certifications in order to obtain government funds, and while I investigated the matter extensively to solidify the case, I was also a victim of inflated interest rates and fees because of my Bank's false certifications.

In 1976, I began farming with my family in northern Oklahoma, and shortly thereafter, graduated with a degree in Business Administration from Tabor College in Hillsboro, Kansas. My wife and I farmed together through the farm debt crisis of the 1980s. However, the hyper-interest rates of the 1980s burdened our farming operation with debt that was difficult to pay off. During the 1990s we enjoyed relative prosperity in our business. But during the late 1990s, our farm experienced several years of low prices and poor crops. This, coupled with a relatively high debt load, made it increasingly difficult to make a profit on the farm.

In 1999, my wife and I made the decision that would forever alter my career path. At the age of 44, I followed a long postponed dream. I began the pursuit of a law degree, with the intent to come back to my hometown of Enid, Oklahoma and practice law. So, while farming 2,000 acres, and with two children in high school, I started law school at the University of Oklahoma College of Law in Norman, Oklahoma. Law school was a fascinating, yet difficult experience for me. I studied during the week, and, for the most part, operated the farm on weekends. My family was invaluable in keeping our business operating under some very difficult circumstances. Nevertheless, in May 2002, I graduated from law school, took the bar exam in July, and was admitted to the Oklahoma Bar in September 2002.

Agriculture is a capital-intensive business, and most farmers borrow money for purchases of real estate, machinery, livestock, or for operating lines of credit. Our family had lines of credit for crops and livestock from Gold Banc and its predecessors.

Many of these loans were Farm Service Agency guaranteed loans. These loans were funded by Gold Banc, but were guaranteed by the federal government much like SBA loans. The congressional intent of the guaranteed loan program was to ensure that adequate capital was available to farmers, especially those farmers that were experiencing temporary financial stress due to crop losses, or periods of unprofitability.

The Guaranteed Loan Program loans, like any government program or contract, required that in exchange for the benefits the Bank was to receive, it had to certify that it complied with the rules and regulations of the program. The Bank received a guarantee from the federal government that they would be paid back 90 percent of any loss. And in exchange for this guarantee on the Bank's credit, the Bank agreed to properly service the loan according to government practices and procedures, and charge the borrower "no more than the average agricultural customer" in the borrower's interest rate and fees the lender charged.

Before I read the False Claims Act, I knew that the interest rates and fees I was being charged were high; and I questioned both the bank and the FSA that oversaw the loan program. What I did not know at the time was that the Bank was charging interest rates and fees that were not only high and improper, but in violation of federal law. Through my investigation of the Bank's practices as a Relator Investigator, I found that the Bank was charging, on a uniform basis, an interest rate in excess of what the average non-guaranteed borrower was being charged. I also found that the Bank charged fees that were in excess of what the average borrower was being charged.

In the fall of 2002, my attorneys and I met with the AUSA's from the Western District of Oklahoma in the Oklahoma City office, as well as a lawyer from the Justice Department in Washington, D.C. A few weeks later, on October 24, 2002, nearly six months after I read the False Claims Act for the first time, I filed the case under seal in the Western District of Oklahoma. As is usual in a qui tam action, the case's seal period was extended a number of times.

On February 24, 2004, CNBC television broadcast the business story that Gold Banc, the Defendant in the false claim action, was being acquired by another entity, Silver Acquisition Corporation ("Silver"). The transaction was to be closed in July 2004. This eventful day placed into motion events on two fronts. First, we began communicating with the Justice Department our demand that the case be unsealed as to Gold Banc and Silver, their eventual purchaser. We believed that Silver had the right to know that there was a significant lawsuit pending against Gold Banc. We believed that if we didn't inform the Bank of the lawsuit, the acquisition would be consummated. Then perhaps, Silver could argue at a later date that the government was barred from bringing the suit against Silver and their acquired Bank because of the legal arguments of laches and estoppel. Simply put, we feared that Silver could argue that the government knew of the impending lawsuit, but didn't do anything about it, allowed the sale to be consummated, and thus bar the government from bringing the action at a later date.

The seal period in a false claims case is intended to give the government time to determine whether the case is worthy of intervention. For months, the government

promised that they would issue a Civil Investigative Demand (CID), and my lawyers and I provided the government with an initial draft of such a CID. However, the CID was never served, and we feared at one point that the government might send a letter of declination. If that were to happen, we'd be the lead attorneys, and not the government, which was our ultimate goal. We wanted the government to intervene in the case because we believed the case was solid.

Because we were uncertain whether the government would intervene or not, we began a research project to gather enough additional evidence to defeat Gold Banc's expected dispositive motions if the case were declined by the government. My research led me to twenty-five courthouses in Oklahoma and several counties in Kansas to find mortgages and civil actions. In addition, my lawyers and I researched bankruptcy filings and UCC records. This information was combined in a massive, comprehensive database. I interviewed farmers that had loans at the Bank and also several former employees of the bank that confirmed my findings.

In the end, however, the Court agreed that the case needed to be unsealed as to the Defendant and the Bank's potential purchaser, Silver. Within a month, we arranged and met with Gold Banc's attorneys in Dallas, along with a lawyer for the Justice Department from Washington, D.C. Within three days after that meeting, the case was settled in principle for $16 million dollars. However, Gold Banc and the government negotiated for nearly two months regarding the settlement agreement and perhaps a corporate governance agreement. I can only speculate as to this, because the government essentially cut my attorneys and myself out of the loop at this point. Nevertheless, the agreements were finalized and executed in November 2004.

With the settlement agreed to, the last piece of the puzzle was the amount of the recovery I was entitled to receive as the Relator. I argued that since the case was settled in principle prior to the government's intervention, which came two months later, I should be entitled to between 25 percent and 30 percent of the recovery. I argued that the government intervened solely to "drive down the percentage" to the 15 percent to 25 percent range. In the end, a settlement conference in late 2004 resulted with an agreement for the Relator to receive 19.1 percent of $16 million, or $3,056,000.00, plus attorneys' fees to be paid by Gold Banc. It's often said that a good settlement is one in which no one was happy—and this holds true in this case as well. I thought the settlement should have been higher, and the government thought it should be lower. In the end, however, I was pleased with both the amount and the percentage received for my efforts.

What began as a casual reading of the False Claims Act in March 2002 resulted in the largest False Claims Case ever settled in the State of Oklahoma—one of the 100 largest False Claims cases in the history of the United States (at the time of settlement), and a case of first impression regarding the application of the False Claims Act to abuses in government guaranteed lending programs. In spite of a few significant disagreements with the U.S. Attorney's office and the Department of Justice's lawyer I worked with, our working relationship with them was generally amicable and positive. If I have any disappointments, it was not with the individuals that we worked

with on a local level. My frustration stems from the individuals in Main Justice, all of whom I never met or even knew their names, who were not nearly as aggressive as I felt they should be. My other disappointment was the great reluctance on the part of the government to allow a proper relator percentage for a Relator who brings this type of fraud to the government's attention. I think it's a travesty to cooperate with the federal government, bring them the largest case ever settled in the State of Oklahoma, only to have them argue that I should be entitled to only the "finder's fee of 15 percent." The government, in my opinion, should be grateful to Relators who risk their careers and bring cases to the government, often at their own personal peril.

I am a very fortunate individual. In spite of being a victim of the fraud I alleged that the Bank perpetrated on nearly 850 loan borrowers, I was able to bring to light the fraud and allow the taxpayers to recover more than what they lost through the Bank's false certifications. My faith in God, a wonderful family, and my perseverance and determination were essential in getting through many difficult times in the process. Also, the great legal work of Larry D. Lahman and Forrest L. Devaughn at Mitchell and DeClerck in Enid, Oklahoma, and also Jonathan Bridges and Terrell Oxford at Susman Godfrey in Dallas, Texas, were critical in bringing this case to a successful conclusion. And finally, the assistance of Taxpayers Against Fraud Education Fund and the TAF Listserve were essential elements to our success.

After the settlement, Mick Aslin, Gold Banc CEO, stated that "Gold Banc denies all allegations of wrongdoing and the parties state that the settlement was reached to avoid the time, expense, and risk of litigation." Furthermore, Mr. Aslin went on to say that . . . "the parties stated that neither the execution of the Settlement Agreement, nor the performance of any obligations under it, nor the fact of the settlement, is intended to be or shall be understood as an acknowledgment of responsibility or admission of liability or wrongdoing, or other expression reflection upon the merits of the dispute."

…I know of 16 million reasons why I disagree with Mr. Aslin's conclusion.

Lessons From the Frontlines

Pursuing Medicare Anti-Kickback Act Violations Administratively as an Alternate Remedy Under §3730(C)(5)

PURSUING MEDICARE ANTI-KICKBACK ACT VIOLATIONS ADMINISTRATIVELY AS AN ALTERNATE REMEDY UNDER §3730(c)(5)

Candace S. McCall

United States of America ex rel. William Van Thiel v. HCMF et al., Civil Action No. 7:99CV0030; The Inspector General v. PharMerica, Inc., Docket No. C-04-483, and The Inspector General v. PharMerica Drug Systems, Inc., Docket No. C-04-482.

On March 28, 2005, the Office of the Inspector General, U.S. Department of Health and Human Services (HHS-OIG) settled with PharMerica, Inc., and its subsidiary PharMerica Drug Systems, Inc., for $5.975 million, resolving allegations of illegal kickbacks paid in violation of the Civil Monetary Penalties Law (CMPL). This case, according to Andrew Penn, Senior Counsel, HHS-OIG, who took responsibility for the OIG action, is the first time ever that HHS-OIG has worked directly with a relator and his counsel.

The settlement is not only the largest ever kickback CMPL, it is nearly twice the recovery of all other kickback CMPL actions combined. Since 2001, the OIG has collected over $3.2 million dollars in settlement of 30 CMPL cases alleging violations of the Anti-Kickback statutes and/or the Stark laws.

RECIPE FOR SUCCESS

This HHS-OIG settlement concludes action started as a *qui tam* filed in 1998 alleging kickback fraud between nursing home executives or owners of HCMF, Inc., the second largest nursing home chain in Virginia, and PharMerica, Inc., for an additional $5.975 million, bringing the total amount recovered to $10.2 million.[1]

A second portion of the *qui tam* also alleged that PharMerica, Inc., a large institutional pharmacy service specializing in provision of supplies and services to long-term care institutions, paid $7.2 million in kickbacks to steer all pharmacy provision contracts for 18 nursing homes and 8 assisted living facilities, most residents of which are Medicaid and Medicare beneficiaries, to their doorstep. The kickbacks were paid to individuals who were owners of HCMF.

The *qui tam* was filed in 1998, in the U.S. District Court for the Eastern District of Virginia, Alexandria Division, then–Assistant U.S. Attorney Janet Rehnquist was assigned to the case. She requested that the *qui tam* be transferred to the Western

1. The first portion of the *qui tam* was settled in August of 2003 for $4.25 million. $1.7 million of the $4.25 million was obtained via the December 2002 felony convictions of HCMF and its Chief Executive Officer William Cranwell for Medicaid and Medicare cost report fraud, specifically home office costs, including paying a host of relatives salaries and health benefit coverage when none of the relatives worked for HCMF, resulting in imprisonment and criminal restitution fines of $1.7 million plus penalties. Virginia's Medicaid program obtained a portion of the $4.25 million.

District of Virginia, Roanoke Division, once she reviewed some of the documents, because of the criminal potential. In June of 2000, the relator and counsel were informed that the relator was a potential witness in upcoming Grand Jury proceedings. That inquiry excluded the kickback allegations, although a great deal of investigation had taken place. The reason provided at the time was that there appeared to be problems related to amount of damages to the Government arising out of the payments of kickbacks.

In December 2002, the Government intervened on the cost report fraud portion of the *qui tam*, but not the kickback portion. The Government also indicted the CEO of HCMF, William Cranwell, and the corporate defendant HCMF for cost report fraud as set forth in the *qui tam* action. Guilty pleas were entered the same week, on December 12, 2002.

Thereafter, the USDOJ proceeded to settle the *qui tam* as to the cost report fraud, having intervened on those counts, but ignored the allegations of violations of the Anti-Kickback statute.

By June of 2003, settlement discussions became intense, there were two corporate defendants and 9 individual defendants, each represented by separate counsel. By about August of 2003, it became clear to relator's counsel that the violations of the Anti-Kickback statute should be carved out of the settlement if any further action could occur. HCMF and the individual defendants declared that the settlement covered all claims. By negotiation, and by pointing out that the Government had not intervened on the kickback claims, the Government finally agreed, as did HCMF and the individual defendants, that the kickback allegations as to HCMF and the individual defendants would be dismissed without prejudice, on the condition that these defendants all agreed "to cooperate fully and truthfully with the United States's . . . investigation of individuals and entities not specifically released in this Agreement . . . and the remaining allegations in the *qui tam* complaint."

During this time counsel continued to request that the kickback allegations be reviewed once more. Once the settlement agreement was fully executed and the Government informed the relator that it was not going to pursue the kickback claims, a letter was sent proposing how to proceed, which got the attention of HHS and the USDOJ and eventually a meeting with an HHS-OIG attorney in attendance.

The Government conceded that it was not so inclined to pursue the kickback claim because of numerous difficulties kickback cases had under the FCA. Relator's counsel pointed out it would be a lot easier to win the case under an administrative proceeding using the civil monetary penalty portion of the Medicare Anti-Kickback statute. To do so solves several problems.

To prove PharMerica broke the Anti-Kickback statute under the criminal portion of the statute, 42 U.S.C. § 1320a-7b(b), a *qui tam* action ends up with the standard of proof being beyond a reasonable doubt, intent is relevant, the conduct must be "willfully" done.

Under the CMPL, the standard of proof is the same as under the FCA, preponderance of the evidence. "Knowing" and "knowingly" as defined exactly as under

the False Claims Act. Second, under the CMP portion of the Anti-Kickback statute, the CMP damages are broader, including three times the amount of the kickbacks as one option, plus $10,000 fines, no haggling over damage amounts, here $7.2 million, tripled. With $7.2 million in kickbacks, the damages would be very high compared to previous CMPL cases; PharMerica would be a high profile defendant, with a deep pocket, HHS with a strong evidentiary case. Should HHS-OIG choose to pursue the case, it will get all the credit.

Third, the language of the CMP portion of the Anti-Kickback statute is in many places identical to language of the False Claims Act. Instead of invoices it is the receipt or payment of bribes or kickbacks.

There were some incidental other considerations, that may assist relator's counsel when state agencies show up to claim a portion of the Medicaid damages in a *qui tam*. It happened that Virginia, which at the time did not yet have a state false claims act, has a statute for defendants who commit cost report fraud as triple damages. Virginia saw HCMF and the Cranwell family, and this case, as a victory for its investigators, who did most of the work. Before this case, about $8 million total had been recovered for Medicaid fraud by the Virginia Medicaid Fraud Unit. Because Virginia refused to negotiate for less than triple damages for the state share under its own statute, USDOJ was over a barrel as this position left a severely anemic corporate defendant available for an award in a *qui tam*. Virginia had all the evidence, and USDOJ took single damages plus Medicare damages, less than an even split with Virginia. There were no good feelings about this squabbling, including those of the relator, leaving USDOJ with a near bankrupt corporate defendant, and also reducing the award available for the relator.

At the time there was a sense that HHS and USDOJ were not too enthusiastic about pursuing the *qui tam* to obtain more damages. DOJ traveled to Richmond and tried in many ways to obtain a fair share, but it was not to be. When the settlement came along, Virginia insisted Governor Warner personally sign it, then announced its "victory" without mentioning the *qui tam* or the United States, including the criminal successes, to the public.

The relator, and counsel, saw the pursuit of this case as too expensive, and too high a risk, to pursue the case without government intervention. There was nothing to lose.

So it was with great interest that HHS received the invitation to hear us out that it appeared from diligent research that HHS could keep 100 percent of any recovery if another tack was taken. Virginia would have no standing, and Virginia would be unable to claim any share of a penalty. That got us into a meeting with HHS and the Justice Department. A week later, HHS agreed that the OIG's office would prosecute the kickback allegations under CMPL instead of the False Claims Act.

Then followed work to get the *qui tam* out of litigation and the court system while preserving the relator's rights. First, the Government filed a notice of intervention on the kickback counts. Next, language for a stipulated order of dismissal was negotiated, which specifically referred to HHS's intention to proceed with PharMerica in an

administrative action as an alternate remedy, including identifying the Administrative Proceeding and case number. The dismissal was without prejudice to both the relator and the Government, "just in case" things went wrong, if the administrative action appeared doomed later or if HCMF did not cooperate. It was agreed that the relator retained all rights he had under the FCA, and that language was placed into the stipulated dismissal. To make sure, the reservation of rights of the relator was repeated in the negotiated proposed *qui tam* court order, and was signed off by the court.

There was also a handshake agreement that if the administrative action settled, there would be a separate relator's share agreement, that the relator would not be signing off on an administrative action, although there would be a statement in the relator's share agreement that the relator agreed with the administrative settlement amount and did not intend to challenge it. No one wanted to get the relator caught up in negotiations.

The HHS administrative kickback language under the administrative side of the Medicare Anti-Kickback statute essentially tracks the language of the False Claims Act. *See* section 1128A(a)(7) of the Social Security Act, 42 U.S.C. 42 U.S.C. § 1320a-7a(a)(7) and 42 CFR § 1003.102(b)(11). The CMP Act even goes so far as to enumerate different sections that are the same, or very close to, § 3729(a)(1–7) of the FCA. It defines "knowledge" and "knowing" with the same language as defined under the FCA. A preponderance of the evidence standard applies to the administrative action portion.

It was also agreed that the relator's share would be paid by HHS directly upon receipt of settlement funds, and that it would be handled by the OIG's office, so as to eliminate mistakes since no one had done this before. It was not to go through the Treasury Department. Our request that payment accompany signature of the settlement agreement by PharMerica was honored by HHS: HHS got the check from PharMerica and we were paid within 3 or 4 days of the settlement.

FOLLOW-UP

Despite the success of this litigation, there appears to be some possible weaknesses that might not work out between HHS-OIG and a relator. It is the agency that has the investigatory power, the relator has no standing under the APA, and probably has no right to conduct his own discovery in an administrative proceeding, even if the FCA language provides such rights. It is unexplored territory. Under a CMPL action with HHS, respondents have no right to notice depositions, witnesses answer written interrogatories with written answers that prove HHS allegations, the respondent can only respond in writing cross-examination questions, with the answer in writing returned. The relator appears to have no subpoena power, the *qui tam* is dismissed and there is no standing for a subpoena under the APA as the relator is arguably not a party. In this particular case, we worked directly with HHS-OIG, attended interviews and meetings, and made suggestions to HHS rather than try to work out evidentiary matters independent of HHS. Teamwork was key.

Other matters not contemplated at the time came later on. Once settlement discussions got under way between HHS and PharMerica, PharMerica insisted that it would not settle unless there would be no attorney fee petitions. Since very little time, perhaps 30 hours in one year, was all that was at stake, it was agreed that the relator's share agreement include a provision where the relator promised HHS that it would not pursue PharMerica for attorney fees. Counsel proposed to HHS-OIG that the relator's award be increased 1 percent, roughly $59,000. It is suggested that the matter of fees be at least discussed, because HHS attorneys may not be aware of this right. In this case the kickbacks occurred in 1997 and 1998. Since the statute of limitations is not always tolled during pendency of a proceeding, depending on the state law and federal case law, a 6-year statute of limitations for the *qui tam* action could expire before settlement. Perhaps re-filing the *qui tam* and letting HHS ask the court for a stay pending the administrative hearing could be an extra precaution.

As to the relator's share, when one has nothing to lose, and everything to gain, we all knew that had this case not been taken to an alternate remedy, the result could have been zero. There was very little the relator or counsel could do to assist in discovery, and the large fee petition from the first settlement helped out mentally. It is not every day that a relator can, through a simple presentation, some research, and a little creative thinking, convince a government agency to do all the work, and walk out with an extra million dollars.

CONCLUSION

The success had here with HHS-OIG came with comments that this approach is an effective tool for kickback cases. The HHS-OIG staff was professional and willing to work directly with us. It is do-able, HHS has a keen interest now to work with Relators, and it is a win-win situation. I have sent to TAF in PDF format all of the documents mentioned in the text, and the HHS-OIG demand letter to PharMerica, with its findings of fact.[2]

The Relator is represented by Candace McCall, Esq., of Candace McCall, P.C. The settlement between HHS-OIG was handled by Andrew Penn, Senior Counsel, HHS-OIG. John Henebery, Trial Attorney with the U.S. Department of Justice handled the civil *qui tam* settlements and worked to transfer the *qui tam* smoothly over from the U.S. Department of Justice to HHS. Julie Dudley, Assistant United States Attorney, Roanoke Office, worked to keep these actions coordinated, and worked to get the $1.7 million in criminal restitution from HCMF and Cranwell credited to the civil *qui tam*.

2. Links to these documents can be found at http://www.taf.org/opinions/mccall.htm.

In the Spotlight

Game Theory and the Civil False Claims Act:
Iterated Games and Close-Knit Groups

GAME THEORY AND THE CIVIL FALSE CLAIMS ACT: Iterated Games and Close-Knit Groups+

*Pamela H. Bucy**

I. INTRODUCTION

In the 1980s, a lieutenant colonel of the Israeli Air Force embezzled $11 million of United States military aid and funneled it into Swiss bank accounts.[1] Using aliases and smuggled records, a United States citizen living and working in Israel gathered information about the embezzlement and reported it to the United States Department of Justice ("DOJ")[2] under the civil False Claims Act ("FCA")[3] as a co-plaintiff with the DOJ.[4] As a result of their partnership, the United States Treasury collected $75 million from the guilty parties and the whistleblower collected $11.3 million.[5]

This Article uses game theory[6] to analyze the public-private partnership created by the civil FCA. Because of the FCA's enormous success in detecting and deterring white collar crimes, and its prospect for detecting and deterring even more,[7] understanding this partnership is important. Part II of this Article provides a brief overview of the civil FCA, focusing on the unusual public-private dynamic created by the Act. Part III highlights basic principles of game theory, identifying two game theory concepts especially pertinent to FCA practice: "iterated," or repeated, games and game-playing within "close-knit" groups. Part IV applies these game theory concepts to the partnership created by the civil FCA and concludes by offering suggestions for optimal strategies to be pursued by the players in the FCA game.

II. OVERVIEW OF THE CIVIL FALSE CLAIMS ACT

Angry at contractors who were supplying the Union Army with defective supplies, President Lincoln lobbied hard for the FCA,[8] which is aimed at government con-

+ This article originally appeared in the Summer 2004 issue of the Loyola University of Chicago Law Journal. *See* Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 Loy. U. Chi. L.J. 1021 (2004). TAFEF received permission to republish this article.

* Bainbridge Professor of Law, University of Alabama School of Law. The author most gratefully expresses her appreciation to Dean Ken Randall and the University of Alabama Law School Foundation for their support, to David Hoffman for his comments, and to Julie J. Bucy who conducted the research on the Federal Claims Act Bar for this Article.

1. United States *ex rel*. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1037 (6th Cir. 1995).

2. *Id*.

3. 31 U.S.C. §§ 3729-3733 (2000).

4. *Gen. Elec. Co.*, 41 F.3d at 1037–38.

5. *Id.* at 1036.

6. *See generally* Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 Fla. St. U. L. Rev. 603 (2004) [hereinafter Bucy, *Games and Stories*] (providing an in-depth examination of game theory principles).

7. Currently, the FCA applies only in the government contracting context, but its model could be expanded effectively to other areas, such as protection of financial and securities markets and protection of the environment. Pamela H. Bucy, *Private Justice*, 76 S. Cal. L. Rev. 1, 58, 76–77 (2002) [hereinafter Bucy, *Private Justice*].

8. 31 U.S.C. § § 3729-3733. For a history of the False Claims Act, see J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539, 565–607 (2000); Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 Hous. L. Rev. 905, 909–19 (2002) [hereinafter Bucy, *Information as a Commodity*]. See also David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. Rev. 103, 103–08 (1996), for a discussion of the English shift

tractors who cheat the federal government.[9] The FCA creates a civil cause of action against any person who files a "false claim" against the government, such as falsely alleging the amount or quality of the products supplied.[10] The FCA provides that a private party, known as a "relator," may serve as a plaintiff, along with the United States, in a lawsuit brought under the FCA against the contractors.[11] This private party need not be injured personally or even affected by the defendant's false claim. Rather, she is deemed to have standing on an assignment theory—that the federal government, as the injured party, may assign to the relator its right to sue.[12] These private actions are called *qui tam* suits, deriving their name from the Latin phrase, "*qui tam* pro domino rege quam pro se ipso in hac parte sequitur," which means he "who pursues this action on our Lord the King's behalf as well as his own."[13]

The procedure for pursuing *qui tam* actions is unusual.[14] An individual who believes she can prove that a defendant has submitted false claims to the federal government files a *qui tam* action in federal court.[15] The complaint is sealed and not served on the defendant or made public in any way.[16] The complaint is, however, served on the United States DOJ, and the action is stayed while the DOJ decides whether to join the suit as a co-plaintiff.[17] If the DOJ intervenes, it assumes "primary responsibility"[18] for the lawsuit, though the relator retains certain rights, including the right to object

---

from private prosecution to public prosecution, and Note, *The History and Development of* Qui Tam, 1972 Wash. U. L.Q. 81, 83–91 [hereinafter Qui Tam *History*], which offers an overview of the linguistic origin, legal structure, and historical development of English *qui tam* actions.

9. 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman). According to an 1863 investigation, 1000 mules delivered to the Union Army were "unfit for the services, and almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out or diseased." *Id. See generally False Claims Act Amendments: Hearings on H.R. 3334 Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong. 1 (1986).

10. 31 U.S.C. § 3729(a).

11. *Id*. § 3730(b).

12. *See* Vt. Agency of Natural Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 773 (2000) ("[A]dequate basis for the relator's suit . . . is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.").

13. *Id*. at 768 n.1; *see also* Qui Tam *History*, supra note 8, at 83 (citing 3 W. Blackstone, Commentaries on the Laws of England 160 (1768)).

14. *See* Bucy, Private Justice, *supra* note 7, at 49–52 (noting the uniqueness of the *qui tam* action and explaining *qui tam* action procedures).

15. 31 U.S.C. § 3730(b). The FCA provides that "any person" may bring a civil action under the FCA. Typical private plaintiffs, known as relators, include current or former employees, competitors, competitors' employees, state and local governments, special interest groups (such as Taxpayers Against Fraud), attorneys, and law firms that discover fraud in the course of representing clients in other matters. John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.01[B] (2d ed. 2002).

16. 31 U.S.C. § 3730(b)(2).

17. *See id*.

18. *Id.* § 3730(c)(1). This dual-plaintiff system creates interesting dynamics. When the government intervenes, *qui tam* actions become three-party lawsuits. The co-plaintiffs (the federal government and the relator) are united on some aspects of the litigation (gathering information of fraud and opposing most defense strategies and motions), but the government and relator become pitted against each other when, for example, the government seeks to have the relator jurisdictionally barred. *See, e.g.*, United States *ex rel*. Fine v. Chevron, 72 F.3d 740, 745 (9th Cir. 1995). Such disagreement also might occur if the government disagrees with the award the relator seeks upon conclusion of the case. *See, e.g.*, United States *ex rel*. Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 429–30 (E.D. Pa. 1998); United States v. Gen. Elec. Co., 808 F. Supp. 580, 583–84 (S.D. Ohio 1992), *aff'd in part, rev'd in part sub nom*. United States *ex rel*. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032 (6th Cir. 1995).

For a more in-depth discussion of the tension between the DOJ and relators in *qui tam* cases, see Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 Temp. L. Rev. 23, 36–37, 47–53 (1998).

and be heard on motions to dismiss or settle.[19] If the federal government elects not to intervene, the relator may proceed with the action as the sole plaintiff.[20]

When the government intervenes, the relator is guaranteed at least 15 percent of any judgment or settlement, and the court can award more—up to 25 percent.[21] If the government does not join the lawsuit, the relator is guaranteed 25 percent and could receive up to 30 percent.[22] Only in cases in which evidence is based on publicly disclosed information or the relator is partially at fault for the violations does the relator get less.[23] Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments,[24] relators' percentages involve substantial sums.[25]

In 1986, Congress substantially amended the FCA, invigorating *qui tam* actions.[26] The amendments did so in two major ways.[27] First, the *qui tam* relator is allowed to remain actively involved in the case even if the federal government joins as a plaintiff.[28]

---

19. 31 U.S.C. § 3730(c)(2). Some relators have successfully objected to proposed settlements between the government and *qui tam* defendants. *See, e.g.*, Gravitt v. Gen. Elec. Co., 680 F. Supp. 1162, 1165 (S.D. Ohio 1988).

20. 31 U.S.C. § 3730(c)(3). The federal government may request to receive copies of all pleadings filed and deposition transcripts (at the government's expense). *Id*. Upon a showing of "good cause," the court may permit the government to intervene "at a later date." *Id*.

21. *Id*. § 3730(d)(1).

22. *Id*. § 3730(d)(2).

23. *Id*. § 3730(d)(1), (3).

24. For example, recent judgments in FCA *qui tam* cases include a $745 million settlement with HCA Healthcare Corporation to resolve some of the FCA violations pending against HCA, a $385 million settlement with National Medical Care, Inc., a $325 million settlement with SmithKline Beecham Clinical Laboratories, a $324 million settlement with National Medical Enterprises, and a $110 million settlement with National Health Laboratories. Boese, *supra* note 15, § 1.05[A].

25. *See* Response from U.S. Dep't of Justice to FOIA Request 145-FOI-6072 (Oct. 20, 2001) [hereinafter FOIA Response] (on file with author) (listing the following decisions: *United States* ex rel. *Durand N. v. Tap Holdings, Inc*. (awarding $95.1 million), *United States* ex rel. *Johnson v. Shell Oil Co*. (awarding $64.3 million), *United States* ex rel. *McLendon v. Columbia/HCA Healthcare Corp*. (awarding $44.1 million), *United States* ex rel. *Ven-A-Care v. Nat'l Med.Care, Inc*. (awarding $40 million)). Historically, relators who proceed on their own after the DOJ has declined to intervene have enjoyed little success. *See* FOIA Response, *supra*. Their cases are dismissed more often and their recoveries are substantially less. *Id*. For example, the aggregate amount paid to relators through fiscal year ending September 30, 2002, as the relators' statutory share when the government intervened, was $917.6 million. Phillips & Cohen LLP, *All About* Qui Tam, *The False Claims Act*, *at http://www.all-about-qui-tam.org./fca_stats.shtml* (last visited May 19, 2004) (citing DOJ statistics as of September 30, 2002); TAF Educ. Fund, The False Claims Act Legal Center, *at http://www.taf.org/statistics2002.html* (last visited May 19, 2004) (reporting DOJ statistics for fiscal year ending September 30, 2002). The aggregate amount to relators during this same time period when the government did not intervene was $70.2 million. Phillips & Cohen, *supra*. Also, only 2.1 percent (12 out of 570) of *qui tam* FCA cases in which the government has intervened have been dismissed, whereas 71.1 percent (1357 out of 1907) of *qui tam* FCA cases in which the government has not intervened have been dismissed. *Id*.

26. Boese, *supra* note 15, § 1.04[H]; *see* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. § § 3729-3133).

27. Other provisions in the 1986 amendments increased the amount of recovery a relator could obtain, and established a (fairly generous) mandatory minimum recovery for relators. 31 U.S.C. § 3730; *see supra* text accompanying notes 21–22 (noting that (as a result of the 1986 amendments) a relator is guaranteed 15 to 25% of the judgment when the government intervenes and 25 to 30% when it does not). The relator's amount may be reduced to 10% if the FCA case is based upon information in addition to that provided by the relator. 31 U.S.C. § 3730(d)(1). This amount may be reduced to nothing if the relator is convicted of conduct arising from his or her role in the FCA violation. *Id*. § 3730(d)(3). The amendments relaxed provisions that had prevented many relators from filing suit. Bucy, *Private Justice*, *supra* note 7, at 47 (discussing the relaxation of the mens rea requirement). The amendments also provided a cause of action for relators who suffer retribution from their employers for whistleblower activities related to the FCA. 31 U.S.C. § 3730(h). Other amendments made FCA cases easier to prove overall, thereby improving all plaintiffs' chances of success. These amendments included relaxing the *mens rea* requirement, *id*. § 3729(b), establishing that the burden of proof is by a preponderance of evidence rather than the clear and convincing standard in FCA cases, *id*. § 3731(c), and expanding the statute of limitations, id. § 3731(b).

28. 31 U.S.C. § 3730(c)(1) (stating that the relator continues as a party even if government joins as a plaintiff); *see also id*. § 3730(c)(2)(A) (stating the relator is entitled to a hearing before the case is dismissed); *id*. § 3730(c)(2)(B) (stating that the relator is entitled to a hearing before the case is settled).

Previously, if the government decided to enter the lawsuit, the *qui tam* relator retained only a minor role with no power to influence the course of the lawsuit.[29] The second substantial change made by the 1986 amendments increased the amount of recovery allowed the *qui tam* relator and guaranteed a minimum percentage.[30] The 1986 amendments made a remarkable difference in the use of the FCA. Before 1986, the DOJ received about six *qui tam* cases per year.[31] Since the 1986 amendments went into effect, and through fiscal year 2000, 3326 *qui tam* FCA lawsuits have been filed and $4.024 billion has been recovered through the FCA.[32] Eyeing the success of the 1986-invigorated FCA, states are passing similar statutes covering false claims submitted to state governments.[33]

The FCA has proven highly effective for three reasons: (1) it provides a way for regulators to gain access to high-level, detailed, inside information about wrongdoing;[34] (2) it provides a mechanism for private parties and their counsel to supplement regulators' resources;[35] and (3) it has significant potential to control the quality of private party participation in regulatory efforts.[36] However, the FCA is no panacea. Because *qui tam* actions empower private parties—regardless of their ability or ethics—to bring significant lawsuits against businesses in the name of the United States, they are subject to abuse.[37]

29. The significance of this change is demonstrated dramatically in a 1989 Ohio case in which the government, which chose to join in a fraud suit initiated by a *qui tam* relator against General Electric, was not allowed to settle the case because the *qui tam* relator objected to the settlement amount of $234,000. Gravitt v. Gen. Elec. Co., 680 F. Supp. 1162, 1162-65 (S.D. Ohio 1988). "Later, on the eve of trial, the case was settled, with the *qui tam* relator's consent, for $3.5 million." Pamela H. Bucy, White Collar Crime, Cases and Materials 715 (2d ed. 1998). "The *qui tam* relator received $770,000—22 percent of the government's recovery." *Id*.

30. Prior to the 1986 amendments, if the government joined the action, the *qui tam* relator could receive no more than 10% of the recovery, and the *qui tam* relator's share depended on what the court thought was an appropriate amount. *See* 31 U.S.C. § 3730(c)(1) (1982). The 1986 amendments guarantee that even if the government joins the lawsuit, the *qui tam* relator gets at least 15 percent of any judgment or settlement, and the court can award more—up to 25 percent. 31 U.S.C. § 3730(d)(1) (2000). If the government does not join the lawsuit, the *qui tam* relator is guaranteed 25 percent. *Id*. § 3730(d)(2). Only in cases in which the evidence is based on publicly disclosed information does the *qui tam* relator get 10 percent or less. *Id*. § 3730(d)(1).

31. Steve France, *The Private War on Pentagon Fraud*, A.B.A. J., Mar. 1990, at 46, 48; *cf*. William L. Stringer, The False Claims Act Amendments: An Assessment of Economic Impact 23 (1996) (consisting of an economic study commissioned by the Taxpayers Against Fraud and stating that "[i]n the period between 1943 and 1986, the Department of Justice records show only three *qui tam* cases (with a total recovery of $54 thousand) and, although there could have been more if records had been able to identify *qui tam* cases, there were undoubtedly very few.").

32. FOIA Response, *supra* note 25.

33. *See, e.g.*, Cal. Gov't Code § § 12650–12656 (West 1992 & Supp. 2001) (establishing California's version of the False Claims Act); Del. Code Ann. tit. 6, § § 1201–1209 (Supp. 2002) (creating liability for false claims to the state and establishing reporting guidelines); Fla Stat. Ann. § § 68.081–.092 (West 1997 & Supp. 2004) (providing remedies for obtaining treble damages and civil penalties when money is obtained from state government under a false claim); Haw. Rev. Stat. Ann. § 661-21 (Michie 2002) (outlining requirements for *qui tam* actions or recovery of false claims to the state); 740 Ill. Comp. Stat. 175/1–175/8 (2002) (creating false claim liability in Illinois); Nev. Rev. Stat. Ann. 357.010–.250 (Michie 2000) (allowing for recovery for submission of false claims to state or local government); *cf.* La. Rev. Stat. Ann. § § 437.1–440.3 (West 1999) (applying to false claims regarding health care only); Tenn. Code Ann. § § 71-5-181 to -5-185 (2002) (applying to false claims regarding health care under Medicaid programs only).

34. See Bucy, *Private Justice*, *supra* note 7, at 53; Bucy, *Information as a Commodity*, *supra* note 8, at 940–47

35. *See* Bucy, *Private Justice*, *supra* note 7, at 54–56, 61–62.

36. *Id*. at 68–76.

37. *Id*. at 62–68 (discussing how frivolous False Claims Act cases create difficulties for business, regulators, and the judicial system).

III. RELEVANT PRINCIPLES OF GAME THEORY

Game theory looks at how people make decisions. Like all economic modeling, game theory simplifies social situations and offers insights from the simplification.[38] It was developed in the early and mid-twentieth century by a mathematician, John von Neumann, and an economist, Oskar Morgenstern.[39] Game theory arises from the notion that routinized, describable habits and behaviors govern day-to-day interactions much as rules govern parlor games such as bridge and poker.[40] Like other rational choice theories, game theory assumes that decision-makers are rational actors who pursue their self-interest.[41] Game theory further assumes that when making decisions, actors take into account what they expect other rational self-interested decision-makers to do.[42] This assumption leads to a key concept in game theory, the Nash equilibrium.

The Nash equilibrium posits that each player will choose a strategy that is best for that player given the fact that other players are also choosing the strategy that is best for them.[43] The movie *A Beautiful Mind*, based upon the life of John Nash, included a bar scene with an example of the Nash equilibrium.[44] Nash and several of his college friends are at a crowded bar when a group of attractive college coeds enter. There are the same number of females in the group as there are males in Nash's group. In the movie, Nash and his friends are taken with a particularly attractive blond in the female group. As the males watch the coeds enter, Nash suggests to his friends that they decide among themselves which coed each will approach, rather than all competing for the blond. He explains why—that at best only one of them will be successful wooing the blond, and that their obvious competition for her will anger the other girls so much that none of them will be amenable to the males' subsequent efforts to charm them. This is the Nash equilibrium: in selecting their strategy for wooing the coeds, Nash and his friends take into account what the girls are likely to be thinking—resentment at being chosen second. Thus, Nash and his friends revise their initial strategy of competing for the blond to a strategy of agreeing among themselves which coed each male will approach. In this sense, the Nash equilibrium advises players in any game that, when choosing their strategies, they should take into account what other players are likely to do.

Two game theory principles are particularly relevant to FCA practice. The first is that the FCA is an iterated game with repeat players. The DOJ is the obvious repeat player in the FCA game because the DOJ will deal with many FCA cases, FCA counsel, and FCA defendants over time. Because of the specialized nature of FCA

38. Douglas G. Baird *et al.*, Game Theory and the Law 7, 15 (1994); Morton D. Davis, Game Theory 6-8 (1983); Robert C. Ellickson, Order Without Law, How Neighbors Settle Disputes 157 (1991).

39. John Von Neumann & Oskar Morgenstern, The Theory of Games and Economic Behavior (3d ed. 1953).

40. Davis, *supra* note 38, at xv.

41. Ellickson, *supra* note 38, at 156-59; Richard A. Posner, Economic Analysis of Law 19-23 (5th ed. 1998).

42. Baird *et al.*, *supra* note 38, at 11-12; Ellickson, *supra* note 38, at 156-64; Martin J. Osborne & Ariel A. Rubinstein, A Course in Game Theory 1 (1994).

43. John F. Nash, Jr., The Bargaining Problem, 18 Econometrica 155- 62 (1950); *cf*. Baird *et al.*, *supra* note 38, at 19-28; Davis, *supra* note 38, at 119-123; Avinash K. Dixit & Barry J. Nalebuff, Thinking Strategically 85-86 (1991); Herbert Gintis, Game Theory Evolving 6 (2000); Osborne & Rubinstein, *supra* note 42, at 155-57.

44. *A Beautiful Mind* (Universal Pictures 2001).

practice, most private attorneys (plaintiff and defense) who handle FCA cases also will be repeat players. Even some of the defendants, especially large defense contractors, will be repeat players. The second game theory principle seen in FCA practice is that its players, especially counsel, are part of a close-knit group.

IV. APPLYING GAME THEORY TO THE CIVIL FALSE CLAIMS ACT

A. Repeated or Iterated Games

Considerable scholarship has been devoted to the way game strategies change when games repeat. Robert Axelrod pioneered scholarship of iterated games with his analysis of computer generated games[45] modeled after the Prisoner's Dilemma.[46] Axelrod solicited computer games from game theory experts.[47] The only two choices of play allowed in the two-player games he solicited were cooperation with the other player and noncooperation, or defection.[48] Axelrod played the games against each other in computer generated tournaments.[49] The winning strategy in every tournament was the simplest strategy submitted—Tit-for-Tat.[50] A player using a Tit-for-Tat strategy begins play by cooperating with the other player and thereafter copying whatever strategy the other player used on the prior move.[51] Thus, a player begins by cooperating and continues to cooperate as long as the other player cooperates.[52] A player is never the first to defect but responds with defection when presented with defection.[53]

Axelrod's observations about optimal strategies in iterated games have become game theory lore. First, in the short-run, each player has incentive not to cooperate, but in the long run, players benefit most by cooperating.[54] Second, a player should not cooperate with another player if the other player becomes uncooperative,[55] but a player should respond to noncooperation with noncooperation, and return to cooperation only when the other player returns to cooperation.[56] Third, in zero-sum games (where one player wins only if the other player loses), hiding one's strategy is beneficial, but in non-zero-sum games (where both parties have the potential to win), clearly com-

45. Robert Axelrod, The Evolution of Cooperation 109 (1984).

46. The Prisoner's Dilemma is the most well known game used to demonstrate the interdependence of decisions. Dixit & Nalebuff, *supra* note 43, at 11-13. Two prisoners are held in separate cells and they are not allowed to communicate with each other. *Id*. Each is given the choice of confessing (and implicating the other prisoner) or refusing to confess. *Id*. If both prisoners refuse to confess, they both go free. *Id*. Otherwise, the prisoner who confesses first gets a short prison sentence and the nonconfessing (or second-to-confess) prisoner gets a lengthy prison sentence. *Id*. Thus, even though each individual prisoner has an incentive to defect (to be the first to confess) and do it quickly, both prisoners are better off if they cooperate and refuse to confess. *Id*. While the first to defect benefits himself, he benefits himself more by cooperating from the beginning with the other prisoner. *Id*. Thus, mutual cooperation is the best strategy for both prisoners. *Id*.

47. Axelrod, *supra* note 45, at xi–xii.

48. *Id*. at 30.

49. *Id*.

50. *Id*. at 31.

51. *Id*. at 136–37.

52. *Id*. at 36–39.

53. *Id*. at 113–20.

54. *Id*. at 109.

55. *Id*. at 118–20.

56. *Id*. at 118–19.

municating one's strategy of cooperation is best.[57] Fourth, clarity in one's strategy is essential in pursuing optimal strategies in repeating games;[58] thus each player's strategy should be "eminently comprehensible to the other player."[59]

To demonstrate how Axelrod's observations apply to FCA practice, we will focus on the DOJ and the game moves available to the DOJ. There are, at most, five key decisions the DOJ must make in any FCA case brought to the DOJ by a relator: (1) whether to investigate the information the relator brings;[60] (2) how thorough of an investigation to conduct;[61] (3) whether to intervene in the case; (4) whether to oppose the relator's case, in whole or part, if the DOJ does not intervene;[62] and (5) what to recommend as to the percentage of judgment allocatable to relator.[63]

Axelrod's principles for optimal game playing suggests that at each of these key points, the DOJ should begin by working with each relator and the relator's counsel cooperatively.[64] A DOJ cooperation strategy would include facilitating contact be-

57. *Id*. at 122–23.

58. *See id*. at 120.

59. *Id*. at 122.

60. If the information does not appear to be credible, the DOJ likely will do little or nothing to further investigate the allegations.

61. Robin Page West, Advising the *Qui Tam* Whistleblower 41 (2001). If the information of wrongdoing appears credible, the DOJ likely will investigate the matter further through subpoenas or interviews. *Id*. Such investigation may be for criminal or civil liability or both. If the DOJ investigates the matter, it must decide how much to involve the relator. Those relators who are insiders—whether to the targeted business or just the industry—can be extremely helpful in identifying relevant transactions, records, or individuals to speak with. Knowledgeable insiders can also be helpful in explaining industry practices and trends. According to one experienced relator's counsel:

> The role of relator's counsel will depend in large part on whether the government lawyers need and want assistance. In some cases, due to shortage of resources or attorney inexperience, the government may choose not to litigate the case aggressively; in this event, counsel for the relator may wish to take up the laboring oar.

Id. at 69. There are innumerable examples in which a relator's counsel has conducted considerable work on an FCA case jointly pursued by the DOJ and the relator. For example, in one *qui tam* FCA case, six law firms devoted twenty full-time lawyers to the case and incurred $1 million per month in investigative costs, just to prepare the case for filing. John R. Phillips, *Remarks at the 2001 A.B.A. National Institute on the Civil False Claims Act and Qui Tam Enforcement, Panel on FCA Enforcement in the Post-*Stevens *World* (Nov. 29, 2001).

In another recent *qui tam* FCA case, in which there were 125 defense attorneys and fifteen relators' attorneys, plus DOJ attorneys, the federal courthouse was not large enough to accommodate the group for docket calls. Scott A. Powell, *Remarks at the Mealey's Conference, Litigating Whistleblower Cases Under the* Qui Tam *Provisions of the False Claims Act, Panel on Reports from the Field, Developments on Notable Cases* (June 11, 2001) (referring to *United States* ex rel. *Johnson v. Shell Oil Co*., 33 F. Supp. 2d 528 (E.D. Tex. 1999)). The defendant, Shell Oil Company, produced 7000 banker boxes of records. *Id*. One of the relator's attorneys took responsibility for handling all documents in the case. *Id*. Doing so took 5000 square feet of warehouse space (with the record boxes stacked seven feet high). *Id*. This relator's attorney organized the records so that the plaintiffs could respond within thirty days to any defense request for identification of any record pertaining to a particular claim by producing a CD containing the requested records. *Id*. This case settled on February 4, 2000, with a recovery to the U.S. Treasury of $400 million and a relators' share of $64 million. FOIA Response, *supra* note 25.

62. If the DOJ decides not to participate in the matter, either because the case lacks merit or because the DOJ lacks resources, the DOJ must decide how to respond if the relator opts to continue the case. Under the FCA statute and evolving practice, the DOJ has the authority to intervene for limited purposes in a case, such as moving for dismissal of the case. 31 U.S.C. § 3730(c)(2)(A) (2000); *see also* Bucy, *Private Justice*, *supra* note 7, at 70–72.

63. *Cf*. West, *supra* note 61 at 41–55 (outlining the DOJ's issues); Bucy, *Private Justice*, *supra* note 7, at 51–52 (discussing relator's goals vis-à-vis the DOJ).

64. *See supra* note 54 and accompanying text (noting Axelrod's first principle—that players benefit in the long run by cooperating with other players).

tween the DOJ and relators' counsel[65] and involving relators and relators' counsel in the investigation to the extent feasible.[66] Axelrod's principles further suggest that the DOJ should cease cooperating with relators and relators' counsel only when they cease to cooperate with the DOJ.[67] A relator's lack of cooperation could range from minor (e.g., not being available to meet with DOJ personnel when promised), to significant (e.g., providing inaccurate or incomplete information to the DOJ), to catastrophic (e.g., alerting suspects and assisting in a cover-up of the problem). Following the lesson of Tit-for-Tat, the DOJ should respond to relators' defections in kind, with non-cooperation strategies that match the seriousness of the relators' defections.[68] Given the significance of a relator's defection (destruction of evidence, for example), the DOJ's appropriate response may be complete discontinuation of cooperation with the relator. Only if a relator returns to a trustworthy, cooperative strategy after a defection should the DOJ return to a cooperation strategy.[69]

Not only is the message the DOJ sends to potential relators and relators' counsel important, but, because the FCA is a non-zero sum game, so is clarity in sending the message.[70] FCA *qui tam* actions present non-zero-sum games, at least as between the DOJ and the relator, since both the DOJ and the relator can "win" by working cooperatively to detect, investigate, and pursue fraudulent defendants.

The press can be helpful in communicating the DOJ's Tit-for-Tat strategy in FCA cases by publicizing the opportunities for and virtues of serving as a relator.[71] For this reason, the DOJ's strategy when dealing with the press in FCA cases should be making information about the DOJ's practices and strategies accessible through press releases, reports, knowledgeable government personnel, and conferences that inform and educate the public about the FCA.

Although the mainstream press effectively can convey the fairly simple message that serving as a relator can be beneficial and that the DOJ is ready, willing, and able to work with relators,[72] the press is not equipped to convey more subtle messages about

---

65. The FCA has gone a long way in establishing these protocols. It directs the plaintiffs to file their complaints under seal, thereby giving the government time and opportunity to investigate the plaintiffs' claims. 31 U.S.C. § 3730(b)(2). It requires the plaintiffs to serve the government with a copy of their complaints as well as "written disclosure of substantially all material evidence and information" the relator possesses, thereby enabling the government to more efficiently utilize the relator's information. *Id*. The FCA also requires the government to respond to a relator's case within a set time period. *Id*. § 3730(b)(2)–(3). Also, the FCA has established a mechanism for relators and the government to proceed as dual plaintiffs. *See id*. § 3730(c)(1). Finally, if the government chooses not to join the case, the government has the power to monitor a relator's litigation of the case. *Id*. § 3730(c)(2).

Individual DOJ offices have developed additional protocols for communicating with relators prior to and after a relator's case is filed and throughout the government's investigation, so as to keep a relator informed of the case's status. West, *supra* note 61, at 47–50, 53–56.

66. *See, e.g.*, Fed. R. Crim. P. 6(e) (providing limits on disclosing grand jury evidence).

67. *See supra* note 55 and accompanying text (noting Axelrod's second principle—that players should not cooperate with uncooperative players).

68. *See supra* notes 50–53 and accompanying text (discussing the Tit-for-Tat strategy).

69. *See supra* notes 55–56 and accompanying text (discussing Axelrod's second principle, which states that players should not cooperate with uncooperative players).

70. *See supra* notes 58–59 and accompanying text (explaining Axelrod's fourth principle, which states that clarity in communicating one's strategy to other players is important).

71. Bucy, *Information as a Commodity*, *supra* note 8, at 969.

72. *See* France, *supra* note 31, at 46. News stories often report on relators' experiences with the False Claims Act. *See, e.g.*, Kurt Eichenwald, *He Blew the Whistle and Health Giants Quaked*, N.Y. Times, Oct. 18, 1998, § 3, at 1, *available at* LEXIS,

the DOJ's FCA practice. The private bar can do so, however. The FCA bar consists of relators' counsel and defense attorneys. Both groups are likely to be repeat players.[73] Like the press, the private bar can communicate the general message that the DOJ is ready, willing, and able to work with relators and their counsel and that, for many, the benefits of working with the DOJ outweigh a relator's costs.[74] The private bar, especially relators' counsel, can do even more, however. Relators' counsel can screen FCA cases by discouraging relators from going forward in nonmeritorious cases.[75] Counsel does so by refusing to take such cases. Relators' counsel generally take FCA cases on a contingency basis and front all or most investigation expenses.[76] Because of their complexity, FCA cases are expensive to prepare and lengthy to resolve.[77] Aware of the risks inherent in such cases, experienced relators' attorneys screen out many non-meritorious cases before they reach the DOJ or the courts.[78]

News Library, The New York Times File; Ralph Vartabedian, Teledyne's Legal Ills Mounting, L.A. Times, Nov. 16, 1992, at D1, *available at* 1992 WL 2838306; *Whistleblower Gets $13 Million*, Chi. Trib., Dec. 5, 1992, at 10, *available at* 1992 WL 4546091; *Whistle-blowers Win Against Lockheed*, Chi. Trib., Nov. 16, 1990, at 2, *available at* 1990 WL 2884280.

73. *Cf*. Bucy, *Private Justice*, *supra* note 7, at 58–59 (describing the sophistication of FCA cases and the result that inexperienced counsel does not undertake FCA cases).

74. *See* Bucy, *Information as a Commodity*, *supra* note 8, at 948-58 (discussing the costs of becoming a whistleblower).

75. *See, e.g.*, Mitchell R. Kreindler, So You Wanna Be a Whistleblower's Lawyer? 2 (n.d.) (unpublished manuscript, on file with author):

> Matching cases to your firm's resources is always a critical skill and nowhere is it more critical than in representing *qui tam* relators. Unlike other contingent fee practices, like personal injury, *qui tam* is unlikely to ever become a high volume practice. Combine that with the fact that most *qui tam* cases take three to five years to resolve and it is clear that picking viable cases is the lifeblood of a successful *qui tam* practice.

Id. Perhaps unwittingly referring to what is one of the key features of a repeated game—protection of one's reputation—Kreindler explains how carefully choosing cases affects a relator's attorney's reputation:

> Not only is it important to your financial health to pick 'good' cases, it is also important to your reputation with the government. If you can develop a reputation for bringing meritorious cases, the reception you receive from the government will be far different than the one you will receive if you throw every *qui tam* claim you can find against the wall in the hope that something will stick. The quality of case selection may be the most important attribute of a successful *qui tam* attorney.

Id.

76. Bucy, *Information as a Commodity*, *supra* note 8, at 971–72. For example, in *United States* ex rel. *Taxpayers Against Fraud v. Gen. Elec. Co*., 41 F.3d 1032, 1036 (6th Cir. 1994), the relator's counsel and the relator agreed that counsel would receive 25 percent of the relator's share. This percentage was in addition to attorney fees and costs awarded by the court pursuant to 31 U.S.C. § 3730(d)(1). *Id*. The total amount awarded to the relator's counsel in this case exceeded $4 million. *Id*.

John R. Phillips, an experienced relators' attorney and generally credited as one of the architects of the 1986 FCA Amendments, discussed in a Wall Street Journal letter to the editor the financial risk relators' counsel take on. John R. Phillips, Letter to the Editor, *The Taxpayers Win When the Whistle Blows*, Wall. St. J., Feb. 10, 1995, at A9. Phillips was responding to a prior article in the Wall Street Journal, the point of which is obvious from Phillips' response:

> You suggest that lawyers who bring these [*qui tam*] lawsuits may be making too much money. You fail to take into consideration the financial risks lawyers take to sustain the cases over years of litigation as they do battle with deep-pocket defendants . . . For example, from 1987 to 1994, private attorneys in our cases...spent more than 100,000 hours (more than 60 attorney years)—not to mention the huge out-of-pocket costs—bringing outlaw corporations to justice. I, personally, went deeply into debt risking everything I own to finance these cases, coming within weeks of having no idea of how I was going to meet the next payroll.

Id.

77. Bucy, *Information as a Commodity*, *supra* note 8, at 940.

78. *See supra* note 75 and accompanying text.

Relator's counsel can also help control difficult or demanding relators[79] while optimizing the information a relator can provide. Many members of the relators' bar are former federal prosecutors with extensive experience investigating and preparing the type of complex, sophisticated, and economically motivated wrongdoing the FCA involves.[80] These attorneys are experienced enough to take the information a relator has and package it in a way that is helpful to the DOJ. Such packaging includes piecing together complex transactions, investigating lengthy paper trails, and controlling, cajoling, and counseling difficult clients.[81] Such efforts by private counsel can conserve scarce DOJ resources.[82]

As an aside, it is interesting to note that the communicative functions of the FCA private bar feed an interesting dynamic of competition among United States Attorney's offices for relators. Because of their size and complexity, FCA cases often are of national scope and offer multiple venue options. This means that relators' counsel can steer relators to certain DOJ offices and away from others. Assistant U.S. Attorneys vie for meritorious FCA *qui tam* cases because the greater FCA recoveries that an office can garner, the more resources and recognition within the DOJ that office obtains.[83] In addition, individual attorneys within the DOJ advance their careers, inside the DOJ and beyond, by handling high profile, large-dollar FCA cases. U.S. Attorney's offices and individual DOJ attorneys vary considerably in their treatment of relators, their willingness to advise relators about procedures and a case's viability, the resources they can devote to *qui tam* FCA cases,[84] and their expertise and comfort-level in working with relators and relators' counsel. Jurisdictions vary in applicable precedent and

---

79. Experienced relators counsel describe relators as persons under tremendous stress, suffering from professional, personal, marital, and family tensions brought on by their whistle blowing. Kreindler, *supra* note 75, at 2–3. They are often "paranoid . . . tired . . . lonely . . . beat-up, frustrated and isolated." *Id*. at 3. They "require more personal attention . . . than most other clients." *Id*. Relators tend to be "exceedingly bright and inquisitive. . . assertive and tenacious . . . outraged . . . suspicious of the government . . . suffering from nagging doubts [that they are] 'crazy.'" West, *supra* note 61, at 30–31.

DOJ attorneys rely on a relator's counsel to educate the relator about the risks and difficulties that likely lie ahead in an FCA *qui tam* action. As one experienced Assistant United States Attorney noted:

> The relator should be educated to the risks of whistle blowing and investigative process, particularly in speculative, marginal cases. [For example,] [t]he seal provisions of the statute provide only temporary anonymity. Accordingly, even after the government declines to intervene and the relator determines not to proceed there is a danger that the public record will reveal the filing of suit that both the relator and the United States declined to pursue.

Kathleen McDermott, *Qui Tam, An AUSA's Perspective*, False Claims Act & *Qui Tam* Q. Rev., Oct. 1997, at 20, 23.

80. *See infra* note 127 (providing a chart showing that 48.3% of the private FCA bar has prior DOJ experience).

81. West, *supra* note 61, at 53–56.

82. *See id*. at 47.

83. *Cf*. James B. Stewart, The Prosecutors 128 (1987) (explaining that the DOJ apportioned more resources to offices that posted results garnering favorable media attention).

84. As one experienced relators' attorney explained:

> Methods for dealing with *qui tam* cases vary greatly from one U.S. Attorney's Office to another. [For example,] [s]ome U.S. Attorney's Offices encourage relators' attorneys to contact them with their allegations before filing suit when they can informally exchange information regarding *qui tam* procedures and discuss the potential merits of the suit. This informal exchange of information often prevents the filing of bad *qui tam* lawsuits and improves the quality of the suits which are filed....
>
> Some U.S. Attorney's offices are also better at obtaining resources—investigators, primarily—from other agencies. Obviously, your client is better served if you are able to file her case in a jurisdiction where significant resources can be devoted to the case.

Kreindler, *supra* note 75, at 7.

favorable or knowledgeable jurists.[85] Relators' counsel weigh these issues in determining where to file their clients' cases.

B. Iterated Games in Close-Knit Groups

1. Game Theory Principles Applicable to Close-Knit Groups

Robert Ellickson has conducted the leading work in game theory on how games are affected when the players are members of a close-knit group.[86] To study this phenomenon, Ellickson conducted field research in Shasta County, California, on how neighbors interact with each other.[87] Shasta County is in north-central California, bordered by the Cascade Mountains.[88] The major economic activity in Shasta County is cattle-raising.[89] Ellickson's study focused on Shasta County neighbors' interactions over the cattle that roam in Shasta county.[90]

Most of Shasta County is designated as open range, where cattle roam free.[91] In open-range areas, cattle owners generally are not legally liable for damages arising from cattle trespassing on unfenced land.[92] Portions of Shasta County, however, have been designated as closed range.[93] In closed-range areas, cattle owners are strictly liable for damage caused by their wandering cattle.[94]

Problems arise when cattle trespass.[95] They eat grass and, if they can get to it, devour stored feed.[96] They destroy expensive landscaped property and vegetable gar-

85. For example, the Fourth, Tenth, and Eleventh Circuits adopt statutory interpretations on key issues in FCA cases that are more favorable to relators, while the First, Second, and Third Circuits adopt statutory interpretations more favorable to defendants. *Compare* United States *ex rel*. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1521 (10th Cir. 1996) (holding that information—a report in the files—potentially available to the public does not activate the jurisdictional bar provisions), *with* United States *ex rel*. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1159-60 (3d Cir. 1991) (holding that information—discovery in unrelated case—potentially available to the public activates the jurisdictional bar provision); *compare* United States *ex rel*. LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990) (holding that a government employee with responsibility for uncovering fraud cannot qualify as a *qui tam* relator), *with* United States *ex rel*. Williams v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991) (holding that a government employee may qualify as a relator); *compare* United States *ex rel*. Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992) (holding that a relator is barred if the complaint reflects publicly held information even if relator did not rely upon it or base her complaint on it), *with* United States *ex rel*. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1349 (4th Cir. 1994) (holding that a relator's complaint is not barred even if it reflects publicly held information where the relator received his information elsewhere and did not base his complaint on the publicly held information).

86. *See* Ellickson, *supra* note 38, at vii–viii (studying how close-knit groups, primarily in the context of cattle ranchers, farmers, and other rural residents in Shasta County, California, resolve disputes over trespassing cattle without resorting to the legal system).

87. *Id*. at vii. Shasta County was a prime area to study neighbor disputes because immediately prior to Ellickson's study, it had seen tremendous growth, which presented great potential for conflicts between the older, established residents of the county and newer residents. *Id*. at 19–25.

88. Much of the county is mountainous or consists of foothills leading to the mountains. *Id*. at 15. The soil is generally poor: only one percent of the county's land is devoted to agricultural crops. *Id*. at 16–17. The area is also arid in the summer, receiving very little rain. *Id*. at 15.

89. *Id*. at 16.

90. *Id*. at 1–3.

91. *Id*. at 3.

92. *Id*.

93. *Id*.

94. *Id*.

95. *Id*. at 25–26.

96. *Id*. at 40–41.

dens.[97] The most serious problems occur when the cattle venture onto roadways and cause vehicle accidents.[98] Wandering cattle create problems for their owners as well as neighbors.[99] They sustain injuries, get stolen, and consume their owners' time when their owners have to retrieve them.[100] Wandering bulls, because they are more aggressive than cows, create even more problems.[101] Bulls charge property owners[102] and impregnate cows, resulting in calves of undesired pedigree.[103]

The earliest residents of Shasta County established large ranches that have a significant current market value (most over $1 million), but generate modest income.[104] The families that own these ranches live simply, in unassuming homes, and work seven-day work weeks raising cattle as their livelihood.[105] Most of the new Shasta County residents, who own "ranchettes" consisting of parcels of land ranging from five to forty acres, generally do not raise cattle.[106]

Among the cattle-raisers there are two groups: the traditionalists, who let their cattle roam freely over ranch lands or on higher-elevation, unfenced property leased from timber companies,[107] and modernists, who tend to fence in their property and irrigate it so that there is adequate feed year-round.[108] Although the modernists have less to lose if additional portions of Shasta County are designated closed range, they tend to side with the traditionalists in opposing efforts to close additional portions of the county.[109]

Ellickson began his study researching animal-trespass laws applicable in Shasta County.[110] He also interviewed residents and Shasta County animal-trespass experts such as insurance claims adjusters, law enforcement officials, and lawyers.[111] Ellickson found that the residents of Shasta County rarely used available legal remedies or even followed the law's allocation of liability when resolving problems caused by trespassing cattle.[112] Instead, they used informal norms of civility and neighborliness to resolve problems even when the norms were to their legal disadvantage.[113] Accordingly, in Shasta County, trespass incidents are resolved by an exchange of civilities that follow a set protocol: the victim of the trespass notifies the cattle owner,[114] the cattle owner apologizes to the victim and thanks the person for calling, and the cattle owner prompt-

97. *Id*. at 41.
98. *Id*. at 82–85.
99. *Id*. at 25–26.
100. *Id*.
101. *Id*. at 41.
102. *See id*.
103. *Id*. at 26, 41.
104. *Id*. at 20.
105. *Id*. at 20–21.
106. *Id*. at 21.
107. *Id*. at 22–23.
108. *Id*. at 24–25.
109. *Id*. at 25.
110. *Id*. at 42–48.
111. *Id*. at 40 n.1.
112. *Id*. at 52–56.
113. *Id*. at 52–53.
114. *Id*. at 53. The victim generally notifies the owner by phone not as a complaint, but as a service, as in "I found one of your animals." *Id*.

ly removes his animals.[115] Ellickson found that resort to these informal norms rather than to legal remedies benefited everyone.[116] Time, money, and hard feelings were saved when neighbors resolved problems without pursuing available legal remedies.[117]

Ellickson sought to determine what led the Shasta County neighbors to use informal norms.[118] He found the existence of a close-knit group to be the key. In this context, a "close knit group" exists where there are interactions among repeat players who share common characteristics and informal norms and exchange information easily, where each player possesses power within the group, and where the group employs sanctions to discipline members who fail to follow the group's informal norms.[119] In Shasta County, these sanctions include (in escalating order): (1) self-help retaliation,[120] (2) reporting offenses through "truthful negative gossip,"[121] (3) requesting compensation for damage created,[122] and (4) resorting to legal means.[123]

2. Application of Close-Knit Group Theory to False Claims Act Practice

The FCA bar meets Ellickson's definition of a close-knit group. Its members are repeat players who share common characteristics and informal norms, exchange information easily, possess power within the group, and employ sanctions to enforce the group's informal norms.[124]

A. REPEAT PLAYERS

Attorneys with the DOJ are obvious repeat players in FCA practice. All FCA cases in the United States are handled by specialists within the DOJ's Civil Division who either are assigned to cases directly or supervise cases based in various U.S. Attorneys' offices.[125] The private bar, both relators' counsel and defense counsel, are repeat players primarily because of the complexity, risk, and sophistication of FCA cases.[126] Even defendants can be repeat players, often as reconstructed corporate entities.

115. *Id*.
116. *Id*. at 10, 52, 283.
117. *See id*. at 56–64.
118. *Id*. at 9–10.
119. *Cf. id*. at 48–64 (describing the close-knit group of Shasta County neighbors).
120. *Id*. at 57. Shasta County residents discipline deviant neighbors in several ways: spreading truthful negative gossip about noncooperative neighbors; herding trespassing animals to places from which it is inconvenient for their owners to retrieve them; threatening to harm, even kill, offending animals (e.g., one irate neighbor threatened to castrate a wandering bull); actually harming animals; and "borrowing" needed equipment belonging to the animal owner. *Id*. at 56–59, 80. Cattle rustling apparently was a common response to an especially notorious rancher, Frank Ellis, who allowed his herds to roam freely, damaging many neighbors' property. *Id*. at 56–59. One Shasta County resident who lived in Oak Run, an area especially tormented by Ellis's trespassing cattle, suggested that Ellis print t-shirts saying "Eat Ellis Beef. Everyone in Oak Run does!" *Id*. at 59.
121. *Id*. at 57; *see also id*. at 59 (explaining that residents occasionally report a cattle trespass to county officials, such as animal control officers or brand inspectors).
122. *Id*. at 57, 60–61. The Shasta County norm is to use "in-kind" compensation, such as replanting damaged crops, rather than cash payments. *Id*. at 61.
123. *Id*. at 57, 62–64.
124. *See infra* Part IV.B.2.a–e (describing the FCA bar's close-knit group characteristics).
125. U.S. Dep't of Justice, U.S. Attorneys Manual 4–4.120 (1998); Kreindler, *supra* note 75, at 7.
126. Telephone and Internet Research of Faculty at American Bar Association National Institute on The Civil False Claims Act and *Qui Tam* Enforcement (1998–2001) [hereinafter Telephone and Internet Research] (research on file with author). Among FCA specialists, 68.5 percent primarily or exclusively represent defendants, 28.8% primarily or exclusively represent relators, and 1.4% represent both relators and defendants. *Id*.

B. SHARED CHARACTERISTICS

The FCA bar, which includes DOJ attorneys, relator's counsel, and defense counsel, is a surprisingly close-knit group. The attorneys in this group share common characteristics in addition to their experience in FCA cases. A survey of the FCA private bar shows that 93.5 percent share at least two of the following professional characteristics: (1) 50.7 percent attended a "top 25" undergraduate institution, (2) 71.2 percent attended a "top 25" law school, (3) 48.3 percent served in the DOJ prior to entering private practice, (4) 23.3 percent served as a law clerk to a federal judge, (5) 42.5 percent possess a leadership role in their law firm, and (6) 31.5 percent have authored three or more publications in the FCA field.[127]

C. INFORMAL NORMS

In the case of the Shasta County residents, the informal norms that governed the group were civility and neighborliness in resolving the problems caused by trespassing cattle.[128] In FCA practice, there are also informal norms of behavior. For relators' counsel, these include the expectation that relators' counsel will bring only meritorious cases to the DOJ's attention,[129] will warn DOJ attorneys if problems develop in the case,[130] will be trustworthy and accurate in their representations about the case,[131] and will deliver on what they promise.[132]

For DOJ counsel, the expectations are that DOJ attorneys will work closely with the relator and the defendant and their respective attorneys early in the case,[133] that DOJ counsel will alert the relator's counsel if another relator has previously filed a *qui tam* action covering the same material,[134] and that DOJ counsel will warn the relator's counsel if there are problems in the relator's case[135] or if the DOJ is going to take some

---

127. Telephone and Internet Research, *supra* note 126.
128. Ellickson, *supra* note 38, at 52–55, 280–83.
129. *See* West, *supra* note 61, at 31–49; Kreindler, *supra* note 75, at 2.
130. *See* West, *supra* note 61, at 42.
131. Kreindler, *supra* note 75, at 2.
132. *Id*.
133. *Cf*. T. Clay Mason & Larry D. Leonard, *A Government Investigator Perspective*, False Claims Act & *Qui Tam* Q. Rev., July 1997, at 10, 11–12 (explaining why and how relators' contact with the DOJ prior to filing *qui tam* complaints is valuable for all players); McDermott, *supra* note 79, at 22–23 (giving advice to relators to contact the DOJ prior to filing a *qui tam* complaint). Some U.S. Attorney's offices, for example, encourage relators to approach them as soon as they have identified a possible violation. McDermott, *supra* note 79, at 22. These discussions often are frank and extensive, and include DOJ advice to relators on procedural matters. *Id*. For an in-depth discussion of legal theory and case strength, see *United States* ex rel. *Alderson v. Quorum Health Group, Inc*., 171 F. Supp. 2d 1323, 1327 (M.D. Fla. 2001). Some U.S. Attorney's offices have adopted a policy of seeking a lifting of the seal on the otherwise confidential information in an FCA suit to discuss it with the defendant and defense counsel as part of the DOJ's decisional process of whether and what charges to bring against a defendant. McDermott, *supra* note 79, at 25–26. This practice, which is not mandated or even suggested by the language or legislative history of the FCA, is especially remarkable because it is contrary to the DOJ's customary ways of conducting its cases and making its decisions in confidence and without consultation with private parties. *See* Fed. R. Crim. P. 6(e) (requiring secrecy of grand jury proceedings).
134. This is significant information to relators because once an FCA *qui tam* case has been filed, all others are preempted. *See* West, *supra* note 61, at 22; *cf*. Kreindler, *supra* note 75, at 7. Because *qui tam* cases are filed under seal and remain under seal for years, other prospective relators will have no way of knowing whether it is worth their time and resources to prepare a *qui tam* case for filing. A tip by a DOJ attorney who is aware of pending cases under seal can be invaluable to prospective relators and their counsel. *See* 31 U.S.C. § 3730(b)(5) (2000).
135. McDermott, *supra* note 79, at 27; Kreindler, *supra* note 75, at 10.

action detrimental to the relator.[136] For defense counsel, the expectations are that if defense counsel is brought into discussions with the DOJ regarding the defendant's liability,[137] defense counsel will be honest and thorough in her representations. For example, if the defense counsel represents that the defendant was unaware of certain applicable regulations, or was confused as to their interpretation, DOJ counsel will expect that the defense counsel has investigated the matter fully with the defendants and is informed when providing the DOJ with this exculpatory explanation.[138]

D. Information Exchange Within the FCA Bar

Members of a close-knit group contribute to the circulation of information about issues important to each other.[139] In the context of the FCA, such information includes

136. Such detrimental action could include seeking limitations on a relator's involvement, 31 U.S.C. § 3730(c)(4), moving to dismiss the relator's case, *id*. § 3730(c)(2)(A), or opposing a settlement the relator may have reached with the defendant, *id*. § 3730(c)(2)(B).

137. McDermott, *supra* note 79, at 25–26. The defendant may only be a putative defendant since some discussions between the DOJ and targets can occur before a relator has filed her *qui tam* action. *Id*. This situation would occur when the relator approached the DOJ prior to filing her *qui tam* action. *Id*.; Mason & Leonard, *supra* note 133, at 10–13.

138. Because of the unusual level of communication between the DOJ and relators' counsel and, often, also with defense counsel, attorneys who are players in the FCA game must deal with a special dilemma. Every attorney has the ethical obligation not to represent a client if "the representation...will be materially limited by . . . a personal interest of the lawyer." Model Rules of Prof'l Conduct R. 1.7(a)(2) (2002). The comments to this rule include the following: "[C]onflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." *Id*. cmt. 8. Because of the informal norms existing in FCA practice, attorneys could run afoul of this ethical obligation when following such norms.

Imagine the following scenario: As noted, a relator's counsel is expected to alert the DOJ to problems that counsel is aware of in the case. *See supra* note 130 and accompanying text. This is a reasonable expectation, since the DOJ will be devoting resources to investigating and preparing the case. If the problem is that the relator has been involved in the wrongdoing, the relator's counsel understandably may be reluctant to reveal such involvement to the DOJ. A culpable relator almost certainly would see her percentage of any recovery in the FCA case cut considerably, plus she may be indicted on criminal charges. Yet if counsel does not reveal the relator's culpability, counsel's credibility as a repeat player in future FCA encounters with the DOJ will be compromised.

A similarly difficult situation arises for defense counsel who has been given an opportunity by the DOJ to review the potential case against a defendant and explain the defendant's position to the DOJ. Assume that here, too, significant harm could befall the defendant if the DOJ learns from defense counsel the full scope of the defendant's wrongdoing. Yet again, if defense counsel is not forthcoming with the DOJ when given the opportunity to engage in candid discussions, defense counsel's credibility as a future player in other cases with the DOJ will suffer. Again, while lack of candor is a problem for counsel in any encounter with the DOJ or any other government representative, the norm of truthful prefiling discussion and candor that prevails in FCA practice raises the stakes of a less-than-truthful policy.

In stark terms, both the relator and defense counsel face the possibility of damaging their own interests if they follow their clients' instructions not to reveal their clients' liability. They will be damaged because, as repeat players in the FCA regulatory games their reputations will suffer from the deceit they practice at their clients' instructions. Unlike their clients, neither counsel has anything to lose by revealing their clients' liability; they stand to lose only by not revealing such liability. The consequences for private counsel if the DOJ learns of its deceit would likely begin with the DOJ attorneys' reluctance to grant counsel access and opportunities to discuss future matters with the DOJ. This reluctance will damage counsel's ability to serve future clients and could affect counsel's future client development potential and, thus, prosperity. In addition, depending upon the degree of concealment of client culpability, the DOJ may refer counsel to the relevant bar for licensing sanctions, or even prosecute counsel for obstruction of justice, conspiracy, or complicity.

Although both relators' counsel and defense counsel will suffer some of the same consequences if the DOJ discovers that they have concealed their clients' culpability, their damage is not identical. For example, relators' counsel will suffer an additional consequence of deceit with the DOJ that defense counsel will not. Recall that the FCA provides that defendants must pay "reasonable" attorneys' fees to plaintiffs. 31 U.S.C. § 3730(d). When the DOJ trusts the relator's counsel and is willing to work hand-in-hand with the relator's counsel on FCA cases, or even to delegate the bulk of work on FCA cases to the relator's counsel, the relator's counsel is able to generate fees on such work. If the DOJ declines to deal with the relator's counsel or strives to keep interactions with the relator's counsel to a bare minimum, the relator's counsel's ability to perform fee-generating work on FCA cases will be diminished.

139. *See* Ellickson, *supra* note 38, at 57 (referring to "truthful negative gossip" as a way of communicating deviance by neighbors to other neighbors).

court rulings, DOJ policies, interpretations of these rulings and policies, and informal developments such as the custom, practice, and personalities of players.[140] This communication may be through formal publications or casual conversation among the players. For example, an off-hand remark by a defense attorney to a relator's attorney, as in, "I wish you had filed that in the Fourth Circuit," communicates that the Fourth Circuit follows precedent on an issue pertinent to the case that favors the defense. One relator's attorney's comment to another relator's attorney, "That office is full of idiots," or "That's a great office to work with. See if you can get venue there," communicates volumes about which U.S. Attorney's office is more favorable to relators.

E. POWER WITHIN THE FCA BAR

1. Power Held by the DOJ

The power held by DOJ attorneys is obvious. These attorneys decide whether the federal government will intervene in a relator's case, whether to work with the relator, the manner in which the DOJ will cooperate with the relator, whether and how to oppose the relator in the case, and what percentage of the recovery they will recommend for relator.[141]

2. Power Held by Relators' Counsel

Power is held by relators' counsel in five ways. First, and most obviously, relators' counsel can influence potential relators on whether to become relators in the first place, and where to file a relator's complaint. Given the risks to potential relators of becoming whistleblowers,[142] willingness to become a *qui tam* relator may exist only after considerable education of a potential relator by counsel. Also, as noted above, relators' counsel determine in which district a relator should file a *qui tam* action (and thus, with which U.S. Attorney's office a relator will be working).[143]

Second, relators' counsel can screen out nonmeritorious relators, which, given the expansive reach of the FCA and regulatory complexity of the contracting world covered by the FCA, takes considerable sophistication on the part of counsel.[144] Such screening saves the DOJ time and resources.

Third, relators' counsel, working together with a relator, can educate the DOJ about new and evolving frauds of which the DOJ has no knowledge. It can take considerable time, effort, and expertise on the part of relators' counsel to sift through a relator's information and present a coherent explanation of complex transactions to the DOJ. With the benefit of conversations protected by the attorney-client privilege, an experienced relator's attorney can piece together the fraud the relator has uncovered.

140. Such information exchange also occurs at professional meetings such as the American Bar Association's National Institute on the Civil False Claims Act.

141. *See, e.g.*, United States *ex rel*. Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 429–30 (E.D. Pa. 1998), *rev'd*, 205 F.3d 97 (3d Cir. 2000); United States *ex rel*. Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1325–35 (M.D. Fla. 2001).

142. *See* Bucy, *Information as a Commodity*, *supra* note 8, at 948–58.

143. Kreindler, *supra* note 75, at 7 (discussing how approaches to *qui tam* cases vary greatly from one U.S. Attorney's office to another).

144. *See* Bucy, Private Justice, *supra* note 7, at 55, 68–69.

Fourth, relators' counsel can supplement the DOJ's resources significantly by assisting in, and even absorbing, a major portion of the workload of investigating and preparing an FCA case.[145]

Fifth, as a co-plaintiff, a relator has statutory power under the FCA. For example, a relator may oppose the DOJ's requests for extensions of time, which the DOJ may seek when deciding whether to intervene;[146] the relator may oppose the DOJ's motion to unseal or partially unseal a relator's complaint so as to discuss and negotiate with the putative defendant;[147] and the relator may oppose the DOJ's efforts to settle or dismiss the action.[148] The extent to which a relator exercises her statutory power over a case can facilitate or frustrate the DOJ's chosen strategies.[149]

3. Power Held by FCA Defense Counsel

The FCA defense counsel holds power within the group because of its ability to evaluate the information collected both by the DOJ and by relators, and because it informs and influences its clients. Defense counsel's influence may well begin early in FCA cases. For example, the DOJ often obtains the unsealing of a relator's complaint before it officially joins as a party.[150] This gives the defendant an opportunity to review and respond to allegations and evidence before the DOJ decides whether to intervene.[151] If a defense attorney finds from this review that the defendant may have liability, the defense attorney can be of immense help to the DOJ and the relator by educating her client about the seriousness of the matter. Accustomed to general civil litigation, clients may expect to engage in delay strategies, which generally work to the defense's favor. Delaying an FCA case, however, can be catastrophic.[152] Helping a client see a quick resolution of liability, especially before the DOJ joins the case as a plaintiff, can significantly reduce penalties and damages under the Act.[153]

F. SANCTIONS EMPLOYED BY THE FCA BAR FOR BREACHES OF INFORMAL NORMS

The FCA bar employs sanctions to enforce its norms that are similar to the sanctions Ellickson found were being used by the residents of Shasta County. In both groups, these sanctions include informing the offender, truthful negative gossip about the of-

145. Bucy, *Games and Stories*, *supra* note 6, at 670.
146. 31 U.S.C. § 3730(b)(2)–(3) (2000).
147. West, *supra* note 61, at 26.
148. 31 U.S.C. § 3730(c)(2)(A)–(B).
149. For example, a relator can oppose the government's request for an extension of the sealing period, 31 U.S.C. § 3730(b)(2), the government's effort to dismiss the action, *id*. at § 3730(c)(2)(A), or settle the action, *id*. § 3730(c)(2)(B). Opposing the DOJ may result in a lesser percentage of the recovery for relators at the conclusion of the case, since the DOJ might argue to the court that the relator was not cooperative. *See, e.g.*, United States *ex rel*. Coughlin v. IBM Corp., 992 F. Supp. 137, 142 (N.D.N.Y. 1998). In Coughlin, the DOJ opposed the relators' request for a 25 percent share of the settlement in a *qui tam* action in part because the relators opposed the settlement reached by the DOJ and the defendant. *Id*. The court agreed with the DOJ and awarded the realtor 15% of the settlement, noting, among other things, that "[r]elators vigorously opposed the settlement of this matter." *Id*.
150. *See* West, *supra* note 61, at 26.
151. *Id*.
152. Penalties accrue as additional false claims are filed, thus, delay can increase the penalties. *See* 31 U.S.C. § 3729(a) (2000).
153. John R. Phillips, *Remarks at the A.B.A. National Institute on the Civil False Claims Act and Qui Tam Enforcement, Panel on FCA Enforcement in the Post-*Stevens *World* (Nov. 2000).

fender within the community, cessation of cooperation, and referring the offender to enforcers.[154]

1. Inform the Offender and Allow an Opportunity to Correct

Informing the offender and allowing an opportunity for correction is a minimal sanction appropriate for minor breaches of informal norms. Within FCA practice, minor breaches include actions such as not showing up for a scheduled meeting or failing to produce information or services when promised.

2. Truthful Negative Gossip

Truthful negative gossip, which is repeating to others within the community facts of a violator's breach of a norm, is appropriate for repeated, minor breaches of norms, and for slightly more serious breaches. In the FCA context, this would include actions such as carelessly (though not intentionally) providing incorrect or incomplete information about the case or counsel. Given the importance of reputation in the success of one's FCA practice, this is a particularly meaningful sanction.

3. Cease Cooperation

Cessation of cooperation is appropriate for serious breaches of conduct. In the FCA context, this would include actions such as repeated presentations of incomplete or inaccurate information and dishonoring a significant commitment.[155] Different players within the FCA bar have varying abilities to exercise this option. DOJ attorneys have the most discretion to invoke this sanction since the DOJ simply can cease cooperating with a relator and fall back on its traditional investigative techniques if it decides not to work with the relator. If a relator has already provided helpful information to the DOJ and the DOJ ceases to cooperate with the relator, the DOJ would lose little in exercising this sanction. The relator and relator's counsel, however, would lose a lot, as the DOJ's disassociation of a relator prevents the relator from assisting in the case and would result in a lower percentage of any recovery for the relator. Notably, relator's counsel also would lose if the DOJ ceases cooperation with the relator, because most relators' counsel negotiate with their clients for a share of the relator's percentage in addition to the statutorily awarded attorneys fees.[156] Disassociation of a relator and the relator's counsel from active participation in the case also obviously reduces the opportunity to perform additional hourly work, thereby reducing the attorneys' fees allowable under the FCA and payable to the relator's counsel by defendant.

Realistically, the only way relators and relators' counsel can exercise a cessation of cooperation sanction is by taking the relator's case to another U.S. Attorney's office. It is harmful to a relator and her counsel to cease cooperating with the DOJ once the case has begun because doing so will reduce the percentage of any recovery awarded

154. *See supra* notes 118–23 and accompanying text.

155. For example, cessation of cooperation could affect the DOJ's commitment not to move for dismissal, defense counsel's commitment that he is disclosing the full extent of the defendant's fraud, or the relator's counsel's commitment that the relator will agree to a DOJ settlement of a case.

156. *See, e.g.*, United States *ex rel*. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1036 (6th Cir. 1994) (discussing contingency fees relators' attorneys negotiate with their clients in addition to court-ordered attorneys fees and costs); Boese, *supra* note 15, § 4.09[A][1] (discussing awards of attorneys fees under the FCA).

to the relator in the case. To the extent that the relator's information is helpful in investigating the case, which presumably it is or the DOJ would not be willing to work with the relator, the relator's cessation of cooperation could jeopardize the success of the case.

Defendants and their counsel have the least ability to exercise a disassociation option. A decision to cease cooperating with the DOJ (and/or the relator, depending on whether the DOJ has intervened in the case) simply because the DOJ or the relator has breached norms of behavior is shortsighted for a defendant. Cessation of cooperation by a defendant will simply cause more penalties and damages to accrue. Significant noncooperation even could be viewed as a criminal matter, such as obstruction of justice.[157]

4. Refer the Offender to Enforcers

Referring offenders to "enforcers" is the most serious sanction. Enforcers in the context of FCA practice include disciplinary committees of the relevant bar and criminal prosecutors. The sanction of referral to criminal prosecutors could be exercised by any player against any other player. The most draconian deployment of this sanction would be referral of a player, or witness, to the DOJ Criminal Division or another group that has authority to bring criminal charges (such as a State's Attorney General's office). Presumably, exercise of this sanction would be used when the breach of norms is severe, such as destruction of subpoenaed records, submission of fraudulent records, or providing false testimony under oath.[158]

V. CONCLUSION

This Article has applied game theory principles identified by Robert Axelrod and Robert Ellickson concerning optimal strategies for players of close-knit groups involved in iterated games to the regulatory game created by the civil FCA. Axelrod's principles for iterated games suggest that to optimize success under the FCA, the DOJ should cooperate with relators who bring information of wrongdoing to the DOJ's attention. If relators or their counsel behave irresponsibly, such as by providing inaccurate information or frustrating the investigation, the DOJ should cease cooperating with the relator and should return to cooperation only if the relator's defection has not damaged the case, and the relator and her counsel return to cooperation. This is the Tit-for-Tat strategy that Axelrod found to be most effective in iterated games. To facilitate cooperation, the DOJ should embrace the press and the private FCA bar in communicating the specifics of its Tit-for-Tat strategy.

The FCA bar is a close-knit group, as defined by Robert Ellickson in his studies of game theory. A close-knit group is identified by interactions among repeat players who share common characteristics and informal norms and exchange information easily,

157. *See, e.g.*, 18 U.S.C. § § 1504–1505, 1518 (2000); *id.* § § 1512, 1516 (2000 & West Supp. 2003).

158. Such conduct may constitute obstruction of justice, *see, e.g.*, *id* § 1512 (2000 & West Supp. 2003), or, depending upon the specifics, a violation of dozens of criminal fraud offenses. *See, e.g.*, *id*. § 1341 (providing the penalties for mail fraud); *id*. § 1343 (prescribing the penalties for wire fraud); *id*. § 1961(1) (defining racketeering), amended by Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 5(b), 117 Stat. 2875.

where each player possesses power within the group and the group employs sanctions to discipline members who fail to follow the group's informal norms. Those involved in FCA practice share common characteristics: 93.5 percent of the FCA private bar share at least two significant professional characteristics.[159] There are informal norms within the FCA bar that govern the interactions among members and the sanctions for violation of these norms.

Because of the FCA's success in dealing with complex economic wrongdoing and our global economy's need for effective tools to combat such wrongdoing, expansion of the FCA's model should be considered by policy makers.[160] Implementing this Act, whether in an expanded form or in its current form, however, should be informed by an appreciation of how to optimize its effectiveness. This Article has attempted to use game theory principles to highlight some of the ways to use the FCA effectively.

159. *See supra* note 127 and accompanying text.
160. Bucy, *Private Justice*, *supra* note 7, at 76–80.

Upcoming Legal Battles

Piecing Together a Scattered Puzzle of Fraud: Honor the True Intent Behind the False Claim Act's Original Source Exception

PIECING TOGETHER A SCATTERED PUZZLE OF FRAUD:
Honor the True Intent Behind the False Claims Act's Original Source Exception

Joseph E. B. White

Lifting the cover of the puzzle box and peering into the mound of assorted shapes and sizes of multicolored cardboard, one is faced with the daunting task of somehow piecing together the scattered puzzle into the idealistic masterpiece that graces the box's cover. Inevitably—probably to the amusement of an employee back at the puzzle factory—a key piece of the final picture has never made its way into the carton, leaving the purchaser frustrated and bewildered.

In the False Claims Act arena, corporate fraudfeasors, cognizant of the beloved public disclosure bar,[1] frequently provide the Government with all of the information about their fraudulent activity, but the vital data typically arrives in a form similar to the proverbial puzzle box. However, most fraudfeasors seem to lose the box cover, ultimately substituting a rosier cover than the distorted image of fraud produced by the enclosed pieces.

By grafting an original source exception to the public disclosure bar,[2] the drafters of the 1986 False Claims Act amendments wanted to reward those who pieced together the scattered puzzle, providing the Government with the true picture of the buried fraud. The circuit courts have honored the true intention behind the original source exception, but a dishonest petition for certiorari has caused the United States Supreme Court to take a closer look at this provision.[3] On October 12, 2004, the Court sought the legal impressions of the Solicitor General's Office, analyzing the meaning of the False Claims Act's original source exception.[4]

This article defends the existing case law, which honors the true intent and meaning of the federal False Claims Act's original source exception. Part I highlights the case history of this particular case now being studied by the U.S. Supreme Court and the Solicitor General's Office. Part II examines the existing law and its application to the this particular case. The article concludes that the Court should be encouraged to deny the Defendant's petition for writ of certiorari, thereby respecting this well-established provision of the False Claims Act.

I. THE HISTORY BEHIND THE *COMSTOCK* CASE

Don Kennard and Harold Wright brought a *qui tam* action against Comstock Resources, Inc., alleging that Comstock, which allegedly underpaid royalties pursuant to

1. 31 U.S.C. 3730(e)(4)(A).
2. 31 U.S.C. 3730(e)(4)(B).
3. Comstock Resources, Inc. v. Kennard, 2004 WL 1748928 (U.S.) (Petition for Writ of Certiorari).
4. Comstock Resources, Inc. v. Kennard, 73 USLW 3235 (U.S. Oct. 12, 2004).

oil and gas leases to the Mineral Management Service, an agency under the Secretary of the Interior, who acts as fiduciary for the owner, an Indian tribe. Wright owned royalty interests in gas wells in a tract of land near the tribe's reservation. When the operator on Wright's property sold its lease interests in Comstock, Wright's royalty payments dropped dramatically. Wright speculated that Comstock was underpaying him and others, including the tribe, and informed Kennard of his suspicions. After investigating public records and based on their extensive oil and gas experience, Wright and Kennard concluded that Comstock was knowingly underpaying the tribe. After consulting with attorneys including a Mr. Sydow, they determined that Comstock had violated the FCA and began drafting a *qui tam* complaint. Wright and Kennard invited the tribe to join them as a co-relator but the tribe declined.

On October 21, 1998, Wright and Kennard sent the required prefiling disclosure statement to the Government with the still unfiled complaint attached. On October 26, Sydow filed a non-FCA contract action based on substantially similar allegations, but on behalf of the tribe, not Wright and Kennard. The following day, Wright and Kennard filed their *qui tam* complaint. They allege that Sydow essentially stole their information in preparing the tribe's complaint that was filed the day before.

The district court dismissed Kennard and Wright's *qui tam* action for lack of subject matter jurisdiction pursuant to the public disclosure bar.[5] The court ruled that the Sydow complaint was a public disclosure, and that the relators were not an original source because they merely compiled public information. The Relators appealed.

The Tenth Circuit reversed.[6] As an initial matter, the court rebuffed the Relators' argument that it should not validate Sydow's allegedly unethical use of their information in drafting his complaint for the tribe. The court ruled that the public disclosure bar allows for no exceptions unless the relator is an original source, even if the public disclosure is made by somewhat nefarious means. The remedy for Sydow alleged conversion of information, the court indicated, lay elsewhere.

Accordingly, the court analyzed the case to determine whether the public disclosure bar applied. In the Tenth Circuit, this is a four-step inquiry: (1) whether the alleged public disclosure occurred in one of the statutorily enumerated fora; (2) whether this disclosure was "public" within the meaning of the FCA; (3) whether the relators' complaint is "based upon" this disclosure; and (4) whether the relators qualify as an "original source." Consideration of the fourth question is necessary only if the court answers the first three questions in the affirmative.

In this case, the alleged public disclosure was the Sydow complaint, filed in a "civil . . . hearing," one of the statutorily enumerated fora in § 3730(e)(4)(A). Moreover, the filing of a civil action, the court ruled, is in itself an affirmative act of public disclosure. It did not matter that disclosure was made only to a single government filing clerk who stamped the Sydow complaint. Once the complaint is filed, disclosure has occurred, and there is no requirement that the clerk or any member of the public read the complaint. Moreover, the court rejected the Relators' argument that, by providing the un-

5. *In re* Natural Gas Royalties *Qui Tam* Litigation, 2002 WL 32714554 (D. WYO. 2002).
6. Kennard v. Comstock Resources, Inc., 363 F.3d 1039 (10th Cir. Apr. 5, 2004).

filed complaint to the Government with their disclosure statement, they immunized themselves from the operation of the public disclosure bar.

Moreover, the court concluded that the Relators' complaint was "based upon" the Sydow complaint. The court found no merit in the Relators' argument that, because the Sydow complaint was based exclusively on their information and complaint, it was impossible for their complaint to be based upon the Sydow complaint. The court ruled that "based upon" for purposes of the Statute means "supported by." Thus, a relator need not have learned of the basis for the *qui tam* action from the public disclosure for the action to be considered "based upon" the disclosure if the allegations are substantially similar. Because the Relators conceded that the complaints at issue were substantially similar, the court concluded that the *qui tam* action was based upon the public disclosure.

Nevertheless, the Tenth Circuit concluded that the Relators qualified as an original source. Comstock argued that the Relators were not an original source because: (1) they did not possess substantive information about the fraud; (2) they were not insiders of Comstock or the tribe; and (3) they relied on public records. The court rejected each argument in turn.

The court ruled that Comstock's first argument had no basis in Tenth Circuit precedent. To qualify as an original source, a relator need not have knowledge of the actual fraudulent conduct. The statute requires only knowledge of "the information on which the allegations are based." Thus knowledge underlying or supporting the fraud allegation is sufficient, and knowledge of the actual fraudulent submissions is not required.

According to the Tenth Circuit, Comstock's second argument was similarly without merit. The court ruled that there is no requirement that a relator be a corporate insider, and the court could think of no reason for creating such a restriction.

Comstock's third argument deserved more attention. The court declined to adopt a bright-line rule disqualifying a relator who relied on public records as an original source. The court stated that when a *qui tam* action is based solely on material elements already in the public domain, the relator is not an original source. On the other hand, a relator starting with innocuous public information and completing the equation with information independent of any preexisting public disclosure may qualify as an original source.

The court of appeals determined that the case at bar fell into the latter category. It disagreed with the district court's conclusion that Wright and Kennard merely compiled publicly available information. Wright relied exclusively on his own private royalty records, not on any public information. Kennard did examine public records in the course of his independent investigation, but the court of appeals observed that this did not disqualify him as an original source, as many investigations of fraud on the Government will necessarily involve a review of the relevant publicly available contracts out of which the claim arises. Significantly, none of the public documents disclosed alleged fraud. It was only through independent investigation, deduction, and effort that the Relators discovered the alleged fraud. The court concluded that the Relators had direct and independent knowledge of the alleged fraud because they were

the persons responsible for ferreting it out in the first place. Accordingly, the court concluded that they qualified as an original source. The Defendant filed a petition for a writ of certiorari.

II. LEGAL ANALYSIS

A. Original Source Exception Requires Relators to Have Knowledge of "Information" underlying Allegation, Not Knowledge of the "Transaction" Itself

The Tenth Circuit, refusing to deviate from the well-established case law interpreting the FCA's original source provision, correctly rejected Comstock's proposed requirement that relators must possess knowledge of the "actual alleged fraudulent submissions to the Government" to be an original source. In renouncing the Defendant's flawed understanding of the FCA, the court honored its basic task in statutory interpretation: "[G]ive effect to the intent of Congress."[7] Namely, in the context of the 1986 amendments, which broaden the FCA's *qui tam* provisions, the legislative intent was to encourage "private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."[8] In turn, Congress amended the Act, changing the jurisdictional bar from one precluding actions "based upon evidence or information in the possession of the United States" to one precluding actions "based upon the public disclosure of allegations or transactions . . ." Thus, Congress changed the focus of the jurisdictional bar from evidence of fraud inside the Government's overcrowded file cabinets to fraud already exposed in the public domain.[9] Furthermore, recognizing that Congress specifically added the original source provision in 1986 to "reverse the result in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), a case in which the misrepresented state of affairs had already been presented to the government by an alleged perpetrator of Medicaid fraud,"[10] courts have interpreted the original source provision as meaning "direct and independent knowledge of *any* essential element of the underlying fraud transaction."[11] Thus, in light of the aims of the provision and the absence of contrary statutory interpretations, the existing case law simply requires the relator to possess direct and independent knowledge of the "information on which the publicly disclosed allegations are based."[12] Therefore, the fact that the Relators in the present case were not physically present when Comstock submitted their allegedly fraudulent claims is irrelevant.

7. United States v. American Trucking Ass'ns, 310 U.S. 534.
8. H.R.Rep. No. 660, 99th Cong., 2d Sess. 22 (1986).
9. *See* United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1521 (8th Cir.1994) (Magill, J., dissenting), *cert. denied*, 515 U.S. 1142 (1995).
10. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994).
11. *Id.*; *see also* United States *ex rel.* Laird v. Lockheed Martin Engineering Co., 336 F.3d 346, 352–53 (5th Cir. 2003) (relator is not required to "have 'direct' and 'independent' knowledge of each false claim alleged in his complaint").
12. *Laird*, 336 F.3d at 355.

B. Relators have "Direct and Independent Knowledge" When They "See the Fraud With Their Own Eyes *OR* Obtain knowledge of It Through Their Own Labor"

The FCA is clear that for a relator to be an original source he need only possess "direct and independent knowledge of the information on which the allegations are based."[13] All of the circuits that have addressed this issued have interpreted the plain meaning of the term "direct" to require "knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others."[14] Furthermore, the relator's knowledge is considered "independent" if it is not derived from the public disclosure.[15] In an often cited ruling from an early case interpreting this provision, the Ninth Circuit ruled that a relator could not qualify as an original source if he "did not see the fraud with [his] own eyes or obtain [his] knowledge of it through [his] own labor unmediated by anything else...."[16] Interestingly enough, the Defendants seized on this language several times in their petition for a writ of certiorari.[17] However, the Defendants neglected to include the "*or* obtain [his] knowledge of it through [his] own labor unmediated by anything else" phrase, thereby mischaracterizing and misquoting the actual existing case law. Indeed, the Defendants proceed to misguide the Court through several factual cases that were decided under the first avenue of the rule of law, failing to highlight the alternative route for relators that obtained knowledge of the fraud through their "own labor unmediated by anything else."[18]

---

13. 31 U.S.C. § 3730(e)(4)(B).

14. *See, e.g.*, United States *ex rel*. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins., 944 F.2d 1149, 1161 (3d Cir.1991) (stating in dicta that plaintiffs may qualify if their information results from their own investigations); Houck *ex rel*. United States v. Folding Carton Admin., 881 F.2d 494, 505 (7th Cir.1989) (attorney-relator had direct knowledge of alleged fraudulent distribution of settlement because his knowledge resulted from his involvement in assisting late class action claimants in recovering money out of settlement order funds), *cert. denied*, 494 U.S. 1026 (1990); United States *ex rel*. Devlin v. State of California, 84 F.3d 358, 360 (9th Cir.1996) ("the relator had 'direct and independent' knowledge because he had discovered the information underlying his allegations of wrongdoing through his own labor"); United States *ex rel*. Fine v. Chevron, 39 F.3d 957, 961-62 (9th Cir.1994) (auditor-relator had "direct and independent" knowledge of the information underlying his *qui tam* action because his "own labor"—reviewing audit sheets and other financial records—led to his discovery of the allegedly fraudulent payments); United States *ex rel*. Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1162 (10th Cir.1999) (burden was on the relator to demonstrate that he had discovered the information on which his allegations were based through his "own efforts and not by the labors of others," and that his "information was not derivative of others"); United States *ex rel*. Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1006-07 (10th Cir.1996) ("direct knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others"); Cooper *ex rel*. United States v. Blue Cross & Blue Shield of Florida, Inc., 19 F.3d 562, 568 (11th Cir.1994) (*per curiam*) (relator's knowledge of an alleged fraud by a Medicare secondary payer is direct because it was acquired through "three years of [the relator's] own claims processing, research, and correspondence with members of Congress and [the Health Care Financing Administration]"); United States *ex rel*. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 656 (D.C. Cir.1994) (plaintiff was deemed an original source because its investigation of phone records and pay vouchers from ongoing litigation first revealed fraud of a federally appointed arbitrator).

15. *See Laird*, 336 F.3d at 355 (citing *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C.Cir.1997); United States *ex rel*. Minn. Ass'n of Nurse Anesthetists v. Allina Health Systems Corp., 276 F.3d 1032, 1048–49; United States *ex rel*. McKenzie v. BellSouth Tele., Inc., 123 F.3d 935, 941 (6th Cir.1997)).

16. United States *ex rel*. Devlin v. California, 84 F.3d 358, 361 (9th Cir.1996).

17. *See, e.g.*, Pet. App. 11 ("United States *ex rel*. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995) (A "relator is said to have direct knowledge of fraud when he 'saw [it] with his own eyes'")(quoting *Wang v. Fmc Corp*., 975 F.2d 1412, 1417 (9th Cir. 1992))).

18. *See, e.g.*, United States *ex rel*. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir.1995) ("a person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the [FCA]"); United States *ex rel*. Kreindler & Kreindler v. United

Because the Defendants chose to present only half of the controlling rule of law, the Court was presented with a skewed view, portraying a conflict among the circuits that actually only exists in the confines of the Defendant's brief. The complete, well-established case law credits relators with "direct and independent knowledge" if the "investigation or experience of the relator either . . . translate[s] into some additional compelling fact, or . . . demonstrate[s] a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed.[19] This recent decision, which was released after the parties filed their respective Supreme Court briefs, succinctly summarizes the existing consensus among all of the circuits that have addressed this specific issue.[20] Under this approach, the courts have "look[ed] to the factual subtleties of the case before [the court] and attempt[ed] to strike a balance between those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those *actually involved in the process of unearthing important information* about a false or fraudulent claim."[21] Armed with the complete and accurate rule of law, the Court should recognize the Tenth Circuit's decision as a factual determination and give deference to the lower court's decision.

The Tenth Circuit also refused the Defendant's invitation to fabricate a restriction limiting an original source to only insiders. Again, respecting the legislative intent behind the 1986 amendments, the court of appeals observed that Congress amended the Act "to encourage any individual knowing of Government fraud to bring that information forward."[22] No court had undermined this legislative purpose by restricting the original source exception; the Tenth Circuit refused to be the first court to do so. Indeed, even the Defendants conceded—albeit buried in a footnote—that a relator did not have to be an insider, but could actually "gain firsthand knowledge by investigation."[23] While the Defendants' concession contradicts the very thrust of their overall argument for certiorari, it should be noted that the Tenth Circuit determined that the Relators had satisfied this exact factual inquiry. Again, the Supreme Court should give deference to the circuit court's factual determination.

Technologies Corp., 985 F.2d 1148, 1159 (2d Cir.) (attorney-relator who obtains information of alleged wrongdoing through disclosures made by alleged wrongdoer in discovery in a previous lawsuit does not have significant direct and independent knowledge; neither the collateral research and investigations conducted by the attorney nor his background knowledge that enabled him to understand the significance of the disclosures were enough to establish that he had direct and independent knowledge), *cert. denied,* 508 U.S. 973 (1993).

19. United States *ex rel*. Reagan v. East Texas Medical Center, 384 F.3d 168, 179 (5th Cir. 2004).

20. *See, e.g., Cooper,* 19 F.3d at 564, 568 (*qui tam* plaintiff was considered an original source because his investigation first alerted HCFA to specific violations of Medicare Secondary Payer law by Blue Cross Blue Shield of Florida); *Springfield Terminal Ry. Co.,* 14 F.3d at 648, 657 (plaintiff was deemed an original source because its investigation of phone records and pay vouchers from ongoing litigation first revealed fraud of a federally appointed arbitrator).

21. *Laird,* 336 F.3d at 356 (emphasis added).

22. S.Rep. No. 99-345, at 2 U.S.Code Cong. & Admin.News 1986, pp. 5266–5267.

23. Pet. App. 26n.6.

C. FCA Bars Suits Based on Publicly Disclosed "Allegations or Transactions," Not Information

Lastly, the Tenth Circuit refused to legislate a "bright-line rule disqualifying a relator as an original source when the relator examines public records." The court of appeals specifically noted that the legislative intent behind the 1986 amendments was to fix the overly restrictive *qui tam* jurisdiction problems that surfaced in *United States ex rel. State of Wisconsin v. Dean*,[24] a case in which the relator was barred even after it investigated and uncovered Medicaid fraud against the federal government. While courts have acknowledged that "Congress did not prescribe by mathematical formulae the quantum or centrality of nonpublic information that must be in the hands of the *qui tam* relator in order for suits to proceed,"[25] no court has adopted a bright-line rule barring a relator merely because he reviewed public documents during the course of his investigation. In fact, the only relevant limitation that has been espoused is that "*qui tam* suits are limited to those in which the relator has contributed significant independent information . . ."[26]

In assessing whether a "relator has contributed significant independent information," the courts have repeatedly highlighted that the Act triggers the jurisdictional bar only when there has been a public disclosure of "allegations or transactions."[27] The term "'allegation' connotes a conclusory statement implying the existence of provable supporting facts."[28] The term " 'transaction' suggests an exchange between two parties or things that reciprocally affect or influence one another."[29] The Courts of Appeals, attempting to clarify the existing rule of law, frequently point to the D.C. Circuit Court's illustration in *Springfield Terminal*.[30] In that case, the court reduced the existing case law to the following equation: X (misrepresented state of facts) + Y (true state of facts) = Z (fraud). X and Y represent the material elements of fraud; "a *qui tam* action cannot be sustained where all of the material elements of the fraudulent transaction are already in the public domain . . ."[31] When the publicly disclosed transaction is sufficient to raise the inference of fraud (X + Y are in the public domain), there is "little need for *qui tam* actions, which tend to be suits that the government presumably has chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue."[32] In other words, a relator may bring an action, so long as the fraudulent "*allegations or transactions*" have not been publicly disclosed.

Similar to *Springfield Terminal*, in which the relator "started with innocuous public information [and] completed the equation with information independent of any pre-

24. 729 F.2d 1100 (1984).
25. United States *ex rel*. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 653.
26. *Id.*
27. *See, e.g.*, United States *ex rel*. Precision Co. v. Koch Indus., Inc., 971 F.2d at 552 n. 2. *See also* United States *ex rel*. Rabushka v. Crane Co., 40 F.3d at 1512–13 (public disclosures gave no hint of wrongdoing); United States *ex rel*. Mikes v. Straus, 931 F. Supp. 248 (S.D.N.Y.1996) (public disclosures contain no allegation of fraud and refer to a different type of transaction than the *qui tam* suit).
28. *Springfield Terminal*, 14 F.3d at 653-54 (citation omitted).
29. *Id.* at 654.
30. 14 F.3d at 654.
31. *Id.* at 655.
32. *Id.* at 654.

existing public disclosure,"[33] the Tenth Circuit ruled that the Relators in the present case "did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such document exists."[34] Moreover, the court determined that the relators "did not merely compile statistics; [the relators] did [their] own research and investigation."[35] Applying the principles summarized in *Springfield Terminal*, it appears beyond question that the Relators qualify as original sources of the allegations of fraud they made in the context of the Comstock litigation. The Tenth Circuit determined that they had direct and independent knowledge of essential information underlying the conclusion that fraud had been committed. Because, as stated above, the government records did not themselves suffice to indicate fraud, the Relators had pieced together the scattered puzzle of fraud by their own "research and investigation," which in this case included reviewing their own private records. The court of appeals concluded that the Relators started with innocuous public information, and completed the equation with information independent of any preexisting public disclosure. As such, the court determined that the Relators were an original source within the meaning of the jurisdictional bar.

III. CONCLUSION

The Relators not only provided the Government with the true picture of the fraudulent activity, but they actually unearthed and assembled the necessary pieces of the puzzle. Unable to adequately distort the facts of their misactions, the Defendants turned to painting a confusing picture of the case law that has no basis in reality. While the False Claims Act has several unanswered questions, the issues supposedly raised in this case represent the bedrock of FCA case law. Granting certiorari in this case would not only unsettle the consensus among the circuits, but would also potentially discourage "private individuals who are aware of fraud being perpetrated against the Government [from] bring[ing] such information forward."[36] The Court should honor the true intent behind the FCA's original source exception by denying certiorari in this case.

33. *Springfield Terminal Ry. Co.*, 14 F.3d at 657.
34. United States *ex rel*. Kennard v. Comstock Resources, Inc., 363 F.3d 1039, 1046 (10th Cir. 2004).
35. *Id.*
36. H.R. Rep. no. 660, 99th Cong., 2d Sess. 22 (1986).

The Big Picture

DOJ *Qui Tam* Statistics,
Fiscal Years 1987–2004

Fraud Statistics—Overview
October 1, 1986–September 30, 2004
Civil Division, U.S. Department of Justice

FY	New Matters[1]		Settlements and Judgments[2]					Relator Share Awards[3]		
	Non Qui Tam	Qui Tam	Non Qui Tam: Total	Qui Tam: Where US Intervened or Otherwise Pursued	Qui Tam: Where US Declined	Qui Tam: Total	Total Qui Tam and Non Qui Tam	Where US Intervened or Otherwise Pursued	Where US Declined	Total
1987	361	32	86,479,949	0	0	0	**86,479,949**	0	0	0
1988	246	60	172,843,696	355,000	35,431	390,431	**173,234,127**	88,750	8,638	97,388
1989	236	95	197,202,180	15,111,719	0	15,111,719	**212,313,899**	1,446,770	0	1,446,770
1990	256	82	193,239,367	40,483,367	75,000	40,558,367	**233,797,734**	6,590,936	20,670	6,611,606
1991	243	90	270,945,467	69,705,771	69,500	69,775,271	**340,720,738**	10,667,537	18,750	10,686,287
1992	357	119	136,862,236	134,099,447	994,456	135,093,903	**271,956,139**	24,196,648	259,784	24,456,432
1993	329	132	187,234,076	171,438,383	5,978,000	177,416,383	**364,650,459**	25,636,134	1,756,902	27,393,036
1994	291	222	706,187,897	379,646,074	1,822,323	381,468,397	**1,087,656,294**	70,112,580	538,896	70,651,476
1995	236	277	279,522,866	245,463,627	1,813,200	247,276,827	**526,799,693**	46,475,379	517,238	46,992,617
1996	187	364	247,357,271	124,565,203	14,033,433	138,598,636	**385,955,907**	22,193,539	3,896,058	26,089,597
1997	185	533	468,549,359	622,746,381	7,136,144	629,882,525	**1,098,431,884**	65,938,921	1,981,346	67,920,267
1998	119	470	151,585,794	432,813,410	29,225,385	462,038,795	**613,624,589**	69,660,944	8,527,750	78,188,694
1999	141	482	196,613,009	454,268,984	62,509,047	516,778,031	**713,391,040**	49,414,054	17,593,462	67,007,516
2000	96	367	367,887,197	1,197,951,907	1,814,847	1,199,766,754	**1,567,653,951**	182,736,218	391,733	183,127,951
2001	88	310	494,496,974	1,161,064,896	125,726,963	1,286,791,859	**1,781,288,833**	184,681,396	30,294,843	214,976,239
2002	63	320	102,680,470	1,063,152,824	26,099,898	1,089,252,722	**1,191,933,192**	158,895,872	4,596,130	163,492,002
2003	93	334	703,003,368	1,414,414,025	87,140,070	1,501,554,095	**2,204,557,463**	305,581,696	19,322,900	324,904,596
2004	105	415	113,156,023	545,195,377	9,431,129	554,626,506	**667,782,529**	106,149,638	2,421,388	108,571,026
Total	3,632	4,704	5,075,847,199	8,072,476,395	373,904,826	8,446,381,221	**13,522,228,420**	1,330,467,012	92,146,488	1,422,613,500

1. "New Matters" refers to newly received referrals and investigations, and newly filed qui tam actions.
2. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Fraud Statistics—Health & Human Services[1]

October 1, 1986–September 30, 2004

Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements and Judgments[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	14	4	11,361,826	0	0	11,361,826
1988	9	9	1,382,675	355,000	88,750	1,737,675
1989	20	15	350,460	5,099,661	50,000	5,450,121
1990	28	12	12,202,500	903,158	119,474	13,105,658
1991	23	13	8,670,735	4,741,340	861,401	13,412,075
1992	30	17	9,821,640	2,192,478	446,648	12,014,118
1993	22	39	12,523,165	142,800,000	21,576,000	155,323,165
1994	43	80	381,635,015	16,564,684	2,752,827	398,199,699
1995	27	94	96,290,779	86,498,324	15,237,303	182,789,103
1996	20	204	63,059,873	52,876,698	9,624,568	115,936,571
1997	49	298	354,371,325	565,978,802	56,744,071	920,350,127
1998	36	287	40,107,920	257,320,610	47,807,528	297,428,530
1999	29	311	38,000,792	404,488,079	42,554,782	442,488,871
2000	37	223	208,899,015	703,489,743	113,462,360	912,388,758
2001	35	180	435,849,179	730,558,259	125,533,189	1,166,407,438
2002	24	197	63,117,427	930,392,301	147,873,675	993,509,728
2003	26	217	536,834,879	1,288,571,761	278,314,563	1,825,406,640
2004	27	276	33,816,447	468,975,818	96,275,602	502,792,265
TOTAL	499	2,476	2,308,295,652	5,661,806,716	959,322,741	7,970,102,368

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary agency.
2. "New Matters" refers to newly received referrals and investigations, and newly filed qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Fraud Statistics—Department of Defense[1]
October 1, 1986–September 30,2004
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements And Judgments[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	245	18	27,897,128	0	0	27,897,128
1988	138	36	149,136,213	33,750	8,438	149,169,963
1989	128	40	154,588,297	10,002,058	1,394,770	164,590,355
1990	77	45	118,915,978	21,699,713	3,795,720	140,615,691
1991	79	50	227,813,245	57,242,000	8,636,300	285,055,245
1992	78	64	62,603,695	129,294,456	23,874,784	191,898,151
1993	94	55	83,968,840	31,812,641	5,291,923	115,781,481
1994	62	96	222,799,421	361,385,206	67,285,578	584,184,627
1995	54	103	110,498,386	149,504,237	29,617,461	260,002,623
1996	44	135	78,085,099	63,347,938	12,991,758	141,433,037
1997	45	146	30,734,273	52,450,622	9,172,921	83,184,895
1998	29	78	71,063,139	145,277,685	20,041,579	216,340,824
1999	33	110	27,211,319	18,577,833	3,394,778	45,789,152
2000	10	77	53,007,693	124,696,475	20,161,416	177,704,168
2001	11	74	17,472,751	193,435,905	34,533,031	210,908,656
2002	16	72	9,549,543	40,975,096	8,235,954	50,524,639
2003	11	78	107,337,000	193,018,638	42,686,070	300,355,638
2004	15	99	10,098,491	17,565,119	2,614,279	27,663,610
Total	1,169	1,376	1,562,780,511	1,610,319,372	293,736,760	3,173,099,883

1. The information reported in this table covers matters in which the Department of Defense is the primary agency.
2. "New Matters" refers to newly received referrals and investigations, and newly filed qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Fraud Statistics—Other (Non-HHS, Non-DOD)[1]
October 1, 1986–September 30, 2004
Civil Division, U.S. Department of Justice

FY	New Matters[2]		Settlements And Judgments[3]			
	Non Qui Tam	Qui Tam	Non Qui Tam[3]	Qui Tam		Total Qui Tam and Non Qui Tam
			Total	Total	Relator Share[4]	
1987	102	12	47,220,995	0	0	47,220,995
1988	99	20	22,324,808	1,681	200	22,326,489
1989	88	46	42,263,423	10,000	2,000	42,273,423
1990	151	33	62,120,889	17,955,496	2,696,412	80,076,385
1991	141	38	34,461,487	7,791,931	1,188,586	42,253,418
1992	249	57	64,436,901	3,606,969	135,000	68,043,870
1993	213	66	90,742,071	2,803,742	525,113	93,545,813
1994	186	105	101,753,461	3,518,507	613,071	105,271,968
1995	155	134	72,733,701	11,274,266	2,137,853	84,007,967
1996	123	163	106,212,299	22,374,000	3,473,272	128,586,299
1997	91	366	83,443,761	11,453,100	2,003,275	94,896,861
1998	54	168	40,414,735	59,440,500	10,339,588	99,855,235
1999	79	153	131,400,898	93,712,119	21,057,955	225,113,017
2000	49	165	105,980,489	371,580,535	49,504,175	477,561,024
2001	42	134	41,175,045	362,797,696	54,910,018	403,972,741
2002	23	122	30,013,500	117,885,326	7,382,373	147,898,826
2003	56	136	58,831,489	19,963,697	3,903,962	78,795,186
2004	63	180	69,241,084	68,085,570	9,681,145	137,326,654
Total	1,964	2,098	1,204,771,036	1,174,255,135	169,553,998	2,379,026,171

1. The information reported in this table covers matters in which an agency other than the Department of Health and Human Services or the Department of Defense is the primary agency.
2. "New Matters" refers to newly received referrals and investigations, and newly filed qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

Fraud Statistics
Qui Tam Intervention Decisions & Case Status
As of September 30, 2004
Civil Division, U.S. Department of Justice

	Active	Settlement or Judgment	Dismissed	Inactive	Unclear	Total
U.S. Intervened	62	705	31	3	8	809
U.S. Declined	280	164	2,384	9	21	2,858
Under Investigation						1,037
						4,704

2004–2005 TAFEF Donors

Without help from our friends in the relators' bar and grateful whistleblowers, TAF Education Fund could not continue to perform the important work of supporting whistleblowers and educating the public about the FCA. It is therefore with deep appreciation that we thank the following contributors for their generosity, support and leadership in the past year:

Richard Ackerman
James Alderson
Anderson, LLC
Dale Aschemann
Bruce Babbitt
Robert Barnett
Daniel R. Bartley
Michael Behn
Phil Benson
Berg & Androphy
Berger & Montague P.C.
Joseph Black
William Blechman
The Breen Law Firm, P.A.
Albert D. Campbell
John Clark
Steven Cohen
Robert Collins
Brian Condon
William Copeland
Cotchett, Pitre, Simon & McCarthy
Anthony DeWitt
Anthony Dunleavy
Suzanne Durrell
Joseph Egan
Engstrom, Lipscomb & Lack
Mark Erickson
Gerald Fugit
Joseph Gerstein
Robert Gerstein
Barbara Gerstein
Gordon Gerstein
Getnick & Getnick
Girardi & Keese
David S. Golub
Alan Grayson
Thomas Greene
Glenn Grossenbacher
Andrew Grosso
Steven Grover
John Harmon
Michael Havard
James B. Helmer Jr.
James Holzrichter
Cliff Johnson
Timothy Keller
Brian Kenney
Mark Kleiman
David Koenigsberg
Alan Konigsberg
Mitch Kreindler
Carol Kroner
Jonathan Kroner
Larry Lahman
M. Tai Lam
Michael Leonard
Stuart Lewin
Ann Lugbill
Harry Markopolos
Candace McCall
Timothy J. McInnis
Warner Mendenhall
William Meshel
Phillip Michael

James Moorman

Much Shelist Freed Deneberg Ament & Rubenstein, P.C.

Tracey Netzel

Kenneth J. Nolan

Ronald E. Osman

Wayne N. Outten

Dean Francis Pace

Donald Peterson

Joseph Petrillo

Regina Poserina

Scott A. Powell

Larry Raskin

Marc Raspanti

Edward Robertson

Brett Roby

Phillip Russ

John Schilling

Ronald Schwartz

Paul D. Scott

George Shuman

J. Stephen Simms

Shelley Slade

Smart Family Fund

Patricia Stamler

Stern, Shapiro, Weissberg & Garrin, LLP

Andrew Stone

David Stone

Gary Takacs

Brian Taugher

Han Turner

Ven-A-Care

Donald R. Warren

Ellen Winterbottom

Susan Wirthlin