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

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

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TABLE OF CONTENTS

FROM THE EDITOR vii

Recent False Claims Act & *Qui Tam* Decisions 1

I. FALSE CLAIMS ACT LIABILITY 3

A. Violations of the Anti-Kickback Statute
U.S. ex rel. McNutt v. Haleyville Medical Supplies, Inc.,
2005 WL 2179164 (11th Cir. Sept. 9, 2005)

B. Definition of "False" Claim
U.S. ex rel. Morton v. A Plus Benefits, Inc.,
139 Fed. Appx. 980 (10th Cir. July 19, 2005)

C. FCA Liability for Lack of Quality of Care
U.S. ex rel. Phillips v. Permian Residential Care Center,
2005 WL 2224982 (W.D. Tex. Sept. 12, 2005)

D. Mere Knowledge of FCA Violation
U.S. ex rel. Camillo v. Ancilla Systems, Inc.,
2005 WL 1669833 (S.D. Ill. July 18, 2005)

E. Claims For Non-Governmental Funds
U.S. ex rel. DRC, Inc. v. Custer Battles, LLC,
376 F. Supp. 2d 617 (E.D. Va. July 8, 2005)

II. STATUTORY INTERPRETATIONS 17

A. Section 3729(a)(7) Lack of Presentment Requirement
U.S. ex rel. Rafizadeh v. Continental Common, Inc.,
2005 WL 2061018 (E.D. La. Aug. 2, 2005)

III. JURISDICTIONAL ISSUES 19

A. Section 3730(B)(5) First-to-File Bar
U.S. ex rel. Campbell v. Redding Medical Center,
2005 WL 2001085 (9th Cir. Aug. 22, 2005)

U.S. ex rel. Smith v. Yale-New Haven Hospital, Inc.,
2005 WL 2072514 (D. Conn. Aug. 25, 2005)

B. Section 3730(e)(4) Public Disclosure Bar and Original Source Exception
U.S. ex rel. Englund v. Los Angeles County,
2005 WL 2089216 (E.D. Cal. Aug. 30, 2005)

C. Impact of Deficient *Qui Tam* Complaint Upon Subsequent Government FCA Action
U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.,
417 F.3d 450 (5th Cir. July 13, 2005)

IV. FALSE CLAIMS ACT RETALIATION CLAIMS 31

A. Section 3730(h) Retaliation Claims
Mack v. Augusta-Richmond County, Georgia,
2005 WL 2270518 (11th Cir. Sept. 19, 2005)

U.S. ex rel. Hartman v. Allegheny General Hospital,
2005 WL 2106627 (W.D. Pa. Aug. 26, 2005)

B. Statute of Limitations for FCA Retaliation Claims
Foster v. Savannah Communication,
140 Fed. Appx. 905 (11th Cir. July 25, 2005)

V. COMMON DEFENSES TO FCA ALLEGATIONS 37

A. Materiality Requirement
U.S. ex rel. Schell v. Battle Creek Health System,
419 F.3d 535 (6th Cir. Aug. 22, 2005)

B. Government Acceptance
U.S. ex rel. Stebner v. Stewart & Stephenson Services, Inc.,
2005 WL 1865309 (5th Cir. Aug. 8, 2005)

VI. FEDERAL RULES OF CIVIL PROCEDURE 43

A. Rule 9(b) Failure to Plead Fraud with Particularity
U.S. ex rel. Gross v. AIDS Research Alliance-Chicago,
415 F.3d 601 (7th Cir. July 6, 2005)

U.S. ex rel. Schmidt v. Zimmer, Inc.,
2005 WL 1806502 (E.D. Pa. July 29, 2005)

B. Rule 15(a) Leave to Amend
U.S. ex rel. Lee v. Fairview Health System,
413 F.3d 748 (8th Cir. July 6, 2005)

U.S. ex rel. Camillo v. Ancilla Systems, Inc.,
2005 WL 1926559 (S.D. Ill. Aug. 8, 2005)

C. Rule 26(b) Discovery Scope and Limits
U.S. ex rel. Tyson v. Amerigroup Illinois, Inc.,
2005 WL 2234747 (N.D. Ill. Sept. 15, 2005)

U.S. ex rel. Smith v. The Boeing Company,
2005 WL 2105972 (D. Kan. Aug. 31, 2005)

VII. LITIGATION DEVELOPMENTS 53
Agyeman v. Corrections Corporation of America,
2005 WL 1847033 (9th Cir. Aug. 5, 2005)

U.S. ex rel. Braham v. Alameda County Superintendent of Schools,
No. 02-56780 (9th Cir. Aug. 4, 2005)

U.S. ex rel. Fisher v. Network Software Associates,
377 F. Supp. 2d 195 (D.D.C. July 20, 2005)

INTERVENTIONS & SUITS FILED/UNSEALED 55

JUDGMENTS & SETTLEMENTS 59

DEVELOPMENTS IN THE LAW 69
Roberts Discusses the False Claims Act During Confirmation Hearings
Joseph E. B. White, TAFEF Staff Attorney

IN THEIR OWN WORDS 73
Reflections
Walter F. DeNino

LESSONS FROM THE FRONTLINES 81
The Intervention Decision
Stephen Altman

The New York City False Claims Act: A Tale of One City
Lesley Ann Skillen

OUTSIDE OF THE LAW 103

Media Relations and the *Qui Tam* Bar
Richard Lavinthal

Success In False Claims Cases Often Depends On Protecting *Qui Tam* Relator With Psychological Evaluation & Support
Donald R. Soeken, LCSW-C, Ph.D.

LEGAL ANALYSIS 113

Penalty Points, Part Two: Number of Penalties
Lani Anne Remick

Courageous Whistleblowers Are Not "Left Out In The Cold": Legitimate Justifications Exist For Collecting Evidence of False Claims Act Violations
Michael R. Grimm, Dean S. Rauchwerger, James F. Smith and Allison K. Baten

The Interplay Between the False Claims Act, Securities Fraud, and ERISA
Reuben A. Guttman, Kirk Chapman and Ann Lugbill

IN THE SPOTLIGHT 143

False Statements and False Claims
Jeremy Baker and Rebecca Young

THE BIG PICTURE 177

Fighting Fraud at the Source: Modifying the Federal False Claims Act to Deter Corporate Fraud at the Individual Level
Joseph E. B. White

FROM THE EDITOR

Teamwork divides the task and doubles the success.
-Unknown

In 1986, when the Justice Department was buried beneath an overflowing inbox of fraud cases, the U.S. Congress enlisted the help of the private bar to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S.Rep. 99-345, at 1, U.S. Code Cong. & Admin. News 1986, 5266. Indeed, in amending the False Claims Act, Congress envisioned a "coordinated effort" between private citizens and the Government, fighting side by side to effectively and to efficiently protect the U.S. Treasury. *Id.* at 2, U.S. Code Cong. & Admin. News 1986, 5266, 5266–67.

Under the "United We Stand, Divided We Fall" banner, the *qui tam* bar has now mobilized into a united force of nearly 300 attorneys dedicated to combating fraud against the Federal Government. Justice Department, the *qui tam* bar is ready for duty. Until we receive our marching orders, we will continue preparing for battle, arming ourselves with the necessary weapons of knowledge and expertise.

Sincerely,

Jeb White
jwhite@taf.org

Recent False Claims Act & *Qui Tam* Decisions

JULY 1–SEPTEMBER 30, 2005

FALSE CLAIMS ACT LIABILITY

A. Violations of the Anti-Kickback Statute

U.S. ex rel. McNutt v. Haleyville Medical Supplies, Inc., 2005 WL 2179164 (11th Cir. Sept. 9, 2005)

The Eleventh Circuit affirmed an Alabama district court's denial of the defendant-owners' motion to dismiss, in an action in which a former employee of a medical services company filed *qui tam* action against owners of medical services company, alleging that they violated the FCA by submitting claims for Medicare reimbursement with knowledge that they were ineligible for that reimbursement. The court of appeals, agreeing with the lower court, held that such a violation of the Anti-Kickback Statute could form basis for a claim under the FCA.

In December 2001, Brent McNutt, a former employee of a medical services company owned by the Gerald and Frances Burleson, filed an FCA *qui tam* action against the Burlesons and five medical services companies that they owned, including Haleyville Medical Supplies, City Pharmacy, Care Medical, Care Pharmacy, and Winfield Medical.

The *qui tam* complaint alleged that the owners of the company routinely provided medical services for which they submitted claims for reimbursement to Medicare, that they violated the Anti-Kickback Statute by paying kickbacks to pharmacists and others which were camouflaged as rental payments or commissions, and that the owners certified that they complied with the Anti-Kickback Statute, which was a condition of receiving reimbursement from the Medicare program.

The Government subsequently filed a complaint-in-intervention, in which the Government clarified that Medicare providers are required to enter a provider agreement with the Government, and under the terms of the agreement, the Medicare provider certifies that it will comply with all laws and regulations concerning proper practices for Medicare providers. One of the laws included in this certification is the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). The Government alleged that a Medicare "provider's compliance with its provider agreement is a condition for receipt of payments from the Medicare program."

The Burlesons subsequently filed a motion to dismiss for failure to state a claim upon which relief could be granted. The district court denied the motion, but encouraged the Burlesons to request the court to certify the question for interlocutory appeal. After the Burlesons filed that request, the district court certified the following question for interlocutory appeal: "whether a violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)[,] can form a basis for a claim pursuant to the False Claim[s] Act, 31 U.S.C. § 3729(a)(1) and 31 U.S.C. § 3729(a)(3)." The Eleventh Circuit granted the Burlesons' petition for interlocutory appeal.

FCA Liability Attaches to Anti-Kickback Violations

In agreeing with the lower court decision, the Eleventh Circuit held that when a violator of government regulations is ineligible to participate in a government program and that violator persists in presenting claims for payment that the violator knows the Government does not owe, that violator is liable under the FCA for its submission of those false claims.

In the case at bar, Gerald and Frances Burleson routinely provided medical services for which they submitted claims for reimbursement to Medicare, and each year, the Burlesons certified that they complied with the Anti-Kickback Statute. Because it is undisputed that a violator of the Anti-Kickback Statute is disqualified from participating in a Medicare program, the court of appeals ruled that the Government stated a claim under the FCA, when it alleged that the Burlesons had submitted claims for Medicare reimbursement with knowledge that they were ineligible for that reimbursement. Accordingly, the Eleventh Circuit ruled that the district court properly denied the Burlesons' motion to dismiss.

B. Definition of "False" Claim

U.S. ex rel. Morton v. A Plus Benefits, Inc., 139 Fed. Appx. 980 (10th Cir. July 19, 2005)

The Tenth Circuit, in an unpublished decision, affirmed a Utah district court's dismissal of an FCA *qui tam* action, which alleged that an administrator of an employee welfare benefit plan covered by ERISA unreasonably denied health benefits for medical treatment provided to their premature infant, which resulted in Medicaid program's payment of those expenses. The court of appeals held that the relators failed to allege a false or fraudulent claim, for "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false."

When Will and Courtney Morton's premature son was born, an ERISA employee welfare benefit plan sponsored by A Plus Benefits paid for two months of medical treatment following his birth. However, the plan denied further coverage on the basis that the subsequent care was "custodial" and not covered by the plan. In the letter notifying the health care providers of the plan's determination on further payment, Everest Administrators, acting as the plan's claims administrator, provided the following information, which the Mortons maintained was a "direction" to file the claims for their son's medical care with Medicaid:

> It is this Plan's preliminary determination, based on the information available to the Plan, that Mitchell Morton's care after May 31, 2001, is custodial, and therefore not covered by this Plan . . . If the information is not already in your files, Mitchell Morton's Medicaid ID is [number] and his case manager is Cherie Morgan . . . Due to an inquiry to the Plan from the Utah State Medicaid office, Ms. Morgan is already aware of this Plan's preliminary determination in this case.

Furthermore, as the relators pointed out in their complaint, payment by Medicaid would not have been necessary or available but for the denial of coverage by the Plan.

Subsequently, the Mortons filed a *qui tam* action against A Plus Benefits and Everest Administrators, arguing that the expenses should have been paid under the terms of the ERISA employee welfare benefit plan sponsored by A Plus Benefits, and that by denying their claims, the defendants fraudulently shifted the cost of his care to the Medicaid system. According to the relators, the reasons given by the defendants for denying their claims were unreasonable to a degree that, when combined with what they contend was a "direction" to file the claims with Medicaid, the statements constituted a violation of the FCA. More specifically, their complaint alleged FCA violations under three subsections of § 3729(a). First, under § 3729(a)(1), the relators alleged that the defendants' false statement—"that Mitchell's medical expenses were not covered under the terms of the Plan"—resulted in the illegal shifting of medical expenses from the plan to Medicaid. Second, the relators, under § 3729(a)(2), alleged that the defendants knowingly made the same false statement to Medicaid, the relators, and

their son's health care providers "to get a false or fraudulent claim paid or approved by Medicaid." Lastly, under § 3729(a)(3), the relators alleged that the defendants conspired to defraud the Government "by getting false or fraudulent claims allowed or paid and by establishing and executing an illegal payment scheme to the damage of the United States."

The defendants' filed a motion to dismiss under Rule 12(b)(6). The lower court, in granting the motion, dismissed the complaint with prejudice, ruling that "there [wa]s no false or fraudulent claim involved." The lower court also ruled that, because Everest was a disclosed agent of A Plus Benefits, as a matter of law, Everest was not responsible for the conduct of its principal. The relators appealed the decision to the Tenth Circuit.

"Expressions of Opinion, Scientific Judgments, or Statements as to Conclusions About Which Reasonable Minds May Differ Cannot Be False"

On appeal, the relators argued that their allegations were sufficient to survive a motion to dismiss because they could prove a set of facts that would entitle them to relief under the FCA. The Tenth Circuit, however, affirmed the lower court decision, explaining that "[a]t least two elements are necessary to state a claim under these provisions [of the FCA]: (1) a claim for payment from the government, (2) that is false or fraudulent." *See Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 808 (D. Utah 1988). According to the court of appeals, the relators failed to allege the falsity required to sustain an FCA claim against either defendant.

In assessing whether the claim was "false" under existing FCA case law, the Tenth Circuit embraced a definition that "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." *United States ex rel. Roby v. The Boeing Co.*, 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000).

The defendants, seizing on the definitional limitation outlined in *Roby*, argued that the disagreement over the coverage of the plan was not susceptible of being proven true or false, and, as such, fell squarely into the general rule that fraud cannot be predicated on a mere expression of opinion. The relators, on the other hand, countered that the interpretation of the plan was "transparently bogus," and the defendants' invocation of the custodial care exclusion lacked "any reasonable basis," such that the defendants' interpretation of the plan to exclude the type of medical care given to their son as custodial was "false."

The court refused the invitation to rule that in all instances, merely because the verification of a fact relies upon clinical medical judgments, or involves a decision of coverage under an ERISA plan, the fact cannot form the basis of an FCA claim. However, in this particular case, the court determined that "neither the scientific nor contract determinations inherent in the formation and evaluation of the allegedly 'false' statement [wa]s susceptible to proof of truth or falsity." More specifically, the Tenth Circuit ruled that it was ambiguous whether the care given to this particular infant was therapeutic or custodial. Therefore, the court concluded that the relators failed to allege the required "false or fraudulent claim." Accordingly, the Tenth Circuit affirmed the lower court decision.

C. FCA Liability for Lack of Quality of Care

U.S. ex rel. Phillips v. Permian Residential Care Center, 2005 WL 2224982 (W.D. Tex. Sept. 12, 2005)

A Texas district court granted a defendant's motion for summary judgment in a quality-of-care FCA *qui tam* action against a nursing home facility. In reaching its conclusion, the court held that the FCA should only be used in quality-of-care cases in which the medical treatment was so deficient as to be worthless. Based on the facts in the record, the court determined that this level of depravity was not met in the case at bar.

Anna Phillips and Delores Perryman are the daughters of the late Hazel Hughes. Prior to her death, Hughes was a resident at Permian Residential Care Center in Andrews, Texas. On March 6, 2003, Hughes was transported to Permian Regional Medical Center, where she was treated at that facility until March 19, 2003, for dehydration, malnutrition, and bedsores. Subsequently, she returned to Permian Residential Care Center, where she remained until her death on May 11, 2003.

The relators filed an FCA *qui tam* action, arguing that Hughes was not properly treated by Permian Residential Care Center and that in connection with the care provided to Hughes, false claims and fraudulent bills were submitted to Medicare/Medicaid for services rendered.

In the matter at bar, the defendant filed a motion for summary judgment, arguing that even after being ordered to do so, the relators did not comply with the particularity requirements of Fed. R. Civ. Pro. 9(b).

Medical Care Was Not So Deficient As To Be Worthless

According to the relators' complaint, the defendant defrauded the Government by providing substandard care and then submitting false claims as a result of that care. However, the court, hesitant to adopt the relators' theory of liability, quoted from the Second Circuit *Mikes* decision:

> The False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment—and to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act's reach.

United States ex. rel. Mikes v. Strauss, 274 F.3d 687, 699-700 (2nd Cir. 2001). Moreover, "permitting *qui tam* plaintiffs to assert that defendants' quality of care failed to meet medical standards would promote federalization of medical malpractice, as the Federal Government or the *qui tam* relator would replace the aggrieved patient as plaintiff." *Id.* at 700

In turn, *Mikes* reasoned that "a medical provider should be found to have implicitly certified compliance with a particular rule as a condition of reimbursement in

limited circumstances . . . Specifically, implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." *Id*. On the other hand, the lower court, reading the rest of the *Mikes* decision, highlighted the holding that, if a treatment is so deficient as to be worthless, then the defendant's claims would be false. *Id*. at 703.

Even so, the district court held that "the False Claims Act should not be used to call into question a health care provider's judgment regarding a specific course of treatment." In the case at bar, even though the relators argued that the defendant provided substandard care, the court was unable to rule that the defendant's services were so deficient as to be worthless. Thus, the court, finding that the relators had failed to demonstrate that there was a genuine issue of material fact, granted the defendant's motion for summary judgment.

D. Mere Knowledge of FCA Violation

U.S. ex rel. Camillo v. Ancilla Systems, Inc., 2005 WL 1669833 (S.D. Ill. July 18, 2005)

An Illinois district court granted a defendant's motion to dismiss, ruling that "knowledge, ratification and creating the procedures do not state a claim upon which relief c[ould] be granted as a matter of law under the FCA." The court stressed that the "mere knowledge of a claim with nothing more does not constitute a violation," for a defendant must have submitted false claims or caused false claims to be submitted.

On January 10, 2003, Anthony Camillo, the former director of Corporate Health of Ancilla Systems, Inc., filed an FCA *qui tam* action against his former employer, alleging that the defendant-healthcare provider bundled charges on individual tests under a profile offered to nursing homes but unbundled these charges when billing Medicare. In addition, Camillo also alleged that Ancilla double billed and received double payments from Medicare and nursing home clients. Lastly, Camillo alleged that Ancilla submitted requests for payment for HUD and EPA grants when it was entitled to payment of only one of the grants and that Ancilla submitted multiple and excessive billing on travel expenses to its clientele.

Distilling Camillo's complaint, the court summarized that the allegations are: (1) that St. Mary's Hospital was at all relevant times a wholly owned subsidiary of Ancilla; (2) that Ancilla distributed an "Associates Handbook" to all employees at St. Mary's Hospital; (3) that Ancilla distributed a "Code of Conduct" to all employees at St. Mary's Hospital; (4) that St. Mary's retained the authority to review St. Mary's procedures on accounting and billing practices; (5) that Ancilla knew of St. Mary's fraudulent filling practices but refused to report the fraud to the Government and ratified those actions and allowed the practices to continue; (6) that Ancilla sold St. Mary's to Kenneth Hall after Camillo reported the fraud; and (7) that Ancilla set up, instigated, authorized and ratified the procedures and decisions that caused the fraudulent billings to take place by St. Mary's.

After the Government declined to intervene in the matter, the defendant filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b).

"Knowledge, Ratification and Creating the Procedures Do Not State a Claim Upon Which Relief Can Be Granted as a Matter of Law Under the FCA"

The court granted the defendant's motion to dismiss, finding that Camillo's allegations did not state a claim under the FCA, for "knowledge, ratification and creating the procedures do not state a claim upon which relief can be granted as a matter of law under the FCA."

The court opined that to be "liable under the FCA, a defendant must not only have known of a claim that is false, but defendant must have submitted or caused to

be submitted a claim that is false or fraudulent, 31 U.S.C. § 3729(a)(1), or must have knowingly made, used or caused to be made or used false records or statements to get a false or fraudulent claim paid. 31 U.S.C. § 3729(a)(2). Moreover, the court clarified that "mere knowledge of a claim with nothing more does not constitute a violation." Camillo, according to the court, does not allege that the defendant submitted or caused to be submitted false claims.

Likewise, the court rejected Camillo's argument that the defendant could be liable for subsequently ratifying the submission of false claims. The court ruled that the FCA does not apply to ratification, for there is no "fraud by hindsight."

Lastly, the court refused to accept Camillo's argument that Ancilla "set up" the procedures that caused false claims to be submitted. Instead, the court warned that the mere creation of the general circumstances leading to the submission of false claims is insufficient to state a FCA violation. *See United States v. ex rel. Atkinson v. Pennsylvania Ship Building Co.*, 2000 WL 1207162, *14 (E.D. Pa. 2000) (Yohn, J.) ("Thus, although Plaintiff may have alleged that Sun Ship caused some of the circumstances that led to the submission of false claims, the plaintiff has not pleaded with adequate specificity any allegations that Sun Ship caused the submission of false claims."). Without pleading that Ancilla actually *caused* the submission of false claims, the court rejected Camillo's argument.

Accordingly, after finding that Ancilla's alleged misconduct did not violate the FCA, the court dismissed the suit with prejudice.

E. False Claims For Non-Governmental Funds

U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617 (E.D. Va. July 8, 2005)

A Virginia district court granted in part and denied in part a defendant-contractor's motion for summary judgment in a *qui tam* action alleging that the contractors submitted tens of millions of dollars in false claims to the Coalition Provisional Authority in Iraq. The court held that the contractor's demand for payment from funds seized by Executive Order and by occupying troops constituted a "claim" within meaning of FCA and that the contractor's demands for payment fulfilled the FCA's presentment requirement. The court also ruled that the Development Fund for Iraq was not property of United States, and thus the contractor's demand for payment from those funds did not constitute a "claim" within the meaning of the FCA.

In 1989, Scott Custer and Michael Battles formed Custer Battles, a Delaware Limited Liability Company headquartered in Virginia, to provide support services to the United States and other governments engaged in wars and conflicts.

According to the relators' *qui tam* complaint, Custer Battles and the other defendants conspired to overbill the Coalition Provisional Authority (CPA) for tens of millions of dollars in services and facilities in the fulfillment of two CPA contracts awarded to Custer Battles, the first of which was for the provision of security, housing, and related facilities and services at the Baghdad International Airport (BIAP), including armed security at the main gate and perimeter of the airport and a team of Transportation Safety Administration-approved security screeners. The second contract was for security, construction, and operational services to support the Iraqi Currency Exchange (ICE), which was charged with the creation of a new Iraqi currency to replace the "old" Iraqi dinars, bearing the face of Saddam Hussein, with "new" Iraqi dinars. The complaint alleged that the fraud was accomplished, in the case of the BIAP contract, by contracting for services and facilities the defendants never provided to the CPA, and in the case of the ICE contract, by using "shell companies" to create the appearance of additional costs and overhead, thus inflating the price of those products and services charged on a cost-plus basis to the CPA.

The district court distilled the complaint down to the one threshold issue of whether the FCA applies to the allegedly false claims presented to the CPA.

Differed for DFI Funds

In reaching its ultimate conclusions, the court focused most of its attention on the CPA's funding sources. The court determined that the CPA conducted its operations and awarded contracts for projects intended to promote Iraq's reconstruction from four primary funding sources: (i) funds appropriated by Congress from the general revenues of the United States (hereinafter "Appropriated Funds"); (ii) Iraqi funds confiscated by the President and vested in the Department of the Treasury (hereinafter

"Vested Funds"); (iii) Iraqi state assets, primarily in the form of currency and negotiable instruments, seized by the Coalition Forces occupying Iraqi territory (hereinafter "Seized Funds"), and (iv) funds from the Development Fund for Iraq (DFI).

Vested Funds consisted of Iraqi funds confiscated pursuant to Executive Order from United States bank accounts held in the name of the Government of Iraq and its various agencies and instrumentalities. The authority for such an order derived from the International Emergency Economic Powers Act (IEEPA), which provides that when the United States is engaged in armed conflict or has been attacked by a foreign country or foreign nationals, the President has the authority to confiscate property within the jurisdiction of the United States belonging to any foreign entity that he determines has planned, authorized, aided or engaged in those hostilities. *See* 50 U.S.C. § 1702(a)(1)(C). Importantly, the IEEPA further provides that "all right, title, and interest" in the seized property shall vest in any agency or person the President designates. *Id.* In 2003, the President twice exercised this authority, issuing Executive Orders directing that certain Iraqi assets should vest in the United States Treasury.

The second category of funds, the "Seized Funds," consisted of Iraqi state- or regime-owned cash, funds, or realizable securities that were found and seized by Coalition Forces in Iraq as an occupying force in accordance with the laws and usages of war, including the well-publicized funds hidden in or near Hussein's presidential palaces.

The DFI was established through the coordinated effort of the United Nations and the CPA to fund relief and reconstruction efforts in Iraq. It was established to hold various funds for Iraq's reconstruction needs, including (i) deposits from surplus funds in the U.N. "Oil for Food" program, (ii) revenues from export sales of Iraqi petroleum and natural gas, (iii) international donations, and (iv) repatriated Iraqi assets seized by the United States and other nations. While the DFI was administered by the CPA and the account was held at the Federal Reserve Bank of New York, it was recorded on the books of the Central Bank of Iraq. Most significantly for the district court, and as the government conceded in its brief, "[t]he funds in the DFI have always been Iraqi funds."

CPA Managed DFI Funds

The management, accounting, and expenditure of these funds were also relevant in the court's analysis. The process was substantially similar for Vested and Seized Funds, which required more significant involvement and oversight of the Defense Department and the U.S. Army. The process differed somewhat for DFI funds, however, which during the relevant period were solely controlled, expended, and accounted for by the CPA.

With Vested or Seized Funds, final approval was required from the United States Government. Specifically, both the Office of Management and Budget (OMB) and the Under Secretary of Defense (Comptroller) were required to approve each funding request from Vested or Seized Funds before the money could be allocated for use by the CPA.

Importantly for the court, the Army in turn made disbursements from Seized and Vested Funds in reliance on these CPA certifications. Payments were made by electronic fund transfer, check, or cash. CPA payments via check were made with U.S. Treasury checks. And cash payments in dollars were coordinated by the Army's 336th Finance Command (FINCOM), which maintained physical control of the currency

Unlike Seized and Vested Funds, however, once the CPA Administrator approved the allocation, no approval was needed from the DoD or from the OMB. Also, the management and accounting for the DFI Account did not involve the Army. Instead, the CPA's DFI Manager was responsible for maintaining and updating the DFI Account records.

Source of Funding Differed Between Two Contracts

On June 19, 2003, the CPA, through the Iraqi Ministry of Transportation, solicited proposals to provide security services at the BIAP. Custer Battles submitted a proposal for the contract and was awarded a one-month letter contract first for the month of July 2003, and later extended for the month of August. On August 6, 2003, Custer Battles was approved to receive $14.8 million from Vested Funds and $2 million in Seized Funds for its BIAP contract. The defendants contended that CPA officials repeatedly assured them that these were not United States government contracts.

As for the ICE contract, on August 27, 2003, Custer Battles signed a second contract with the CPA to construct camps and provide security and operational support for the ICE project to replace old Iraqi dinars bearing Saddam Hussein's picture with a new Iraqi currency. The contract itself identified two sources of funding for the ICE contract: Seized Funds and DFI. A payment of $3,000,000 was paid with Seized Funds by U.S. Treasury check on the day the contract was signed. Then, the remainder of the contract price, approximately $12 million, was paid with DFI funds.

On February 24, 2004, the relators filed their *qui tam* complaint, alleging violations under § § 3729(a)(1), (a)(2), and (a)(3), and as well as § 3730(h). Seven months later, the Government elected not to intervene. Thereafter, the complaint was unsealed and served upon the defendants. The defendants filed a joint motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). The defendants argued that claims presented to the CPA for Vested, Seized, and DFI Funds did not fall within the FCA because these requests for payment (i) did not represent a "claim for payment or approval" that would, if paid, result in an economic loss to the U.S. Government and (ii) were not presented to an officer of the United States. The relators countered, arguing that (i) a "claim" requires only a request for payment that "might result in financial loss to the Government," and (ii) that the undisputed facts establish that the defendants presented or caused to be presented false claims to an officer of the United States.

In the matter at bar, the court focused on the following central issues: (i) whether the requests for payment submitted by Custer Battles to the CPA in furtherance of the BIAP and ICE contracts were false or fraudulent "claim[s]" within the meaning of the FCA, and (ii) whether they were presented to an officer of the United States Government.

FCA Liability Only Attaches to U.S. Government Funds

Pointing to the language of Section 3729(c), the relators and the Government argued that the term "provides" must be read broadly to include any demand that causes the Government to disburse resources within its legal possession, control, or administration, without respect to whether it is the Government's money that is paid out.

The defendants, however, argued that for the Government to "*provide*[ ]" or "*reimburse*" the money requested or demanded, it must be the *Government's* money.

Even after dissecting the definition of "claim" outlined in Section 3729(c), the court was unable to rule out either argument. Importantly, however, the court pointed to a long history of Supreme Court precedent defining the contours of an FCA "claim," and thus, according to the court, "the amendment defining the term must be understood in light of that precedent."

According to the district court, "Courts have often liberally construed the FCA to reach a wide range of fraud committed upon instrumentalities of the United States, but they have always done so consistent with Congress' purpose in promulgating the Act, namely to protect *government* funds and property from fraudulent claims for payment." Most significantly for the court, the relators and the Government failed to point to a single case that read the FCA to reach not only false claims presented for *government* property, but to claims for any property in the Government's possession, even if the Government is only a custodian, bailee, or administrator of the property. Indeed, the court pointed to a contrary holding from the Supreme Court in which the Court rejected the argument that a "claim" includes a demand for money or property that does not belong to the Government, but is merely in the Government's possession. *See United States v. Cohn,* 270 U.S. 339, 345-46, 46 S.Ct. 251, 70 L.Ed. 616 (1926).

While the court recognized that the definition in § 3729(c) is not exclusive, the court warned that the expanded definition outlined in Section 3729(c) "does not explicitly overturn the rule that a claim requires a request or demand for payment from government funds." Thus, the district court held that a "claim" requires a request or payment for government property plainly survives the 1986 FCA amendment.

Thus, for the purposes of the case at bar, if the funds used to pay the Custer Battles contracts were "Iraqi funds," even if administered or held in the possession of the United States, then the presentment of a fraudulent request for payment from these funds does not constitute a "claim" within the meaning of the FCA. On the other hand, if the funds used to pay for the contracts belonged to the United States, then FCA liability may attach if Custer Battles knowingly presented a false or fraudulent claim to a United States government officer for payment from these funds. In turn, the court then turned its attention to each source of funds to determine whether a request for payment therefrom constitutes a "claim."

FCA Protects Vested Funds And Seized Funds

The court quickly ruled that although Vested Funds were at one time property belonging to the Government of Iraq and its various agencies and instrumentalities, they ceased to be so, becoming property of the United States, as of the date of the first Vesting Order directing that they be confiscated and vested in the United States Treasury. Indeed, as the court highlighted, the IEEPA explicitly provides that "all right, title, and interest in any property so confiscated shall *vest* ... in such agency or person as the President may designate" and that such "interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with *in the interest of and for the benefit of the United States*." 50 U.S.C. § 1702 (emphasis added). Thus, because the Vested Funds were United States government funds, a demand for payment from these funds constituted a "claim" within the meaning of the FCA.

The court reached the same conclusion with the Seized Funds, ruling that a demand for payment from the money seized by American or Coalition forces in Iraq was a demand for United States funds and, accordingly, constituted a "claim" under the FCA.

The court distinguished DFI funds, however. Most significantly for the court, as the Government conceded in its brief, the "funds in the DFI have always been Iraqi funds;" they never became United States government property. Indeed, the DFI was established by international agreement and United Nations Security Council Resolution as a depository for Iraqi proceeds from the sale of Iraqi national resources and for repatriated Iraqi funds seized and returned to Iraq by United Nations member states. Furthermore, "[u]nlike Vested Funds, funds in the DFI funds did not vest in the U.S. Treasury. And unlike Seized Funds, the funds in the DFI could not be used or wasted to further the interests of the United States. Instead, all of the funds in the DFI either came directly from Iraqi sources or became Iraqi funds upon donation to the DFI." Thus, the court ruled that a request for payment from the DFI was not a demand for payment from U.S. government money that caused financial loss to the federal fisc. Accordingly, any demands for payment from the DFI were not "claims" within the meaning of the FCA.

In summary, based on the undisputed record facts, the court ruled that any request submitted to the CPA for payment from Seized or Vested Funds constituted a "claim" within the meaning of the FCA. Requests for payment from funds in the DFI, however, were requests for Iraqi funds and thus did not constitute an FCA "claim."

Presentment Requirement Satisfied

While the parties (and the Government) spent considerable time discussing the implications of a possible "presentment requirement," this ultimately presented no obstacle to FCA liability in this case because the undisputed facts in the record reflected that demands for payment from Seized and Vested Funds under both the BIAP and ICE contracts were presented to a member of the Armed Services before payment. Indeed, even though the court ordered the Government to file a brief on the issue, the court concluded that this decision did "not depend on whether the CPA was an instrumentality of the United States—the answer is the same in either case."

Accordingly, based on the undisputed facts currently in the record, the district court ruled that the defendants failed to demonstrate that they were entitled to judgment as a matter of law on either the "claim" or presentment issues. However, the defendants' liability will be limited to money or property requested or demanded from Seized and Vested Funds, and will not extend to money requested or paid out from the Development Fund for Iraq.

A. Section 3729(a)(7) Lack of Presentment Requirement

U.S. ex rel. Rafizadeh v. Continental Common, Inc., 2005 WL 2061018 (E.D. La. Aug. 2, 2005)

A Louisiana district court granted a relator's motion for leave to file an amended complaint. The court ruled that the *Totten* holding, which stands for the proposition that §3729(a)(1) and (a)(2) FCA liability only attaches when a false claim is presented to an officer of the Government, does not apply to reverse FCA claims, or other theories of liability, including "fraud in the inducement" and "false certification." Because the complaint did not include allegations under subsections (a)(1) or (a)(2), the court allowed the relators *to add facts* further clarifying their theory of recovery.

On June 25, 2004, Schumann Rafizadeh filed an FCA *qui tam* action against Continental Common, Inc., alleging overcharges on office spaced leased in the 1010 Common Building, which houses employees of the State of Louisiana Departments of Social Services and Health and Hospitals, entities which are allegedly subsidized by the Federal Government. According to Rafizadeh, the leases in question were not acquired through the competitive bidding process as required by the Code of Federal Regulation, the actual amount of space occupied by the lessees fell considerably short of the negotiated "usable square feet" stated in the leases, and the "negotiated" rates were well in excess of the prevailing market rates.

In the matter at bar, Rafizaheh had filed a motion for leave to file a second amended complaint. The defendant opposed the motion.

Court Limited Totten To (a)(1) And (a)(2) Theories Of Liability

Rafizaheh maintained that the defendant violated the FCA's "reverse FCA provision," 31 U.S.C. § 3729(a)(7). The defendants, citing *United States ex rel. Totten v. Bombardier,* 380 F.3d 363 (D.C. Cir. 2004), argued that each and every subsection of 31 U.S.C. § 3729 must be particularly pled because of the different standards applicable to each, and that Rafizaheh did not meet this hurdle. Moreover, because the Rafizaheh's motion for leave to amend supposedly failed to cure the deficiencies previously identified, he argued that the motion must be denied on the basis of the futility of the amendment.

The court highlighted Fed.R.Civ.P. 15(a), which states that "leave to amend shall be freely given when justice so requires," and "is by no means automatic." The relevant factors in determining whether to grant leave to amend include "undue delay, bad faith or dilatory motive on the part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment."

Taking particular note of the last factor, the court underscored that the Rule 12(b)(6) standard guides the court's assessment of the amendment's futility, and that the court should examine the complaint in the light most favorable to the plaintiff. In other words, amendments are futile if the theory presented lacks legal foundation or was presented in a prior version of a complaint.

In the case at bar, the defendants argued that the relator failed to demonstrate a false claim for payment to the Federal Government and highlighted the absence of any allegation that any one of the defendants made a false claim to the Government.

The court, in rejecting the defendants' reading of the Act, pointed to *United States ex rel. Riley v. St. Luke's Episcopal Hospital,* in which the Fifth Circuit had held:

> The FCA applies to anyone who knowingly assists in causing the government to pay claims grounded in fraud, without regard to whether that person has direct contractual relations with the government. Thus, a person need not be the one who actually submitted the claim forms in order to be liable.

United States ex rel. Riley v. St. Luke's Episcopal Hospital, 355 F.3d 370, 378 (5th Cir. 2004) (citations and quotations omitted)

Defendants countered by citing *United States ex rel. Totten v. Bombadier,* 380 F.3d 488 (D.C. Cir. 2004) for the proposition that, for FCA liability to attach, a false claim must be presented to an officer of the Government. *Id.* at 492-93.

The court quickly rejected this application of *Totten*, highlighting that *Totten* only addressed liability under subsections (a)(1) and (a)(2) of the FCA, not subsection (a)(7). The court further noted that unlike *Totten*, Rafizadeh's claim for liability under the FCA concerned other theories of liability, including "fraud in the inducement," and "false certification."

The court further emphasized that Rafizadeh was not seeking to add any new claims or parties. Rather, Rafizadeh's proposed amended complaint simply supplemented the earlier complaints with additional factual allegations, charts, graphs, calculations and exhibits, purportedly putting the defendants on notice of the specifics regarding his *qui tam* action.

In turn, after reviewing the record, the court found that the proposed amendments were not sought in bad faith or for any dilatory purpose. Moreover, it did not appear to the court that the proposed amendments would cause any undue delay or prejudice to defendants. Indeed, as the court stressed, "denial of the motion to amend *to add facts* further clarifying relator's theory of recovery will likely infuse delay and forestall consideration of the defendants' motion to dismiss, the merits of which should be considered by the district judge in the first instance."

Accordingly, the district court granted the relator's motion for leave to file a second amended complaint.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Campbell v. Redding Medical Center, 2005 WL 2001085 (9th Cir. Aug. 22, 2005)

The Ninth Circuit reversed a California district court's decision to grant a Government's motion to dismiss based on earlier-filed FCA *qui tam* pursuant the FCA's first-to-file bar, in a *qui tam* action against a privately owned medical facility, alleging a scheme to defraud state and federally funded health care insurance systems via performance of unnecessary cardiac procedures. The Court of Appeals held that the first-to-file bar does not preclude filing of subsequent related action when the first complaint was rendered jurisdictionally defective because the relator in first action was not original source of the already publicly disclosed allegations.

This lawsuit arises out of a scheme involving the performance of thousands of unnecessary invasive cardiac procedures at the Redding Medical Center (RMC) for the purposes of fraudulently billing Medicare. On October 30, 2002, a magistrate judge issued a medical records search warrant authorizing the FBI to investigate RMC and the medical offices of the defendant doctors. The FBI executed the search warrant at RMC that same day. The U.S. Attorney's Office also released the search warrant affidavit to the public and to the press on October 30.

On November 5, 2002, John Corapi, a former RMC patient, and Joseph Zerga, his friend, filed a sealed *qui tam* complaint in the Eastern District of California against RMC; Tenet Healthcare Corporation; Chae Moon, RMC's director of Cardiology; and Fidel Realyvasquez, the Chairman of RMC's Cardiac Surgery Program. The Corapi/Zerga complaint alleged that the defendants had submitted false claims to federal and state medical insurance programs and stated that they had direct and independent knowledge of the facts underlying the complaint and had brought that information to the attention of the Government.

Three days later, on November 8, 2002, Patrick Campbell, a local physician, filed his own *qui tam* complaint in the same court against the same defendants, alleging that the defendants had performed medically unjustified invasive diagnostic coronary artery imaging tests and then misrepresented the results of these tests to patients so that they would undergo invasive cardiac procedures.

The Government moved to dismiss Campbell's complaint pursuant to 31 U.S.C. § 3730(b)(5), arguing that Campbell's action was based on the same facts underlying the Corapi/Zerga complaint and therefore was barred under the FCA's first-to-file bar.

Campbell countered that, because Corapi and Zerga were not original sources, the district court had no jurisdiction over their action and their suit could not be considered a "pending" action for the purposes of the FCA's first-to-file bar. The Government responded that it took no position on whether the Corapi/Zerga complaint was

jurisdictionally flawed, arguing that the "analysis is irrelevant to the issue of whether the court h[ad] subject matter jurisdiction of Campbell's complaint."

The district court granted the Government's motion to dismiss Campbell's action. In doing so, the court assumed that Corapi and Zerga were *not* original sources, but held that Campbell's suit was nevertheless barred by the first-to-file rule, citing *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001).

The Government subsequently announced that it had settled its civil claims against RMC and Tenet Healthcare Corporation for payment of $54 million. Campbell filed objections to the settlement and sought a hearing on its fairness pursuant to 31 U.S.C. § 3730(c)(2)(B) and discovery regarding the amount of and reasons for the settlement. The Government responded that Campbell's motion should be denied because his case had been dismissed and he had no standing to object to the settlement. The district court, agreeing with the Government, denied Campbell's objections, concluding that Campbell had no standing to object to the Government's settlement or to demand a fairness hearing. Campbell appealed both the district court's order dismissing his complaint and the denial of his objections to the settlement.

Non-Original Source Cannot Bar Subsequently Filed Complaint

In reversing the lower court decision, the Ninth Circuit held that the FCA's first-to-file bar does not preclude filing of subsequent related action when the first complaint was rendered jurisdictionally defective because the relator in first action was not the original source of already publicly disclosed allegations.

In reaching its conclusion, the court of appeals noted that the FCA provides that "[n]o court shall have jurisdiction" over a *qui tam* action based on allegations of fraud that have already been publicly disclosed, unless the relator was an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A). In addition, the Act precludes any person from filing a subsequent "related action based on the facts underlying the pending action" when a *qui tam* action already has been filed. *Id.* § 3730(b)(5). Reading the two provisions together, the court of appeals clarified that a sham complaint cannot bar a subsequently filed *qui tam* action.

The district court relied on the Ninth Circuit's interpretation of § 3730(b)(5) in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), for the conclusion that the first-to-file bar operates independently of § 3730(e)(4), and that any complaint filed, even if jurisdictionally flawed, would bar all subsequent complaints related to the same underlying facts. The Ninth Circuit, however, rejected the lower court's conclusion for two reasons. First, *Lujan* did not contemplate the situation presented in the case at bar, "which involves publicly disclosed allegations that are particularly vulnerable to opportunistic *qui tam* suits." Second, such an interpretation of § 3730(b)(5) would "contravene the intent of Congress in enacting the 1986 amendments to the FCA," for "Congress sought to provide incentives to *qui tam* whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, allowing even sham complaints to preclude subsequent meritorious complaints in a public disclosure case, would contravene this intention."

Court Distinguished *Lujan*

The Ninth Circuit distinguished *Lujan* from the case at bar, for the *Lujan* action was dismissed on the merits and Lujan did not argue that her action should proceed because the first relator was not an original source. *Id.* at 1187. As a result, the Ninth Circuit stressed that the reasoning behind *Lujan* did not extend to the case at bar, where the first complaint filed did not fulfill the jurisdictional prerequisites established by 31 U.S.C. § 3730(e).

The court, reiterating its minority view that an original source "must have had a hand in the public disclosure" which alerted the Government to the essential facts of the fraudulent scheme, explained that a non-original source does not contribute to the Government's knowledge. Furthermore, because original sources are still permitted to bring a *qui tam* complaint after a public disclosure, "Congress clearly believed that original sources possessed valuable information that would assist the government in prosecution of false claims actions."

Thus, according to the Ninth Circuit, the justification for barring Lujan's claim did not extend to the case at bar, for a pending action filed by a non-original source did not "alert[ ] the government to the essential facts of a fraudulent scheme." *Compare Lujan*, 243 F.3d at 1188.

Plaintiff's Reading of the Act Is Consistent With the Purpose of the Act

While the court of appeals conceded that a "pending action" could be read to include any action filed, even if jurisdictionally flawed, it could also be read as only encompassing an action that could proceed on the merits. Unable to reach a conclusion based on the statutory language of § 3730(b)(5), the court then turned its attention to the underlying legislative history.

The court observed that, in the Senate Report to the 1986 Amendments to the FCA, "[t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits." S. Rep. No. 99-345, at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89. Moreover, citing its earlier decision, the Ninth Circuit highlighted that "the purpose of the 1986 amendments was to repeal overly-restrictive court interpretations of the *qui tam* statute, which had prohibited not only suits by private citizens based on information obtained by the government, but also suits brought by those who had information independently of the government." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991).

Against the backdrop of the history of the FCA and the legislative history of the 1986 Amendments, the court ruled that construing Section 3730(b)(5) to create an absolute bar would permit opportunistic plaintiffs with no inside information to displace actual insiders with knowledge of the fraud. Indeed, even the Government conceded at oral argument that under its interpretation of § 3730(b)(5), a purely frivolous sham complaint filed in an instance where the allegations had been publicly disclosed

would bar a subsequently filed action by an original source. As the court noted, such an interpretation would reduce the number of *qui tam* suits in public disclosure cases, directly contravening the express intent of Congress.

The Government, dismissing Campbell's concerns that an absolute first-to-file rule would permit displacement of real whistleblowers by sham complaints, stated that Rule 9(b) would prevent such a situation. The court rebutted, however, that, although Rule 9(b) requires *qui tam* plaintiffs to plead fraud with particularity, this inquiry was separate from the original source inquiry under § 3730(e)(4). As a result, "the Government's argument does not adequately respond to Campbell's point that a placeholder complaint filed by a non-original source could divest the court of jurisdiction over a complaint appropriately filed by an original source, thereby thwarting the intent of Congress."

Thus, to clarify the application of *Lujan* to the circumstances in the case at bar, the Ninth Circuit held that, in a public disclosure case, the first-to-file rule of § 3730(b)(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4). In turn, the court reversed and remanded the lower court decision, with the strong recommendation that the district court consolidate Campbell's case with the Corapi/Zerga case before determining whether Corapi and Zerga actually qualified as original sources.

U.S. ex rel. Smith v. Yale-New Haven Hospital, Inc., 2005 WL 2072514 (D. Conn. Aug. 25, 2005)

A Connecticut district court granted a defendants' motion to dismiss an FCA *qui tam* action pursuant to the FCA's first-to-bar, even though the earlier *qui tam* action was filed by the same relator against the same defendants. Examining the language of § 3730(b)(5), which states that "*no person other than the Government* may intervene or bring a related action based on the facts underlying the pending action," the court held that this limitation applies equally to the original relator as to any other person.

From July 1, 1990, through June 30, 1999, Robert Smith, a licensed medical doctor, was employed by Yale University as an Associate Professor, Department of Diagnostic Imaging and Chief, Section of MRI, Department of Diagnostic Imaging at Yale University's School of Medicine, and Director, Magnetic-Resonance Imaging Center and attending staff physician at Yale-New Haven Hospital (YNHH).

According to Smith, during his employment, Yale University knowingly engaged in improperly billing and retaining payments from the Medicare and Medicaid Program for producing outpatient radiological studies (x-rays, films and images) even though the studies were never used in connection with the diagnosis or treatment of patients; the studies were not interpreted by properly qualified radiologists in a timely fashion relative to the patient encounter when the studies were taken in accordance with the Medicare and Medicaid Program requirements; and/or the studies were never taken.

Smith further alleged that, as a result of his investigation and reporting of these alleged frauds, he was harassed and discriminated against in the terms and conditions of his employment, stating he was ultimately forced to resign after his salary was cut and he was stripped of administrative positions and titles of Chief of MRI, Abdominal Imaging, Fellowship Director and Coordinator of Abdominal Schedule.

On July 12, 2002, Smith filed an FCA *qui tam* action against Yale University and YNHH. Smith had also filed a previous *qui tam* action against the same defendants on July 19, 2000. Finally, Smith had also filed an even earlier action in state court alleging violations of state law concerning his employment with the defendants. After the Government declined to intervene, the defendants filed a motion to dismiss his second *qui tam* action.

The defendants, pointing to the language of the FCA public disclosure bar, argued that the disclosures made in the state court action brought by Smith amounted to a public disclosure and Smith was not an original source of the information. Smith countered that while the earlier action constituted as a public disclosure, he qualified as an original source under § 3730(e)(4)(B).

Court Could Examine Amended Complaint In Assessing "Original Source Exception"

According to the original source exception, an "original source" must have direct and independent knowledge of the circumstances constituting the alleged fraud. The defendants, as an initial matter, argued that the court could only look to the original complaint and not any subsequent amended complaints to determine whether Smith has properly plead facts to support the existence of direct and independent knowledge.

The court, in rejecting the defendants' reading of the Act, could find no supporting case law that embraced the defendants' view. The defendants did point to a lone district court decision, *United States ex rel. Ackley v. IBM*, 76 F. Supp. 2d 654, 660 (D. Md.1999), which held that because the original complaint was "framed before any possible distortions associated with discovery took place, [it] is the most reliable evidence of" direct and independent knowledge.

The court, however, borrowing from *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (2d Cir. 1995), disagreed with *Ackley* and stated that "it is not necessary for a relator to have all the relevant information in order to qualify as independent, so long as he possesses more than simple background information which enables him to understand a publicly disclosed transaction or allegation, and the relator possesses substantive information, or core information, about the particular fraud." Moreover, the court was particularly swayed by the fact that in this case, the alleged taint, or disclosure, took place before the filing of even the original complaint. As the court noted, "[t]he taint YNHH raises is the state court action, not discovery in *this* case and it is therefore unclear how the *Ackley* decision, which was concerned with discovery in the same action, applies." Accordingly, the court refused to discount the allegations raised in the amended complaint.

Relator Can Have "Direct And Independent Knowledge" of Events That Took Place After Leaving Employment

The defendants also argued that Smith could not have direct and independent knowledge of events that took place after he left his employment. While the court circled the fact that Smith's allegations did not reach beyond his employment, the court, nevertheless, ruled that he was permitted to raise such allegations so long as the allegations flowed from matters over which he had direct knowledge while employed. *Stinson*, 944 F.2d at 1160 (a relator need not have direct knowledge every fact alleged). As the court explained, "[a]ssuming conduct substantially similar to the conduct Relator has direct knowledge of continued after his departure, it would be not be in the ultimate interest of Government recovery to limit an action solely to conduct that occurred during his employment."

Qui Tam Action Bars Subsequent *Qui Tam* Suit By The Same Relator

Lastly, the defendants raised the argument that Smith's first *qui tam* action, which is still pending, bars the present *qui tam* action under the FCA's first-to-file bar. The court quickly raised two important issues surrounding such a reading of § 3730(b)(5): one, whether it should apply to two cases involving the same plaintiff-relator and, two, whether the two cases are in fact "related" or "based on the same underlying facts." *Id.*

Examining the language of the Section, the court stated that the language was clear: "a person brings an action under this subsection, *no person other than the Government* may intervene or bring a related action based on the facts underlying the pending action." *Id.* (emphasis added by the court). The court ruled that this limitation applies equally to the original relator as to any other person.

As for whether the two suits were related within the meaning of § 3730(b)(5), the court determined that the allegations in two suits were almost identical, in that they both focused on the fraudulent billing of Medicare and Medicaid for radiological studies that had not been interpreted by qualified physicians.

Accordingly, finding the § 3730(b)(5) defense to be dispositive, the court granted the defendants' motion to dismiss.

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

U.S. ex rel. Englund v. Los Angeles County, 2005 WL 2089216 (E.D. Cal. Aug. 30, 2005)

A California district court denied a defendant-county's motion to dismiss an FCA *qui tam* action under the FCA public disclosure bar. The court ruled that the relator's allegations had not been previously disclosed to the public, for the supposed public disclosures did not include the material elements of the alleged scheme nor were they "made open to public attendance."

From April 2, 2001, to July 30, 2002, Beverly Englund was employed by the California Department of Health Services as a staff services manager with the Medi-Cal Operations Division (MCOD). Beginning around May 2001, one of Englund's duties at MCOD was to oversee the preparation of invoices regarding claims made by Los Angeles County under the Medicaid system. In December 2001, Englund began to suspect that the County, in order to obtain federal funds to which it was not entitled, falsely represented its need for additional funding of approximately $716 million under the Medicaid program.

Her suspicions increased through the following spring based upon her observation of closed-session negotiations in which the County demanded additional funding without demonstrating a purpose for it. Englund was especially concerned about signing invoices certifying that the amounts claimed on the invoice had been expended by the defendant "in compliance with all terms/conditions, laws and regulations governing its payment."

After investigating further, including reviewing as many claim schedules, invoices, secretly-negotiated contracts and financial statements as she could access, she came to the conclusion that the County was participating in a "scheme" to obtain unwarranted funds that had been in operation for many years. According to Englund, the scheme caused the Government to pay the County hundreds of millions of dollars in federal "matching" funds to which it was not entitled. Englund informed her associates that she felt uneasy with the situation, and left her job at MCOD as soon as she was able to find another position.

Subsequent to her departure, Englund brought an FCA *qui tam* suit against Los Angeles County, alleging that the County made false claims and/or conspired with others in order to receive unwarranted funds under the federal Medicaid program. After the Government elected not to intervene in this suit, the County filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4) prevents the relator from moving forward with her suit.

There Was Not a Public Disclosure Under Section 3730(e)(4)(A)

Englund alleged that in each year since 1994, the County knew that it had received Medicaid funds to which it was not entitled. However, the County did not notify

the State of these overpayments so that the State could accurately prepare its request forms that it sent to the Federal Government. In other words, the County "knowingly caused" the State to make false reports and certifications to the Government that the expenditures to County under the Medicaid program were "allowable and in accordance with applicable implementing federal, state and local statutes, regulations, policies and the state plan." Moreover, the County remained silent while the State made false claims to the Government and the County retained the excess payments to which it was not entitled.

Dissecting the language of the FCA public disclosure bar, the court observed that the FCA bars a *qui tam* action that is based on allegations or transactions already disclosed in certain public fora, unless the relator is the original source of the information underlying the action. In application, this means that if there has been a public disclosure through one of these public fora, the court then determines whether the content of the disclosure consisted of the "allegations or transactions" giving rise to the relators' claim, as opposed to "mere information." *Hagood v. Sonoma County Water Agency,* 81 F.3d 1465, 1473 (9th Cir. 1996). Clarifying further, the court pointed out that the substance of the disclosure, however, does not need to contain an explicit "allegation" of fraud, so long as the material elements of the allegedly fraudulent "transaction" have been disclosed. *See id.* (citing *United States ex rel. Springfield Terminal Ry. v. Ouinn,* 14 F.3d 645, 654 (D.C. Cir. 1994)).

In support of its motion for dismissal, the County submitted a number of items that supposedly contained sources that had previously disclosed Englund's alleged fraudulent scheme, including "numerous lengthy exhibits with pages numbering in the hundreds."

Weeding through this mound of exhibits, the court focused on three apparently potentially relevant documents which the defendant argued previously disclosed the relator's false claim allegations: 1.) a board letter addressed to the County Board of Supervisors; 2.) the County's FY2001 annual financial report; and 3.) an affidavit attesting to a meeting with County and federal officials.

The board letter addressed to the Los Angeles County Board of Supervisors was written by the Director of Health Services, encouraging the members to adopt an amendment to the County's MediCal contract to facilitate the transfer of funds to the State. The County argued that the letter was a public document, available by telephonic or in-person request. While the court agreed that this letter, which was the subject of a public "administrative hearing," qualified as one of the specific public fora in § 3730(e)(4)(A), the contents of the letter did not disclosed Englund's claim. According to the court, the letter failed to disclose that the County used Medicaid funds for non-health-related purposes, and merely detailed the gross amount of money that the County would receive from the Federal Government if it were to transfer $318.8 million dollars to the State.

Likewise, the court rejected the defendant's argument that the County's 2001 Annual Financial Report disclosed the alleged fraud. Instead, the court stressed that the

report argued quite the opposite, highlighting the quote: "[t]he county contribution to the State is recorded as a health expenditure of the General Fund."

Lastly, the County offered the declaration of Allan Wecker, the Chief-Fiscal Programs for the County's Department of Health Services, which explained that in the mid-1990s, the County was in the midst of a budget deficit, which led county officials to meet with various officials in Washington, D.C.

The court again rejected the County's § 3730(e)(4) argument, ruling that the County failed to demonstrate that the meetings qualified as a "public disclosure." In support of their argument, the County pointed to the Ninth Circuit decision *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000), which held that a county public agency proceedings was an "administrative hearing[ ]." The court, however, highlighted that the *A-l Ambulance* court reached this holding after reviewing the nature of the hearings, public comment, and the distribution of documents, and that the Ninth Circuit stressed that the hearings were "deliberate and not incidental," that it was "made open to public attendance and actually invited, as well as received, public comment." 202 F.3d at 1238. In the case at bar, however, the district court found nothing in the Wecker declaration to suggest that the meetings relied on by the County were of such a character.

Accordingly, after the determining that Englund's allegations were not previously disclosed to the public, the court denied the County's motion to dismiss.

C. Impact of Deficient *Qui Tam* Complaint Upon Subsequent Government FCA Action

U.S. ex rel. Williams v. Bell Helicopter Textron, Inc., 417 F.3d 450 (5th Cir. July 13, 2005)

The Fifth Circuit affirmed a Texas district court's dismissal of an FCA *qui tam* action, under the assumption that the lower court would change its earlier ruling from "dismissed with prejudice" to "dismissed without prejudice" as it relates to the Government. In this *qui tam* action, in which a relator alleged that his former employer made false claims regarding the supply of goods and services for development of military aircraft, the court of appeals held that the complaint failed to satisfy Rule 9(b). The Fifth Circuit also ruled that a dismissed nonintervened *qui tam* action cannot preclude the Government from later bringing its own FCA action against the same defendant.

Douglas Williams was employed as an engineer for over five years at Bell Helicopter Textron, Inc., a government contractor that supplies goods and services for the development of military aircraft. Five months after being terminated by Bell Helicopter, Williams filed an FCA *qui tam* action, alleging that his former employer had made false claims against the Government in violation of the FCA. After investigating his claims, the Government declined to intervene in the matter.

Williams's complaint centered on three incidents that he claimed proves the defendant violated the FCA. First, he alleged that, over a period of time in 1998, three Bell Helicopter employees "conspired to falsify and knowingly and intentionally falsified labor charges of over $3,000 each on the United States Marine Corps UH-1 program." He asserted that Bell Helicopter discovered these false charges and failed to report them to the Government. He further alleged that "[t]he knowledge of which Bell Helicopter agent or employee failed to reimburse the U.S. for its payment to Bell Helicopter, as well as the date Bell Helicopter knew of its false claim and failed to notify the U.S. and failed to reimburse the U.S. for its payment it was not obligated to make is peculiarly within the knowledge of Bell."

Subsequently, Bell Helicopter filed a motion to dismiss, arguing that the complaint failed to satisfy the particularity requirements of Rule 9(b), namely that the complaint failed to plead "the circumstances constituting fraud . . . with particularity." Fed. R. Civ. P. 9(b). Even after Williams filed a more detailed complaint, the district court agreed that Williams did not meet the 9(b) hurdle, and the court dismissed the case. The court also went as far as to dismiss all claims *by the* Government with prejudice because "the United States has had ample opportunity to participate in the prosecution of those claims if she had any notion that any of them has the slightest merit." Williams, in appealing the decision, argued that the lower court erred by failing to accept as true the facts set out in his complaint. The Government, which had declined to intervene in the matter, also appealed the district court's decision to dismiss all potential claims by the Government with prejudice.

Complaint Failed To Satisfy Rule 9(b)

In affirming the lower court's ruling as it related to Williams's *qui tam* action, the court of appeals agreed that the allegations failed to meet the particularity requirements of Rule 9(b). Of particular significant to the court, Williams's complaint was directed at the company, and not at the three named employees that allegedly filed the false reports. Moreover, Williams failed to plead any particular facts showing that Bell Helicopter was aware of the actions of its employees, that it had intentionally filed these false claims with the Government, that it had purposefully withheld information about these charges, or that it intentionally failed to repay the Government for the overcharges.

Furthermore, the court complained that the complaint was devoid of any facts indicating that these allegedly false charges were ever filed with the Government or that Bell Helicopter was aware that these charges were fabricated. Instead, the complaint only stated that "[o]n information and belief, these [claims] were delivered to, certified to, and invoiced to the U.S. . . . by Bell Helicopter." This was not sufficient to satisfy the court.

Williams, however, produced specific emails that showed that Bell Helicopter was "conspiring to conceal" its obligation to repay the Government for software and wiring upgrades. The court seemed unimpressed, noting that the "complaint and emails do not indicate that Bell Helicopter ever made a false statement or record to conceal its obligation to pay the government. Rather, it only alleges that the company *intended* to avoid repayment." Therefore, the court explained that "[w]ithout any affirmative action by the company to allegedly defraud the government, a plain reading of the statute indicates that Williams cannot rely on these emails to establish a FCA violation."

In turn, the Fifth Circuit ruled that the lower court had correctly concluded that the complaint, reviewed in the light most favorable to the plaintiff, was too general and conclusory to satisfy the particularity requirements set forth in Rule 9(b).

Deficient *Qui Tam* Complaint Cannot Preclude Government FCA Action

The court disagreed with the lower court's ruling as it related to a potential Government action. The Government asserted that the district court erred in dismissing the complaint against the United States with prejudice. Specifically, the Government argued that its statutory rights should not be foreclosed when a *qui tam* action is dismissed, not on the merits, but because of a deficient complaint.

The district court stated that it was dismissing the claims against the Government with prejudice because it believed "the United States has had ample opportunity to participate in the prosecution of those claims if she had any notion that any of them has the slightest merit." The Fifth Circuit, however, found the district court's speculation as to the motives of the Government's actions to be unreasonable, especially given the fact that the complaint was dismissed under Rule 12(b)(6) due to lack of specificity.

As the court of appeals noted, the FCA does not require the Government to proceed if its investigation yields a meritorious claim. Indeed, as the court stressed, "absent any obligation to the contrary, it may opt out for any number of reasons." Borrowing from a Fourth Circuit decision, the Fifth Circuit stressed that a decision not to intervene may "not [necessarily be] an admission by the United States that it has suffered no injury in fact, but rather [the result of] a cost-benefit analysis." *See United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1458 (4th Cir. 1997).

Speculating on possible motivations, the court of appeals noted that, given the Rule 9(b) deficiencies in the case at bar, the Government might have determined that "the costs associated with proceeding based on a poorly drafted complaint outweighed any anticipated benefits." However, as the court explained, "it is not the court's duty to speculate as to the costs and benefits associated with such a strategy."

Continuing to point out the potential pitfalls with the lower court's ruling, the Fifth Circuit warned that, "[b]y essentially requiring the Government to intervene in order to avoid forfeiting any future claims against the defendant, private parties would have the added incentive to file FCA suits lacking in the required particularity, knowing full well that the government would be obligated to intervene and ultimately 'fill in the blanks' of the deficient complaint." Accordingly, the Fifth Circuit found that the lower court abused its discretion in dismissing the claims as to the Government with prejudice after holding that the *qui tam* complaint failed to meet the heightened pleading standard of Rule 9(b).

Accordingly, the Fifth Circuit affirmed the district court's order dismissing the plaintiff's *qui tam* action, but encouraged the lower court to modify the judgment to be without prejudice to the Government.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

Mack v. Augusta-Richmond County, Georgia, 2005 WL 2270518 (11th Cir. Sept. 19, 2005)

In an unpublished *per curiam* decision, the Eleventh Circuit, in affirming a Georgia district court's grant of summary judgment in an FCA retaliation action, found that the plaintiff was unable to show that his former employer-defendant was aware of his "protected conduct." In a strained reading of the law, the court further noted that the individual-defendant did not have ultimate terminating power, so it could not be held liable under Section 3730(h) for the plaintiff's termination.

Kevin Mack worked for the consolidated government of Augusta-Richmond County, Georgia, as the Director of Housing and Neighborhood Development, which included overseeing Augusta's disbursement of federal grant money from the United States Department of Housing and Urban Development (HUD) through the Community Development Block Grant program (CDBG) and ensuring compliance with the applicable regulations.

In 2000, Augusta named the East Augusta Community Development Corporation as a Community Development Housing Organization (CDHO), which are development partners eligible for HUD funds through the CDBG program. Augusta entered into a contract with East Augusta to oversee the rehabilitation of the Lincoln Square Apartments in Augusta. Under the contract, East Augusta would act as a sub-recipient of CDBG funds provided to Augusta by HUD. East Augusta's use of CDBG funds was subject to the HUD regulations and guidelines. Failure to comply with the applicable HUD guidelines and bidding procedures could result in Augusta being required to remit all funds disbursed under the CDBG. East Augusta pulled in a partner, Capital Development Corporation, to help East Augusta remain compliant with the HUD guidelines.

East Augusta sought a contractor for the Lincoln Square project. However, at a meeting to discuss the bidding procedures required to comply with the HUD guidelines, employees of Kevin Mack's department learned that East Augusta had already entered into a contract with Gold Mech, Inc. for the Lincoln Square project without first soliciting competitive bids as the HUD regulations require. An employee in Mack's department contacted HUD to obtain an opinion about this procurement. HUD issued a memorandum opining that Capital Development Corporation violated the HUD regulations by not utilizing a competitive bidding process. In subsequent months, Augusta Commissioners and Augusta's attorney Jim Wall became involved and Augusta continued to work with HUD to resolve the problem.

In September 2001, Augusta met with Stella Taylor of HUD to discuss the Lincoln Square project. Augusta agreed to carve out three items of the construction contract to rebid according to HUD regulations. Invitations for bids were sent out, including an invitation to Gold Mech, whose bid was significantly lower that the next low bidders. After Mack learned of Gold Mech's participation in the bidding, he called HUD and it appears later sent an e-mail to Wall requesting a meeting to discuss the procurement issue before awarding contracts on the rebids. However, Gold Mech had already been awarded the contracts. Another employee in Mack's department contacted HUD regarding the rebids and the employee sent Mack an e-mail expressing his concern about the rebids and noncompliance with the HUD guidelines. Mack forwarded the e-mail to Wall and copied his supervisor the City Administrator, George Kolb. Wall responded, disagreeing with the employee's assessment and indicated that he had spoken with Stella Taylor of HUD to confirm that there was no problem with Gold Mech participating in the rebid. Wall also stated that he would "appreciate [Mack] not calling HUD for a second opinion on issues which you ask me to address—this merely complicates the whole process."

Subsequently, Kolb asked for Mack's resignation and presented him with a severance package and informed Mack that his termination would follow if he did not resign. Kolb allegedly responded to Mack's questions as to why he was being terminated that he did not like him bringing up the fact that Gold Mech had rebid. Kolb recommended to the Commission that Mack's employment be terminated. The Commission meeting minutes reflected that Kolb recommended termination, stating only: "I have lost confidence in [Mack's] ability to lead the Housing and Neighborhood Department effectively." On the day of the commission meeting, Mack's attorney faxed a letter to Wall asking that the letter be presented to the Commission prior to the vote. The letter stated that Kolb ignored Mack's accomplishments and simply criticized him about the Lincoln Square project and accused Kolb and the Commission of acting to terminate Mack "for protecting the public's trust." The Commission voted seven-to-one to terminate Mack based on his insufficient management skills and inability to make decisions without outside assistance. The Commissioners filed affidavits stating that they voted to terminate solely based upon Kolb's recommendation.

Mack filed a complaint alleging violations of the FCA retaliation provision, 31 U.S.C. § 3730(h), arguing that he was terminated in retaliation for raising concerns and questions about Gold Mech's participation in the rebid process. The district court granted summary judgment in favor of Augusta-Richmond County and Kolb. Mack appealed the decision to the Eleventh Circuit.

Failed to Establish That Termination Was Retaliatory

The court of appeals affirmed the lower court decision, pointing out that protection under the FCA retaliation provision requires a showing that the plaintiff was engaged in protected conduct and that the defendant retaliated against him because of that conduct. *See Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140, 1142 (11th Cir.

1996). The circuit court stressed that while Mack possibly engaged in protected conduct, this determination was not necessary, for Mack failed to establish that his termination was retaliatory.

The court placed a lot of weight in the fact that the Augusta Commission, not Kolb, terminated Mack. And while Mack could show that Kolb was aware of his "protected conduct," Mack was unable to show that the Commission was aware of this conduct. In other words, Mack could not show that the employer, the Commission, could have reasonably believed that his actions provided a "distinct possibility" that he would file an FCA *qui tam* suit. *See Childree,* 92 F.3d at 1146 (holding that protection under § 3730(h) is only available when a false claims action is actually filed or "where the filing of such an action . . . was a 'distinct possibility'"). In turn, the court ruled that the Commission's decision to terminate him did not qualify as "retaliation" as defined under § 3730(h) case law.

As for Mack's § 3730(h) claims against Kolb, the court noted that even if Mack could show that Kolb acted in a retaliatory manner, this would be insufficient because ultimate terminating power rested with the Commission, not Kolb alone. Thus, the Eleventh Circuit affirmed the district court's summary judgment.

***U.S. ex rel. Hartman v. Allegheny General Hospital*, 2005 WL 2106627 (W.D. Pa. Aug. 26, 2005)**

A Pennsylvania district court granted a defendant-hospital's motion to dismiss a *qui tam* action, which alleged that the hospital violated the FCA by mistakenly submitting false claims to the Federal Government. The court also dismissed the relator's FCA retaliation claim, for there was no evidence from which a reasonable jury could conclude that the plaintiff was engaged in "protected conduct," when she was told about the Medicare billing problem by other hospital staff members, was asked to participate in meetings to resolve the issue, and was not the one to report the problem to anyone within, or outside of, the hospital.

From July 1997 until April 12, 2002, Cindy Lee Hartman was a cardiology billing clerk at Allegheny General Hospital, where she reviewed hard copies of charge slips for cardiology services, identified and corrected errors, and entered the appropriate information into the computerized billing system. This information was then used by other members of Allegheny's staff to create the bills that were sent to patients and third parties, including Medicare and private insurers.

During the course of her employment, Hartman allegedly discovered that Allegheny was submitting false claims to Medicare for electrocardiogram (EKG) tests. Under Medicare rules, Medicare only pays for an EKG over-read if it resulted in "added value" to the patient. An over-read occurs when a cardiology department doctor reads a patient's EKG after an Emergency Room doctor has already read it. If the cardiology department doctor's reading of the EKG is the same as the Emergency Room doctor's, no "value" has been "added" and Medicare will only pay for one reading.

Hartman filed an FCA *qui tam* action arguing that because Allegheny occasionally billed Medicare for both EKG readings in error, Allegheny violated the FCA. She also alleged that she was fired in violation of the anti-retaliation provisions of that Act and Pennsylvania's Whistleblower Statute.

After the Government declined to intervene in the matter, the defendant filed a motion for summary judgment on all counts.

Not Sufficient Evidence to Support Claims

The court granted the defendant's summary judgment motion, finding that the plaintiff could not present sufficient evidence to support her claims. Perhaps most telling, the defendant agreed with Hartman that the hospital mistakenly billed Medicare for EKG over-reads. In fact, in the summer of 2001, Allegheney asked Hartman to take part in a series of meetings to establish procedures and safeguards to prevent Medicare from mistakenly being billed for EKG over-reads. After the meetings, human and computerized procedures were implemented to ensure that Medicare was not billed for the over-reads. As far the court was concerned, these steps, coupled with the hospital refunding the improper charges, prevented Hartman from moving forward with her *qui tam* action.

As for her retaliation claims, the court ruled that there was no evidence from which a reasonable jury could conclude that Hartman was engaged in "protected conduct." Although Hartman claimed that she "discovered double billing" in 2001 and, again in 2002, and reported it to her supervisors, the court could found no evidence to support her claim. In fact, all evidence, including Hartman's own subsequent admissions at her deposition, showed that she was told about the Medicare billing problem by other hospital staff members and was asked to participate in meetings to resolve the issue. Moreover, the court noted that Hartman was not the one to report the problem to anyone within, or outside of, the hospital. Accordingly, the court granted the defendant's motion for summary judgment on Hartman's FCA retaliation claim. Lastly, with only the state retaliation claim remaining, the court exercised its discretion and dismissed the defendant's state law counterclaim for lack of jurisdiction.

B. Statute of Limitations for FCA Retaliation Claims

Foster v. Savannah Communication, 140 Fed. Appx. 905 (11th Cir. July 25, 2005)

In an unpublished *per curiam* decision, the Eleventh Circuit affirmed the dismissal of a *pro se* FCA *qui tam* action, in which a former employee sued the U.S. Army, alleging that she was constructively discharged for reporting fraud to her supervisors in violation of the FCA retaliation provision. The court of appeals ruled that the statute of limitations barred the retaliation claims and the accompanying FCA claims against the U.S. Army and three contractors. The court also ruled that the action failed to comply with the procedural filing requirements, including the requirement to file the complaint under seal.

Deborah E. Foster appealed *pro se* the district court's dismissal with prejudice of her claims against the defendants, Savannah Communication, the United States Army, McLlanham Automotives, Inc., and A & E Electronic Company. Foster brought her claims under the FCA, alleging that she had been constructively discharged by her employer, the Army, for reporting fraud to her supervisors in violation of 31 U.S.C. § 3730(h), and that the remaining three defendants allegedly committed fraud against Government, in violation of 31 U.S.C. § 3729.

While Foster at first argued that the district court erred in finding that her complaint was filed beyond the statute of limitations, she later argued that "she did her best to ensure that the complaint was filed in a timely manner." Foster also maintained that the district court erred by alternatively dismissing her complaint for failure to comply with the procedural requirements of § 3730(b)(2). In support of her argument, she asserted that she "had no knowledge of sealing a case."

FCA Claims Barred by Statute of Limitations

The court observed that the applicable limitation period for an action brought under 31 U.S.C. § 3730 is no "more than 6 years after the date on which the violation of Section 3729 is committed." 31 U.S.C. § 3731(b)(1). In her complaint, Foster alleged that she complained of the fraud and was constructively discharged by the Army on July 23, 1997. Thus, according to the court, Foster could not have witnessed or had knowledge of any alleged fraudulent activity, such as submission of false claims, after that date. Because Foster's complaint was not filed until August 8, 2003, more than six years after the date on which her employment ended, the court ruled that all of the acts of which Foster claims the contractor-defendants took part occurred more than six years before Foster filed her complaint. Moreover, Foster conceded that her complaint was untimely in light of the limitation period. Therefore, the court of appeals ruled that the district court did not err in finding that her *qui tam* complaint against the contractor- defendants was barred by the six-year statute of limitations set forth at § 3731(b)(1).

Retaliation Claims Time-Barred

As for her Section 3730(h) retaliation claims against the U.S. Army, the court of appeals, citing the recent Supreme Court decision *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,* --- U.S. ----, ----, 125 S.Ct. 2444, 2446, --- L.Ed.2d ----, ---- (2005), explained that the most closely analogous state limitations period, rather than the six-year statute of limitations in the FCA, applied to her claim. However, because the applicable period is not more than six years, the court did not directly address this issue. Thus, the court affirmed the lower court dismissal of her retaliation claim against the Army for failing to comply with the statute of limitations.

Relator Failed to Comply With Procedural Requirements

Lastly, the Eleventh Circuit noted that Foster failed to comply with the various procedural requirements listed in Section 3730(b). Specifically, she brought the action under her own name, not in the name of the Government; she did not filed the complaint under seal; and she did not serve upon the Government "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. § § 3730(b)(1) and (b)(2).

Accordingly, the Eleventh Circuit affirmed the district court's order dismissing Foster's complaint for failure to file within the statute of limitations period, and, alternatively, for failing to comply with the procedural filing requirements of § 3730(b)(2).

COMMON DEFENSES TO FCA ALLEGATIONS

A. Materiality Requirement

U.S. ex rel. Schell v. Battle Creek Health System, 419 F.3d 535 (6th Cir. Aug. 22, 2005)

The Sixth Circuit, in a *qui tam* action alleging that a health care provider committed fraud by charging Medicare for entire multi-dose vial of anesthesia medication when only portions of vials' contents were administered to patient, reversed and remanded a Michigan district court's grant of summary judgment. The court of appeals held that genuine issues of material fact as to how medical provider billed Medicare precluded summary judgment.

From 1991 to 1999, Thomas Schell was employed by Battle Creek Health System as a certified registered nurse/anesthetist (CRNA). Battle Creek terminated Schell's employment in May 1999 as part of a plan to replace CRNAs with independent contractors. In March 2000, Schell filed an FCA *qui tam* suit against Battle Creek and its owner, Mercy Health Services, alleging that, during his period of employment, Battle Creek committed fraud by charging Medicare for entire multi-dose vials of anesthesia medication when only portions of the vials' contents were actually administered to patients. After the Government elected not to intervene, the district court twice granted Schell leave to file an amended complaint and ordered the dismissal of all claims against Mercy Health Services.

After experts from both sides completed their reports and were deposed, Battle Creek moved for summary judgment on the grounds that its policy of charging for entire multi-dose vials did not result in increased expenditures by Medicare, for Medicare reimbursements for outpatients were calculated on a cost, not charge, basis. The district court granted Battle Creek's motion and ordered the dismissal of Schell's suit. Schell appealed the decision to the Sixth Circuit.

FCA Liability Attaches to False Claims Submitted on Interim Cost Reports

As an initial matter, the Sixth Circuit rejected the defendant's argument that, because the final amount reimbursed by Medicare was determined based on Battle Creek's costs, any overstated charges would be corrected through the final cost-to-charge-ratio adjustment. Instead, the court ruled that, if Battle Creek was found to have made false statements to Medicare during the interim-payment phase, the fact that Battle Creek returned any overpayments to Medicare after final settlement of the cost report would not insulate Battle Creek from FCA liability.

In reaching its conclusion, the Sixth Circuit first clarified its recent *Medshares* decision, where it had concluded that "false statements or conduct must be material to the false or fraudulent claim to hold a person civilly liable under the FCA," and that 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." *United States ex rel. A + Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 445 (6th Cir. 2005) (quoting *Neder v. United States*, 527 U.S. 1, 16, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). In applying the "natural tendency" test in *Medshares*, the court had rejected the defendant's argument that it should be relieved of civil liability under the FCA because it expected the fiscal intermediary to conduct an audit and to disallow any pension expenses that the defendant had claimed in error. *See id.* at 447

Likewise, applying *Medshares* to the case at bar, the Sixth Circuit concluded that if Battle Creek made false statements to Medicare during the interim-payment phase, Battle Creek would not be immune from FCA liability simply because it reimbursed Medicare for any overpayments after final settlement of the cost report.

Genuine Issues of Material Fact Regarding Billing Practices

Schell also argued that, by charging for an entire vial of anesthesia medication when only a portion of the vial had been administered, Battle Creek engaged in fraud by charging Medicare for medication it did not provide. Battle Creek, on the other hand, countered that it simply adopted a flat-fee method of charging for anesthesia medications and that it made no representations to Medicare as to the amount of drug administered to a particular patient.

Second, as a technical matter, Battle Creek's reliance on the cost-to-charge ratio as an accurate conversion mechanism was called into question to the extent that the evidence before the court suggested that Battle Creek might not have followed a uniform procedure in how it charged its patients. As Lawrence Bara, one of Battle Creek's expert witnesses, explained, the conclusion that charging for entire multi-dose vials of anesthesia medication does not cause increased costs to Medicare hinges upon Battle Creek's charging each of its patients in the same manner.

After examining the record, the court concluded that there were genuine issues of material fact regarding Battle Creek's billing practices that prevented entry of summary judgment. The court of appeals highlighted that a central assumption pervading the discovery process and the instant summary judgment proceeding was that Battle Creek followed a consistent and uniform policy in billing anesthesia medications. However, the sample patient-billing records appended to Schell's complaint provided some indication that Battle Creek in fact might not have followed a uniform, flat-fee method of charging for anesthesia medications. Specifically, the records for several Battle Creek patients suggested that some requests for payment submitted by Battle Creek to Medicare reflected multiple charges for the same anesthesia medication rather than a single flat-fee charge.

Accordingly, the Sixth Circuit concluded that there was a genuine issue of material fact with respect to how Battle Creek billed Medicare for anesthesia medications that would make entry of summary judgment in favor of Battle Creek improper. In turn, the court of appeals reversed the lower court decision.

Dissent Championed Backend Audits as a Form of Blanket Immunity for Providers

Rejecting the majority's argument, Judge Cook dissented, concluding that the billing practices challenged in this case did not cause Medicare to overpay Battle Creek. Cook placed substantial weight in the fact that Medicare reimburses Battle Creek based on the hospital's costs, not its charges to patients, and that Medicare audits Battle Creek's cost reports at the end of each year so that, "at the end of the day," Medicare will not overpay for patients' anesthetics.

B. Government Acceptance

U.S. ex rel. Stebner v. Stewart & Stephenson Services, Inc., 2005 WL 1865309 (5th Cir. Aug. 8, 2005)

The Fifth Circuit, in an unpublished *per curiam* decision, affirmed a Texas district court's dismissal of an FCA *qui tam* action, agreeing that the defendant did not "cause[ ] a prime contractor to submit a false claim to the Government." The court of appeals further stressed that summary judgment was appropriate because the Government retained, and exercised, its discretion to conditionally accept products that did not meet contractual standards.

In 1991, the Government contracted with Stewart & Stephenson, Inc. to build a Family of Medium Tactical Vehicles (FMTV), which included a variety of models of two-and-a-half ton to five-ton military trucks with enclosed cabs. The contract included a number of provisions, including one specification requiring the vehicles to be free of corrosion during the first ten years of use. Stewart & Stephenson subsequently contracted with McLaughlin Body Co. to produce the cabs.

During the production of these vehicles, on-site government officials would inspect the FMTVs. Upon the Government being satisfied with a vehicle, its representative would sign the requisite government form, form DD250, indicating conditional or final acceptance. The documents were then returned to Stewart & Stephenson, which then converted the DD250 into an invoice and submitted it to the Government for payment. The DD250 contained no express certifications of contractual compliance, and only included the government officials' signature.

After a final design was agreed upon in 1995, Stewart & Stephenson began retrofitting some of the conditionally accepted vehicles. During the retrofit, the company found corrosion problems on the cabs and the cargo beds of many of the vehicles. The company immediately informed the Government, which led to a series of negotiated modifications, which required the company to produce a Cab Corrosion Report disclosing the corrosion's "root cause"; to repair the vehicles that had certain corrosion levels; and to refrain from submitting for acceptance vehicles with severe corrosion.

Stewart & Stephenson hired Werner Stebner to discover the "root cause" of the corrosion. He found internal and external cab corrosion on the vehicles; blamed inadequacies at McLaughlin's production facility and its use of faulty products and sealing procedures; and concluded McLaughlin's corrosion-prevention coating product and processes did not conform to contractual requirements and produced "junk."

Despite his findings, Stewart & Stephenson ordered Stebner not to include the totality of his assessment in the Cab Corrosion Report, but to say the systems were only bad "some of the time." Stebner refused, and was removed from the project. The Cab Corrosion Report was presented to the Government in April 1996.

Approximately six months later, after two retrofitted vehicles failed testing for the negotiated corrosion-repair, the Government suspended conditional acceptance of any vehicles evidencing corrosion or which had undergone corrosion repair. After further negotiations, the Government agreed to two contract modifications. The Government

would resume acceptance if the company would provide a ten-year corrosion warranty, capped at $10 million, on vehicles already manufactured or being manufactured; and they modified the contract to provide fully galvanized cabs. The Government considered these two modifications the "final resolution of the corrosion problems."

Stebner filed an FCA *qui tam* action on October 8, 1996, after the Government suspended all acceptances but before the corrosion settlement was reached. Stebner alleged that Stewart & Stephenson and McLaughlin made false representations and certifications to the Government with the intent to defraud and made "misleading minimization in reports to the Government of known systemic problems in the coating and cleaning process of the FMTV."

The defendants moved for summary judgment, arguing that they submitted no false claims within the meaning of the FCA; that the Government's knowledge of the manufacturing processes and corrosion issues precluded any claim of falsity; and that Stebner's claims were barred by the contractual resolution of the corrosion problem. The district court awarded the defendants summary judgment, concluding that the defendants did not submit false claims, either express or implied, to the Government; and that there were no false claims because there was no material misrepresentation to the Government and it received the benefit of the bargain.

Defendants Did Not Submit a "False" Claim

In affirming the lower court decision, the Fifth Circuit observed that "it is only those claims for money or property to which a defendant is not entitled that are 'false' for purposes of the False Claims Act." *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674–75 (5th Cir. 2003) (*en banc*) (citation omitted).

Applying the *Southland* definition of "claim" to the record, the court determined that summary judgment was appropriate in the case at bar. Notably, the claims Stewart & Stephenson submitted to the Government were the progress payment requests and the Government-signed DD250, neither which expressly certified compliance with every provision of the overall contract.

The Fifth Circuit again refused the invitation to adopt an implied theory of certification. *See U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 381-82 (5th Cir. 2003). However, even under an implied theory, FCA liability would not attach in this action, according to the court. "The Government was involved in the design, production, testing, and modification of the FMTVs; and [the defendants] and the Government negotiated contract modifications in response to the well-documented corrosion problem. The Government retained, and exercised, its discretion to conditionally accept or refuse to accept FMTVs that did not meet contractual standards; and the DD250 was not signed by the Government until it was ready to accept a vehicle." Therefore, the court reasoned, McLaughlin did not "cause[ ] a prime contractor to submit a false claim to the Government". *United States v. Bornstein,* 423 U.S. 303, 309 (1976).

Accordingly, the Fifth Circuit affirmed the lower court's summary judgment decision.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Gross v. AIDS Research Alliance-Chicago, 415 F.3d 601 (7th Cir. July 6, 2005)

The Seventh Circuit affirmed an Illinois district court's dismissal of an FCA *qui tam* action, in which a research subject in federally-funded AIDS research study alleged various acts of negligence and mismanagement by the researcher, several of its participating medical professionals, and the institutional review board for the study. The Seventh Circuit held that the relator failed to plead that the alleged fraudulent statement's purpose was to coax a payment of money from the Government with requisite particularity; that the relator failed to allege that any particular certification of regulatory compliance was a condition of payment of government money; and that the lower court lacked jurisdiction over the relator's claim to extent it was based on a warning letter sent by FDA to institutional review board.

From October 1998 to December 1999, the AIDS Research Alliance–Chicago, as one of fifteen participating agencies taking part in an NIH-sponsored research study on an "off-label investigational new drug" for the treatment of AIDS, was awarded approximately $3.7 million in research funds. Catholic Health Partners acted as the Institutional Review Board for the Alliance. Sanford Gross was one of the research subjects taking part in Alliance's AIDS research study.

Gross brought an FCA *qui tam* action alleging various acts of negligence and mismanagement by the Alliance, several of its participating medical professionals, and Catholic Health Partners. More specifically, Gross alleged that the defendants submitted various forms and reports to the Government during the course of the study and these constituted "certifications" that the study was being conducted in compliance with federal regulations, grant study protocols, and "Good Clinical Practices," when, in fact, it was not.

After dismissing the relator's original and amended complaints under Rule 9(b), the district court dismissed the relator's second amended complaint under Rule 12(b)(6) for failure to state a claim, based largely on what the district court saw as insufficiencies in the allegations regarding the knowledge element of a § 3729(a) claim. In addition, the court also invoked the FCA public disclosure bar, § 3730(e)(4), ruling that the relator's complaint was premised upon publicly disclosed information and Gross was not the original source of the information. Gross appealed the decision to the Seventh Circuit.

Complaint Failed To Satisfy Rule 9(b)

The Seventh Circuit affirmed the district court decision, but on the rationale that the second amended complaint failed under Rule 9(b) because "it d[id] not allege to the required degree of particularity the false statement or statements made by the defendants, with knowledge of their falsity, for the purpose of obtaining payment from the Government." The court of appeals also dismissed the complaint under Rule 12(b)(6), for the complaint "d[id] not allege that payment by the Government was conditioned upon certification of regulatory compliance, a necessary component of a *qui tam* FCA claim premised upon false certification of compliance with federal statutes and regulations."

Gross argued that the Alliance was noncompliant with federal regulations, various study protocols, and "Good Clinical Practices." The complaint also alleged that Catholic Health Partners participated in "other federal grants" and was out of compliance with certain federal regulations in connection with these unspecified "other grants." The pleading pointed to a supposed December 9, 2002 warning letter sent from the Federal Drug Administration to Catholic Health Partners, temporarily suspending its participation in an unrelated study for "violating regulations governing the composition, operation, and responsibilities of an IRB." Lastly, the complaint alleged that the defendants submitted various "forms, written reports and study results" to the Government.

The court of appeals, however, was unable to decipher the relator's complaint, complaining that the complaint was full of "cryptic acronyms and generalized references to form titles" without any explanation to "how the filing of any of these forms related to payment of grant money." Instead, the complaint alleged that "[i]ndividually, and in cumulative effect, the forms, written reports, and study results submitted by the defendants constituted certifications of compliance with all requirements and conditions of the research grant." The court also highlighted a general allegation that the "[d]efendants, individually and in conspiracy, have knowingly made false or fraudulent claims and certifications to justify retention of federal funds already received and to induce payment of additional federal funds."

Dissecting the language of 31 U.S.C. § 3729(a)(2), the Seventh Circuit announced that FCA liability only attaches when the fraudulent statement's purpose was "to coax a payment of money from the government," for the statute includes the language "to get a false or fraudulent claim paid or approved by the Government." *Id.* According to the court of appeals, Gross failed to plead this element with the specificity required by Rule 9(b).

Moreover, Gross failed to allege that any particular certification of regulatory compliance was a *condition* of payment of government money. Therefore, according to the court, the complaint failed to state a claim under Rule 12(b)(6), for "where an FCA claim is based upon an alleged false certification of regulatory compliance, the certification must be a condition of the government payment in order to be actionable." Because the complaint failed to make such an allegation, the Seventh Circuit agreed with the lower court decision.

Lastly, the court agreed with the lower court's dismissal on FCA public disclosure bar grounds. The court quickly concluded that a 2002 FDA warning letter was a public disclosure and that Gross did not affirmatively allege that he was an original source of the information in the warning letter.

Accordingly, the Seventh Circuit affirmed the district court decision.

U.S. ex rel. Schmidt v. Zimmer, Inc., 2005 WL 1806502 (E.D. Pa. July 29, 2005)

A Pennsylvania district court granted the defendants' motion to dismiss for failing to meet the particularity requirements of Rule 9(b), for the complaint failed to identify which, out of approximately 1,600 hospitals, submitted false claims to Medicare.

Richard G. Schmidt, M.D., an orthopedic surgeon in Bala Cynwyd, Pennsylvania, filed an FCA *qui tam* action against Zimmer, Inc., a manufacturer, seller, and distributor of orthopedic implants, alleging that Zimmer violated the FCA by causing approximately 1,600 unnamed defendant hospitals to submit false claims for Medicare benefits. The court dubbed Schmidt's theory liability as a syllogism: "Zimmer contracts via a purchasing cooperative (Premier Purchasing Partners, L.P.) with approximately 1600 unidentified hospitals (the Premier Participants). Under Zimmer's separate contracts with each of the 1600 hospitals, Zimmer provides certain remunerations to each hospital. These remunerations are part of a marketing scheme on the part of Zimmer that violates the Anti-Kickback and Stark laws."

The matter was before the district court on remand from the Third Circuit, to determine whether the defendants' motion to dismiss based on the relator's complaint failed to meet the particularity requirements of Rule 9(b).

The court granted the defendants' motion, for Schmidt failed to identify which, out of approximately 1,600 hospitals, submitted false claims to Medicare. Indeed, according to the court, Schmidt was unable to identify even one allegedly false claim that was submitted to Medicare. In turn, the court ruled that because Schmidt failed to identify with particularity a specific false claim, there was no nexus between the allegedly illegal marketing scheme and the FCA. *See Harrison v. Westinghouse Savanna River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("The [FCA] attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'")

Accordingly, the court dismissed the case with leave to replead.

B. Rule 15(a) Leave to Amend

U.S. ex rel. Lee v. Fairview Health System, 413 F.3d 748 (8th Cir. July 6, 2005)

The Eighth Circuit affirmed a Minnesota district court's decision to deny a relator's motion to amend his complaint in an FCA *qui tam* action, in which a former physical therapist-relator alleged that a health system submitted false Medicare and Medicaid claims. The court of appeals, agreeing with the lower court, held that the proposed amendment was improper on futility grounds because the relator failed to communicate the substance of her proposed amendments. The Eighth Circuit also ruled that the lower court was justified in assuming that the amendments would concern claims already included in the complaint.

Toni Lee, a former physical therapist at various Fairview Health System facilities, brought an FCA *qui tam* action against her former employer in January 2002. In her complaint, Lee alleged that Fairview had submitted a number of false Medicare and Medicaid claims by incorrectly billing services provided by athletic trainers and massage therapists as physical therapy services, improperly supervising physical therapy assistants, and wrongly allowing athletic trainers to perform duties that could only be performed by physical therapists and physical therapy assistants.

After the Government declined to intervene in the matter, Fairview moved to dismiss the complaint under Rule 12(b)(6) for failing to state a claim upon which relief could be granted. While Lee did not oppose the dismissal of most of her claims, she did contest the dismissal of her claim that Fairview had improperly allowed athletic trainers to perform physical therapist and physical therapy assistant duties. In addition, she requested that, if the district court granted Fairview's motion to dismiss, she be allowed to amend her complaint.

The lower court granted Fairview's motion to dismiss, citing that, under Minnesota law, "athletic trainers could provide physical therapy services when working under the direct supervision of a physical therapist." In turn, the district court denied Lee's motion for leave to amend as futile on the ground that "[n]o set of facts [could] rehabilitate Lee's fatally flawed interpretation of Minnesota law." Lee appealed the decision based on the argument that the court erred in denying her motion for leave to amend.

In affirming the lower court decision, the Eighth Circuit highlighted its earlier *Dudek* decision, in which the court had found no abuse of discretion when the plaintiff failed to submit the proposed amended pleading and had failed to describe the substance of the amended claims. *See Dudek v. Prudential Securities, Inc.*, 295 F.3d 875, 880 (8th Cir. 2002).

On appeal, Lee argued that the district court abused its discretion by denying her motion for leave to amend as futile because she could have amended the complaint to include an allegation that Fairview's athletic trainers were not properly supervised and, accordingly, that Fairview's Medicare and Medicaid claims were falsely made. Lee, similar to the *Dudek* plaintiff, refused to disclose the potential substance of the proposed

amendments, and she declared at oral argument that the dispositive "supervision" issue was "irrelevant" to her claims.

Accordingly, under the reasoning espoused in *Dudek*, the Eighth Circuit affirmed the lower court's decision to deny her motion to amend her complaint.

U.S. ex rel. Camillo v. Ancilla Systems, Inc., 2005 WL 1926559 (S.D. Ill. Aug. 8, 2005)

An Illinois district court denied an FCA defendant-hospital's motion to dismiss, in which the defendant had argued for dismissal based on the fact that it was not originally named as a defendant when the Government made its initial review of the case and declined intervention. The court highlighted that the Government was aware that the real party in interest was the hospital, for it was a wholly owned subsidiary of the original defendant.

In addition to originally filing an FCA *qui tam* action against Ancilla Systems, Inc., Anthony Camillo later added Kenneth Hall Regional Hospital to the suit. Kenneth Hall, seeking a motion to dismiss, argued that the court must dismiss the FCA claims against it because it was not originally named as a defendant when the Government made its initial review of the case and declined intervention. More specifically, Hall argued that because Camillo did not name it as a defendant in the complaint that the Government reviewed, the Government was compelled to decide whether or not to intervene, settle over Camillo's objection, pursue an alternative remedy, or even dismiss without being able to consider Camillo's claims against it.

In support of its motion, Kenneth Hall pointed a First Circuit decision that had held that "allowing a *qui tam* relator to amend his or her complaint after conducting further discovery would mean that the 'government will have been compelled to decide whether or not to intervene absent complete information about the relator's cause of action.'" *United States ex rel. Karvelas v. Melrose-Wakefield Hospital,* 360 F.3d 220, 231 (1st Cir. 2004) Camillo, however, countered that the court should deny the motion because the Government had sufficient notice of the claims against Kenneth Hall when it originally filed the complaint under seal. The court agreed with Camillo.

The Court distinguished the case at bar from *Karvelas*, for in *Karvelas* the First Circuit affirmed the district court's decision to dismiss a FCA complaint on the ground that it failed to plead fraud with particularity as required by Rule 9(b). The First Circuit had found that "allowing a relator to plead generally at the outset and amend the complaint at the 12(b)(6) stage after discovery would be at odds with the FCA's procedures for filing a *qui tam* action and its protections for the Government (which is, of course, the real party in interest in a *qui tam* action)." *Karvelas,* 360 F.3d at 231.

In the case at bar, however, the issue was whether Camillo was entitled to amend his complaint to add a defendant. Under the circumstances, the court found that Camillo was. At the time Camillo filed his original complaint and the third amended complaint under seal and when the Government reviewed it, the named defendant was Ancilla Systems, Inc. Also at that time, Camillo produced the documents in his

possession to the U.S. Attorney's office regarding the allegations in the complaints. The allegations in the original complaint and the fourth amended complaint did not changed—the allegations of fraud center on bills being sent out of St. Mary's Hospital, a wholly owned subsidiary of Ancilla before Ancilla sold the hospital to Kenneth Hall. Therefore, according to the court, the Government was aware that the real party in interest was the hospital. Furthermore, as previously noted by the court in its order unsealing the complaint, the Government was entitled to intervene at any time for good cause. Thus, the court denied Kenneth Hall's motion to dismiss based on the addition of Kenneth Hall as a defendant after Government review.

C. Rule 26(b) Discovery Scope and Limits

U.S. ex rel. Tyson v. Amerigroup Illinois, Inc., 2005 WL 2234747 (N.D. Ill. Sept. 15, 2005)

An Illinois district court denied an FCA *qui tam* relator's motion to compel answer to interrogatory on damages, after determining that "[r]equiring the defendants to answer the interrogatory w[ould] not result in any meaningful conservation of time and effort, and the overall balance of equities plainly disfavor[ed] the timing adjustment in disclosure demanded by the plaintiffs."

On March 30, 2000, Amerigroup Illinois, Inc. (AMG-IL), a health maintenance organization operating in the state of Illinois, entered into a contract with the Illinois Department of Public Aid (IDPA) to provide health care services to individuals, who are eligible for Medicaid. Under the contract, AMG-IL was paid per enrollee, with the amount predetermined by actuarial data of the population group to be served.

Cleveland Tyson, a former employee of AMG-IL, filed a *qui tam* action under the FCA and the Illinois Whistleblower Reward and Protection Act, 740 ILCS § § 175/1 *et seq.*, alleging that his former employer engaged in systematic discrimination against the potential enrollees based upon their health status, namely that it provided healthcare services to a group of healthier, less expensive patients than the parties intended under the terms of the contract. Because of these discriminatory practices, AMG-IL was allegedly able to spend less of the predetermined amount it was paid and retained a greater profit. The Government, however, had to provide more healthcare and spend more money than it had bargained for.

Under its contract with the IDPA, the defendant had to submit quarterly statements certifying that, to its knowledge, there had been no fraud, abuse, or misconduct on the part of its employees, providers, or representatives. According to the contract, "abuse" was defined as action that "results in excessive or unreasonable costs to the Federal and/or State health care programs." Tyson alleged that AMG-IL did not report its limited enrollment practices in its quarterly certifications, which were a precondition to its receiving payment from the federal and state programs. Tyson argued that this omission allegedly resulted in and constituted false or fraudulent claims for payment in violation of the applicable statutes.

In the matter at bar, the relator requested an order requiring the defendants to answer a specific interrogatory, which sought disclosure of the several potential counter-theories of damages that the defendants were admittedly considering.

The relator argued that basic "fairness" and "efficiency" demand that the defendant disclose its damage theories and methodologies now, rather than waiting until expert discovery. According to the relator, immediate disclosure was essential, so that they could "begin analyzing the data before expert discovery begins in order to be able to comply with the current schedule for providing an expert report." Without this information, the relator claimed that the discovery would be "very burdensome" and a "fishing expedition for sensitive and closely-guarded information from third parties," including other managed care organizations in Illinois and Amerigroup's healthcare

plans in other states. In other words, by granting this motion, the court would supposedly prevent this intrusive discovery.

The defendant, pointing to *Braun v. Lorillard, Inc.*, 84 F.3d 230, 236 (7th Cir. 1996), maintained that disclosure in advance of expert discovery was premature, would violate the work product privilege, and would impermissibly disclose the opinions of one or more non-testifying experts in violation of Rule 26(b)(4)(B), which forbids disclosure in pretrial discovery of the facts found or opinions formulated by an opponent's non-testifying experts except upon a showing of exceptional circumstances.

The court bought the defendant's argument, ruling that the motion would not, under the circumstances of this case, result in the fairness and efficiencies that were the sole justifications for the motion. The court further maintained that granting the motion would disrupt the orderly flow of discovery contemplated by the Federal Rules of Civil Procedure and would effectively accelerate expert discovery, thereby discarding the existing schedule.

In reaching its conclusion, the court was particularly swayed by AMG-IL's counsel's explanation that although there were "several viable alternative damage theories" under consideration, none had been selected. Thus, the court reasoned, "even if AMG-IL were ordered to disclose the alternative theories, the very thing the plaintiffs fear—namely, unfocused discovery proceeding down multiple paths, none of which would necessarily lead to any end—would come to pass." In other words, the relator would have to explore damage calculations under various, potentially discarded theories of liability.

Accordingly, the district court ruled that "[r]equiring the defendants to answer the interrogatory will not result in any meaningful conservation of time and effort, and the overall balance of equities plainly disfavored the timing adjustment in disclosure demanded by the plaintiffs." In turn, the court denied the relator's motion to compel an answer to an interrogatory on damages.

U.S. ex rel. Smith v. The Boeing Company, 2005 WL 2105972 (D. Kan. Aug. 31, 2005)

A Kansas district court refused to grant a relator a preservation order in an FCA *qui tam* action, finding that there was no showing of a significant threat that relevant documents would be lost or destroyed absent an immediate order.

Taylor Smith, Jeannine Prewitt, and James Ailes brought an FCA *qui tam* action against the Boeing Company and one of Boeing's subcontractors, Ducommun, Inc., alleging that the defendants presented false claims for payment to the Government. More specifically, the relators alleged that defects in the manufacturing and quality control operations at Ducommun resulted in the delivery to Boeing of bogus or unapproved aircraft parts. According to their complaint, the relators brought these facts to the attention of Boeing, but Boeing concealed the information and submitted false claims for payment relating to aircraft and parts delivered to the Government. In addition, the relators alleged that Boeing retaliated against them after they reported their concerns to the management.

In the matter at bar, the relators sought a preservation order directing Boeing to preserve documents, physical evidence, and electronic evidence for discovery and trial. The relators maintained that Boeing took actions to "sweep evidence under the rug," including an alleged deletion or alteration of a supplier evaluation report (SER) from Boeing's computer system; concealing from the Government the lack of data concerning bogus parts and the use by Ducommun of two sets of books; and an incident in which a former Boeing employee alleged that a supervisor asked him "if we could lose" a particular letter relating to Boeing's audit of Ducommun.

The relators further alleged that there were "special concerns" justifying an order in light of the recent sale of Boeing facilities to ONEX, and that Boeing had allegedly made no showing that it took steps to preserve material evidence in connection with the sale.

Boeing, on the other hand, maintained that it had already acted to preserve the evidence relevant to the lawsuit, pointing out that ONEX was not a party to the suit and that the order sought by relators would have no effect on that company, although it added that it had been advised that ONEX was taking appropriate steps to preserve evidence. Boeing also challenged the alleged examples of evidence tampering cited by the relators.

As an initial matter, the district court highlighted that the Federal Rules of Evidence require parties to take steps to preserve relevant evidence, including electronic and physical evidence. In turn, the court explained that a specific order directing a party to preserve evidence is not ordinarily required.

The court, highlighting the reasoning in *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Co.*, 220 F.R.D. 429, 433 (W.D. Pa. 2004), recognized that the courts have inherent power to make such an order when necessary. According to *Capricorn Power*, the following factors must be considered by the court: First, how much of a concern there is for the maintenance and integrity of the evidence in the absence of an order; Second, any irreparable harm likely to result absent a specific order directing preservation; and Third, the capability of the party to maintain the evidence sought to be preserved. *Id*.

Applying the *Capricorn Power* factors to the case at bar, the court found that there was no showing of a significant threat that documents would be lost or destroyed absent an immediate order. Accordingly, the court, ruling that a preservation order was not appropriate in the case at bar, denied the relators' motion.

***Agyeman v. Corrections Corporation of America*, 2005 WL 1847033 (9th Cir. Aug. 5, 2005)**

The Ninth Circuit, in an unpublished decision, affirmed an Arizona district court's dismissal of a *pro se* FCA *qui tam* action. The court, pointing to its earlier *Kelly* decision, also rejected the relator's argument that the Government must intervene before it could move for dismissal. *See United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 (9th Cir. 1993).

***U.S. ex rel. Braham v. Alameda County Superintendent of Schools*, No. 02-56780 (9th Cir. Aug. 4, 2005)**

In an unpublished decision, the Ninth Circuit affirmed a California district court's dismissal of an FCA action against a county school district, ruling that school districts in California are considered "state agencies," and state agencies are not "persons" subject to *qui tam* liability under the FCA. In support of its "state agency" determination, the court of appeals cited to two earlier Ninth Circuit decisions, *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995) and *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992).

***U.S. ex rel. Fisher v. Network Software Associates*, 377 F. Supp. 2d 195 (D.D.C. July 20, 2005)**

Kenneth Fisher filed an FCA *qui tam* action against Network Software Associates. However, after relator's counsel subsequently withdrew its representation, the defendants moved to dismiss the *qui tam* suit. A District of Columbia district court granted the motion, holding that lay relators cannot maintain *qui tam* actions without assistance of counsel.

Interventions and Suits Filed/Unsealed

JULY 1–SEPTEMBER 30, 2005

U.S. ex rel. Westrick v. Second Chance Body Armor

In July 2005, the DOJ intervened in a False Claims Act case, filing a complaint against Second Chance Body Armor and the Toyobo Company for the sale of defective body armor to the Government. The complaint alleges that the defendants provided defective Zylon bullet-resistant vests to Federal, State and local law enforcement agencies despite being aware that the strength and bullet-stopping capacity of the Zylon vests were substantially weaker than represented. The complaint also alleges that Second Chance and Toyobo conspired to suppress evidence that Zylon degraded faster than disclosed to the Federal Government, which bought the vests directly and partially reimbursed State and local law enforcement agencies for their purchases under the Bulletproof Vest Partnership Grant Act. Dr. Aaron Westrick, former Director of Research for Second Chance, filed this *qui tam* suit in 2005.

State of Florida v. Mylan Pharmaceuticals

In July 2005, Florida Attorney General Charlie Crist announced that his office had filed a civil complaint against three generic drug makers: Mylan Pharmaceuticals, Teva Pharmaceutical, and Watson Pharmaceutical. The complaint alleges that the drug makers wrongfully inflated "average wholesale prices" in a way that enabled pharmacies to receive excessive reimbursement for filing prescriptions for Medicaid patients who bought generic drugs for depression, schizophrenia, seizures, angina, and other serious illnesses.

State of California ex rel. Ven-A-Care

In August 2005, California Attorney General Bill Lockyer announced that his office had filed a civil complaint against 39 drugmakers, claiming that they manipulated the state Medi-Cal prescription drug program to pay artificially inflated prices. The complaint alleges that the manufacturers provided false and misleading drug pricing information, knowing Medi-Cal would rely on it to establish payment rates. By defrauding the State into paying higher reimbursement rates, the drug makers created a financial incentive for dispensers to utilize their products.

State of Nevada ex rel. Clark County v. AF Construction

In September 2005, Deputy District Attorney Lee Thompson announced that his office had filed a civil complaint against AF Construction and its 12 subcontractors for overbilling on construction of a new tower at the Clark County Detention Center. The complaint alleges that AF Construction submitted false claims, records, and statements to the County during the expansion of the jail. The project was expected to be completed in May 2001, but was not finished until October 2003. Despite requests from the County throughout construction, AF Construction failed to deliver updates on its process. The Nevada Attorney General's office has intervened in the matter.

Judgments and Settlements

JULY 1–SEPTEMBER 30, 2005

U.S. ex rel. Rademacher v. Softview Computer Products, **(D. DC)**

In July 2005, the DOJ announced that Softview Computer Products had agreed to pay **$9 million** to resolve allegations of overcharging the General Services Administration (GSA) for computer accessories. The Government alleged that the company failed to give the GSA its best price on computer accessories and failed to disclose that one of its products contained a part manufactured outside the United States. Gerald Rademacher, a former district sales manager, filed this *qui tam* suit in 2003. The relator's share is $1.58 million, or approximately 18 percent. Paul Scott (San Francisco) represented the relator.

U.S. v. Simi Valley Hospital and Health Care Services, **(C.D. CA)**

In July 2005, the DOJ announced that Simi Valley Hospital and Health Care Services had agreed to pay **$3.6 million** to resolve allegations of Medicare fraud. The Government alleged that the hospital routinely upcoded Medicare claims for treatment of pneumonia cases from 1993 to 1998, classifying them as "severe respiratory infections." Assistant U.S. Attorney Lisa Palombo represented the Government.

[Editor's Note: The settlement in this case was reached without a complaint having been filed.]

U.S. v. Universal Health Services, **(E.D. PA)**

In July 2005, the DOJ announced that Universal Health Services of Delaware, Inc. and Central Montgomery Medical Center had agreed to pay **$200,000** to settle allegations of Medicare and Medicaid fraud. The Government alleged that the hospital and its managing company collected Medicare and Medicaid payments for patients improperly subdued by unnecessary physical or chemical restraints. Assistant U.S. Attorney David Hoffman represented the Government.

U.S. v. Harvard University, **(D. MA)**

In August 2005, the DOJ announced that Harvard University, Andrei Shleifer, and Jonathan Hay had agreed to pay **$31 million** to settle allegations of fraudulently billing USAID. The Government alleged that Shleifer and Hay, as Project Director and Manager, were paid under a USAID grant to lead a project to provide advice to the nascent Russian economy on privatization, open markets, and the rule of law. Instead, Shleifer and Hay used their positions and substantial influence to make prohibited investments in Russia in the areas in which they were providing advice, essentially self-dealing. Assistant U.S. Attorney Sara Bloom represented the Government.

U.S. ex rel. Relator v. Apria Healthcare

In August 2005, Apria Healthcare Group, Inc. announced that it had reached a preliminary agreement to pay **$17.6 million** to settle allegations of Medicare fraud. The Government alleged that Apria Healthcare inaccurately billed Medicare from 1995 to 1998.

U.S. ex rel. Reilly v. Catskill Regional Medical Center, (S.D. NY)

In August 2005, the DOJ announced that the Mount Vernon Hospital had agreed to pay $**2.65 million** to settle allegations of Medicaid fraud. The Government alleged that in conjunction with its management consultant Applied Case Management, Mount Vernon Hospital engaged in an illegal patient referral for kickbacks scheme to defraud Medicare. John Reilly, a former employee, filed this *qui tam* suit in 2000. The relator's share was $530,000, or approximately 20 percent. Tim McInnis of The Law Office of Timothy J. McInnis (New York) and David Koenigsberg of Menz Bonner & Komar (New York) represented the relator. Assistant U.S. Attorney Ramon Reyes Jr. represented the Government.

U.S. ex rel. Pollak v. Board of Trustees of the University of Illinois, (N.D. IL)

In August 2005, the DOJ announced that the University of Illinois at Chicago had agreed to pay **$2.5 million** to settle allegations of Medicare fraud. The Government alleged that the University of Illinois Hospital intentionally misdiagnosed patients in a liver transplant scheme. By falsely making the patients eligible for transplants, the hospitals increased their chances to perform the minimum transplants to become eligible for Medicare and Medicaid reimbursements. Raymond Pollak, a surgeon and Professor at the University of Illinois at Chicago, filed this *qui tam* suit in 1999. The relator's share was $36,000, or approximately 14 percent. Robin Potter of Robin Potter & Associates (Chicago) represented the relator.

[Editor's Note: This settlement ends litigation that resulted in settlements in 2003 with the University of Chicago College of Medicine and Northwestern Memorial Hospital, in which those hospitals agreed to pay $115,000 and $23,587, respectively, to settle related allegations.]

U.S. ex rel. Garner v. Anthem Insurance Co., (S.D. OH)

In August 2005, the DOJ announced that Anthem Insurance Co. had agreed to pay **$1.5 million** to settle allegations of fraudulently billing the Federal Employee Health Benefits Program (FEHBP). The Government alleged that Anthem included profit in the cost of certain services billed to the program by a company under common corporate control and improperly calculated the amount of drug rebates due the program. The allegations relate to the period from 1992 through 2002. Andrew Garner

III, a former employee, filed this suit in 1998. The relator's share has not yet been determined. Jim Helmer of Helmer, Martins, Rice & Popham Co., L.P.A. (Cincinnati) represented the relator. DCIS and the Office of Personnel Management Inspector General investigated the matter. U.S. Attorney Gregory Lockhart managed the case for the Government.

U.S. v. Watson Wyatt & Company, (D. DC)

In August 2005, the DOJ announced that consulting firm Watson Wyatt & Company had agreed to pay **$689,828** to settle allegations of improperly billing the Department of Defense. The Government alleged that between 1997 and 2003, Watson Wyatt submitted improper invoices to the United States for actuarial consulting work done on the Navy Exchange Service Command ("NEXCOM") and the Bureau of Naval Personnel ("BUPERS") projects. After discovering that it had inappropriately billed NEXCOM and BUPERS, Watson Wyatt promptly reported the irregularities to DoD and requested and gained admission into the DoD Fraud Voluntary Disclosure Program. NCIS and DOD OIG investigated the matter. Assistant U.S. Attorney Brian Sonefeld represented the Government.

U.S. v. Chronimed, (D. DC)

In August 2005, the DOJ announced that Chronimed, Inc. had agreed to pay **$475,000** to resolve allegations of Medicaid fraud. The Government alleged that Chronimed improperly billed Medicaid for 1,695 fraudulent prescriptions, including scheduled medications, that it accepted and dispensed between January 1, 2000, and April 1, 2000. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorneys Brian Sonfield, Rudolph Contreras, and Edward Alkalay represented the Government.

U.S. ex rel. Ven-A-Care v. GlaxoSmithKline, PLC, (D. MA)

In September 2005, the DOJ announced that GlaxoSmithKline, PLC had agreed to pay **$150.8 million** to resolve allegations of Medicare fraud. The Government alleged that GlaxoSmithKline engaged in a scheme to inflate the price of Zofran and Kytril, two anti-nausea drugs used to counter nausea brought on by radiation and chemotherapy. The drug manufacturer charged health-care providers less for the drugs than they charged Medicare knowing that providers would get to pocket the difference, according to the DOJ. The small home-infusion company Ven-A-Care of the Florida Keys, Inc. filed this *qui tam* suit in 2002. James Breen of The Breen Law Firm (Alpharetta, GA) represented the relators. The relator's share is $26 million, or 17 percent. HHS OIG, the Office of Program Integrity of TRICARE, and the National Association of Medicaid Fraud Control Units investigated the matter. Attorneys from the DOJ Civil Division and the U.S. Attorneys' offices for Massachusetts and Southern District of Florida represented the Government.

***U.S. ex rel. Brown v. Caremark*, (E.D. PA)**
***U.S. ex rel. Waite v. Caremark,* (E.D. PA)**
***U.S. ex rel. Schumann*, (E.D. PA)**

In September 2005, the DOJ announced that Caremark Rx Inc. of Nashville had agreed to pay **$137.5 million** to settle allegations of Medicare fraud. The Government alleged that AdvancePCS, a Caremark subsidiary, took kickbacks from drug manufacturers to give their products favorable treatment under contracts with the Federal Employees Health Benefit Program, the Mailhandlers Health Benefit Program, Medicare + Choice, and other government programs. Former AdvancePCS executives Mary Jean Brown, Kevin Waite, and Karl Schumann filed this *qui tam* suit in 2002. Scott Simmer of Robins, Kaplan, Miller & Ceresi (Washington) represented the relators. Mitch Kreindler and Sharon Gurak served as local counsel. The relators' share has not yet been determined. Associate U.S. Attorney James Sheehan represented the Government.

U.S. ex rel. Razin v. Eisenhower Medical Center

In September 2005, the DOJ announced that Eisenhower Medical Center in Rancho Mirage had agreed to pay **$8 million** to settle allegations of Medicare fraud. The Government alleged that Eisenhower Medical Center's cost reports included costs completely unrelated to patient care at the hospital. Mark Razin, a former consultant for Healthcare Financial Advisors, Inc. filed this *qui tam* suit in 1998. Mary Inman of Phillips & Cohen (San Francisco) represented the relator. Assistant U.S. Attorney Wendy Weiss represented the Government.

***U.S. ex rel. Relator v. Providian Financial Corp.*, (N.D. CA)**

In September 2005, the DOJ announced that Providian Financial Corp. and Total System Services, Inc. had agreed to pay **$6 million** to settle allegations of defrauding the U.S. Postal Service. The Government alleged that credit card payment processor Total System Services used a discount postal rate for materials mailed on credit card issuer Providian's behalf, even though both parties knew Providian was not eligible for the discount rate. Mary Inman of Phillips & Cohen (San Francisco) represented the relator. The relator's share will be $1.2 million, or 20 percent. U.S. Attorney Kevin Ryan managed the case for the Government.

***U.S. ex rel. Calabrese v. AdminaStar Federal, Inc.,* (W.D. KY)**
***U.S. ex rel. Moore and Scott v. AdminaStar Federal, Inc.*, (W.D. KY)**

In September 2005, the DOJ announced that AdminaStar Federal had agreed to pay **$6 million** to settle allegations of Medicare fraud. The Government alleged that AdminaStar tampered with Medicare files and claims information and hung up on customer service phone calls in an effort to improve scores on Medicare evaluations. The relators' share has not yet been released. U.S. Attorney David Huber managed the case for the Government.

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

In September 2005, the DOJ announced that Office Depot had agreed to pay **$4.75 million** to settle allegations of contract fraud against the General Services Administration (GSA). The Government alleged that Office Depot sold office supply products manufactured in countries not permitted by the Trade Agreements Act to United States government agencies. Edward Wilder and Robert Chou Lee, two executives of Safina Office Products, filed this *qui tam* suit in 2003. The relators' share is $712,500, or approximately 15 percent. Vince McKnight of Ashcraft & Gerel (Washington) represented the relators. U.S. Attorney Kenneth Wainstein managed the case for the Government.

U.S. ex rel. Marrero v. Breeze-Eastern**, (D. NJ)**

In September 2005, the Department of Transportation announced that manufacturing company Breeze-Eastern had agreed to pay **$1.1 million** to settle allegations of fraudulent equipment repair. The Government alleged that Breeze-Eastern made false certifications concerning the overhaul and repair services to hoists and hooks used in helicopters for the United States military. Lorenzo Marrero, a former employee, filed this *qui tam* suit. The relator's share is $220,771, or 20 percent. Neil Mullin of Smith-Mullin, P.C. (Montclair) represented the relator. Assistant U.S. Attorneys Stuart Minkowitz and Daniel Gibbons and Paul J. Worgman of the DOJ Commercial Litigation Branch represented the Government.

U.S. v. MedQuest Associates, **(N.D. GA)**

In September 2005, the DOJ announced that MedQuest Associates, Inc. and its subsidiaries had agreed to pay **$519,000** to resolve Medicare overpayments uncovered in a government investigation. The government investigation arose from a *qui tam* lawsuit that the DOJ did not intervene in. MedQuest has entered into a separate, confidential agreement with the relator.

U.S. v. Solaris Health Systems**, (D. NJ)**

In September 2005, the DOJ announced that Solaris Health Systems had agreed to pay **$230,000** to resolve allegations of Medicare fraud. The Government alleged that from 1992 through 1998 JFK Medical Center and Muhlenberg Regional Medical Center submitted claims for inpatient hospital stays for people who actually received outpatient treatment. Assistant U.S. Attorney Daniel Gibbons represented the Government.

State of Connecticut v. Dey, Inc.

In July 2005, Connecticut Attorney General Richard Blumenthal announced that Dey Inc. had agreed to pay **$2.5 million** to settle allegations of price-fixing on respiratory medications. The government alleged that Dey Inc. illegally inflated the average wholesale prices of the respiratory medications it sold. The California company has agreed to pay $1.7 million to state and federal medical assistance programs and to donate respiratory drugs worth $800,000 to free clinics across Connecticut.

Gambro Healthcare, Inc.

In September 2005, it was reported that Tennessee-based Gambro Healthcare, Inc. had agreed to pay **$37.5 million** to resolve allegations of Medicaid fraud against 37 states and the District of Columbia. The various state governments alleged that Gambro created a shell corporation named Gambro Supply Corp., to bill Medicaid programs at a higher reimbursement rate permitted for clinics rather than at a lower rate allowed for home dialysis. The scheme resulted in excessive reimbursements by the states.

Developments in the Law

Roberts Discusses the False Claims Act During Confirmation Hearings

ROBERTS DISCUSSES THE FALSE CLAIMS ACT DURING CONFIRMATION HEARINGS

Joseph E. B. White

On Thursday, September 29, 2005, D.C. Circuit Court Judge John G. Roberts was confirmed as the seventeenth Chief Justice of the United States. During the confirmation hearings, Senator Charles Grassley discussed a number of issues relevant to the False Claims Act. In response, Roberts expressed concerns that he wrongly decided the controversial Totten decision, stressing that **"it's certainly possible that the majority in that case didn't get it right. And the dissent, that was a very strong dissent, did get it right." On the question of whether the False Claims Act potentially violates the Eighth Amendment,** Roberts clarified that "[t]reble damages is something that's familiar in the law in a number of areas and is not regarded as impermissible punishment in this context." With that being said, however, Roberts's view on possible Article II Constitutionality issues was more disturbing. Roberts pointed out the following to the Committee:

> I do know that some have raised additional objections under Article 2, which go to the fact that this might interfere with the executive's authority to execute the law; in other words, you have private individuals bringing suit. I'm not sure that those issues have been finally resolved. And obviously, if those cases do come up, I'll want to keep an open mind. The factor you mentioned, obviously, about historic practice, that is something that the court does look to in assessing constitutionality. If it's something that the founders were familiar with or a practice that they engaged in and showed no disagreement with, while not determinative, that is a factor that the court would look at. I don't know if any of those cases are going to come before the court. But if they do, that's one of the considerations that will have to be taken into account.

Only time will tell whether Chief Justice Roberts truly respects the "historic[al] practice" supporting the constitutionality of the FCA *qui tam* provisions.

In Their Own Words

Reflections

REFLECTIONS

Walter F. DeNino

BACKGROUND

Dr. Eric T. Poehlman was an internationally recognized authority on metabolism and obesity, specifically as related to aging in women. I had been working under his direction since 1997, when I joined his research team as a work-study student. In 1998, I wrote and defended a senior honor's thesis under his guidance for which I earned both the Department of Nutrition and College of Life Sciences Excellence in Research Awards. Based on my success and proven ability, I was offered a part-time position in the laboratory to work on various projects following graduation from the University of Vermont (UVM). Within two years of graduation, I was a coauthor on two papers and three abstracts, and lead author on another manuscript. I viewed Dr. Poehlman as a mentor—someone that would be instrumental in my future career in research and possibly in medicine. He displayed a work ethic and passion that I admired. He worked long hours and, on many occasions, he was known to work throughout the weekend or holidays on papers and grant applications. At a relatively early age, he established himself as an expert in his field and a major grant winner for the University. He was awarded the Lily Scientific Achievement Award in 2000 for his work in obesity research. Charismatic and eloquent, he was an impressive public speaker. His devotion and dedication to science, however, seemed to stop at nothing.

DISCOVERY

In late September of 2000, Dr. Poehlman proposed that I take the lead on writing a paper from the Vermont Longitudinal Study of Aging data set. I eagerly ran an exploratory statistical analysis and presented the results to him. The intention was to determine the direction of the publication after the data had been collected, within a "retrospective" analysis. Among the variables of interest were blood lipids, body composition (%fat, fat-free mass) aerobic fitness, and energy expenditure data. To my surprise, the analysis indicated that as our cohort aged, expected deteriorations were not evident in most of the measurements. Dr. Poehlman appeared equally surprised and asked for the data set in order to check for "outliers," "mis-entries," and "reversals" of data points. His explanation was that there could be anomalies or errors that were causing the unexpected results, and he would take it upon himself to check. Ordinarily, this would be a tedious task assigned to a student or research assistant. Even more puzzling, he told me that the patient files were at his home. Three days later, Dr. Poehlman returned the dataset to me after his verification process and asked that I re-analyze the numbers. This time, age-related deteriorations were present in a number of variables and statistically significant. In other words, the statistics *now* sent a completely different message that was more fitting with the expected notions on aging.

DUE DILIGENCE

My suspicions arose immediately and I contacted a trusted former member of the lab. I wanted to confirm that someone with more experience would also find this series of events troubling. He agreed that something was amiss and also told me of another student who had similar concerns years earlier. However, when the concerns were raised to Dr. Poehlman directly, the young Ph.D. student's career was threatened, so he gave up. I began returning to the hospital at night to perform a thorough verification of the data set with the patient medical records. It became blatantly obvious that someone had been manipulating the data, and in some cases, even fabricating it. Moreover, due to confidential conversations with five other current and former students and collaborators of Dr. Poehlman, I became increasingly confident that my concerns were valid. I also learned that it was exceedingly likely that previously published material had been fabricated.

At this point, I felt that I had three options in handling the matter: 1) look the other way and write the paper in order to benefit my own career and avoid a difficult confrontation; 2) address my concerns regarding the integrity of the data with Dr. Poehlman personally; or 3) to report my concerns in an official manner to the Office of Sponsored Programs (OSP) at the University, in turn launching an investigation. For weeks I struggled with the options. I registered an anonymous email account and wrote to the Office of Sponsored Programs and General Counsel for the University seeking advice and exploring the procedure for reporting misconduct. I first was afraid that going forward with a formal accusation would somehow affect my career possibilities, especially if my accusations were eventually rejected or dismissed. I also became concerned that Dr. Poehlman would use physical harm or other intimidation to prevent me from going forward. I hid the disks containing the data each night, afraid that someone would break into my apartment to destroy them. A faculty member within the group warned me to "be careful." Challenging the authority of the professor and researcher I respected and in some cases feared so much was intimidating. I worried about the legal and financial risks that my accusations could bring. I wanted to find someone on the faculty who was willing to look at the data carefully and critically and to support me publicly in my accusations. I thought it was just too great a burden to fall on the shoulders of a 23 year-old with little credibility or resources.

CONFRONTATION

I decided that I would first try to address the discrepancies personally with Dr. Poehlman in the event that I was incorrect or misunderstanding some technical aspect of the database. In a letter that was perhaps the most difficult of my life to write, I outlined all of my concerns for Dr. Poehlman and *demanded* that he address them in writing. He quickly responded with a feeble list of excuses that were unconvincing and that I could not accept. Whereas I had precise concerns with specific data points, he vaguely suggested that the data discrepancies were due to entry errors, a hard drive crash, and

the work of a statistician performing advanced simulation operations. Soon, another letter followed that provided an additional layer of deceit in hopes of disguising the truth. In a last ditch effort to gain the support of a senior member of the faculty, I met with a close collaborator of Dr. Poehlman that I admired, respected, and thought I could trust. During our conversation, though, he adamantly did not want to hear the details of my suspicions, even though the physician told me that if I were "his own son" he would advise me to go forward to the authorities and report the suspected misconduct. He also told me that questioning the validity of Dr. Poehlman's work was reasonable, as his results sometimes "looked too good." (He would later deny this conversation and take a formal stand in support of Dr. Poehlman) Armed with the two "justification" letters, a glowing recommendation that he had recently written for me for medical or graduate school, the data set, and other email records, I filed my formal accusations with the Office of Sponsored Programs at the University of Vermont at the end of December of 2000.

INVESTIGATION

University policy outlined a three-step process that began with an informal inquiry to test the merit of my accusations. Within days, the Dean of the College of Medicine determined that an investigation was warranted and a committee of five faculty members was assembled, directed by the Office of General Counsel, to lead the procedure on behalf of the University. The Committee conducted countless interviews with collaborators, staff, and students. As a result of my accusations and the intensive investigation conducted by UVM, it was determined that Dr. Poehlman had fabricated numerous grant applications, manuscripts, and data sets. The most glaring example of the egregiousness of his deceit was a 1995 paper in the *Annals of Internal Medicine*. The paper reported that as women traverse menopause, quantifiable deteriorations in energy expenditure and body composition occur. As it turned out, follow-up data for 32 of the 35 patients was fabricated. He had been betraying his colleagues, peers, students, and the entire profession for more than ten years.

Along the way, the professor and his lawyers made every attempt to obstruct the investigation and avoid the inevitable. At perhaps his lowest point, Dr. Poehlman announced his homosexuality to the committee. My purported "homophobia," he argued, was the reason that I was attempting to destroy his career. Early in the investigation, Dr. Poehlman resigned from UVM in September 2001 and took a position at the University of Montreal. He would go on to be awarded a $1 million endowed chair by the Medical Research Council of Canada and several other Canadian grants and awards while he was being investigated as a fraud in the United States.

Almost three years later, the University process was complete. The formal stage of the investigation produced a report detailing the findings of the committee, and this report would be sent to the Office of Research Integrity (ORI) within the National Institutes of Health. Poehlman *et al.* filed an injunction in federal court in Vermont to try to prevent this, however. Once the report was in the hands of ORI, however, the Department of Justice intervened via the U.S. Attorney's Office in the District of

Vermont. It was at this point that I retained counsel and began working with Philip R. Michael on a *qui tam* suit. Ironically, I wasn't aware of this option until an investigator from the U.S. Attorney's office mentioned it in an interview. Once the case officially became a federal matter, it came to a very quick conclusion.

CONCLUSION

In the end, Dr. Poehlman would confess to the U.S. Attorneys in Vermont to all of my accusations in the early spring of 2005. Directly from the ORI press release:

> "Dr. Poehlman agreed to plead guilty to making material false statements in a research grant application in April 1999, upon which the National Institutes of Health (NIH) paid $542,000 for Dr. Poehlman's research activities. In addition, Dr. Poehlman has agreed to pay $180,000 to settle a civil complaint related to numerous false grant applications he filed while at UVM. In addition, Dr. Poehlman will pay $16,000 in attorney's fees to counsel for Walter F. DeNino, a research assistant whose complaint of scientific misconduct spurred an investigation by UVM. Also, Dr. Poehlman has agreed to be barred for life from seeking or receiving funding from any federal agency in the future, including all components of the Public Health Service, and to submit numerous letters of retraction and correction to scientific journals related to his scientific misconduct. Dr. Poehlman also agreed to be permanently excluded from participation in all Federal health care programs. In these agreements, Dr. Poehlman has admitted that he acted alone in falsifying and fabricating research data and filing false grant applications."[1]

Last year, he resigned under pressure from the University of Montreal. He now awaits sentencing in U.S. Court in the District of Vermont, facing five years imprisonment, and has yet to speak publicly on the matter.

REFLECTIONS

My singular goal in this matter was to defend the truth and the ethics of science and medicine. I could never have proceeded in my own career direction knowing that I did not act on what I discovered. I felt that Dr. Poehlman's misconduct and subsequent obstruction of the investigation process was of the most serious nature and that the punishment should be commensurate. At the time that I brought my accusations, I had thoroughly and carefully considered their potential ramifications. I tried to envision what the outcome would be and all of the possible routes that the process could

1. Office of Research Integrity Press Release, March 17, 2005 (http://ori.dhhs.gov/misconduct/cases/press_release_poehlman.shtml)

take. Throughout this reflection period that eventually led me to file formal accusations, I was determined that no matter what, the truth would prevail.

Even with my closest advisor on the matter, however, I never could have imagined the course of events that would follow. From the ORI press release:

> "During the course of this investigation, Dr. Poehlman destroyed electronic evidence of his falsifications and fabrications, presented false testimony, presented falsified documents, and influenced other witnesses to provide false documents to the investigating authorities."[2]

He and his lawyers also viciously and relentlessly attacked my character and credibility. I considered multiple times leaking the details of the investigation to the press in an effort to destroy my former mentor publicly. I viewed this as my only defense. I found it extremely difficult to simply act, as instructed, as a witness during the University investigation. My emotional and psychological investment alone could not permit this.

Filing a *qui tam*, in many ways, empowered me during the process, if only at the very end. Working with my lawyer, Philip R. Michael, gave me more of a voice in the proceedings and greater confidence. Because I only learned of the *qui tam* option near the end of the investigation, I would like to specify that it is very clear that my motivations were not financial.

People always ask me, "What could have motivated Dr. Poehlman to enter into this pattern of behavior?" I truly believe that he succumbed to the pressures that are on research scientists to succeed. Grants and publications are the measures of success, and, frankly, there isn't enough funding to support all of the high quality research projects being proposed to funding agencies. The low levels of funding and highly competitive environment breed the necessity for productivity and generation of novel and interesting results. Dr. Poehlman's most interesting results and subsequent publications were almost entirely fabricated. A recent paper in the journal *Nature* reports that nearly 15 percent of NIH funded scientists anonymously report committing some form of scientific misconduct, nearly 1.5 percent admitted to fabrication and falsification of data. Presumably, the realistic incidence is considerably higher.

I have no regrets on my involvement in this matter. My only regret is that this once highly respected and accomplished scientist succumbed to whatever pressures exist and chose a path of deception and fraud over truth.

ACKNOWLEDGEMENTS

I would like to thank TAF for inviting me to share my experiences in the *Quarterly Review*. Most importantly, I want to express my gratitude to Dr. Andre Tchernof who provided endless debate, vision, and advice during the most difficult stages of this process. Finally, I would also like to thank Philip R. Michael for his work on the *qui tam* portion of the case.

2. *Id.*

Lessons From the Frontlines

- **The Intervention Decision**
- **The New York City False Claims Act: A Tale of One City**

THE INTERVENTION DECISION+

Stephen Altman[*]

The Government's decision whether to intervene in your case is often critical to your success.[1] Over 90 percent of relators' recoveries have been from intervened cases. This may be due to a judge's bias against the non-intervened case, the Government's access to witnesses and evidence, its resources, or its expertise. But the most important reason is because the Government has a record of intervening in good cases. This article is intended to assist you in presenting a good case and assist you in developing the important working relationships with government personnel that can enhance your case. Initially, let's start with some basics on which I will elaborate below:

a. It is no big secret—bring good cases, bring them correctly, and bring them against defendants that can pay the judgment.

b. DOJ does not care that it is a *qui tam*—it is just another case to consider and the relator is just a witness. They don't see it as your case. It is the Government's money and the Government's case. If DOJ declines, it does not become your case; it becomes your case to litigate.

c. DOJ's focus is driven by the priority to bring in as much money as it can from each case while balancing its resource limitations.

d. Resources are a growing concern—filings appear to be holding steady or increasing, there is a hiring freeze at Main Justice, there are large cases that eat up enormous time, and conflicting litigation priorities are using up much of the Division's litigation support budget. In addition, the resources of the Inspector General (IG) to investigate cases are stretched thin. We may expect more cases to be assigned to AUSA's and more reliance on agencies to run investigations.

e. The *qui tam* attorney can make a difference at three critical points: The initial presentation; assisting the investigation; and helping understand the results of the investigation. As discussed below, each of these will depend on the individuals involved, the agency involved, and the facts of the particular case.

f. Consider DOJ's perspective of the case and of your role—review the "Holder Memorandum" for factors that Justice attorneys are asked to con-

+ This article is for educational purposes only and is not intended to be relied upon for legal advice.

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1. Through fiscal year 2004, the United States had intervened in 800 of the 4700 *qui tam* cases filed. The U.S. had also recovered $8 billion from intervened cases, but only $375 million from declined cases. 2380 of the 2850 declined cases had been dismissed with no recovery. Only 164 declined case have produced recoveries. (Data from the TAF website.)

sider and the Relator Share Guidelines and cases that discuss them, for factors to help you assess your case, and your role in working with DOJ. And, consider the DOJ attorney's perspective. Yours is not his/her only case, not his/her largest and not his/her most demanding case.

g. ***Note Bene.*** It isn't about how bad you think the conduct is—it is about proving an FCA violation: The witnesses, the documents, the damages. To influence DOJ's consideration of these factors, your credibility is your most important asset.

WHAT DOES DOJ DO WITH A NEW *QUI TAM*?

a. The original complaint and disclosure statement are delivered to the Director of the Commercial Litigation Branch's Fraud Section, Mike Hertz. Mr. Hertz assigns it to a trial attorney (this term refers to the attorneys at Main Justice) and assigns an Assistant Director to be reviewer on the case. The assignment is based, *inter alia*, on area of expertise, complexity of the case, and workload.

b. The Assistant Director calls the Affirmative Civil Enforcement (ACE) AUSA to discuss how the case should be handled. If the single damages are less than $1 million, it will be automatically *delegated* to the U.S. Attorney's Office. That office will have complete authority to bring the case, decline the case, or settle the case. The trial attorney at Main Justice will still monitor the case, primarily focusing on any legal issues, especially *qui tam* issues that arise, and monitoring the end result for reporting purposes. Handling of the merits of the case will be done by the AUSA. If the damages are between $1 million and $5 million, the case can be given to the U.S. Attorney on a *monitored* basis to litigate; but the decision on whether to intervene and decisions to settle must be approved by the Assistant Attorney General for the Civil Division. Therefore, the trial attorney who is assigned keeps a closer tab on the case. Those cases not assigned to the U.S. Attorney and larger cases may be handled individually by the assigned trial attorney or *jointly* with an AUSA. This last category was the most popular for quite a while, but resource problems at Main Justice and in the field may cause a decline in those assignments. This decision of how to handle the case may also be based on expertise, experience, and workload.

c. Main Justice forwards a copy of the complaint and disclosure statement to the DOJ Criminal Division, as well as the relevant Office of Inspector General. The Department is not required to conduct an exhaustive investigation in every case. The Department is required to use its resources and those of the IG's carefully and it may not seek an extensive investigation if the case appears frivolous or otherwise not cognizable.

d. A copy of the complaint and disclosure statement is also sent to the relevant Office of General Counsel. Eventually, the General Counsel will be asked to provide the agency's recommendation whether to intervene in the case. (A few agencies, such as the Department of Commerce, have delegated that decision to the IG Office.)

e. The decision whether to intervene is made on the recommendation of the trial attorney, Assistant Director and Director at Main, the U.S. Attorney, and the agency (the General Counsel's Office, the IG, or both). In other words, you have multiple audiences. While the recommendation of the trial attorney/AUSA is critical, you should note that getting the first line supervisor to know you and the case is also important, for it allows you to raise your concerns beyond the first line Justice litigator. BUT DO NOT OVERUSE THIS PRIVILEGE. If and when you meet with a supervisor, remember not to undercut or embarrass the trial attorney/AUSA, even when you are disagreeing with him/her.

WHAT IS A GOOD CASE?

a. What are the false claims? What does the contract or regulation require? What was done and said? By whom? How did this cause an economic loss to the United States? You would be surprised how often these simple questions are not the focus of a relator's presentation. Don't just look at the outcome—think about the FCA basics and then consider the admissible evidence. (I know that investigating these cases can be very difficult. You may be under time pressure and resource pressures. You may not have access to important information, and you may be concerned that obtaining the information may lead to a public disclosure. These important issues are not part of this discussion and could be an entire presentation by themselves.)

b. What are the damages? Damage calculations may be very difficult and complex. You do yourself and your client a disservice by taking the most extreme theory, such as "every dollar spent," when you bring a case. Present what numbers and estimates you have and work with the trial attorney/AUSA to come up with damage methods. (The damage calculation will be a future article). Identifying the claims and the penalties is also important. Remember, however, that most cases are largely driven by the damages. Penalties may or may not be considered in settlement discussions.

c. Knowledge and Materiality. Do not assume that because the law is favorable, these issues are not important. FCA cases are not simply about mismanagement and negligence. They are also not about differences of opinion over how to interpret contract requirements. Ask the following: What if the defendant had told the truth? Would they have gotten paid anyway? How clear was the regulation or contract term? What guidance had been provided

by the Government? Is there evidence that the defendant recognized a difference in their and the Government's interpretation? Did the defendant seek advice and from whom? Did the Government know about the differing interpretations? What has the agency done in similar circumstances?

d. Defenses. There are many regularly argued defenses (AUSA Mike Theis prepared a list of the top 25, which will be another article). You should be particularly prepared to address the following as necessary:

1. No claim was presented.

2. The claim was not false.

3. The claim was not "knowingly" false.

4. The Government had knowledge of the conduct and took no action.

5. The nexus between the conduct and the decision to pay is insufficient.

e. Enforcement history. Just because the agency has never enforced the regulation does not mean you do not have a case; but you better have an explanation. Do they care? Have they approved such conduct? (see e.g., the *Seaward Marine* decision.) Simple contacts with the agency may answer these questions.

f. Ask tough questions and consider how to bolster your evidence. For example: Is the conduct pervasive in the industry? Which way does this cut? Do you have examples of entities doing it correctly? Is there an independent expert that confirms your view? Can you find a disinterested witness that confirms your allegations? Should agency personnel have known of the conduct? What are the relator's credibility issues? Vetting your case in such a way as you can anticipate the trial attorney/AUSA's questions is one way you enhance your credibility and the willingness of the Government to go forward with your case.

WHAT IS THE CORRECT PROCEDURE?

a. File under seal. Check the particular procedures and rules with the clerk.

b. File in the correct jurisdiction. You will want to check the law as it varies by circuit but DOJ may move the case to the best venue.

c. Do not file the disclosure statement of material evidence with the complaint.

d. In preparing your disclosure consider:

1. A clear presentation

2. A quality not quantity product

3. An opportunity to build credibility; do not oversell

4. Whether experts can enhance your position

5. Whether you can provide a chart of the corporate structure identifying the key players

6. Whether there is material that should be provided orally

e. Do not include privileged material.

f. Do not breach the seal.

WORKING WITH THE INVESTIGATION—THE PARTNERSHIP

a. Remember, at this point the relator is just a witness—maybe an important one, maybe not. As Jim Helmer has written: "While the relator should not interfere with the Government's investigation, both the relator and relator's counsel probably can provide ample assistance." (*False Claims Act: Whistleblower Litigation,* Helmer, Lugbill and Neff, Lexis Publishing 1999 at 289). "Remaining actively involved does not, however, mean stubbornly insisting on participating in all details of the Government's investigation." (*Id.* at 290 discussing particularly undercover investigations.)

b. Consider when to have a first meeting between the Government and relator. Such a meeting can enhance the working relationship between the trial attorney/AUSA and the relator.

c. You will probably have an opportunity to make a presentation. If you are not asked, you can offer. At the meeting, DOJ should endeavor to define the scope and contours of the case. Ask whether there has been a prior investigation. Be prepared to explain where and how you got your evidence. Identify current and former employees. Ask about rules on taking documents. Where relevant, provide information on defendant's financial situation. Discuss the creation of a joint privilege and how to protect it.

d. What is the impact of a criminal investigation?

1. The presence of a criminal investigation is a good sign, for it means that the Government is taking the matter seriously. There are, however, downsides. The first is that it may slow the development of the civil case, and a second is that it may remove you one step further from the investigation. The role the relator will play as a witness in that investigation is

critical. You must now try to build a relationship with the prosecutor and investigator.

2. The prosecutor will probably only focus on the criminal case. He or she will not see your client as a relator but as a witness and you should keep in mind that you too must see your client as a witness in a criminal investigation. You can play a helpful role here by keeping the civil attorney aware of the progress of the investigation. Oftentimes, the prosecutor will not be considering the civil aspects of the case and may not be communicating with the civil attorney. Therefore, if you and the relator are active participants in the investigation, you can assist that communication process.

3. Be familiar with the rules of parallel proceedings. To facilitate communication between the cases, you will need to have some familiarity with the rules of parallel proceedings and grand jury secrecy. While this may also be a topic for a future article, note that the prosecutors and investigators may also be unfamiliar with the rules and may err in either the direction of being too conservative or too cooperative. Take the step to consult with the civil attorneys who do this regularly for guidance.

4. The orphan case: a cautionary tale. This is the case that is being actively investigated by a grand jury for several years (at least according to the prosecutor or his second or third replacement), it is then "no-prossed," the civil trial attorney/USA does not know anything about the case, and the judge is tired of granting extensions on the basis of the "soon to be" indictment. If you can see this coming you may be able to take steps to avoid its consequences.

e. Help the AUSA—Make it easier not harder. Expect requests for extension of the seal. You will usually want to agree to them, but may use the opportunity to obtain an update on the investigation. Assist in researching legal issues and offer to help with the factual investigation. Can your client help write subpoenas or identify documents and witnesses? Should you hire an expert or consultant? Such steps show your commitment to the case and carry some weight in the Government's consideration. Finally, be sensitive to the government attorney's workload. Your case is not their only case and probably not their largest. It does not have the most immediate deadlines. You need to find a balance between helpful reminders and being a pain.

f. At some point during the investigation, DOJ will apprise the defendant of the allegations. This may be after a limited lifting of the seal in order to allow the defendant to review and comment on the allegations. The trial attorney/AUSA, as any prudent litigator, wants to understand the potential pitfalls before committing him/herself. You may or may not be invited to a meeting with the defendant. If not, the trial attorney/AUSA will often report

the defendant's analysis to you. It is critical that you provide a considered response. Be prepared to do additional factual and legal research before you respond.

g. **Create a partnership by being helpful to the AUSA and/or the investigator.** Develop a relationship whereby the trial attorney/AUSA sees it as helpful that you are monitoring the investigation. Think of ways you can assist and what you can bring to the table:

1. Can you provide memos on legal issues, especially on the particular regulations or contract terms?

2. Can you help bring the agency on board?

3. Can you offer resources, such as document reviews?

4. Can you identify additional witnesses and documents?

5. Can you interpret and organize documents?

6. Can you consult with third parties, such as independent specialists in the industry or simply employees at similar companies, to bring neutral opinions that support your allegations?

Seek out the Government's concerns. Provide responses that are conservative and well taken. Recognizing risks does more for your credibility than being so sure of your case. Even if you think the Government's concerns are misplaced, you need to answer them. That will help give you the credibility necessary to redirect their efforts.

h. **How do you open a dialogue?** As Jim Helmer states in his book on *qui tam* actions, "DOJ lawyers are more willing to share information with industrious relator's counsel who make a positive contribution to the Government's investigation" (Helmer at 293).

ADDITIONAL STRATEGIC CONSIDERATIONS

a. **Should you meet with the AUSA before you file?** Probably. But keep in mind that some offices have a policy against such meetings. Should you bring your client? It is helpful to put a face and personality to the relator. But be prepared, be prepared, be prepared. Another experienced *qui tam* counsel, Larry Hammond suggests counseling your client to be careful and to be willing to say what they do actually know rather than speculating. You can always supply an answer after you have had time to analyze it. Your credibility is critical. Be prepared to recognize and admit the problems with your case.

b. Should you meet with the impacted federal agency before filing? With whom should you meet? The Inspector General's Office will conduct the investigation and may be a source of past enforcement history. The General Counsel's Office will probably make the recommendation to Justice regarding intervention. They will also have expertise in interpreting regulations and contract terms. The program office will also have experience in interpreting the key issues and will be the place to find what the Government would have done had they known the truth. Bare in mind that agency program personnel may be reluctant to recognize and admit that they were the victims of fraud. How can you present the allegations in such a way as to help them save face? Care must be taken in talking to any of these offices. You must be careful about the development of your case, creating a record, privileged communications, and public disclosures, among other issues. Nevertheless, too many actions are filed only to have the agency answer a few simple questions that destroy the case. In addition, building the agency's concern for your case is enhanced by personal contact.

c. When presenting the case in the complaint, the disclosure statement, and in oral presentations, try to track the statute. You must balance the need to capture all the damages within your complaint with the negative impact of an overbroad complaint. For example, an allegation that the conduct was done "nationwide," when your client only has evidence of what occurred at his worksite must be bolstered by additional support. Also, make sure you include the correct defendants. Errors of too many and too few can prejudice your case.

d. The innovative case–-that is, the case that raises a new form of fraud or allegations in a program that does not easily fit the FCA mold. Package it as "vanilla" and normal a case as you can; but be frank with the trial attorney/AUSA. Discuss with colleagues how to present the case as a routine matter. With a novel case, the agency's support becomes more important.

e. Listen to the trial attorney/AUSA and the agency. Be flexible. If you think the Government is missing the point, first go back to make sure you are correct. Then provide a written or oral presentation. Consider the audience for this presentation. Should it include the agency personnel, the investigator, or a supervisor at Main Justice?

f. Do not be surprised if the defendant does not want you at their presentation and settlement discussions. The decision of whether you can attend will be made by the trail attorney/AUSA. Discuss it with them beforehand and what your role might be. There are various ways in which you can enhance the Government's presentation; there are also ways in which you may detract.

WHY ARE CASES DECLINED AND WHAT SHOULD YOU DO?

Frequent reasons that cases are declined include:

a. The agency does not care.

b. Damages are not present or cannot be computed.

c. The Government cannot identify the claims.

d. There is insufficient nexus between the fraud and the loss.

e. Lack of evidence that defendants knew they were submitting false claims.

f. The Government has not had the time or the resources to complete an adequate investigation.

g. It isn't a good case.

Do not take a declination as the end of every case. Find out why was it declined? The AUSA may explain the reasons that a case was declined, but will rarely share the Government's investigation. Look forward to an open and frank discussion about those reasons and guidance from the trial attorney/AUSA. It is rare but DOJ has taken a second look and intervened after a declination on a few occasions. By understanding the reasons for the declination, you may be able to focus your discovery in a way that fills in the gaps and allows you to re-present the case to DOJ.

CONCLUSION

Complain as you want, but note well, the Fraud Section is a well-run litigation office. The recoveries per attorney are as high as you can find and its reputation among the defense bar is exemplary for its litigation skills and willingness to take tough cases through trial. It litigates with confidence, is willing to take risks, and yet is conservative in its positions. I say this because you should know that playing to its strengths instead of alleging weaknesses will get you much farther. Those strengths are its focus on the merits of a case rather than on the (small "p") politics or histrionics of a case, and the careful but aggressive approach it takes to each case. Your job is to find ways to enhance DOJ's ability to build on those strengths. Your principle means of accomplishing that job is by doing your homework so you make good presentations of good cases, and by building a working relationship with government personnel.

THE NEW YORK CITY FALSE CLAIMS ACT: A Tale of One City

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The New York City False Claims Act ("NYC FCA")[1] took effect on August 9, 2005. New York City is the third city, after San Francisco[2] and Chicago[3] to adopt its own false claims legislation. It is likely that other municipalities will follow suit.

While the NYC FCA avowedly seeks to reproduce the success of the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* ("federal FCA"),[4] much of its language is hardly recognizable as such. The term "qui tam," for example, appears nowhere in the statute. Still, the NYC FCA represents a different way to achieve the same objectives. Primarily through the efforts of its principal sponsor, Democratic Council Member David Yassky and his staff and and legal staff of the New York City Council and the Corporation Counsel's office, the statute has been thoughtfully crafted to cater for local procedural idiocyncracies as well as the differing views of the various draftspeople on more contentious matters of substance—such as whether whistleblowers should be be permitted to pursue cases that the City declines to join.

A New York City False Claims Act is long overdue. New York is the largest city in the United States. Its annual operating budget of $50 billion is more than any state in the nation other than New York and California. Corruption in key industries in New York City is legendary. For over half a century it has provided abundant grist for the mill in both the public arena and in popular culture. Its pervasiveness has been documented in City, state and federal law enforcement investigations, prosecutions and commissions of inquiry, and it has been depicted in lurid detail in countless movies, books and television shows. While prosecutions and City-mandated structural reforms in recent years have curtailed corruption in key industries like waste hauling

1. A Local Law to amend the administrative code of the city of New York, in relation to creating civil penalties and a private right of action for false or fraudulent claims, Int. No. 630 (2005) (introduced by New York City Council Members Yassky, The Speaker (Council Member Miller), Perkins, Moskowitz, Clarke, Koppell, Liu, Nelson, Recchia Jr., Stewart, Weprin, Gennaro and Brewer), hereafter referred to as "Int. No. 630."

2. *See* San Francisco Admin. Code §§ 6.80 *et seq.*, § 21.35 (1999). A San Francisco district court, in an unpublished opinion, held that the San Francisco FCA was invalid because it prohibited the same conduct proscribed under the California False Claims Act. *See* City of San Francisco v. Tutor-Saliba Corp., No. C 02-5286 CW, slip op. at 47 (N.D. Cal. May 19, 2004).), slip op. at 47. Since the California False Claims Act covers not just false claims against the state but against political subdivisions as well, the City of San Francisco is still served by a False Claims Act.

3. Chicago Ordinance, Chicago, Ill., Mun. Code §§ 1-21-010 through 1-22-060 (2005).

4. "The federal false claims act provides an excellent model for combating fraud by government contractors and other parties … the Council therefore finds that the city of New York should enact legislation modeled on the federal false claims act …" Int. No. 630, § 1.

and wholesale food distribution, a broader attack on fraud in government contracting has been sorely needed. As the New York State Organized Crime Task Force noted in a 1990 report:

> The City's development and infrastructure needs are enormous and acute—schools, jails, office buildings, homeless shelters, housing, pollution control plants, recreational facilities, tunnels, bridges and roads must be built to meet basic individual, social and economic needs . . . When public works programs are riddled with fraud, waste and abuse, costs proliferate, quality deteriorates, delays increase, and the capacity to respond to critical infrastructure needs declines. In short, the quality of life for all New Yorkers is severely threatened."[5]

Contractor monitoring and/or licensing programs run by the City's Department of Investigation, Business Integrity Commission and School Construction Authority are making inroads towards addressing some of these problems but they can only go so far. The respected New York Times investigative reporter Selwyn Raab wrote this of the City's construction industry in 2005:

> In the aftermath of concentrated crackdowns in the 1980s and '90s, New York's billion-dollar construction industry appears nearly as vulnerable as ever to determined gangsters. The obstacles blocking fundamental reforms in the industry were illustrated by a singular setback suffered by [former Mayor] Giuliani. His administration imposed regulatory and licensing rules designed to weed out wiseguys and Mafia-linked companies from major wholesale food markets and the garbage-carting industry. When Giuliani tried to enact similar legislation to scrutinize building projects, he was blocked by an intractable combo of high-voltage developers, contractors, and unions who bottled up the proposed bill in the City Council. Since then, no politician has dared to raise the issue of strict oversight of that corruption-prone industry and its unions, always heavy contributors to election campaigns.[6]

The City's projected spending in that corruption-prone industry alone in 2005–6 tells the tale: $13.7 billion for school construction; $1 billion for new public housing; $1 billion for street resurfacing; $465 million for hospital renovation and reconstruction; $950 million for capital improvements to parks and libraries.[7] And so on.

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5. New York State Organized Crime Task Force, Corruption and Racketeering in the New York City Construction Industry 125, 146, (1990).

6. Selwyn Raab, Five Families 695–6 (St. Martin's Press, 2005).

7. Press Release, Office of the Mayor, Mayor Michael Bloomberg Presents $49.7 Billion FY 2006 Executive Budget; City to Invest in Critical Programs and Infrastructure and Lower Taxes (PR-173-05, May 5, 2005), *available at* http://www.nyc.gov/portal/index.jsp?epi_menuItemID=c0935b9a57bb4ef3daf2f1c701c789a0&epi_menuID=13ecbf46556241d3daf2f1c701c789a0&epi_baseMenuID=27579af732d48f86a62fa24601c789a0&pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2005a%2Fpr173-05.html&cc=unused1978&rc=1194&ndi=1.

If the track record of the federal FCA is any guide, the NYC FCA will have a profound impact on fraud not just in the construction industry but in other traditional enclaves of fraud and big public spending like health care (for example, New York City provides around 25 percent of Medicaid funding) and public welfare.

As TAFEF Chairman Neil Getnick, who was one of the law's principal supporters, told the audience at the signing ceremony at City Hall on May 19, 2005: "The message for the business community is clear: this City Council and the Mayor have designed a law to level the playing field in government contracting. This law supports honest contractors who seek to do business with the City the right way as much as it seeks to eliminate the advantages dishonest contractors think they gain by cheating the City and the taxpayers."

Since the NYC FCA is retroactive, it can be immediately effective in achieving these goals.

LEGISLATIVE FRAMEWORK OF THE NEW YORK CITY FALSE CLAIMS ACT

Like the federal FCA, the NYC FCA creates a "civil enforcement action"[8] for making claims to the City that are false or fraudulent. Almost any knowingly false claim or false statement that involves payment or a demand for payment from the City, or which deprives it of revenues in some way, is actionable.[9] "Knowledge" of falsity includes actual knowledge, deliberate ignorance and reckless disregard for the truth.[10] Treble damages and penalties of $5,000 to $15,000 per violation, plus costs and attorneys fees, are recoverable.[11]

Some aspects of the NYC FCA are borrowed from the federal FCA. The differences between the federal and NYC statutes are both procedural and substantive, and the major substantive difference is major indeed: the NYC FCA does not authorize the whistleblower to pursue a case if the City declines to join. Instead, it compels the City to give reasons for so declining, and identifies the reasons that the City can give. If the City cannot fit its declination into one of these reasons, then it must proceed.

The NYC FCA is best understood by FCA practitioners on the basis of its departures from and similarities to the federal FCA, and will be discussed accordingly.

8. N.Y.C. Admin. Code, Title 7, § 7-802(2) (2005).

9. N.Y.C. Admin. Code, Title 7, §§ 7-802(3) and 7-803 (2005). *But see* United States *ex rel*. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004), holding that the false claim has to be submitted directly to the federal government, as opposed to submitted to someone who is receiving federal government funds, like a grantee or a prime contractor or a state agency. *See also* United States *ex rel*. Atkins v. McInteer, 345 F. Supp. 2d 1302 (N.D. Ala. 2004); U.S. *ex rel*. Sanders v. Allison Engine Company, 2005 U.S. Dist. LEXIS 5612 (S.D. Ohio Mar.) (March 11, 2005); and U.S. *ex rel*. Maxfield v. Wasatch Constructors, 2005 U.S. Dist. LEXIS 10162 (C.D. Utah, May 27, 2005).

10. N.Y.C. Admin. Code, Title 7, § 7.802(5) (2005).

11. N.Y.C. Admin. Code, Title 7, § 7-803(a) and (b) (2005).

DIFFERENCES

The "Sealing" Period and the Decision to Join or Decline

The framers of the NYC FCA recognized that since the City cannot make laws for the state, the City Council could not order a state court to accept a whistleblower complaint for filing under seal. The solution to this potential show-stopper was the following: the NYC FCA provides for private individuals to submit "proposed civil complaints" to the City including all material evidence and information about the alleged false claims. The City is obliged to "diligently investigate" them.[12] Within 180 days (about six months) of receiving a proposed civil complaint, the City's Corporation Counsel must either:

1. commence a civil action based on the complaint or notify the person that it proposes to delay such commencement for an additional 90 days;

2. designate the person or his/her attorney as a "special assistant corporation counsel" for the purposes of filing a civil enforcement action; or

3. decline to commence a proceeding—in which case no proceeding may be brought either by the City or the person who submitted the proposed civil complaint.[13]

The structure is thus essentially three-tiered: the City may pursue its own action, it may designate the whistleblower's attorney as a "special assistant" to take the laboring oar in pursuing the action, or it may decline to commence an action. As set forth below, a higher whistleblower share range reflects the greater contribution of resources by those designated "special assistant."

The Corporation Counsel must give reasons for declining to commence a proceeding, and can decline only on certain identified bases. If none of those bases exist, the City must either bring the case or authorize the person who filed the proposed complaint to do so. The "declined" list includes: tax cases; cases under $25,000; cases that the City is already bringing, either civilly or criminally; cases that are based on public disclosures (unless the person is the "primary source" of the information); cases brought by government employees (subject to certain exceptions); cases against the federal, state or City government; cases that are based on an interpretation of law or regulation that would result in "significant cost" to the City; cases that would cause disruption to the provision of important goods or services to the City or jeopardize the health and safety of the public; and cases that a court would dismiss for failure to state a claim.[14]

12. N.Y.C. Admin. Code, Title 7, § 7-804(b)(1) (2005).

13. N.Y.C. Admin. Code, Title 7, § 7-804(b)(2) (2005).

14. N.Y.C. Admin. Code, Title 7, § 7-804(b)(3) and (d) (2005).

While the 180 day + 90 day period that the Corporation Counsel has to investigate and decide on the disposition of the case might at first appear to be significantly shorter than the typical period of time that takes under the federal FCA, (where the 60-day seal period is serially extended for 6- or 9-month periods for years on end), the practical reality may prove to be otherwise. The Act also states that if the City's Commissioner of Investigation "determines that a civil enforcement action may interfere with or jeopardize an investigation by a governmental agency," the Corporation Counsel can delay a decision on the disposition of the case, provided the person submitting the proposed civil complaint is notified of such delay within 90 days of submitting his or her proposed civil complaint and status reports are provided every 180 days thereafter[15] Once the Commissioner of Investigation gives the all clear, the Corporation Counsel must decide whether to join, designate or decline the case.

Settlement, Dismissal and Whistleblower Rewards

If the Corporation Counsel, after investigating a proposed complaint, decides to commence a civil enforcement action in its own right, the Corporation Counsel controls the action and can settle or move to dismiss it even over the objections of the person who submitted the complaint.[16] If there is a recovery, the person is entitled to receive between 10 to 25 percent of that amount.[17] If the Corporation Counsel decides to designate the person's attorney as a "special assistant corporation counsel" to commence the action, the Corporation Counsel may still settle or move to dismiss the action, but the person is entitled to a court hearing.[18] Such person is eligible for 15 to 30 percent of any recovery.[19]

The amount of the private individual's award is determined by the court, taking into account various factors including: the person's contribution of "time, effort or finances" to the prosecution of the action; the extent to which the action was based on public disclosures; any "unreasonable delay" by the person in submitting the proposed action; whether the allegations "involve a significant safety issue;" as well as "fundamental fairness and any other factors the Corporation Counsel and the court deem appropriate."[20] This catch-all effectively permits the Corporation Counsel to formulate its own set of "Relator's Share Guidelines" that courts would be required to treat as authoritative in determining the private individual's award.[21]

15. N.Y.C. Admin. Code, Title 7, § 7-804 (c) (2005).

16. N.Y.C. Admin. Code, Title 7, § 7-804(g)(1) (2005).

17. N.Y.C. Admin. Code, Title 7, § 7-804(i)(1) (2005).

18. N.Y.C. Admin. Code, Title 7, § 7-804(g)(2) (2005).

19. N.Y.C. Admin. Code, Title 7, § 7-804(i)(2) (2005).

20. N.Y.C. Admin. Code, Title 7, § 7-804(i)(3) (2005).

21. In contrast, as one district court judge observed, the Department of Justice Relator's Share Guidelines, are "merely internal standards and not federal regulations." U.S. *ex rel*. Alderson v. Quorum Health Group Inc., 171 F. Supp. 2d 1323, 1333 (M.D. Fla. 2001).

Government Employees

City, state or federal employees are barred from submitting proposed civil complaints unless they first submitted the information to the Department of Investigation and the Department "failed to act on" the information within six months of receiving it.[22] The issue of government employee-relators has long been a thorny one under the federal FCA, which contains no specific bar. The NYC FCA at least injects some certainty into the issue, although one can expect that interpretations of what amounts to "acting on" the information might vary. The NYC FCA also bars cases against the federal, state or city governments, or any employee thereof acting within the scope of his or her employment.[23]

Attorneys' Fees and Costs

The Corporation Counsel, or a person designated as a "special assistant corporation counsel," may be entitled to attorneys' fees and costs if the court so determines.[24] This is quite a departure from the federal FCA, in which the payment of the relator's attorneys' fees by the defendant is mandatory.[25] Further, the NYC FCA does not appear to provide for the whistleblower whose case is taken over by the Corporation Counsel—presumably, those with the best and strongest cases—to apply for attorneys' fees.

Retroactivity

The NYC FCA applies to claims filed or presented prior to, on or after its effective date.[26] (The federal FCA is silent on this issue.) Without this provision, the statute would sit idle while ongoing frauds generated enough lost revenues to justify the expenditure of City resources to recoup them. As it stands, the statute is immediately available to attack ongoing fraudulent conduct and even pre-existing completed frauds, provided that the acts are within the six (or, in certain circumstances, ten) year statute of limitations.

Annual Report

The Corporation Counsel is required to report annually to the Mayor and Speaker of the Council, such report to include the number of cases filed, pending and completed, the disposition and monetary value of each, and a statistical summary of the Corporation Counsel's reasons in declined cases.[27] While these reporting obligations are absent from the federal FCA, the Department of Justice does in fact provide an-

22. N.Y.C. Admin. Code, Title 7, § 7-804(d)(4) (2005).
23. N.Y.C. Admin. Code, Title 7, § 7-804(d)(5) (2005).
24. N.Y.C. Admin. Code, Title 7, § 7-804(j)(1) (2005).
25. 31 U.S.C. § 3730(d)(1).
26. Int. No. 630 § 4.
27. N.Y.C. Admin. Code, Title 7, § 7-808 (2005).

nual statistics containing similar information, except that it does not provide reasons in declined cases, much less produce an annual summary of same.

The impact of the reporting requirements will only be known with time. While some of the information is not especially exciting (e.g., number of cases filed), the need to report on status, monetary value, disposition, and reasons for declining should provide a degree of accountability and a window on whether the Corporation Counsel is appropriately and effectively discharging its statutory duties. The fact of reporting alone is a statement by the legislature that it will, in effect, be watching.

SIMILARITIES

First to File

Like the federal FCA, the NYC FCA includes a "first-in-time, first-in-right" provision barring any action that is "based upon the facts underlying" an existing civil enforcement action. This means that if two people know about the same alleged fraud, then only the first action survives.[28] However, survival does not appear to depend on when the proposed civil complaints are submitted, but when an action is commenced, which is within the control of the Corporation Counsel, not the person submitting the complaint. The NYC FCA also includes a provision barring actions based on allegations or transactions that are already the subject of a pending criminal or civil proceeding or an administrative action in which the City is a party.[29] Of interest here is that a *criminal* proceeding can bar a proposed civil complaint under the NYC FCA. Under the parallel federal FCA provision, only preexisting civil actions or administrative civil money penalty proceedings brought by the government can bar a subsequent *qui tam* case.[30]

Public Disclosure

Actions based on public disclosures in a criminal, civil or administrative hearing, a legislative or administrative report, hearing audit or investigation, and in the news media (but only those "likely to be seen by the city officials responsible for addressing false claims") are barred, unless the person submitting the proposed civil complaint is "the primary source of the information."[31] "Primary source" is not further defined. The federal FCA uses and defines the term "original source."[32] The use of a different term should allow this NYC FCA provision to develop its own case law independently of the considerable volume that exists around the federal FCA provisions.

28. N.Y.C. Admin. Code, Title 7, § 7-804(f)(1) (2005).

29. N.Y.C. Admin. Code, Title 7, § 7-804(d)(2) (2005).

30. 31 U.S.C. § 3730(e)(4).

31. N.Y.C. Admin. Code, Title 7, § 7-804(d)(3) (2005).

32. 31 U.S.C. § 3730(e)(4) (2005).

Alternate Remedies

The NYC FCA allows for the private citizen to receive an award under the Act if the City decides to pursue "any alternate action with respect to the presentation of false claims" instead of a civil enforcement action. This carries less ambiguity than the corresponding provision in the federal FCA, which uses the term "any alternate remedy … including … a civil money penalty."[33]

Employee Retaliation Claims

The NYC FCA, like its federal counterpart, permits whistleblowing employees to sue their employers for retaliation. Remedies include injunctive relief as well as reinstatement with two times back pay plus interest and special damages including attorneys' fees and costs.[34]

Reduced or No Award for "Involved" Persons

Like the federal FCA, the NYC FCA provides for reduced rewards for persons who were involved in the conduct alleged in the case. The court can award a lower share of the recovery than the minimum share provided in the statute if the person who submitted the proposed civil complaint "initiated" the alleged fraud. A person who is convicted of criminal conduct as a result of his/her role in the fraud is not entitled to any share of the recovery.[35]

Statute of Limitations

The statute of limitations for a civil enforcement action is six years after the alleged false claims were made, or three years after the date when the material facts underlying the false claim are known or reasonably should have been known by the Corporation Counsel or the Department of Investigation, not to exceed ten years after the alleged fraud.[36]

Defendants' Attorneys Fees

In an attempt to discourage frivolous litigation, defendants in civil enforcement actions commenced by private individuals may apply for attorneys' fees and costs if the defendant prevails in the action.[37]

33. 31 U.S.C. § 3730(c)(5).
34. N.Y.C. Admin. Code, Title 7, § 7-805 (2005).
35. N.Y.C. Admin. Code, Title 7, § 7-804(i)(3).)(v) and (vi) (2005).
36. N.Y.C. Admin. Code, Title 7, § 7-806(a) (2005).
37. N.Y.C. Admin. Code, Title 7, § 7-804(j)(2) (2005).

CONCLUSION

In some ways the NYC FCA is broader, and more "plaintiff-friendly," than the federal FCA, and in others it is narrower, and less so. For example, on the one hand it denies the right of the private citizen to move forward without the City—giving rise to concerns that the City could bury politically awkward cases—and on the other hand it makes the City accountable by forcing it to fit its declination decisions into a pre-ordained set of criteria and to provide annual reports on those decisions (amongst other things) to the Mayor and the Speaker of the City Council.[38] Further, the tiered structure providing for up to 30 percent of the recovery to be awarded to private citizens whose lawyers are designated as "special assistant corporation counsel" ensures that the additional contribution of resources typically provided under the federal FCA by attorneys in declined cases is recognized and rewarded. The "special assistant" designation performs the valuable service of ensuring that the private citizen is not robbed of the power and prestige of the government in pursuing cases that the City does not commence itself due to resource constraints.

However one might judge the wisdom of departing from the language, and to some extent, the structure, of the federal FCA, the NYC FCA is unquestionably a serious and thoughtful attempt to address pervasive corruption in crucial City industries as well as fraud on the City in all its manifestations. The City Council and the Mayor have declared their unanimous support for the "public-private partnership" concept embodied in the statute. It is now up to the citizens of New York City to make it happen.

38. Further, since there is no court-ordered seal, the private citizen could go public about the City's handling of his or her case at any time.

Outside of the Law

• **Media Relations and the *Qui Tam* Bar**

• **Success in False Claims Cases Often Depends on Protecting *Qui Tam* "Relator" With Psychological Evaluation & Support**

MEDIA RELATIONS AND THE *QUI TAM* BAR

Richard Lavinthal[*]

A *qui tam* under seal for two years is finally public. Will it get noticed outside TAFEF's listserv? Today's news is a Where's Waldo mélange of news, quasi-news and information pushed and pulled 24/7 from thousands of sources. News used to be delivered neatly to our homes as two local newspapers and one local network television affiliate broadcast. Today it's dispersed via AM, FM, satellite, Internet, Podcast, broadcast, cable, On Demand, video-stream, XML, RSS, Blog, Web and cell phone.

In today's news-inflated world even major case milestones can benefit from media relations strategy and tactics. Media relations can help get a case into the news and before the eyes or into the ears of those who should know about it and the attorney who made it happen. Strategic media relations involves planning and professionally packaging announcements for delivery to selected segments of today's vast media spectrum.

The absence of in-house media relations staff is expected at small-to-mid-sized law firms. But even larger practices that specialize/concentrate in representing relators may leave media relations up to the attorney; and many lawyers aren't great PR practitioners. Lucky indeed is the attorney who gets in-house media relations strategy and real-time news dissemination directed by a savvy public relations specialist.

Some attorneys choose to avoid media relations. If a case is big enough, it will have legs. The Government or defense counsel news release will get the news ball rolling and the relator's law firm may be mentioned in a story. But avoiding your own media relations eliminates a chance to put an attorney's imprimatur on a case.

For attorneys with just one or two major case milestones a year, every complaint or settlement presents a rare, extremely valuable opportunity for marketing, future referrals and case acquisitions. Strategic media relations can maximize branding, case-positioning, practice group recognition, co-counsel generation and client retention.

Outsourced, per-case media relations can be an effective alternative in the absence of in-house marketing/PR, especially when a handful of major case milestones are expected over the year. A per-case investment can represent money well spent. Finding an acceptable outside person or firm for per-case media relations will take effort. Most PR firms have had limited experience with attorneys as clients. PR persons who may have managed the design of new stationery, developed a new logo or placed tombstone ads announcing new associates may not have experience developing media relations strategy for a False Claims Act case, let alone executing media plans for breaking civil or criminal matters.

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If an acceptable media relations consultant is found, the *qui tam* attorney has a new challenge. It's absolutely necessary for a press strategist to be completely up to speed before a case breaks. Proper strategy and collateral must be in place, ready for dissemination the nanosecond a major case milestone is public. This requires disclosing information and documents still under seal. An attorney's neck could be on the line if a media relations consultant doesn't keep confidential information at "close hold."

Deciding to keep information that's under seal from a consultant until the instant a case is public is a waste of time and money. How long will it take to get the information to the media relations consultant? How long will it take to correct initial news release drafts and approve a final news release? How long will it take to select the media targets and properly distribute it?

Breaking-news windows usually close the day that cases are first public. If the case doesn't make news when it happens, it's unusual for an after-the-fact release to be effective. News releases launched a day or two after milestones are public usually are fast-tracked into editors' wastebaskets. One exception is using an earlier milestone as a "hook" to encourage feature news coverage.

Whether a decision is made to vet an outside media relations consultant or for the attorney who has time and inclination manage his own media relations, there are some bedrock best-practices that can help put a case milestone into the news.

PREPARATION

Many Assistant U.S. Attorneys, Deputy (state) Attorneys General, and lawyers in private practice with whom I've worked have misunderstood news deadlines and their urgency. An attorney who wants to see his *qui tam* whistleblower case milestone in breaking news, practice group, trade and other media should lay the groundwork for a professional news release *weeks* before the matter is to be unsealed. A final news release needing simply to be dated should be on the desk or in the computer, needing a few seconds to be ready for dissemination—or urgent revision if a settlement changes radically from what was expected. News releases begun after a case is public may only be fit for wrapping fish.

It takes time to get a news release positioned for completion and dissemination. The attorney must get all relevant documents and information to the consultant, give the consultant time to read and absorb all the information, then dedicate more time to discuss the case. The consultant may be able to identify media possibilities that the attorney did not. Once a final-draft news release is placed in a near-final stage the attorney or an in-house support staff person will be ready to distribute the news the instant that the case is public.

NEWS APPEARANCE AND FORMAT

News releases must look like news, not legal motions or briefs. Ideally, a media relations consultant should have news writing experience to be able to create AP-style

news releases that will get green lights from editors. This is critical for releases that arrive on editor's desks when publications or broadcast stations are on deadline. Legal-sounding news releases will be discarded on deadline, but news releases that look and feel like just like news have a chance of getting into print or on the air, sometimes verbatim.

A news release can exist in perpetuity, another compelling reason for sending out only professionally prepared news. "Unringing the bell" is nothing compared to the impossibility of "unringing the electron" in the Internet age. Once a news release is issued it can appear in many Internet news, special interest, and personal Web pages. It also can be cached and archived online and saved into who-knows-how-many personal and business computer databases. Never release news that can embarrass you for years to come.

CONTACT INFORMATION

Make sure law firm contact information, not the media relations consultant, appears on the news release. For breaking news, features or anything in between reporters should be calling the attorney, never an outsourced media relations consultant.

DISTRIBUTION LISTS

A media relations consultant should help identify all the media to be targeted, consumer, practice group, professional, government, etc. And the law firm should be providing contact data for media, practice group, professional, client and other suggested recipients to receive the news.

DISSEMINATION

The law firm may use the outsourced media relations consultant to handle news distribution or prefer to control its release itself. When e-mailed by the firm, an incoming mail server may recognize the news release message as coming from a friendly domain and let it through the spam-filters. When faxed by the law firm, its name and phone number will appear on it.

REGIONAL AND NATIONAL DISTRIBUTION

The consultant may be asked to handle news release distribution to regional or national targets. When the attorney determines that the *qui tam* matter needs exposure beyond local consumer and professional media, the media relations consultant should be able to recommend and engage the appropriate third-party news distribution channels from among Internet, private newswire and facsimile services. One major fee-based service, for example, can deliver a news release to 2,000 newsrooms across the country and onto scores of business and news Web sites for under $700.

SOUND BITES

Any news release can trigger a reporters' phone call. If a *qui tam* case is interesting or substantial enough, media calls are inevitable. But even when chances are less that a reporter will follow up, the attorney must be ready. The media relations consultant should help the attorney craft one or two brief sound bites that are quotable and relevant. These "comments to be quotes" should be typed out, placed near the attorney's desk phone and carried in his briefcase. In no case should an attorney ever wing it. Expect the call and be ready.

NO COMMENT

Never say, "No Comment" to a reporter. Try, "I'm not permitted to answer that question," or "That's a matter which is not part of public record," or "I understand why you've asked that question but I can't answer it." "No Comment," is a way or saying, "I don't know what to say."

THE FIRM'S WEB SITE

Concurrent with media distribution, the attorney's Web site should present the news release and any related public documents as soon as the event is public. When editors ignore, shorten or otherwise mistreat your news, let any Web user read it all without changes from your site.

Media relations can make a big difference in a case milestones by helping to identify a storyline that the media will grab, developing a professional news release that has a better chance of getting through to an editor, and targeting media who should receive it. When prepared in time either by an outside media relations consultant or the relator's attorney, a professional news release can advance a case, enhance branding, and generate new referrals.

SUCCESS IN FALSE CLAIMS CASES OFTEN DEPENDS ON PROTECTING *QUI TAM* "RELATOR" WITH PSYCHOLOGICAL EVALUATION & SUPPORT

By Donald R. Soeken, LCSW-C, Ph.D.[*]

True or False: More than half of those courageous whistleblowers who dare to report fraud against the federal government under the qui tam provisions of the Civil False Claims Act will eventually undergo life-disrupting psychological stress as a result of telling the truth.

Unfortunately for America's often-injured whistleblowers, the correct answer is "True"—as I learned a few years ago while reporting in the *New York Times* on my recent survey showing that more than fifty percent of these truth-tellers will eventually lose their jobs or their families because of workplace retaliation triggered by their whistle-blowing.

During twenty-five years of counseling and defending whistleblowers as the president of the nonprofit Integrity International, I have watched the same depressing scenario unfold again and again. I have also discovered—while serving frequently as an "expert witness" on the psychological trauma suffered by whistleblowers—how vitally important it is for attorneys who represent them to understand the huge price paid by most "relators" under the False Claims Act as amended in 1986.

As a longtime specialist in treating traumatized whistleblowers, I have also noticed that attorneys who pay careful attention to the psychological needs of *qui tam* relators (while also making the effort to have them psychologically evaluated at the start of a False Claims case) usually wind up doing better on the "bottom line," when awards are decided or settlements are finally reached.

Why is it so important for attorneys in these actions to evaluate and understand the relator's psychological state *before* the case gets underway?

To answer that question, let me tell you briefly about my friend and former client "Joe Hamilton," a typical truth-teller who courageously blew the whistle on illegal "short cuts" in the manufacture of truck wheels for the U.S. Army a few years ago.

After Joe reported to federal inspectors that the supervisors at his truck plant were skipping the time-consuming and expensive step of having truck wheels properly aligned in order to jack up their profits, the retaliation came quickly. Within three months of alerting the factory inspectors to the abuse, Joe found himself without a job—after being called into the foreman's office and told to "get off the premises within the next 30 minutes."

Deeply wounded by the firing, Joe was also suddenly without his $60,000-a-year income. And within about six months—as the bills piled up and the local bank took

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steps to foreclose on his home mortgage—he found himself in desperate straits. Injured in his self-esteem and frantic over his money worries, Joe then watched his 25-year marriage fall apart . . . and ended up living in a $50-a-week rented room as a recipient of food stamps.

The retaliation against Joe Hamilton, all too familiar in a country where "killing the whistle-blowing messenger" often seems to be the norm, meant terrible psychological suffering for a valiant truth-teller who was ground to pieces by immense forces that he didn't fully understand. By the time I was finally asked to step in and provide the counseling that Joe had needed from the beginning, however, it was too late to do much more than help him find better housing, a slightly better job, and medical help for the clinical depression that was devouring his life.

In Joe's case, the consequences of "telling truth to power" were truly horrific. But the gradual destruction of this whistleblower also cost the attorneys who had represented him in this *qui tam* matter a great deal of lost time and wasted energy . . . after their key witness became so depressed and psychologically unpredictable that they were finally forced to stop representing him.

The story of what happened to Joe Hamilton provides a textbook example of why it is so important for *qui tam* attorneys to obtain an early professional evaluation (along with appropriate psychological *support*) for relators—and not in the middle of a case, when the whistle-blower is typically struggling to keep his or her head above water, but at the very start of any False Claims litigation.

While serving as an expert witness in these cases for many years, I have seen numerous situations in which an early physical and mental evaluation—followed by carefully planned psychological and material support for the relator—actually turned out to be a key step on the road to a successful courtroom verdict or settlement.

That is one very good reason to invest in such "up-front" evaluation and counseling for False Claims relators.

But my long experience as an expert witness in these matters has also shown that obtaining such evaluations and support often allows an attorney to gather critically important evidence about damages arising from employer retaliation . . . and that this kind of evidence can be decisive in the awards eventually handed down by judges and juries in False Claims cases.

Among the key benefits for attorneys in arranging for psychological evaluation and support at the start of a *qui tam* action are the following:

- An accurate physical and mental evaluation of the whistleblower will defend against the risk of losing your *qui tam* relator to disabling ailments later. By establishing a "psychological baseline" at the start of the process and then arranging for psychological counseling where appropriate, the attorney can also continue to monitor the physical and psychological well being of this key witness.

- In many cases, an effective counselor can also solve many of the "housekeeping" issues that arise in cases involving retaliation against whistleblowers.

For example, in recent years, I have been able to house many such whistle-blowers at Integrity International's peaceful "Whistlestop Farm" in rural West Virginia, while also advising them on ways to collect appropriate economic assistance from federal, state and local government agencies and private assistance groups. While living cost-free in this tranquil setting, stressed whistle-blowers are often able to keep their bodies healthy—and their minds sharply focused on *qui tam* actions scheduled for adjudication.

- Most attorneys, in my experience, are keenly interested in meeting their ethical obligations to clients. Is there a more urgent obligation than doing your best to make sure that clients do not suffer needless injuries in cases where you are charged with defending them against powerful adversaries intent on shutting down their legal actions by whatever means necessary? Arranging for early counseling and support is a very good way to defend your *qui tam* client to the max.

Given all of these bottom-line benefits, it simply makes good business sense for *qui tam* attorneys to arrange for evaluation and support for relators at the start of False Claims actions. And those attorneys who do so will also gain another key advantage in the effort to recover significant damages for their clients—the knowledge that their *qui tam* relator will be assisted throughout the litigation by a fully qualified, potential expert witness who will be prepared to testify at any time on the subject of injuries caused by illegal retaliation against the courageous truth-teller who brought the action in the first place.

Legal Analysis

- Penalty Points, Part Two: Number of Penalties
- The Interplay Between the False Claims Act, Securities Fraud, and ERISA
- Courageous Whistleblowers Are Not “Left Out in the Cold”

PENALTY POINTS, PART TWO: Number of Penalties

Lani Anne Remick[*]

This article is the second part of a three-part series examining the penalty provisions of the False Claims Act. This part will examine the principles governing how many penalties are awarded in a particular case. Part One reviewed the factors employed by courts in determining the dollar amount of the penalty within the statutory range. Part Three will address Constitutional issues associated with the imposition of penalties under the Act.

How does a court decide how many penalties to award in a False Claims Act case? Although the statute and legislative history provide little direction, the Supreme Court's decisions in *United States ex rel. Marcus v. Hess* and *United States v. Bornstein* have established several guiding principles, discussed in detail in this article. The numerous lower court cases applying these principles provide helpful insight into how the number of penalties is likely to be calculated in a wide variety of factual contexts.

One line of lower court cases, however, contravenes both the general principles set forth by the Supreme Court and the structure and purpose of the Act itself. This line of precedent suggests that where a defendant has created false "records or statements" in support of false claims, the number of penalties awarded should be based only on the number of false "claims" and that no penalties should be assessed for the separate false "records or statements." Courts should reject this line of precedent and instead properly assess penalties for false "records or statements," which constitute separate and independent violations of the Act.

I. STATUTE AND LEGISLATIVE HISTORY PROVIDE LITTLE GUIDANCE AS TO NUMBER OF PENALTIES

The language of the False Claims Act provides no specific instruction as to how to determine the appropriate number of penalties in a particular case, stating only that "Any person who . . . [commits any violation listed in 31 U.S.C. § 3729(a)(1)–(7)] is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . ."[1] The pre-1986 version of the statute was also silent on this point, providing that "Any person . . . who shall do or commit any of the acts prohibited . . . shall forfeit and pay to the United States the sum of two thousand dollars

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1. 31 U.S.C. § 3729. As noted in Part One of this article, the penalty range was increased to $5,500 to $11,000 in 1999. *See* 64 Fed. Reg. 47099, 47104 (August 30, 1999); 28 C.F.R. § 85.3(a)(9) (2005).

. . . ."[2] Likewise, the legislative history of the Act offers "little guidance" as to how to determine the proper number of forfeitures.[3]

II. SUPREME COURT DECISIONS PARTIALLY FILL THE LEGISLATIVE VOID

A. *United States ex rel. Marcus v. Hess*: Multiple Penalties Permissible

In *United States ex rel. Marcus v. Hess,*[4] the Supreme Court began to fill the void left by Congress, establishing that where multiple violations of the Act have occurred, multiple penalties must be assessed. Although the indefinite statutory language and lack of legislative history left room for an argument that only one penalty could be assessed for each action brought under the Act, the Court soundly rejected this "single penalty" reading.

The defendants in *Hess* had engaged in collusive bidding on 56 separate P.W.A. contracts, but argued that only a single $2,000 forfeiture should be imposed "for all the acts done."[5] The Supreme Court rejected this argument, holding that a separate forfeiture should be awarded for each of the separate contracts, because the fraud as to each separate contract was clearly "individualized."[6] The Court also reasoned that to impose only one penalty in the case of multiple false claims would in effect reduce the penalty for each additional false claim. Noting that the assessment of only one $2,000 forfeiture would have amounted to about $30.00 for each of the 56 contracts at issue, the Court stated "we cannot suppose that Congress meant thus to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects each of which individually increased their profit."[7] Instead, the Court assessed the full $2,000 forfeiture for each of the 56 contracts.

2. *See* Rev. Stat. § 3490 (codified at 31 U.S.C. § 231); *see also* P.L. 97-258 (Sept. 13, 1982) (re-codifying Act at 31 U.S.C. §§ 3729, *et seq.*).

3. *See* United States v. Bornstein, 423 U.S. 303, 309, 96 S.Ct. 523, 528 (1976), commenting on the legislative history of the original Act. The Senate Report on the 1986 amendments also said little on the topic of the number of forfeitures, although it did acknowledge that the original Act had been interpreted to provide for the imposition of multiple penalties for multiple false claims. S. Rep. No. 99-345, at 8 (July 28, 1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273 (stating that existing law provided for a $2,000 forfeiture for "each false claim submitted" and that penalty was automatic and mandatory for "each claim which is found to be false").

4. 317 U.S. 537, 63 S.Ct. 379 (1943).

5. 317 U.S. at 552, 63 S.Ct. at 388.

6. *Id.* ("The incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office.") (citations omitted).

7. *Id.*

B. *United States v. Bornstein*

1. One Penalty Per "Payment Demand" Submitted By Defendant

After *Hess*, courts continued to reject the "one penalty" approach,[8] and the imposition of multiple penalties is now commonplace under the Act. In cases where the defendant is the person or entity that directly submitted false claims for payment to the Government, the calculation of the number of penalties is often straightforward.[9] For example, as the Supreme Court recognized thirty years after *Hess*, "[i]n cases involving prime contractors the number of imposable forfeitures has generally been set at the number of individual false payment demands that the contractor has made upon the Government."[10] This approach is consonant with the Court's holdings that a claim against the government "'normally connotes a demand for money or for some transfer of property.'"[11] as well as the current definition of "claim" in 31 U.S.C. § 3729(c) as a "request or demand . . . for money or property."

The following cases provide examples of straightforward, undisputed multiple penalty awards. In each case, the defendant was the entity or person directly submitting a "claim" or "payment demand" to the United States, and the number of penalties was equal to the number of claims or payment demands submitted:

- 88 forfeitures of $2,000 imposed for each of 72 HUD purchase orders prepared on the basis of collusive bids and for each of 16 false invoices submitted to HUD[12]

- 9 forfeitures of $2,000 imposed for each of nine false quarterly reports submitted to Federal Public Housing Authority which included overcharges for butane gas not actually supplied to housing project[13]

- 2 penalties of $5,000 imposed for each of two food stamp redemption certificates presented to the United States' bank which falsely certified that food stamps had been exchanged for eligible food[14]

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8. *See, e.g.*, Lamb Engineering and Const. Co. v. United States, 58 Fed. Cl. 106, 111 (2003) (court rejected defendant's argument that his conduct should be "treated as a single violation" for penalty purposes, instead awarding four penalties based on finding that each of four false progress payment certifications was a "separate and independent act"); United States v. American Packing Corp., 125 F. Supp. 788, 790 (D.N.J. 1954) (court considered whether to award just one penalty for a fraudulent scheme to deliver inferior meat products to the United States, but held that if false claims were presented for each of the 98 contracts involved, the Government would be entitled to 98 separate forfeitures of $2,000 each).

9. *But see* Section III.B., *infra*, examining cases where defendant has both submitted false claims and made false statements or records in support of false claims.

10. United States v. Bornstein, 423 U.S. 303, 309 n.4, 96 S.Ct. 523, 528 n.4 (1976).

11. *Id*. (citing United States v. McNinch, 356 U.S. 595, 599, 78 S.Ct. 950, 952 (1958) (quoting United States v. Tieger, 234 F.2d 589, 591 (3d Cir. 1956))).

12. United States v. Cripps, 460 F. Supp. 969, 977 (E.D. Mich. 1978).

13. United States v. Gardner, 73 F. Supp. 644, 648 (N.D. Ala. 1947).

14. Abdelkhalik v. United States, 1996 WL 41234 at *7 (N.D. Ill., Jan. 30, 1996).

- 2 penalties of $7,500 imposed for each of two false CA-1 forms claiming worker's compensation benefits under the Federal Employees Compensation Act[15]

- 264 penalties of $5,000 imposed for each occasion on which defendant illegally redeemed food stamp coupons at a financial institution after withdrawing from the food stamp program[16]

- 3 forfeitures of $2,000 imposed for each of three invoices submitted to Navy for non-conforming aircraft engine bearings[17]

- 18 forfeitures of $2,000 imposed for each of eighteen false invoices submitted to Medicaid program[18]

- 2 forfeitures of $2,000 imposed for each of two false payrolls submitted to United States for construction work on National Guard Armory project[19]

- 12 forfeitures of $2,000 imposed for each of twelve checks drawn on the United States Treasury; defendant contractor forged endorsement of payee and then presented checks for payment[20]

In many other post-*Hess* cases, however, calculating the number of penalties was not so straightforward. One recurring question was how to count penalties where the defendant was someone other than the party who actually submitted the false claims to the United States: should the number of penalties still be based on the number of false claims submitted, or should some other measure be used? A second question left unaddressed in *Hess* was whether the number of penalties should be limited to "one per contract" or "one per project," as with the 56 penalties for 56 contracts in *Hess*, or whether this rule did not always apply. The Supreme Court addressed both of these issues in *United States v. Bornstein*.[21]

2. Penalties to Be Based Upon the Specific Conduct of the Person From Whom the Government Seeks to Collect Penalties

The defendant in *Bornstein* was a subcontractor who contracted to supply electron tubes to be incorporated into radio kits. The subcontractor provided tubes which were falsely marked to make them appear as though they were of the quality required by the contract. The subcontractor supplied the contractor with three separately invoiced

15. United States v. Bottini, 19 F. Supp. 2d 632, 642 (W.D. La. 1997), aff'd, 159 F.3d 1357 (5th Cir. 1998).

16. United States v. Byrd, 100 F. Supp. 2d 342, 343–46 (E.D.N.C. 2000).

17. United States v. Aerodex, Inc., 469 F.2d 1003, 1011 (5th Cir. 1973).

18. United States v. Jacobson, 467 F. Supp. 507, 508 (S.D.N.Y. 1979).

19. United States v. Sanders, 194 F. Supp. 955, 956 (E.D. Ark. 1961).

20. United States v. Silver, 384 F. Supp. 617, 620 (E.D.N.Y. 1974), aff'd, 515 F.2d 505 (2d Cir. 1975).

21. 423 U.S. 303, 96 S.Ct. 523 (1976).

shipments of falsely-marked tubes. The contractor incorporated the falsely-marked tubes into radio kits, for which it sent 35 invoices to the United States.

The Government argued that 35 forfeitures should be imposed, one for each of the 35 invoices which the subcontractor had "caused" the contractor to submit to the United States. The defendant argued that since only one subcontract was involved, only one forfeiture should be assessed. The district court agreed with the Government, awarding 35 forfeitures. On appeal, however, the circuit court agreed with the defendant, and awarded just one forfeiture.

The Court accepted neither of these approaches, instead awarding three forfeitures, based on the three shipments of falsely-marked tubes which the subcontractor sent to the contractor. The Court declined to base the forfeiture award on the 35 invoices sent by the contractor to the Government on the ground that such an approach "fails to distinguish between the acts committed by [the subcontractor] and the acts committed by [the contractor]."[22] As the Court explained, the subcontractor did not "cause" the contractor to submit 35 invoices, or indeed any particular number of invoices. Thus, an award of 35 forfeitures would be inappropriate because the fact that the contractor chose to submit 35 invoices instead of some other number was "completely fortuitous and beyond [the subcontractor's] knowledge or control."[23]

Finding that the Act "penalizes a person for his own acts, and not for the acts of someone else," the Court held that the correct application of the statute required that "the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures."[24] Here, the Court found that the subcontractor had committed three acts which caused the contractor to submit false claims: sending the three separate shipments of falsely-labeled tubes. If the subcontractor had not shipped these tubes, then the contractor would not have submitted false claims. When it sent the three shipments of tubes, the subcontractor knew that the contractor would incorporate them into radio kits to be sent to the Government, and that the contractor would seek payment from the Government. Accordingly, the Court awarded three forfeitures of $2,000 each.

In addition to applying *Bornstein* as written, lower courts have also adopted a sort of inverse-*Bornstein* rule, *i.e.*, if the defendant *did* have "knowledge or control" of how many payment demands were being submitted to the Government (in contrast to the *Bornstein* subcontractor, who did not), then that number of payment demands is an appropriate basis for a penalty award. In *United States v. Ehrlich*,[25] for example, the defendant supplied false and inflated construction information to his mortgagee. The mortgagee then presented 76 monthly vouchers to HUD which were false because they were based on the false, inflated cost information provided by the defendant. Defendant claimed that he "did but one act, inflating construction costs, that caused false claims to be filed," and that he should therefore be liable for only one forfeiture.[26] The

22. 423 U.S. at 312, 96 S. Ct. at 529.

23. *Id.*

24. 423 U.S. at 313, 96 S. Ct. at 529.

25. 643 F.2d 634 (9th Cir. 1981).

26. *Id.* at 637.

court, however, found that the defendant knew that a false claim would be submitted each month, and that he could have prevented the filing of additional false claims but instead "did nothing and gained a continuing benefit."[27] Concluding that the defendant had "knowledge and control of the situation," the court awarded 76 forfeitures, based on the 76 monthly vouchers submitted to HUD by the mortgagee.[28] The court held that "In the absence of such knowledge, using the number of claims to determine the number of forfeitures would be arbitrary. Where such knowledge is present, however, it is consistent with the purposes of the Act to impose forfeitures based on the number of claims."[29]

3. No "One Penalty Per Contract" Rule

The *Bornstein* case also is also noteworthy in that it rejected a *per se* "one per contract" approach to counting penalties. This approach had been urged by the *Bornstein* defendant and adopted by the Third Circuit, which relied on its own previous opinion in *United States v. Rohleder.*[30] In *Rohleder*, the court had based its forfeiture award on the number of subcontracts at issue, citing the *Hess* Court's award of 56 penalties for 56 subcontracts.[31]

The *Bornstein* Court clarified that *Hess* "in no way stands for the proposition that the number of forfeitures is inevitably measured by the number of contracts involved in a case," and emphasized that the Act "focuses on false claims, not on contracts."[32] In *Bornstein*, it was not the subcontractor's entry into the subcontract which caused the false claims. Rather, it was the subcontractor's conduct in shipping falsely marked tubes to the contractor that caused the contractor to submit false claims. The Court held that the number of forfeitures should be based on the number of acts that caused false claims to be filed, *i.e.*, the number of shipments sent by the subcontractor, not the number of contracts. As a further reason for rejecting the "one per contract" approach, the Court pointed out that "[t]o equate the number of forfeitures with the number of contracts would in a case such as this result almost always in but a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed . . . . Such a limitation would, in the language of the Government's brief, convert 'the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud.'"[33]

27. *Id.*

28. *Id.* at 638.

29. *Id.; see also* United States ex rel. Fahner v. Alaska, 591 F. Supp. 794, 800-02 (N.D. Ill. 1984) (imposition of 551 forfeitures ($1,102,000) was appropriate because doctor knew he was submitting 551 false claims to Medicaid); United States v. Zan Machine Co., 803 F. Supp. 620, 625 (E.D.N.Y. 1992) ("[W]hile there is some dispute as to who prepared the false certifications, there is no dispute that Zan presented them to the Government 'to get a false or fraudulent claim paid or approved.' Imposing the civil penalty against Zan eight times, for each false certification . . . presented, penalizes Zan solely for *its own wrongful acts,* as *Bornstein* enunciates.").

30. 157 F.2d 126 (3d Cir. 1946).

31. *Id.* at 130–31 (limiting award to 16 forfeitures, the number of subcontracts between defendant and prime contractor for the Navy, even though defendants engaged in separate collusive bidding process for each of 90 underlying purchase orders).

32. 423 U.S. at 311, 96 S. Ct. at 528–29.

33. 423 U.S. at 311, 96 S. Ct. at 529.

Numerous courts, both before and after *Bornstein*, have similarly rejected defendants' suggestions of a "one per contract" or "one per project" approach to counting penalties, and have instead based the number of penalties on the number of invoices, vouchers, bills, or purchase orders submitted to the Government.

- 22 penalties awarded for 21 false payment vouchers and 1 claim for additional compensation failing to disclose prohibited business relationship which were presented to Small Business Administration, not just one penalty for the one contract involved[34]

- 14 penalties awarded for each of 14 false purchase orders based on collusive bidding which were submitted to HUD for residential repair work, not just one penalty for each "project" or "house" involved[35]

- 54 penalties awarded against subcontractor for 33 invoices submitted to Air Force by one prime contractor and 21 invoices submitted to Air Force by another prime contractor for work on airplane parts contract, not just two penalties for each of the two subcontracts[36]

III. LOWER COURT DECISIONS SUGGEST FURTHER RULES GOVERNING NUMBER OF PENALTIES

A. One Penalty For Each Separate Conspiracy

Lower court opinions also suggest several principles governing how to calculate the number of penalties under the Act with respect to issues left undecided by *Hess* and *Bornstein*. For example, where one or more conspiracies have been proved under the Act,[37] lower courts have imposed one penalty for each separate conspiracy, in addition to any penalties assessed for the underlying submission of false claims. Examples of penalties assessed in cases involving conspiracies under the Act include:

- 4 forfeitures of $2,000 imposed—one for each of three false claims submitted to the Small Business Administration for the release of funds from an advance payment account, and one for conspiracy to submit such false claims[38]

34. Ab-Tech Construction, Inc. v. United States, 31 Fed. Cl. 429, 435 (1994) ("[E]ach separate submission seeking payment from the Government is a claim for purposes of the False Claims Act, even when such submissions are made pursuant to one overall contract.") (citations omitted), aff'd, 57 F.3d 1084 (Fed. Cir. 1995).

35. Brown v. United States, 524 F.2d 693, 705–06 (Ct. Cl. 1976) ("Plaintiff was paid by HUD, not for each house he worked on, but for each purchase order submitted for processing. Therefore, each purchase order must be regarded as a separate claim . . . .").

36. United States v. Ueber, 299 F.2d 310, 313-14 (6th Cir. 1962) ("Plaintiff's complaint did not charge that the entering into subcontracts with Kaiser and Chase in any way violated § 231. . . . The vouchers submitted to the United States to obtain payments under such contracts made up the acts which offended the False Claims Act.").

37. 31 U.S.C. § 3729(a)(3) imposes liability on any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Similarly, the previous version of the Act imposed liability on anyone who "enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." 31 U.S.C. § 231.

38. United States v. Uzzell, 648 F. Supp. 1362, 1368 (D.D.C. 1986).

- 10 penalties of $7,000 imposed—one for each of eight false claims submitted to the Federal Crop Insurance Corporation and one for each of two separate conspiracies to submit such false claims[39]

- 4 penalties of $5,000 imposed—one for each of three false requests for payment submitted to EPA for asbestos abatement work that had not actually been done or did not involve asbestos and one for conspiracy to submit such false claims[40]

Assessing a separate penalty for each conspiracy in addition to any false claims accords with the construction and purpose of the Act. The Act separately prohibits both submitting false claims, 31 U.S.C. § 3729(a)(1), and conspiring to submit false claims, § 3729(a)(3), and thus either of these prohibited acts alone is sufficient to support the imposition of a penalty. It would be anomalous not to assess a separate penalty for a conspiracy just because the defendant had also submitted false claims.

B. No Penalty for False Records or Statements?

In another series of cases, lower courts have held that the number of penalties should be limited to the number of "claims" or "payment demands" submitted by the defendant, even when the defendant has also made separate false statements in support of those claims or demands.[41]

In short, although almost every case in the line of cases described below directly or indirectly relied on *Hess* in support of the conclusion that the number of penalties should not be tied to the number of false records and statements supporting a false claim or payment demand, the *Hess* case did not in fact address that issue. The penalties awarded in these cases were as follows:

39. Kelsoe v. Federal Crop Insurance Corp., 724 F. Supp. 448, 453–54 (E.D. Tex. 1988).

40. United States v. Peters, 927 F. Supp. 363 (D. Neb. 1996), aff'd, 110 F.3d 616 (8th Cir. 1997).

41. These cases are presented in chronological order to emphasize that each subsequent case relied upon and cited the previous cases, and that nearly every case either incorrectly cited, or relied upon another case which incorrectly cited, the holding in *United States ex rel. Marcus v. Hess*. The pattern started with *United States v. Rohleder*, *infra*, in which the Third Circuit suggested that the *Hess* Court had rejected the United States' position that the number of penalties should be based on the "many hundreds of false forms" submitted in connection with the 56 fraudulent contracts at issue in that *Hess*.

Whether the number of penalties should be based upon the "hundreds of false forms," however, was not addressed by the Supreme Court in *Hess*. To the contrary, the *Hess* Court explicitly noted that, although the United States had argued at the district court level that a separate forfeiture "should be exacted for every form submitted by respondents in the course of their enterprise," the United States was not appealing the district court's finding that only one forfeiture should be awarded for each separate P.W.A. project. *Hess*, 317 U.S. at 552, 63 S.Ct. at 388.

In *Bornstein*, the Supreme Court further clarified exactly what was and was not decided in *Hess*. In overruling the Third Circuit, the Court noted that in support of its decision at the appellate level, the Third Circuit had relied primarily on its previous holding in *Rohleder*, and that *Rohleder* purported to rely on *Hess*. *Bornstein*, 423 U.S. at 310, 96 S. Ct. at 528. The Court then pointed out that in *Hess*, "no party argued in this Court that more than 56 forfeitures should have been imposed. . . ." *Id.* The *Bornstein* Court also stated that the *Hess* Court had merely approved the 56 forfeitures awarded by the district court, which had explicitly found that "in each project there was a single, false, or fraudulent claim." *Id.* (quoting *Hess* district court opinion).

- 16 penalties awarded, not 106, where in connection with 16 subcontracts with Navy contractor, subcontractor submitted for approval 90 purchase orders which were the product of collusive bidding directed by subcontractor[42]

- 10 penalties awarded, not 140, where defendant submitted 10 monthly vouchers with 130 schedules attached; vouchers sought reimbursement for rental payments on vehicles, and attached schedules for each of the 130 vehicles "contained false statements as to the ownership and valuation of the vehicles"[43]

- 8 penalties awarded, where defendant submitted 8 payment vouchers, even though payment vouchers also had several false invoices attached which falsely described the misbranded regulators supplied[44]

- 10 penalties awarded, not 15, where defendant submitted 10 false payment applications, even though payment applications had five additional documents attached which the court had found to be fraudulent[45]

- 5 penalties awarded, not 16, where defendant submitted five consolidated billings, even though billings were supported by eleven invoices used to calculate billing amounts[46]

- number of penalties would be based upon number of leases referenced in monthly reports which falsely reported prices and amounts of oil taken under leases, no separate penalties would be assessed for individual false run tickets, tank strapping reports and meter prover reports which supported monthly reports[47]

Two additional cases relying on this same line of precedent held that the number of penalties should be limited to the number of forms or invoices presented, even if each form or invoices contained numerous individual fraudulent line items.[48]

Arguably, a rule has evolved from these lower court decisions: the number of penalties must be based only upon the number of false "claims" or "payment demands," and any additional false "records or statements" should be disregarded for purposes of

42. United States v. Rohleder, 157 F.2d 126, 130–31 (3d Cir. 1946) (citing *Hess*).

43. United States v. Grannis, 172 F.2d 507, 515–16 (4th Cir. 1949) (citing *Hess* and *Rohleder*).

44. United States v. National Wholesalers, 236 F.2d 944, 950–51 (9th Cir. 1956) (no cases cited).

45. United States v. Woodbury, 359 F.2d 370, 377–78 (9th Cir.1966) (citing *National Wholesalers*, *Grannis*, *Rohleder*, and *Hess*).

46. Miller v. United States, 550 F.2d 17, 23–24 (Ct. Cl. 1977) (citing *Woodbury* and *Bornstein*).

47. United States v. Koch Industries, Inc., 57 F. Supp. 2d 1122, 1124-27 (N.D. Okla. 1999) (citing *Hess* and *Bornstein*).

48. United States v. Krizek, 111 F.3d 938-40 (D.C. Cir. 1997) (citing *Bornstein*, *Hess*, *Grannis*, *Miller*, and *Woodbury*) (penalty award should be based upon each HCFA-1500 form submitted to Medicare, not on each individual false CPT code listed on the form, even though magistrate found that the CPT code, not the HCFA-1500, was the basic accounting unit used by the Government in paying claims); Cantrell v. New York University, 326 F. Supp. 2d 468, 469–70 (S.D.N.Y. 2004) (citing *Krizek*) (number of penalties would be calculated based on number of invoices submitted to Medicare, even though each invoice contained numerous individual "upcoded" items).

counting penalties.[49] Such a rule, however, ignores the plain language of the Act. Making false records or statement in support of a false claim is a separate and independent violation of the Act. The Act separately prohibits *both* "present[ing], or caus[ing] to be presented . . . a false or fraudulent claim," 31 U.S.C. § 3729(a)(1), *and* "mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved," § 3729(a)(2).[50] Committing either of these prohibited acts alone is sufficient to warrant imposition of a penalty (as is committing any one of the other enumerated prohibited acts). Where a defendant has both submitted false claims and created false statements or records in support of those claims, therefore, the number of penalties should be based upon both violations,[51] just as a separate penalty is assessed for each conspiracy in cases where a defendant has both submitted false claims and conspired to submit those claims.[52] To simply ignore the false statements and records for penalty purposes improperly fails to give effect to all of the provisions of the Act.

Moreover, a false claim supported by false documentation is likely more difficult, costly, and time-consuming to detect; assessing penalties for the additional violation of creating false records and statements therefore serves the Act's purpose to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government," and to "make the statute a more useful tool against fraud in modern times."[53] Assessing separate penalties for false records or statements made in support of false claims, rather than simply ignoring such violations of the Act for penalty purposes, is also in accord with the direction of the Supreme Court in *Bornstein* that "the focus in each case [must] be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures," and that the number of penalties should not simply be limited to the number of contracts or false claims at issue. The defendant who both submits false claims and also creates false records, statements or documents to support or conceal those claims has committed more acts in violation of the statute than the defendant who has only submitted a false claim. Likewise, the defendant who creates tens or hundreds of false documents in support of his false claims has committed more acts in violation of the statute than the defendant who has created only one or two false records or statements. In accordance with *Bornstein*, the number of penalties assessed should reflect the different acts committed by such de-

49. One court recently summarized the rule as follows: "[s]eparate penalties are to be assessed for each request for payment, rather than for each false statement." United States ex rel. Augustine v. Century Health Services, 136 F. Supp. 2d 876, 895 (M.D. Tenn. 2000) (20 penalties awarded, even though court explicitly found defendant liable for both 20 false claims and 22 false statements) (citing *Krizek*), aff'd, 289 F.3d 409 (6th Cir. 2002).

50. Likewise the previous version of the Act, although not divided into subsections, prohibited both presenting a false claim and making or using a "false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for purposes of getting a false claim paid or approved. 31 U.S.C. § 231.

51. Of course, additional penalties should be assessed for false records or statements only when the United States is pursuing a claim under § 3729(a)(2). It should be noted that it is not always clear from the opinions cited above whether or not the United States had separately alleged the making of false statements in addition to false claims, especially under the previous Act, where reference is usually just made to the entire section.

52. *See* Section III.A., *supra*.

53. S. Rep. No. 99-345, at 1–2 (July 28, 1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

fendants, and should not arbitrarily treat them identically, especially in contravention of the Act's plain statutory language.

The case of *United States v. Board of Education of the City of Union City*[54] provides a rare example of a court explicitly assessing separate penalties for violations of sections 3729(a)(1), (a)(2), and (a)(3). *Union City* involved a public school construction project. The court assessed sixteen separate penalties based upon: nine false "claims" under 3729(a)(1), such as false change orders and grant offers; six false "records or statements," under 3729(a)(2), namely five quarterly reports and one interim report; and one penalty for conspiring to defraud the United States, under 3729(a)(3). Unlike the cases discussed above, however, it appears that *Union City* did not involve a situation where one or many false claims were each supported by several "false records and statements." Instead, it is not clear what connection, if any, the quarterly and interim reports, *i.e.*, the "records and statements" for which the *Union City* court assessed penalties had to the false "claims" for which it assessed penalties. The "records and statements" appear to have been independent from the particular "claims" the Court found to be false. Thus, although Union City is noteworthy for recognizing that "[i]n determining the appropriate number of penalties, if any, that may be imposed against defendants, . . . each separate violation which occurred must be accounted for,"[55] it did not address the issue of whether separate penalties can be assessed for both a false claim and any "records or statements" made to get that same false claim paid.

The case of *United States ex rel. Virgin Islands Housing Authority v. Coastal General Construction Services Corp.*,[56] provides an example where a court properly assessed penalties based on ten false records or statements made in support of a single false claim, although it might have reached the right result for the wrong reason. In *Virgin Islands*, the court found the defendant liable under § 3729(a)(1) for submitting an arbitration demand containing false costs.[57] It also found the defendant liable under § 3729(a)(2) for making ten false statements in support of the arbitration demand.[58]

The Government argued that each false record or statement used to support the false arbitration claim warranted a separate penalty, while the defendant argued that there was "only one claim and not ten."[59] Although the court awarded ten penalties as requested by the Government, it is not clear whether it awarded these penalties based on the § 3729(a)(2) violation. The court titled its discussion of this issue "Penalties of $5,000 on William Koenig for *each* of the ten false records he used to support the Donoe claim,"[60] thus suggesting it was going to award the penalties based on the ten false records or statements submitted in violation of § 3729(a)(2). In the text however, the court, citing *Bornstein*, seemed to conclude that the number of penalties

54. 697 F. Supp. 167, 175–77 (D.N.J. 1988)

55. *Id.* at 174.

56. 299 F. Supp. 2d 483 (D.V.I. 2004).

57. *Id.* at 487.

58. *Id.* at 487–88.

59. *Id.* at 488.

60. *Id.*

had to be based upon the number of "false payment demands."[61] It held that the ten false subcontracting bills submitted in support of the one arbitration claim were each "false payment demands," and further stated that "there were ten fraudulent acts which caused [the arbitration] claim to be false." This language suggests that the court may have assessed the ten penalties in connection with the § 3729(a)(1) violation, either viewing the false subcontracting bills as separate false claims in their own right, or as having "caused" the submission of false claims.[62]

Whether the *Virgin Islands* court thought it was imposing ten penalties because there were ten false "claims" or ten false "records or statements," at least it did not fall into the trap of simply collapsing the ten false subcontracting bills into the single arbitration demand and awarding one penalty, as did the courts in the line of precedent discussed above. In fact, the *Virgin Islands* court did just the opposite: it correctly assessed ten penalties based on the ten false subcontracting bills, but then forgot to assess an additional penalty for the arbitration demand itself. An analysis that was truly faithful to both *Bornstein* and the language, structure and purposes of the Act would have yielded *eleven* penalties: one for the single arbitration demand which was a false "claim" under § 3729(a)(1), and ten additional penalties for the ten separate false statements made in support of the arbitration demand, which were separate false "records or statements" under § 3729(a)(2).

The ever-lengthening line of cases failing to assess separate penalties for false "records or statements" creates a loophole for those who have been found liable under the Act, one that Congress never intended. These cases are irreconcilable with the language and purposes of the Act, as well as established Supreme Court precedent. Courts should assess penalties for both false "claims" *and* false "records or statements" made in support of suchclaims, which plainly constitute separate and independent violations of the Act.

61. *Id.* at 488–89.

62. *Id.*

COURAGEOUS WHISTLEBLOWERS ARE NOT "LEFT OUT IN THE COLD": Legitimate Justifications Exist for Collecting Evidence of False Claims Act Violations

*Michael R. Grimm, Dean S. Rauchwerger, James F. Smith & Allison K. Baten**

Courage is rightly considered the foremost
of the virtues, for upon it, all others depend.
—Winston Churchill

I. INTRODUCTION

It is the courage of whistleblowers, standing up in the face of great adversity and overwhelming pressure to "look the other way," that enables the False Claims Act ("FCA") to fulfill its primary purpose of combating fraud on the U.S. Treasury. By marshalling evidence and collecting company documents, the whistleblower provides the necessary proof to shed light on fraudulent and illegal FCA activities.

Many speculate as to whether an employee can gather or retain documents during the course of his or her employment to support a *qui tam* action under the FCA. The short answer is that an employee will generally not be liable for gathering or retaining an employer's documents to support a *qui tam* action under the False Claims Act. While an employee owes a general duty of loyalty to his or her employer, this duty is qualified as the law offers a "safe-harbor" exception, so to speak, where the employee has a good faith reason to believe that the employer is engaged in fraudulent or illegal conduct. This exception is codified by the FCA and ensures that an employee cannot be retaliated against for exposing the employer's fraudulent or illegal activity.

This article will briefly address an employee's general duty of loyalty owed to his or her employer and its significant exceptions. It further examines the strong public policy and Congressional intent behind the FCA—encouraging exposure of fraudulent or illegal activity. Finally, this piece will address the typical claims pursued by employers seeking to assert liability against employees who have copied or retained the employer's documents, confidential or otherwise, to support a *qui tam* suit.

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II. AN EMPLOYEE'S QUALIFIED DUTY OF LOYALTY

A. Generally, an employee has a duty to refrain from using or communicating confidential information acquired or compiled by his or her employer.

Generally, "unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency . . . unless the information is a matter of general knowledge."[1] As a general proposition, a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit, but must account to his principal for any profits derived therefrom.[2]

"Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy."[3] The Supreme Court has held that "even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment."[4]

B. There are several significant exceptions to the general duty of loyalty that an employee owes to his or her employer.

Courts have held, however, that there are certain situations where an employee's duty of loyalty is abrogated. For example, courts have held that employees with a good faith reason to believe their employer is engaged in unlawful conduct "[have] a legitimate interest in preserving evidence of [their employer's] unlawful employment practices."[5]

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1. Restatement (Second) of Agency § 395 (1958).

2. Restatement (Second) of Agency § 388 (1958).

3. William M. Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 857.1 at 260 (rev. ed. 1986).

4. *See* Snepp v. United States, 444 U.S. 507, 515, n.11 (1980) (upholding provisions of a written trust agreement prohibiting the unapproved use of confidential Government information relating to CIA operations). *See also* Carpenter v. United States, 484 U.S. 19 (1987) (upholding the conviction of a defendant for violating the mail and wire fraud statutes when he fraudulently misappropriated his employer's property and used the mail and wire services to commit these acts); Buckley v. Valeo, 424 U.S. 1, 25-28 (1976); Cole v. Richardson, 405 U.S. 676 (1972).

5. *See* O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996) (involving employer's unlawful age discrimination practices); *see also* Kempcke v. Monsanto Co., 132 F.3d 442 (8th Cir. 1998) (holding that a reasonable fact-finder could conclude that an employee had a good faith reasonable belief that documents he found in his computer revealed an ongoing plan by Monsanto to weed out senior managers due to their age, in violation of the ADEA; therefore, retention of documents was lawful). *But see* Shoaf v. Kimberly-Clark Corp., 294 F. Supp. 2d 746 (M.D.N.C. 2003) (finding that an employee who provided unsolicited confidential information to a former employee to aid his Title VII claim was not entitled to protection under the participation clause of Title VII because he offered no reasonable justification for disclosing the confidential information and did not engage in protected "opposition" himself; the court found the employer's justification convincing that Shoaf was terminated for the disclosure, not for his protected deposition testimony assisting another's Title VII claim).

Several courts have also engaged in a balancing test, weighing the interests of the employer in protecting confidential information against the employee's interest in copying and disseminating confidential documents to expose wrongdoing.[6]

III. THE FALSE CLAIMS ACT: ENCOURAGING EXPOSURE OF FRAUD

"[T]he purpose of the *qui tam* provision of the Act is to encourage those with knowledge of fraud to come forward."[7] In order to proceed with an FCA action, the FCA requires that relators disclose to the United States "substantially all material evidence and information the person possesses,"[8] and ties relator's share to the importance of her participation in the action and the relevance of the information she provided.[9]

Courts continually recognize the importance of the FCA, the purpose of which is to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[10] Achieving that goal requires the "coordinated effort" between private citizens and the government.[11] "From targeting massive contractor fraud during the Civil War to halting healthcare fraud today, the ability of individuals to serve as private attorneys general and to protect the interests of the government has and continues to serve vital purposes."[12]

As to one of the primary purposes of the FCA—encouraging the exposure of fraud—the "*qui tam* provisions seek to ensure that information bearing on potential fraud will come to light even if government officials should decide not to initiate proceedings based on information contained in government files."[13] The FCA provides that "[a]ny employee who is discharged . . . by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled" to sue to obtain make-whole relief.[14]

6. *See* Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980) ("Courts have required that the employee conduct be reasonable in light of the circumstances, and have held that the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare."). *But see* Laughlin v. Metro. Wash. Airports Auth., 952 F. Supp. 1129, 1138 (E.D. Va. 1997) (court struck the balance in favor of the employer where the plaintiff was an informant (rather than a participant) supplying confidential information regarding a co-worker's Title VII claim she took from her boss' desk, copied, and provided to the co-worker who had filed a Title VII claim).

7. Neal v. Honeywell, 33 F.3d 860, 861 (7th Cir. 1994) (citing H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986)).

8. 31 U.S.C. § 3730(b)(2).

9. United States ex rel. Green v. Northrop Corp., 59 F.3d 953, 964 (9th Cir. 1995).

10. S. Rep. 99-345, at 1, U.S. Code Cong. & Admin. News 1986, 5266.

11. *Id*. at 2, U.S. Code Cong. & Admin. News 1986, 5266, 5266–67.

12. United States ex. rel. Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 769–70 (N.D. Ill. 2004).

13. United States ex. rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1520 (10th Cir. 1996).

14. 31 U.S.C. § 3730(h)(1986).

In regard to potential *qui tam* actions under the FCA, courts have held that Congress intended to "protect employees while they are collecting information about a possible fraud, before they have put all the pieces together."[15]

Moreover, courts have found employees' activities in collecting information protected although they may not have ultimately filed *qui tam* suits.[16] Nor is it necessary that the employee "know" that the investigation he or she is pursuing could lead to a FCA suit.[17]

In *X Corp. v. Doe*,[18] the court also dealt with the issue of whether a former employee could be compelled to return materials taken from the employer that might demonstrate fraud. The court responded in the negative, finding less onerous ways of preventing this information from being used to harm the employer, such as enjoining disclosure of allegedly confidential information.[19]

IV. FCA'S STRONG PUBLIC POLICY: OVERRIDING EMPLOYER'S EFFORTS TO SEEK LIABILITY FOR COLLECTION OR RETENTION OF DOCUMENTS

Employers sometime seek to assert claims against an employee who copied or retained confidential documents from the employer. The three claims are typically for: 1) breach of a confidentiality agreement; 2) breach of fiduciary duty; and 3) conversion.[20]

At the outset, it is paramount to recognize that the duties of confidentiality and loyalty are qualified and must acquiesce to matters of public interest irrespective of whether those duties flow from an express confidentiality agreement or a common law fiduciary duty.[21] Moreover, a claim for conversion cannot be found where the owner has not been deprived of title or right to use the property.[22]

15. Yesudian v. Howard Univ., 153 F.3d 731, 740 (D.C. Cir. 1998); *see also Neal*, 33 F.3d 860; Lang v. Northwestern Univ., No. 04-C-3290, 2005 WL 670612, at *2 (N.D. Ill. 2005) ("there is nothing in the language of § 3730(h) that precludes a claim for retaliation in a situation where the employer learns that an employee has engaged in protected activity regarding a false claim"); Williams v. Martin-Baker Aircraft Co., 389 F. 3d 1251, 1260 (D.C. Cir. 2004) ("The FCA's whistleblower protections entitle [a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, . . . to all relief necessary to make the employee whole.").

16. *See Neal*, 33 F.3d at 864–65; *see also* Childree v. UAP/GA AG CHEM., Inc., 92 F.3d 1140 (11th Cir. 1996); *Ramseyer*, 90 F.3d at 1522.

17. *See Childree*, 92 F.3d at 1143, 1145–46 (noting that employee never considered bringing FCA case and had not heard of the Act at the time of discharge); United States ex. rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996) (finding that protected activity does not require "specific awareness of the FCA"); *Neal*, 33 F.3d at 864 (noting that plaintiff was not informed that she could file a *qui tam* action); *Yesudian*, 153 F.3d at 740 ("[I]t is sufficient that a plaintiff be investigating matters that reasonably could lead to a viable False Claims Act case").

18. 805 F. Supp. 1298 (E.D. Va. 1992), *aff'd*, 17 F.3d 1435 (4th Cir. 1994).

19. *Id*. at 1304, 1311 (when it was determined that the materials did not establish ongoing fraud, however, the relator was ordered to return them).

20. *Grandeau*, 350 F. Supp. 2d at 772–74.

21. *See generally* Comments & Illustrations, Restatement (Second) of Agency § 395 (1958).

22. *See generally* Restatement (Second) of Torts § 222A(1) (1965).

A. Breach of Confidentiality Agreement

For strong public policy reasons, agreements that attempt to restrain a party from cooperating with criminal investigations or disclosing matters of public consequence are unenforceable.[23] Courts have refused to enforce private agreements that prohibit signatories from disclosing federally protected matters of public interest, including those addressed by the FCA.

In *Connecticut Light & Power Co. v. Sec'y of the U.S. Dep't of Labor*, the Second Circuit found that a proposed settlement, which restricted a former employee's cooperation with the Nuclear Regulatory Commission, violated Section 210 of the Energy Reorganization Act of 1974 ("ERA"), "a remedial statute intended to shield employees from adverse action taken by their employers in response to employees' complaints of safety violations."[24] The court also found that "[a]lthough the act of inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet."[25]

Additionally, the Tenth Circuit has refused to enforce a non-disclosure agreement against a "whistleblower" where honoring the contract might have allowed a civil wrong against a third party to go undetected.[26] The trial court had dismissed the action finding that public policy "will never penalize one for exposing wrongdoing . . .", and the Tenth Circuit affirmed explaining that:

> It is public policy . . . everywhere to encourage the disclosure of criminal activity, and a ruling here in accordance with the argument advanced by appellant would serve to frustrate this policy. . . . By holding that appellee breached its contract we would, in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a

23. *See* Town of Newton v. Rumery, 480 U.S. 386, 392 (1987) ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"); *see also* Fomby-Denson v. Dept. of the Army, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (concluding that "the public policy interest at stake [in] the reporting of possible crimes to the authorities is one of the highest order and is indisputably 'well defined and dominant' in the jurisprudence of contract law."); Palmateer v. Int'l Harvester Co., 421 N.E. 2d 876, 878 (1981) ("parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public"). *But see* Turner v. Reynolds Ford, Inc., No. 97-6152, 1998 U.S. App. LEXIS 9552, at *34 (10th Cir. 1998) (unpublished) ("Whether reporting criminal activity falls within the public policy exception depends on who the victim is and what the crime is"—court found that plaintiff met her burden where she alleged termination of employment related to her reporting of sexual harassment in violation of Title VII and state law retaliatory discharge provisions).

24. Conn. Light & Power Co., 85 F.3d 89, 95 n.5 (2d Cir. 1996).

25. *Id.* at 95.

26. Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 851 (10th Cir. 1972) (defendant informed a third party of plaintiff's possible misappropriation of certain oil and natural gas deposits belonging to the third party, and plaintiff sued for breach of the non-disclosure agreement).

> crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed.[27]

Courts have also been motivated by public policy when deciding against the enforcement of private agreements that operated to interfere with the Government's ability to carry out its investigations. In *EEOC v. Astra USA, Inc.*, the First Circuit denied, on public policy grounds, defendant's request for the enforcement of non-assistance provisions in its settlement agreements with employees, which prohibited the employees from "assist[ing] in any way" the EEOC with its discrimination investigation.[28] The court reasoned that "if victims of or witnesses to sexual harassment are unable to approach the EEOC or even answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered."[29]

Of particular relevance to this article, the Congressional intent in creating the 1986 FCA amendment for whistleblower protection is plain—to encourage the detection and exposure of potential frauds against the United States Treasury.[30] Thus, private agreements, whether entered into as a condition of employment, during the course of employment, or in settlement of claims outside of the FCA framework, that would frustrate this public interest and Congressional objective are generally unenforceable. For example, the Ninth Circuit, in *United States ex rel. Green v. Northrop Corp.*, considered whether a private pre-filing settlement agreement, entered into without the knowledge or consent of the government, releasing a relator's *qui tam* claims against the company for alleged double billing, was enforceable to bar a subsequent *qui tam* suit.[31] The court refused to enforce that release because to do so "would impair a substantial public interest," and specifically "threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986."[32] As the court pointedly explained:

> If the prevailing legal rule were that prefiling releases entered into without the government's consent or knowledge were enforceable,

27. *Id.* at 852–54; *but see* United States ex rel. Hall v. Teledyne, 104 F.3d 230 (9th Cir. 1997) (upholding enforcement of state court settlement and release against relator where the government was fully aware of and investigated charges prior to release). *But see also* United States ex rel. Gebert v. Transp. Admin. Serv., 260 F.3d 909 (8th Cir. 2001) (the Eighth Circuit held that public policy issues actually militated in favor of enforcing a waiver and release of all known and unknown causes of action, claims or suits executed as part of a party of a bankruptcy proceeding where the Geberts possessed all information necessary to file the suit as of the date they filed for bankruptcy yet failed to disclose the potential *qui tam* FCA suit on the Schedule (B) listing of their assets—court determined they lacked standing and barred suit by the Geberts); Zahodnick v. Int'l Bus. Machs. Corp., 135 F.3d 911 (4th Cir. 1997) (plaintiff enjoined from disclosing and ordered to return confidential materials where plaintiff had signed non-disclosure agreements in connection with employment and evidence revealed that plaintiff had voluntarily resigned and brought suit under the retaliation provision of the FCA only after learning that his resignation disqualified him from an enhanced separation package and unemployment compensation benefits).

28. *Astra USA*, 94 F.3d 738, 743–45 (1st Cir. 1996).

29. *Id.* at 744.

30. 22 Causes of Action 2d 217 (2005).

31. 59 F.3d at 956–58.

32. *Id.* at 963.

> then it stands that Green never would have filed his *qui tam* complaint in the first place. And . . . both the structure of the Act and the legislative history reveal that it is the *filing* of more private suits that Congress sought to encourage, both to increase enforcement and deterrence as well as to spur the government to undertake its own investigations.[33]

B. Breach of Fiduciary Duty[34]

The same public policy arguments that preclude enforcement of a confidentiality agreement support dismissal of a claim for breach of fiduciary duty, as well. The duty of loyalty owed by an employee to an employer is a "qualified duty." The agent may reveal confidential information "in the protection of a superior interest of himself or a third person."[35] An agent, therefore, may reveal current or planned criminal conduct by the principal in service of the public interest.[36] There exists a "clear public policy favoring investigation and prosecution of criminal offenses," and "the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy."[37] Similarly, the Ninth Circuit held that a party who cooperated with the Federal Government in a covert criminal investigation was immune from subsequent civil liability in an action by the target.[38]

33. *Id*. at 966 (emphasis in original).

34. In *United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am*., the District Court for the Northern District of Illinois addressed a "unique" factual scenario where the U.S. mailed a subpoena to an employee at the defendant's business, addressed to her in her representative capacity as "QA Coordinator, PCI," and requested production of documents necessary for the government investigation of FCA violations. 350 F. Supp. 2d at 768, 772, 775. According to the opinion, the government had taken no official steps to keep the subpoena secret from defendant, including an application of 18 U.S.C. § 3486(a)(6) providing that a district court may issue an *ex parte* order requiring nondisclosure of the subpoena. *Id*. at 772. In response to the subpoena, Grandeau collected and produced documents without informing her employer but also filed her own *qui tam* action. *Id*. at 768–69. Defendant counterclaimed on three grounds, one of which was breach of fiduciary duty for Grandeau's failure to disclose receipt of and response to the subpoena to her employer, which was allegedly not done in good faith. *Id*. at 769, 771. The court noted that "[t]he FCA does [not] . . . condone or shield individuals who receive and respond to subpoenas that are not theirs to address." *Id*. at 770. The court allowed the fiduciary duty counterclaim to survive a motion to dismiss, finding that the receipt of a subpoena issued to a company and not to Grandeau individually or with an order, if true, would obligate the relator to disclose the subpoena to her employer. *Id*. at 775.

35. Restatement (Second) of Agency § 395 cmt. F (1958).

36. *Id*.

37. Niebur v. Town of Cicero, 212 F. Supp. 2d 790, 826 (N.D. Ill. 2000).

38. Caesar Elecs., Inc. v. Andrews, 905 F.2d 287, 289 (9th Cir. 1990).

C. Claim of Conversion

The gravamen of the tort of conversion is the deprivation of the possession or use of one's property.[39] Section 222(A) of the *Restatement (Second) of Torts* defines conversion as "an intentional exercise of dominion or control over a chattel which *so seriously interferes* with the *right* of another to *control it*. . . ."[40] Thus, an owner generally cannot state a claim for conversion if he or she retains either originals or copies of the documents.[41] The reason for this rule is that the possession of copies of documents—as opposed to the documents themselves—does not legally rise to an interference with the owner's property sufficient to constitute conversion.[42] "In cases where the alleged converter has only a copy of the owner's property and the owner still possesses the property itself, the owner is in no way being deprived of the use of his property . . . [t]he only rub is that someone else is using it as well."[43]

Even if the confidential documents constitute "property" of a type subject to conversion, holding the relators responsible for engaging in conduct for the purposes of pursuing an FCA claim would undercut a statutorily protected right and further undermine the pivotal purpose of the FCA to uncover false and fraudulent claims on the United States.

V. CONCLUSION

Whistleblowers are generally not liable for gathering or retaining an employer's documents to support a *qui tam* action under the False Claims Act. While an employee owes a duty of loyalty to his or her employer, there are exceptions for situations where the employee has a good faith reason to believe the employer is engaged in fraudulent or illegal conduct. This exception has been codified by the FCA and ensures that an employee cannot be retaliated against for exposing the employer's fraudulent activity. It is only by the whistleblower's courage to uncover fraudulent and illegal activities that the Congressional intent behind the False Claims Act is fulfilled.

39. *See* Prosser & Keeton on the Law of Torts ch. 3, § 15, at 102 (5th ed. 1984) ("The gist of conversion is the interference with control of the property."); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985) ("[c]onversion requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor"); Pearson v. Dodd, 410 F.2d 701, 706 (D.C. Cir. 1969) ("where the intermeddling falls short of the complete or very substantial deprivation of possessory rights in the property, the tort committed is not conversion. . . .").

40. Restatement (Second) of Torts § 222A(1) (1965) (emphasis added).

41. Harper & Row Publishers, Inc., 723 F.2d at 201; *Pearson*, 410 F.2d at 706–08 (conversion claim not stated where originals were copied and returned to the original files, noting that owner was not substantially deprived of his beneficial use of the documents); Furash & Co., Inc. v. McClave, 130 F. Supp. 2d 48, 58 (D.D.C. 2001) (no conversion found where former employer received copies of the documents retained after employment upon demand of such); *but see* FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300, 303 (7th Cir. 1990) (defendant was required to return originals to plaintiff; plaintiff did not have a copy, and thus defendant did not qualify as an additional user but was a converter).

42. Harper & Row Publishers, Inc., 723 F.2d at 201.

43. *FMC Corp.*, 915 F.2d at 303.

THE INTERPLAY BETWEEN THE FALSE CLAIMS ACT, SECURITIES FRAUD, AND ERISA*

*Reuben A. Guttman, Kirk Chapman and Ann Lugbill***

There is an often-neglected interplay between violations of the federal False Claims Act (FCA) and a host of common and statutory laws that regulate government contractors.[1] While the Government may be victimized by wrongful conduct, injuries flowing from defective products or over-charging will undoubtedly impact consumers, shareholders and even employees of the contractor.[2] Less obvious is the interplay between conduct that violates the FCA and obligations under the federal securities laws, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et. seq.*[3]

The principle is that where publicly reported revenue streams or accounts receivables are inflated or fraudulent, then violations of federal securities laws or ERISA may exist.[4] Herein lies the potential that a False Claims violation, or the conduct underlying the FCA claim, can give rise to a securities law claim. Where a publicly traded company reports revenue that is based on dollars that were generated through unlawful conduct, as in the case of revenues based on "false claims," then potentially an action may exist under the federal securities laws if that conduct causes injury to shareholders who purchased stock at inflated prices. Where the loss causes employees and retirees to suffer losses in their 401(k) or defined contribution plans, an ERISA violation may also exist.

With greater numbers of companies relying on the Federal Government for revenue, there is an ever-increasing potential that false claims could give rise to securities fraud. This is particularly true in the pharmaceutical industry, the health care industry, the post–9/11 field of security services, and the defense industries. Furthermore, with

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1. *See, e.g.*, Ann Lugbill & Reuben Guttman, *The False Claims Act: Holding Employers Accountable for Workplace Rights*, Employee Rights Quarterly, Autumn, 2000, at 17.

2. In terms of common law obligations, defective products sold to the Government that injure third parties may lead to litigation under state tort laws, including actions in negligence, fraud, and strict liability. Similarly, a pattern of conduct that injures the government may also injure individuals who have rights of action under federal antitrust laws and state consumer laws.

3. The authors focus this article primarily on federal securities laws and ERISA. There are a wide array of actions that arise under state common laws and consumer protection statutes. Rights under these statutes or laws exist where the victims are those whose injuries flow from defective products or services provided by federal contract.

4. "In the context of private securities litigation, the First Circuit has held that 'information is 'material' only if its disclosure would alter the 'total mix' of facts available to the investor and 'if there is a substantial likelihood that a reasonable shareholder would consider it important to the investment decision." *In Re* Focus Enhancements, Inc. Securities Litigation, 309 F. Supp 2d 134, 143 (D. Mass. 2001) (quoting, in part, Cooperman v. Individual, Inc. 171 F.3d 43, 49 (1st Cir. 1999)).

the recent Gulf Coast hurricane disasters, new segments of American industry will no doubt be added to this list. For example, in the pharmaceutical industry, misrepresentations about the safety or efficacy of drugs or the off-label marketing of drugs could arguably give rise to both False Claims and securities cases. Merck Pharmaceutical's failure to make disclosures about the safety of its pain medication Vioxx, has lead to a wave of both personal injury tort actions and class action securities litigation. That same conduct, however, could very well amount to false claims to the extent the federal Medicare system and/or states with false claims acts reimbursed consumers for the purchase of the pain medication. These dual theories of liability particularly exist in the medical device, durable medical equipment and pharmaceutical industries, where there are now a host of instances where providers allegedly withheld information about their products' efficacy or safety. Similarly, if a drug company's revenues are substantially based on prohibited off-label marketing practices that were concealed from shareholders, causes of action might arise under both the FCA and federal securities laws.

I. FEDERAL SECURITIES LAWS

Federal Securities laws dating back to 1933 require public companies to "speak the truth" in their public pronouncements. Specifically, Section 10(b) of the Securities Exchange Act of 1934 makes it "unlawful for any person, directly or indirectly . . . to use or employ, in connection with the purchase of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Securities and Exchange Commission (SEC) may prescribe."[5] The SEC has, in turn, promulgated Rule 10b-5, 17 C.F.R. § 240.10b-5, which states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

As a general proposition, a publicly traded company and its officers may be held liable for a Rule 10b-5 violation where they make knowing misrepresentations, or omissions

5. 15 U.S.C. § 78j(b).

6. Liability includes monetary damages resulting from the fraud.

of fact, to shareholders.[6] Often, these misrepresentations or omissions occur in filings with the SEC. Sometimes a corporation will attempt to employ a rationale that itself is fraudulent in order to justify a false statement made in an SEC filing. This could include adopting an accounting practice that deviates from accepted standards.[7]

"Channel stuffing" is one such example. It is a deceptive practice designed to inflate sales and earnings figures by deliberately sending retailers more product than they are able to sell.[8] The company records the sales figures even though there is a high probability that the product will be returned, or worse yet, be returned and not usable as in the case of drugs that have exceeded their expiration date or have been rendered obsolete by a vastly improved new product. In *In Re Scientific Atlanta, Inc., Securities Litigation*,[9] for example, the court sustained plaintiffs' causes of action, explaining that "channel stuffing has the effect of shifting earnings into earlier quarters to the detriment of earnings in later quarters."

In alleging securities violations, however, it may not be sufficient to merely argue that the defendant claimed in its SEC filings that it was in compliance with federal procurement law when in fact it was not.[10] To survive a motion to dismiss under the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA),[11] some courts have maintained that where the plaintiff actually alleges misrepresentations regarding compliance with the FCA or procurement laws as a predicate to the securities claim, the plaintiff must allege that the defendant knew its public statement to shareholders regarding legal compliance was false at the time it was made. Absent a specific allegation regarding a false statement about legal compliance, courts may find that a corporation has some latitude to opine on its compliance

7. Enron, for example, relied on an accounting scheme known as "marked to market" accounting which allowed it to immediately report revenue that was prospective. *See* Kurt Eichenwald, Conspiracy of Fools, Broadway Books (2005). This, in turn, allowed Enron to borrow more money.

8. In August 2004, for example, the SEC filed a civil complaint against the drug giant Bristol-Myers Squibb for engaging in this type of conduct. *See also* Carpenters Health and Welfare Fund v. The Coca Cola Company, 321 F. Supp. 2d 1342 (N.D. Cal. 2004) (sustaining complaint, pending further discovery, involving allegations that Defendant stuffed distribution channels by shipping $600 million worth of excessive concentrate to foreign bottlers); *In Re* Focus Enhancements, Inc., Securities Litigation, 309 F. Supp. 2d 134 (D. Mass. 2001) (sustaining complaint alleging channel stuffing).

9. 239 F. Supp. 2d 1351, 1355 (N.D. Ga. 2002).

10. In *Kushner v. Beverly Enterprises, Inc*., LEXIS 24979 (E.D. Ark. 2001), *aff'd* 317 F.3d 820 (8th Cir. 2003), for example, the Court dismissed a securities fraud claim against Beverly Enterprises. That complaint was filed after the company announced that it had agreed to reimburse the United States $170 million and to pay a $5 million fine to settle Medicare fraud charges. The announcement of the settlement caused a marked drop in the price of Beverly's stock to a point where its value was 55 percent less than its trading price prior to the announcement of the investigation and the penalties.

In their civil complaint alleging securities fraud, the Plaintiffs claimed, *inter-alia*, that:

> In Beverly's Form 10-K filing for the years 1994 through 1998, Defendants state that "the Company believes that its facilities are in substantial compliance with the various Medicaid and Medicare regulatory requirements currently available to them.

Focusing on whether the Defendants had a duty to disclose their improprieties to shareholders, the court was "persuaded by the Defendants' argument that Beverly's opinion regarding compliance with Medicare laws was 'soft information' that Defendants were not under a duty to disclose." Slip Op. at 20. The court agreed with Defendant's argument that predictions or matters of opinion are "soft information," Slip Op. at 17, and that federal securities laws do not require companies to accuse themselves of "uncharged or unadjudicated wrongs." Slip Op. At 17 (citing Mayer v. Mylod, 988 F.2d 635, 639 (6th Cir. 1988)). The court recognized that "an opinion could be actionable if the speaker does not believe the opinion and the opinion is not well grounded in fact." *Id*.

11. 15 U.S.C. § 78u-4.

with the law. Alternatively, rather than plead the defendant's misrepresentations of compliance with federal law as a predicate wrong, the plaintiffs may allege that the defendant made misrepresentations or fraudulent omissions of fact concerning a specific practice that may also violate the FCA. This could, for example, include withholding disclosure of studies questioning the efficacy or safety of a medical device or drug. Arguably, if these studies had been disclosed, sales would have been diminished or non-existent.[12]

II. ERISA AND EMPLOYEE WHISTLEBLOWERS CAN BE IMPACTED

Injury as a result of securities fraud is not limited to shareholders, but may include employees and retirees protected by ERISA. Specifically, shareholders also can include employees who own an interest in their employer through a company-sponsored 401(k) plan or in defined contribution plans that invest in company stock.

Whistleblower employees who actually invested in a defendant employer through, for example, a 401(k) plan face actual personal loss if the revelation of the wrongdoing causes the stock to plummet. Such whistleblowers are not without redress.

Under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et. seq*., employees have an independent cause of action, which actually parallels actions of shareholders under the federal securities laws. While the facts necessary to prove these causes of action are overlapping, the pleading requirements and theories of law are different.

In contrast to a securities action which is based on statutory securities fraud, ERISA actions are based on a statutory claim for breach of fiduciary duty.[13] Where an employer is a 401(k) plan sponsor, it can exercise discretionary authority with respect to management and administration of the plan and/or management and disposition of the plan's assets, and is therefore a fiduciary of the plan in its own right.

ERISA provides, in pertinent part, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a

12. Alternatively, perhaps the FDA would not have approved the product for any use.

13. In addition to the differing legal theories, a class action suit under ERISA is governed only by Fed. R. Civ. P. 23, while the securities action also is governed by special class action rules imposed by the PSLRA, including unique provisions regarding the appointment of a lead plaintiff and the timing of discovery.

prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[14] ERISA, 29 U.S.C. § 1109, provides a statutory right of redress for breach of fiduciary duty.[15]

ERISA also mandates that plan fiduciaries have a duty of loyalty to the plan and its participants, which includes the duty to speak truthfully to the plan and its participants when communicating with them. A fiduciary's duty of loyalty to plan participants under ERISA also includes an obligation not to materially mislead, or knowingly allow others to mislead, plan participants and beneficiaries. "[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."[16] Moreover, an ERISA fiduciary's duty of loyalty requires the fiduciary to correct the inaccurate or misleading information so that plan participants will not be injured.[17] Finally, with regard to plan trustees, the United States Supreme Court has stated that the duty of loyalty to the plan participants "overcomes" any duty of loyalty to the corporation that appointed the trustee.[18]

14. *See* ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). These fiduciary duties under ERISA § 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence and are the "highest known to the law." They entail, among other things:

- The duty to conduct an independent and thorough investigation into, and continually to monitor, the merits of all the investment alternatives of a plan;
- A duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with an "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor;
- A duty to disclose and inform, which encompasses: (1) a negative duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

Additionally, ERISA § 405(a), 29 U.S.C. § 1105 (a), "Liability for breach by co-fiduciary," provides, in pertinent part, that:

> "…in addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (A) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (B) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (C) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach."

15. Specifically, ERISA, 29 U.S.C. § 1109, "Liability for breach of fiduciary duty," provides that:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court shall deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

16. *Varity Corp v. Howe*, 516 U.S. 489, 506 (1996).

17. *See, e.g., Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 381 (4th Cir. 2001) ("[An] ERISA fiduciary that knows or should have known that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent – especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions.") (emphasis added); *Jones v. Am Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1072 (11th Cir. 2004); *Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund*, 12 F.3d 1292, 1300 (3rd Cir. 1993).

18. *See* National Labor Relations Board v. Amax Coal, Co., 453 U.S. 322 (1981).

Though not arising in the False Claims Act context, the case of *In Re Royal Dutch/ Shell Transport ERISA Litigation*,[19] is instructive. That matter settled this calendar year for $90 million. The settlement notice[20] distributed to class members explained the case as follows:

> Co-Lead Plaintiffs' claims arise out of the January 9, 2004, announcement by the corporate defendants that certain of their oil and gas reserves would be recategorized. Co-Lead Plaintiffs allege that the stock of the Royal Dutch Petroleum Company—which was an investment option available to participants in the Plans—was inflated as a result of inappropriate reserve categorizations.
>
> Co-Lead Plaintiffs allege that Defendants were fiduciaries of the Plans during the Class Period and thus owed certain fiduciary duties to the Plans pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Fiduciaries are persons or institutions who manage money or property for another and who must exercise a standard of care imposed by law—in this case ERISA. ERISA is a federal statute that was enacted to protect employee benefit plans by establishing standards of conduct, responsibility and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies and sanctions. Co-Lead Plaintiffs further allege that Defendants knew or should have known that Royal Dutch Petroleum Company stock was inflated and that Defendants breached their fiduciary duties to the Plans by failing either to inform participants that the stock value was inflated by certain incorrectly categorized reserves or to remove the stock as an investment option available to participants.

To the extent that a company's revenue stream is the product of government contract fraud, company employees risk economic loss if the value of their 401(k) investment in company stock or their retirement benefit in a defined contribution plan is diminished as a result of their employer's fraud. The critical issues are the following: Did the company make false representations about its bona fides to its employee plan participants? Did employees invest in the company at an inflated stock price? Did the company match employee contributions with company stock knowing that the stock was inflated in value because of improper practices that the company had not disclosed?[21]

19. *In Re* Royal Dutch/Shell Transport ERISA Litigation, (D.N.J. 04-1398 (JWB).

20. A complete copy of the settlement notice can be found at www.MilbergWeiss.com. For complete information about ERISA and securities litigation, see www.TheCorporateInsider.com.

21. Though not arising out of a false claims situation, the most well-known example of where a devaluation of a company's stock has impacted workers is the case of Enron, where many employees of the company lost their life savings.

Where the court determines that the answers to these queries are "yes," that can result in corporate liability not only to the government and outside shareholders, but also to liability under ERISA for losses to beneficiaries of employer-sponsored retirement plans.

III. CONCLUSION

In today's environment, workers' rights are increasingly under siege as corporate officers use their power and influence to benefit themselves personally. Corporate fraud not only injures the governments consuming defective, harmful and/or overpriced products and services, but may also impact shareholders and employees. Those representing *qui tam* whistleblowers should be cognizant of the full range of corporate wrongdoing impacting their clients and the consequences that such wrongdoing may have upon others injured by the same or closely related misconduct.

In the Spotlight

False Statements and False Claims

Editor's Note: While this article mainly focuses on criminal provisions, it also dissects the interplay between the civil and criminal false claims statutes. This has become even more relevant over the last couple of years, as the DoJ has increasingly prosecuted traditional Title 31 cases under Title 18.

FALSE STATEMENTS AND FALSE CLAIMS+

Jeremy Baker
Rebecca Young

I. INTRODUCTION

Sections 287 and 1001 of Title 18 of the United States Code are statutes that make it a crime to (1) knowingly make a false claim upon or against the United States or to any department or agency thereof[1] and to (2) knowingly and willfully make a false statement to the United States or to any department or agency thereof,[2] respectively. In addition, 31 U.S.C. § § 3729-33 provides for the civil prosecution of false claims.[3] The three statutes, covered by just one statute from 1863 to 1948, contain very similar elements.[4] Often, this grants prosecutors the ability to choose the statute under which they desire to prosecute cases of fraud.[5] In some instances, it does not constitute a violation of the Double Jeopardy Clause to punish defendants under both § 287 and § 1001 because the language of the statutes demonstrates Congress intended to create two distinct violations.[6]

While prosecutors may use the statutes interchangeably, some significant differences do exist between the three statutes. For example, while materiality is an element of § 1001 regardless of which portion of § 1001 is at issue,[7] the circuits are split on whether materiality is an element of § 287.[8] In addition, § 1001 requires that the prosecutor prove the defendant both knowingly and willfully lied to the government.[9] However, the circuits are divided on the intent requirement for § 287.[10]

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1. 18 U.S.C. § 287 (1986).

2. 18 U.S.C. § 1001 (1996).

3. 31 U.S.C. § § 3729–33 (1994).

4. *See* Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 592 (1996).

5. *See id.* at 591; Ronald J. Nessim & Benjamin N. Gluck, *Waiver of Copayments as False Statements*, 14 HEALTH LAW. 1, 3 (2002).

6. *See* United States v. Allen, 13 F.3d 105,108 (4th Cir. 1993) (holding that punishment for making both false claims against the government and for making a false statement did not violate the Double Jeopardy Clause).

7. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996) (codified as amended at 18 U.S.C. § 1001 (2000)); H.R. Rep. No. 104-680 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3935, 3942 (stating "[t]his express requirement that all three offenses have materiality as element resolves conflict among circuits as to whether materiality is element of all three offenses or merely the offense of falsifying as delineated in paragraph (3)").

8. *Cf.* United States v. Logan, 250 F.3d 350, 358 (6th Cir. 2001) (holding materiality is not an element of § 287); United States v. Fordham, 225 F.3d 647, 649 (2d Cir. 2000) (finding it "doubtful" materiality is an element of § 287); United States v. Baker, 200 F.3d 558, 561 (8th Cir. 2000) (stating jury instruction that materiality is an element of § 287 is consistent with the law of the circuit).

9. *See* United States v. Yermian, 468 U.S. 63, 69 (1984) (requiring actual knowledge of false statement but not of federal agency jurisdiction); United States v. Heuer, 4 F.3d 723, 732 (9th Cir. 1993) (stating "[t]o willfully make a false statement under § 1001, the defendant must have the specific intent to make a false statement. Specific intent does not require evil intent, but only that the defendant act 'deliberately and with knowledge'").

10. *Cf.* United States v. Catton, 89 F.3d 387, 392 (7th Cir. 1996) (holding § 287 does not require specific intent to defraud the government); United States v. Gumbs, 283 F.3d 128, 131 (3d Cir. 2002) (holding the defendant must know he is presenting a false claim).

In addition to the two criminal statutes, 31 U.S.C. § 3730(b) affords private citizens the ability to bring a *qui tam* civil action for a violation of § 3729 on behalf of the government.[11] Suits brought under this statute effectively function as criminal suits, while allowing the private citizen to be awarded damages.

There are tactical reasons why a prosecutor chooses to use one statute over another. For example, the Department of Justice ("DOJ") advises its attorneys to pursue cases under § 287 rather than under § 1001 whenever possible, in order to enhance the government's ability to favorably use estoppel doctrines in subsequent civil suits[12]. Section I of this article discusses prosecutions brought under § 1001, the false statements statute. Section II of this article addresses criminal charges brought under § 287, the false statements statute. Finally, Section III addresses the civil false claims statutes.

II. FALSE STATEMENTS

§ 1001 of Title 18 of the United States Code[13] is a broad and frequently used[14] statute that criminalizes the act of making false statements to the United States government. Title 18 also contains several more specific false statement statutes, including § 1014, which criminalizes false statements to influence loan and credit applications,[15] and § 1027, which criminalizes false statements related to Employee Retirement Income Security Act (ERISA) documents.[16] However, prosecutors use § 1001 most often because they can enforce it either alone or in tandem with more specific statutes, such as § 287.[17] Also, it is used frequently because of the comparative malleability of its elements.[18]

11. 31 U.S.C. § 3730(b) (1994).

12. BUCY, *supra* note 4, at 596

13. Section 1001 provides in pertinent part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

14. Section 1001 is a "catch-all, reaching those false representations that might 'substantially impair the basic functions entrusted by law to [the particular] agency', but which are not prohibited by other statutes." United States v. Kappes, 936 F.2d 227, 231 (6th Cir. 1991); *see also* Moser v. United States, 18 F.3d 469, 473 (7th Cir. 1994) (stating "Congress intentionally drafted § 1001 in an expansive fashion in order that it be accorded the broadest possible interpretation regarding the situations in which it would come into play").

15. 18 U.S.C. § 1014 (2001).

16. 18 U.S.C. § 1027 (2000).

17. *See* United States v. Wilkinson, 124 F.3d 971, 975 (8th Cir. 1997) (allowing simultaneous conviction under § 1001 and 18 U.S.C. § § 666(a)(1) and 1163, which apply to bribery as well as misapplication and embezzlement of tribal funds); United States v. Mavroules, 819 F. Supp. 1109, 1120 (D. Mass. 1993) (allowing simultaneous conviction under § 1001 and 18 U.S.C. § § 1014, 1951, and 1962(c), which prohibit using false information to enter into agreement for unlawful purposes and RICO violations).

18. *See generally* David A. Sklansky, Symposium, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 515 (1999) (addressing use of § 1001 and issue of prosecutorial discretion over many kinds of criminal prosecutions).

During the last decade, the government has used § 1001 to prosecute a wide variety of crimes.[19] Government scrutiny of federal service providers has also increased, leading to convictions of health care executives who overbilled the government for health services.[20] Recent convictions, such as those of Martha Stewart and of Peter Bacanovic, have put the corporate world on guard about the consequences of lying to the government.[21] Furthermore, the convictions of Soliman S. Biheiri and Faisal M. Al Salmi under § 1001 demonstrate that the government is now using the statute to prosecute suspected terrorists.[22] The list of suspected terrorists indicted under § 1001 continues to grow.[23] In fact, Congress is considering an amendment to enhance the penalties available under § 1001 if a matter relates to terrorism.[24] Although high profile § 1001 prosecutions during the Clinton administration raised criticism around the level of discretion that the statute provided prosecutors,[25] § 1001 has continued to evolve, and it now criminalizes a variety of deceptive statements.[26]

§ 1001 covers offenses spanning three broad categories: (i) falsifying, concealing, or otherwise covering-up a material fact by any trick, scheme, or device; (ii) making materially false, fictitious, or fraudulent statements or representations; and (iii) making or using a writing or document with knowledge that such document contains materially false, fictitious, or fraudulent statements.[27] For the last category, which is rarely

19. *See* Paul Glastris, *False Statements: The Flubber of All Laws*, U.S. NEWS & WORLD REP., Mar. 30, 1998, at 25 (discussing growth of § 1001 into "elastic, all-purpose, and fearsome" statute that legitimized claims against former Clinton Housing Secretary Henry Cisneros, not for lying about the fact that he made payments to his former mistress, but for lying about the amount and the frequency of those payments in an FBI background check); *Phony Driver Logs Bring Indictments*, OMAHA WORLD-HERALD, Oct. 8, 1997, at 19 (discussing falsification of monitored drivers' work hours records to fall within maximum hours allowed by federal law); Veronique de Turenne, *Camarillo Office Targeted in Federal Fraud Probe*, L.A. TIMES, July 22, 1997, at B2 (discussing submission of false reimbursement claims for purchase of barbecue grill and vacation to Utah); Pierre Thomas & John Schwartz, *Government Intensifies Tobacco Company Probe*, WASH. POST, May 3, 1997, at A18 (reporting FBI plan to compare tobacco company research documents with information previously provided to FDA).

20. Anita Sharpe & Eva M. Rodriquez, *Columbia/HCA's Internal Probe Finds Apparent Wrongdoing in Some Markets*, WALL ST. J., Aug. 20, 1997, at A2; *see also* Matter of Duker, 662 N.Y.S.2d 847 (1997) (prosecuting defendant, an attorney who formerly represented the FDIC, under § 1001 for over-billing the government by $1.4 million).

21. United States v. Stewart, 323 F. Supp. 2d 606, 609 (2004) (upholding defendants' conviction under § 1001 for making false statements to federal investigators).

22. United States v. Biheiri, 299 F. Supp. 2d 590 (2004) (convicting defendant for making false statements in an application for naturalization); United States v. Al Salmi, 58 Fed. Appx. 261, 263 (9th Cir. 2003) (affirming conviction of defendant for willfully making a materially false statement in a matter within the jurisdiction of the Federal Bureau of Investigation).

23. FindLaw Legal News: Special Coverage: War on Terror: Cases, *at* http://news.corporate.findlaw.com/legalnews/us/terrorism/cases/index2.html (last visited Feb. 8, 2005).

24. Intelligence Reform Act of 2004, Pub. L. No. 108-458, § 6703, 118 Stat. 3638, 3766 (2004) (increasing the prison-term limit under § 1001 from five years to eight years if the matter relates to terrorism).

25. United States v. Hubbell, 177 F.3d 11, 12 (D.C. Cir. 1999) (prosecuting defendant for statements made in connection with Office of Independent Counsel investigation); United States v. Cisneros, 26 F. Supp. 2d 24, 31 (D.D.C. 1998) (addressing indictment of former cabinet official for engaging in a conspiracy to withhold information from, and make false statements to, various governmental entities in an effort to ensure that defendant would be nominated and confirmed as the Secretary of Housing and Urban Development).

26. *See infra* notes 33–46 and accompanying text (providing examples of deceptive statements).

27. 18 U.S.C. § 1001 (1996). The third category, "making or using a writing or document with knowledge that such document contains materially false, fictitious or fraudulent statements," is the least employed grounds for alleging a § 1001 violation.

prosecuted, it is an offense to use a writing or a document to give: (i) false information for the purpose of receiving a monetary or proprietary benefit;[28] (ii) false information in order to resist monetary claims by the United States;[29] (iii) false information to pursue a governmental privilege, such as employment or a security clearance;[30] and (iv) false information to frustrate lawful regulation.[31]

Part A of this section describes the five elements of a false statement offense under § 1001. Part B discusses several defenses to a charge under § 1001. Part C explains the sanctions for this offense.

A. Elements of the Offense

To convict a defendant under § 1001, the government must prove five elements: (i) the defendant made a statement or concealment; (ii) the statement was false; (iii) the statement or concealment was material; (iv) the statement or concealment was made "knowingly and willfully"; and (v) the statement or concealment falls within executive, legislative, or judicial branch jurisdiction.[32]

28. *See* United States v. Somsamouth, 352 F.3d 1271, 1278 (9th Cir. 2003) (affirming conviction of making false statement to Social Security Administration for purpose of retaining Supplemental Security Income benefits); United States v. Kosth, 257 F.3d 712, 714 (7th Cir. 2001) (affirming conviction of defendant who made false statements to the Small Business Administration in an effort to obtain a loan); United States v. Mandanici, 205 F.3d 519 (2d Cir. 2000) (upholding conviction based on filing false documents with HUD in effort to obtain subsidies); United States v. Shah, 44 F.3d 285, 296 (5th Cir. 1995) (affirming holding that defendant made false statements to secure welfare benefits).

29. *See* United States v. Wright, 211 F.3d 233, 238 (5th Cir. 2000) (affirming conviction of tax preparer based on defendant's false statements made to IRS in an attempt to hide assets from the IRS); United States v. Steele, 933 F.2d 1313, 1319 (6th Cir. 1991) (affirming conviction based on defendant's report of false land sale price to IRS).

30. *See* United States v. Camper, 384 F.3d 1073, 1075 (9th Cir. 2004) (holding defendant could be convicted of making a false statement to the government, based on false statement on application for security clearance); United States v. Whab, 355 F.3d 155, 164 (2d Cir. 2004) (affirming false statement conviction based on statements made by defendant in application for United States passport); United States v. Milton, 8 F.3d 39, 45 (D.C. Cir. 1994) (affirming conviction of defendant based on false statements on forms submitted to receive back-pay from EEOC); United States v. Arcadipane, 41 F.3d 1, 7 (1st Cir. 1994) (affirming conviction of defendant's false statements to Department of Labor and Office of Workers' Compensation program).

31. *See* United States v. Johansson, 249 F.3d 848, 851 (9th Cir. 2001) (convicting defendant of making false statements by causing his company's drivers to violate the federal hours-of-driving regulations and to create and maintain false and fraudulent daily logs for inspection by Federal Highway Administration inspectors in order to conceal the violations); United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999) (holding "the false statements in this case were made to a state agency that received federal support and was subject to federal regulation, the false statements made by [the Defendant] involve a matter that falls squarely within the jurisdiction of an agency or department of the United States"); United States v. Gabriel, 125 F.3d 89, 95 (2d Cir. 1997) (affirming conviction of defendant who made false statements to FAA that jet engine repairs had been completed, thereby adversely affecting air safety); United States v. Wright, 988 F.2d 1036, 1038 (10th Cir. 1993) (affirming conviction of defendant who submitted false drinking water reports to EPA).

32. *See* Brogan v. United States, 522 U.S. 398, 400 (1998) (outlining elements of offense under § 1001).

33. *See id.* at 417–18 (Souter, J., concurring) (discussing distinctions in oral, written, sworn and unsworn statements).

1. Statements or Concealments

Section 1001 covers all statements, whether oral or written, sworn or unsworn, voluntary or required by law.[33] Such statements include: false invoices and certifications,[34] checks naming false drawees,[35] false applications to obtain official documents,[36] false identifications given to border[37] or customs agents,[38] false Medicare claims,[39] false marriage vows given to gain citizenship,[40] false information given to federal investigators,[41] and a variety of false statements made to other governmental entities.[42] Section 1001 can also extend to affirmative acts of concealment even where no actual statement has been made.[43] Affirmative acts include both nondisclosures and misrepresentations of

34. *See* Unites States v. Gaudin, 515 U.S. 506, 508 (1995) (affirming conviction under § 1001 for making misrepresentations on HUD/FHA form HUD-1); *Arcadipane*, 41 F.3d at 4 (finding false statements were made on standardized Form 1032 submitted to Office of Workers Compensation Programs of Department of Labor to obtain compensation benefits).

35. Such checks may not include those written for an amount greater than the balance of the account on which they are drawn, or "bad" checks. *Compare* United States v. Worthington, 822 F.2d 315, 316 (2d Cir. 1987) (holding checks that actively mislead and are intended solely to mislead, such as those naming fictitious drawee, fall "squarely within the dictionary definition of a 'false statement'"), *and* United States v. Hord, 6 F.3d 276, 283 (5th Cir. 1993) (holding forged drawee and payee signatures were false statements intended to defraud federally insured banks under 18 U.S.C. § 1014), *with* United States v. Devon, 39 F.3d 575, 578 (5th Cir. 1994) (holding passing of "bad" checks with named sums above actual account balance cannot be prosecuted under § 1014, because check is not factual assertion that can be characterized as true or false, but passing itself may be prosecutable as "check kiting within the scope of federal bank fraud").

36. *See* United States v. Whab, 355 F.3d 155, 164 (2d Cir. 2004) (affirming false statement conviction based on statements made by defendant in application for United States passport); United States v. Velez, 185 F.3d 1048, 1053 (9th Cir. 1999) (affirming sentence of defendant found guilty of violating § 1001 with false applications and false statements to INS).

37. *See* United States v. Gilbert, 242 F.3d 368, 368 (2d Cir. 2000); United States v. Renteria-Ortiz, 15 F.3d 1094, 1094 (10th Cir. 1993) (affirming sentence of defendant found guilty of violating § 1001 by using false Canadian license and birth certificate in attempt to gain entry into United States); United States v. Champegnie, 925 F.2d 54, 55 (2d Cir. 1991) (affirming conviction under § 1001 for giving false name to border agent).

38. *See* United States v. Hsu, 364 F.3d 192, 196 (4th Cir. 2004) (affirming conviction of defendant under § 1001 for making materially false statements to the United States Customs Service); United States v. Beras, 183 F.3d 22, 29 (1st Cir. 1999) (affirming conviction under § 1001 of defendant who made false statements to customs service regarding identity).

39. *See* Brandon v. Anesthesia & Pain Management Associates, Ltd., 277 F.3d 936, 941 (7th Cir. 2002) (stating Medicare fraud is covered by several federal felony statutes, including § 1001); United States v. Mills, 138 F.3d 928, 942 (11th Cir. 1998) (upholding sentence for § 1001 conviction based on falsified documents relating to Medicare-reimbursable airplane use).

40. *See* United States v. Rashwan, 328 F.3d 160, 161 (4th Cir. 2003) (affirming defendants conviction under § 1001 of invoking false statements in marriage for the purpose of obtaining a green card); United States v. Tablie, 166 F.3d 505, 507 (2d Cir. 1999) (affirming conviction for falsely representing to INS purpose of marriage).

41. *See* United States v. Genao, 343 F.3d 578, 579 (2d Cir. 2003) (affirming defendants conviction based on § 1001 of making false statements to the United States Attorney's Office and the Federal Bureau of Investigation); United States v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996) (applying § 1001 to false statements made by narcotics informant to DEA because statements could have engendered groundless federal investigations).

42. Such statements are usually submitted in an attempt to profit under false pretenses. *See* United States v. Darrah, 119 F.3d 1322, 1328 (8th Cir. 1997) (holding defendant knowingly made false statement by failing to list loan on tax return submitted to IRS); United States v. Shah, 44 F.3d 285, 296 (5th Cir. 1995) (affirming conviction for making false statement to GSA under § 1001); United States v. Inserra, 34 F.3d 83, 87 (2d Cir. 1994) (affirming conviction under § 1001 based on false statements made to probation officer); United States v. Moser, 18 F.3d 469, 474 (7th Cir. 1994) (affirming conviction under § 1001 based on false statements made to IRS inspector); *cf.* United States v. De Castro, 113 F.3d 176, 178 (11th Cir. 1997) (affirming conviction of mortgage broker who falsified loan documentation to U.S. Department of Housing and Urban Development in violation of 18 U.S.C. § 1010).

43. *See* United States v. Cabreles, 109 F.3d 471, 473 (8th Cir. 1997) (quoting United States v. Hernando Ospina, 798 F.2d 1570 (11th Cir. 1986), which held § 1001 made criminal, "knowingly and willfully ... conceal[ing] or cover[ing] up by any trick, scheme, or device a material fact"); United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994) (noting § 1001 encompasses both statements and concealments and different proof is required to convict under each).

material facts.[44] Concealing information with intent to deceive the government is covered by § 1001, as is concealing information with the intent to cause another to violate his duty to disclose[45] In addition, silence may constitute a false statement under § 1001 when it serves to mislead or when the individual has a duty to speak.[46]

2. Falsity

Falsity, the cornerstone of a § 1001 offense, can be established by either an affirmative false representation or by the concealment of a material fact.[47] A statement can be considered false for § 1001 purposes even though it is "literally true" if it misleads federal agents.[48] To prove the falsity element, the government must show a non-disclosure of a fact through a "trick, scheme, or device."[49] However, where an affirmative representation is made, no trick, scheme, or device must be proved.[50]

Courts disagree on whether the two primary categories of § 1001 impose a general duty to be honest and forthcoming, or whether there must be a specific duty deriving explicitly or implicitly from an independent statute. Several circuits have noted that § 1001 is a "catch-all" provision and that there is a duty to be forthcoming even if the misrepresentation is not specifically prohibited by statute.[51] However, in prosecutions under the concealment prong of the statute, the Second, Third, Seventh, and Eleventh

44. *See* United States v. Seay, 718 F.2d 1729, 1284 (4th Cir. 1983) (holding that a woman who had been in a common law marriage was liable under § 1001 because she marked that she was not remarried in a questionnaire regarding government compensation for the death of her first husband); *see also* United States v. Leal, 30 F.3d 577, 585 (5th Cir. 1994) (holding silence may constitute false and fraudulent representation under § 1001).

45. *See* United States v. Goldberger & Dubin, 935 F.2d 501, 506 (2d Cir. 1991) (applying § 1001 to attorney-client relationship).

46. *See Leal*, 30 F.3d at 585 (holding silence may constitute false and fraudulent representation under § 1001); United States v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981) (holding blank response can be false statement where duty to answer exists), *overruled on other grounds by* United States v. Daily, 921 F.2d 994, 1003 (10th Cir. 1990).

47. *See* United State v. Hubbell, 177 F.3d 11, 12 (D.C. Cir. 1999) (holding § 1001 covers schemes involving the concealment of material facts); *Curran*, 20 F.3d at 566 (holding § 1001 proscribes both false statements and concealment of material facts but that proof needed to prosecute each offense differs).

48. *See* United States v. Kosth, 257 F.3d 712, 720-21 (7th Cir. 2001) (holding even though defendant was not technically manager of a company, because he effectively had control over day to day operations, his statements on a small business loan application were intentionally misleading); United States v. Stephenson, 895 F.2d 867, 873–74 (2d Cir. 1990) (stating that defendant misrepresented or concealed information by actively seeking to mislead government official into believing another person was responsible for defendant's act of bribery, even though his statements were literally true).

49. 18 U.S.C. § 1001; *See* United States v. St. Michael's Credit Union, 880 F.2d 579, 589 (1st Cir. 1989) (holding "trick, scheme or device" language requires an "affirmative act of concealment"); *see* United States v. Holmes, 840 F.2d 246, 249 (4th Cir. 1988) (finding use of false name to conceal prior criminal record was concealment under § 1001); United States v. Gafyczk, 847 F.2d 685, 691–92 (11th Cir. 1988) (holding changing bills of lading on cigarettes was concealment of fact).

50. *See* United States v. Woodward, 469 U.S. 105, 108 n.4 (1985) (*per curiam*) (noting affirmative misrepresentation such as false statement on customs form is proscribed by statute even where no trick, scheme, or device is employed).

51. *See* United States v. Kappes, 936 F.2d 227, 231–32 (6th Cir. 1991) (explaining § 1001 provides "catch-all" for false representations that impair basic agency functions even where misrepresentations are not prohibited by other statutes); United States v. Corsino, 812 F.2d 26, 31 (1st Cir. 1987) (applying § 1001 to false signatures intended to influence HUD investigation even though agency did not require that signatures be filed); United States v. De Rosa. 783 F.2d 1401, 1407 (9th Cir. 1986) (explaining intended role of § 1001 was as "catch-all [to reach] fraud not prohibited by other statutes").

Circuits have held that to sustain a conviction, the government must prove that the defendant had a legal duty to disclose the material facts allegedly concealed.[52]

The issue of whether there is a duty or not frequently arises in the context of the reporting requirements of the Federal Election Campaign Act of 1971.[53] This issue also arises under the Currency Transaction Report Act ("CTRA"),[54] which requires domestic financial institutions to file currency transaction reports ("CTRs") describing transactions and identifying parties who transfer United States currency.[55]

3. Materiality

In an attempt to resolve a conflict among the circuit courts, Congress amended § 1001 in 1996 to extend the applicability of the materiality element of § 1001 to all of subsection (a)[56]. Prior to the amendment, § 1001 did not clearly require proof of materiality as an element of all § 1001 offenses.[57] By codifying a minimal materiality threshold, the amendment ensured that defendants would not be held liable for trivial falsifications.[58]

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52. *See* United States v. Calhoon, 97 F.3d 518, 526 (11th Cir. 1996) (stating "falsity through concealment exists where disclosure of the concealed information is required by a statute, government regulation, or form"); United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994) (noting defendant could not be guilty of concealment because he had no duty to disclose source of contributions to Federal Election Commission).

53. 2 U.S.C. § § 431-454 (2000); *see also* 18 U.S.C. § 2(b) (2000) (criminalizing act of deliberately causing another to violate federal criminal law); *Curran*, 20 F.3d at 567 (discussing application of § § 1001 and 2(b) to campaign contribution structuring); United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990) (same).

54. 31 U.S.C. § § 5311-5322 (2000). In CTR cases, non-bank defendants who conceal such transactions from the government by failing to report them are criminally liable when they have a legal duty to inform the bank or the government of their transactions. *See* 31 U.S.C. § 5324 (2000) (making it unlawful to cause, or attempt to cause, domestic financial institutions to not file required report, to file report that contains material omission or misstatement of fact, or to structure any transaction with one or more such domestic financial institutions for purpose of evading reporting requirements).

55. Courts may infer a legal duty to report whenever the defendant's failure to do so might impede the bank's explicit statutory duty of reporting all currency transactions beyond an ordinary level. *See* United States v. Polychron, 841 F.2d 833, 836 (8th Cir. 1988) (explaining although ordinary customer was not liable under § 1001 for failure to file CTR, customer who was also bank president was liable); United States v. Richeson, 825 F.2d 17, 19–20 (4th Cir. 1987) (applying § 1001 to customer who purposefully concealed transactions to avoid filing requirements). *But see* United States v. Mastronardo, 849 F.2d 799, 804–05 (3d Cir. 1988) (holding bank customer who "structured" transaction to avoid bank reporting as required by CTRA was not liable under § 1001 because CTRA does not clearly criminalize failure of customers to report); United States v. Gimbel, 830 F.2d 621, 624 (7th Cir. 1987) (finding bank had no duty under CTRA to report defendant's structured transactions, and thus, defendant could not be held criminally liable for causing bank to not disclose material fact to government).

56. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996) (codified as amended at 18 U.S.C. § 1001 (2000)); H.R. Rep. No. 104-680 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3935, 3942 (stating "[t]his express requirement that all three offenses have materiality as element resolves conflict among circuits as to whether materiality is element of all three offenses or merely the offense of falsifying as delineated in paragraph (3)").

57. Previously, § 1001 stated in relevant part:

> [W]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1994).

58. *See* United States v. White, 765 F.2d 1469, 1472 (11th Cir. 1985) (explaining materiality test precludes frivolous prosecutions).

Both prior and subsequent to the enactment of the amendment, courts have considered a statement to be material if it either: (i) actually influenced or (ii) has a natural tendency or capacity to influence a decision or function of a federal agency.[59] The agency need not have actually believed or even received the false statement for the materiality requirement to be met.[60] A voluntary, non-mandatory statement may also qualify as material.[61] Moreover, a statement may be material even if the declarant derived no pecuniary or economic benefit at the government's expense.[62] However, courts have held a statement is not material where the government itself supplied the information that the defendant relied upon in making the false statement.[63]

In *United States v. Gaudin*,[64] the Supreme Court overruled conflicting precedent on the issue of whether materiality is a question for the judge or the jury. The Court explained that materiality is not a pure question of law, but rather a "mixed question" of law and fact and, consequently, is best resolved by a jury.[65]

4. Intent

Knowing and willful intent[66] to make a false statement is a necessary element of a § 1001 violation.[67] "Intent" under § 1001 encompasses the intent to deceive, mislead, or

59. *See* United States v. Gaudin, 515 U.S. 506, 509 (1995) (finding statement material if it has "a natural tendency to influence or [is] capable of influencing" an agency); United States v. Rashid, 383 F.3d 769, 779 (8th Cir. 2004) (holding that simply because the defendant's false statement did not actually influence the bank, did not make it immaterial under § 1001); United States v. Chen, 324 F.3d 1103, 1104 (9th Cir. 2003) (holding that defendant's false statement that he entered the country only two months prior to filing an asylum application was material because it could have affected an investigation of illegal alien smuggling).

60. *See* State v. Sarihifard, 155 F.3d 301, 306–07 (4th Cir. 1998) (rejecting Petitioner's argument that his false statements were not material because United States Attorney recognized instantly that statements were false); United States v. Rutgard, 116 F.3d 1270, 1287 (9th Cir. 1997) (stating § 1001 criminalizes false statements made to federal agency as well as false entries concealing material facts); United States v. LeMaster, 54 F.3d 1224, 1230 (6th Cir. 1995) (explaining false statement may be material even if agent who hears it suspects it is false).

61. *See* United States v. Ross, 77 F.3d 1525, 1546 (7th Cir. 1996) (holding the fact that a statement was not required does not make that statement any less material); United States v. Dick, 744 F.2d 546, 553 (7th Cir. 1984) (explaining non-required statement is no less material than mandatory one).

62. *See* United States v. Ranum, 96 F.3d 1020, 1025 n.12 (7th Cir. 1996) (stating "it is not necessary for an allegedly false statement to have any ill effect at all"); United States v. Campbell, 848 F.2d 846, 852 (8th Cir. 1988) (finding it unnecessary to prove statement intended to provoke pecuniary loss to government or gain to defendants).

63. *See* United States v. Johnson, 937 F.2d 392, 397–98 (8th Cir. 1991) (holding statement was not material where defendant contractor's price quote was based upon quantity figure Air Force itself supplied).

64. 515 U.S. 506 (1995). The respondent in G*audin* was charged with making false statements on federal loan documents in violation of § 1001. *Id.* at 508.

65. *Id.* at 511–14.

66. *See* United States v. Curran, 20 F.3d 560, 567-68 (3d Cir. 1994) (defining "intent" under § 1001 as "deliberate action with knowledge that the statements were not true").

67. *See* United States v. Yermian, 468 U.S. 63, 69 (1984) (requiring actual knowledge of false statement but not of federal agency jurisdiction); United States v. Heuer, 4 F.3d 723, 732 (9th Cir. 1993) (stating "[t]o willfully make a false statement under § 1001, the defendant must have the specific intent to make a false statement. Specific intent does not require evil intent, but only that the defendant act 'deliberately and with knowledge'"); *see also* United States v. Rodriguez-Rios, 14 F.3d 1040, 1043 (5th Cir. 1994) (stating "knowing and willful" requirement applies to concealing material fact, making false statement, and using false writing). *But cf.* United States v. Rooney, 37 F.3d 847, 855 (2d Cir. 1994) (stating "[f]alse representations, like common law perjury, require proof of actual falsity; concealment requires proof of willful nondisclosure by means of a 'trick, scheme, or device'").

induce belief of false information.[68] The intent to "manipulate and pervert" a government agency's function satisfies the element, even where no intent to deceive in a "subjective or literal sense" exists.[69] The statute does not require the intent to defraud.[70]

Juries can infer from circumstantial evidence that the defendant acted knowingly and willfully,[71] even if there is no direct proof of actual knowledge or willfulness.[72] A "reckless disregard of the truth" satisfies the intent element, a concept often expressed to the jury in a willful blindness instruction.[73] Furthermore, a defendant can have the requisite intent even if he or she is unaware of the potential consequences of making a false statement.[74]

68. *See* United States v. Tracy, 108 F.3d 473, 477 (2d Cir. 1997) (holding defendant's false statements were intended to mislead or defraud United States Attorney's Office); United States v. Shah, 44 F.3d 285, 289–94 (5th Cir. 1995) (holding certification to government that price information would not be shared with competitors constituted false statement when perpetrator had "present intent" to share such information); Heuer, 4 F.3d at 732 (finding defendant's statements and actions provided ample evidence defendant knew substance was waste and therefore knowingly made false statement to Nevada Department of Environmental Protection); United States v. Manning, 955 F.2d 770, 773 (1st Cir. 1992) (finding evidence sufficient to show defendant used false social security number and false name with intent to deceive government agency).

69. *See* United States v. Ranum, 96 F.3d 1020, 1029 (7th Cir. 1996) (holding intent requires "only a purpose to do the forbidden act, not a specific intention or awareness that the act will mislead the Government"); *see also* United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999) (overturning a district court ruling by holding that the prosecutor need not prove that defendant knew that her false statements were unlawful); United States v. Fairchild, 990 F.2d 1139, 1142 (9th Cir. 1993) (upholding defendant's conviction under § 1001 when he acted with intent and purpose of causing false certificates to be filed with GSA, even though he did not make false statements himself).

70. *See Shah*, 44 F.3d at 289 n.7 (finding § 1001 "does not require an intent to defraud—that is, the intent to deprive someone of something by means of deceit"); Nilson Van & Storage Co. v. Marsh, 755 F.2d 362, 367 (4th Cir. 1985) (holding § 1001 requires only proof of intent to deceive and not intent to defraud).

71. *See* United States v. Sebaggala, 256 F.3d 59, 63 (1st Cir. 2001) (holding defendant's previous answers on customs forms and educational background was sufficient to conclude he made knowing false statements to customs officials); United States v. Burns, 104 F.3d 529, 535 (2d Cir. 1997) (determining defendant knowingly and willfully concealed material facts from government agency when he failed to tell agency that he was full-time student and submitted false time sheets stating he was working); *Heuer*, 4 F.3d at 732 (holding "willful" means that "defendant had specific intent to make a false statement"); United States v. Wales, 977 F.2d 1323, 1325 (9th Cir. 1992) (finding defendant acted knowingly when he "knowingly and willfully stated on his customs declaration form" that he did not possess more than $10,000 in United States currency when he in fact did).

72. *See* United States v. Bardsley, 884 F.2d 1024, 1028–29 (7th Cir. 1989) (holding jury may infer intent where defendant postal clerk made false statements enabling him to steal funds and lied to postal inspector to obfuscate illegal actions); United States v. Gafyczk, 847 F.2d 685, 692 (11th Cir. 1988) (explaining where jury could infer intent, prosecution need not show proof of actual knowledge by defendant that false documents would be created from false statements and submitted to government).

73. *See* Arthur Pew Constr. Co. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992) (stating "[t]he misrepresentation or scheme must have been deliberate, knowing and willful, or at least with a reckless disregard of the truth and a conscious purpose to avoid telling the truth"); *see also* United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (finding requisite intent where "a defendant deliberately ignores a high probability that [a] form contain[s] material false information"); United States v. Darrah, 119 F.3d 1322, 1328 (8th Cir. 1997) (holding taxpayer violated § 1001 in submitting false tax forms by displaying reckless disregard for its requirements); United States v. Arnous, 122 F.3d 321, 323 (6th Cir. 1997) (holding if defendant "deliberately ignore[s] a high probability that [a] form contain[s] material false information," the requisite specific intent has been established); United States v. London, 66 F.3d 1227, 1242 (1st Cir. 1995) (holding false statement was made "knowingly" when defendant demonstrated reckless disregard of truth).

74. *See* United States v. Yermian, 468 U.S. 63, 69 (1984) (holding terms "knowingly and willfully" did not modify jurisdictional language of ultimate federal jurisdiction); United States v. Leo, 941 F.2d 181, 190 (3d Cir. 1991) (holding defendant could not be acquitted on basis that he lacked knowledge that his statement would be returned to Department of Defense since such knowledge is not essential element of § 1001); United States v. Bakhtari, 913 F.2d 1053, 1060 (2d Cir. 1990) (holding no mental state is required with respect to federal involvement to obtain § 1001 conviction).

5. Jurisdiction

Submitting a false statement to any of the three branches of government constitutes a basis for application of § 1001.[75] Prior to 1996, the statute prohibited only false statements to departments and agencies of the federal government.[76] In 1996, § 1001 was amended to expand its application to all false statements made within the jurisdiction of the executive, legislative, or judicial branches of the government of the United States.[77] Congress intended for the amendment to overrule the Supreme Court's 1995 decision in *Hubbard v. United States*,[78] which held that Congress did not intend for federal courts to be included as a "department" within the meaning of § 1001.[79] As amended, the scope of the term "department" in § 1001 is consistent with the Court's pre-*Hubbard* interpretation set forth in *United States v. Bramblett*,[80] which had included Congress and the federal judiciary.

The term "jurisdiction" in § 1001 serves a broader purpose than its typical use by the legal system.[81] In a § 1001 context, there is jurisdiction to prosecute a false statement when the request for information falls within the general authority of the requesting department or agency.[82] Jurisdiction exists even if the government has not lost money or property.[83] Moreover, jurisdiction exists regardless of whether the defendant communicated the statement directly to the government[84] or knew that the

75. 18 U.S.C. § 1001(a) (2000).

76. 18 U.S.C. § 1001(a) (1994).

77. False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459 (1996) (amending 18 U.S.C. § 1001); *see* H.R. Rep. No. 104- 680 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3935; *see also* United States v. Bryant, 117 F.3d 1464, 1469 (D.C. Cir. 1997) (finding defendant who falsely identified himself as Special Deputy United States Marshal could be convicted under § 1001 because misrepresentation was made "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").

78. 514 U.S. 695 (1995).

79. *Id.* at 705 (reasoning that prosecution of statements made to a federal court in the course of its judicial function would have a chilling effect on advocacy); *see also* H.R. Rep. No. 104-680 (1996), at 2–6, *reprinted in* 1996 U.S.C.C.A.N 3935, 3936–39 (stating H.R. 3166 returns scope of § 1001 to its pre-Hubbard status).

80. 348 U.S. 503, 504–6 (1955) (stating that § 1001 has a broad scope and that the legislative history of § 1001 did not indicate that legislative and judicial branches of the United States government should be exempt from protections from false statements).

81. *See* Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 629 (2001) (adopting a "natural, non-technical" definition of the word jurisdiction for purposes of § 1001 and declining to confine the definition to narrow, technical meaning).

82. *See* United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999) (finding statement originally made to state agency that receives support from a federal agency is within the jurisdiction of the federal agency for § 1001 purposes).

83. *See* United States v. Notarantonio, 758 F.2d 777, 787 (1st Cir. 1985) (ruling government may protect integrity of its programs by use of § 1001 even when false statement caused no pecuniary loss); United States v. White, 765 F.2d 1469, 1473 (11th Cir. 1985) (holding potential effect of false statement on government need not involve pecuniary loss); United States v. Gilliland, 312 U.S. 86, 93 (1941) (discussing Congressional intent of jurisdictional element).

84. *See Shafer*, 199 F.3d at 829 (finding statement originally made to state agency that receives support from federal agency is within jurisdiction of federal agency for § 1001 purposes); United States v. Calhoon, 97 F.3d 518, 526 (11th Cir. 1996) (stating conviction under § 1001 is possible "even if [the statement] is ignored or never read by the agency"). *See also* United States v. Wright, 988 F.2d 1036, 1038 (10th Cir. 1993) (stating false statement need not be made directly to federal agency to be within its jurisdiction); United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) (holding no implicit requirement that statement be made directly to federal department or agency); United States v. Brantley, 786 F.2d 1322, 1326 (7th Cir. 1986) (holding statement need not be submitted to government agency, provided agency has ultimate authority over disbursement of federal funds).

government had jurisdiction over the false statement.[85] Where a defendant knowingly and willfully makes a false statement to a state agency, the defendant need not have actual knowledge of the federal jurisdiction over the state agency to secure jurisdiction under the statute.[86]

B. Defenses

Most successful defenses in § 1001 prosecutions have been based on the "exculpatory no" and "ambiguity" doctrines. The "exculpatory no" doctrine has been rejected by the Supreme Court, but because of the constitutional implications discussed below, the United States Attorneys' Manual discourages prosecutors from pursuing "exculpatory no" situations. Ambiguity defenses remain viable. Double jeopardy and other defenses, including constitutional defenses, have been less successful.[87]

1. "Exculpatory No"

Despite the Court's traditionally broad view of the scope of § 1001,[88] some lower courts had limited its reach with the judicially created "exculpatory no" doctrine.[89] The

85. *See* United States v. Yermian, 468 U.S. 63, 69 (1984) (holding terms "knowingly and willfully" did not modify jurisdictional language of ultimate federal jurisdiction); United States v. Ranum, 96 F.3d 1020, 1027 (7th Cir. 1996) (citing the holding in *Yermian* stating the government need not prove knowledge on the part of the defendant of government jurisdiction over the false statement); United States v. Heuer, 4 F.3d 723, 734 (9th Cir. 1993) (holding government need not prove defendants knew United States government had jurisdiction over false statement).

86. *See Yermian*, 468 U.S. at 69–70 (stating § 1001 does not require actual knowledge of federal agency jurisdiction); *Shafer*, 199 F.3d at 828 (holding statement made to state agency sufficient for jurisdiction requirement even if defendant was unaware of federal support for agency); United States v. Arcadipane, 41 F.3d 1, 5 (1st Cir. 1994) (ruling defendant's knowledge of whether Department of Labor had authority to request earnings information was irrelevant); United States v. Koenig, 53 F. Supp. 2d 803, 809 (D.V.I. 1999) (holding false statements within jurisdiction of § 1001 even though they were first delivered to a local agency).

87. These defenses include multiplicity of the indictment, statute of limitations, good faith belief that a false statement was not a binding obligation, duress, entrapment, collateral estoppel, good faith reliance on expert advice, active misleading by past governmental conduct, good faith reliance on custom, and literally true answers that actively mislead the government. *See infra* notes 112–126 and accompanying text (discussing other defenses).

88. The Supreme Court historically has given a very broad reading to the scope of § 1001. *See* United States v. Brogan, 522 U.S. 398, 400 (1998) (holding that § 1001 covers "any" false statement, a false statement of whatever kind); United States v. Gilliland, 312 U.S. 86, 93 (1941) (warning against interfering with the intended function of § 1001 of protecting government from deception and finding "no reason why this apparent intention should be frustrated by construction"). The Court has also held that defendants have no right to avoid answering even illegal questions by falsifying answers. *See* Bryson v. United States, 396 U.S. 64, 72 (1969) (stating "[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them"). The Court has stated that § 1001 reaches false statements in any matter, including criminal investigations. *See* United States v. Rodgers, 466 U.S. 475, 479 (1984) (interpreting "any matter" to include criminal investigations). In addition, the Court has ruled that § 1001 may be applied even when more specific statutes apply. *See* United States v. Woodward, 469 U.S. 105, 108 (1985) (*per curiam*) (allowing separate punishments under both § 1001 and Customs' currency reporting statute).

89. *See* United States v. Aguilar-Portillo, 344 F.3d 744, 748 (8th Cir. 2003) (stating the "exculpatory no" exception "enjoyed a long pedigree as a judicially-created exception to the prohibitions of the False Statements Act); United States v. Fitzgibbon, 619 F.2d 874, 878 (10th Cir. 1980) (finding § 1001 did not to apply "to statements not required by law, not under oath, and not in writing made in the exercise of routine governmental administrative duties and which do not involve the possibility of self-incrimination").

doctrine made § 1001 "[in]applicable to false statements that are essentially exculpatory denials of criminal activity."[90] In *Brogan v. United States*,[91] the Supreme Court rejected the "exculpatory no" exception, holding that there was no exception to criminal liability for false statements consisting of a mere denial of wrongdoing.[92] The *Brogan* Court stated that the "plain language of § 1001 admits no exception for an 'exculpatory no'"[93] and excluding denials of wrongdoing from § 1001 under the "exculpatory no" exception would pervert the government's investigatory function.[94] The Court held that the petitioner's "cruel trilemma"[95] was not a valid reason to create an exception to § 1001.[96] The Court rejected the argument that eliminating the "exculpatory no" exception would open § 1001 up to prosecutorial abuse, explaining that the petitioner had failed to demonstrate a history of "prosecutorial excess."[97]

However, in concurrence, Justice Ginsberg noted that a pure false statement doctrine vests an extraordinary authority in prosecutors to manufacture crimes.[98] To avoid problems with this issue, the United States Attorneys' Manual encourages DOJ attorneys, as a matter of policy, not to pursue prosecutions in "exculpatory no" situations.[99] Although *Brogan* resolved that an "exculpatory no" exception is not valid in a false statement prosecution, in rare situations such an exception may be needed.[100]

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90. United States v. Whab, 355 F.3d 155, 160 (2d Cir. 2004) (stating that some courts defined an "exculpatory no" exception to § 1001 as false statements that are essentially exculpatory denials of criminal activity); United States v. Wiener, 96 F.3d 35, 37 (2d Cir. 1996); *see* United States v. Taylor, 907 F.2d 801, 806 (8th Cir. 1990) (finding the exception applied to defendant's false denial of any knowledge as to who had forged his wife's name on a Chapter 13 petition).

91. 522 U.S. 398 (1998).

92. *Id.* at 404, 408 (holding union official's false reply of "no" to FBI inquiry about whether he had taken bribes from employer violated § 1001).

93. *Id.* at 408.

94. *Id.* at 402 (stating "[w]e cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function").

95. *Id.* at 404–05. The "cruel trilemma" is the dilemma of a "cornered suspect" being forced to choose between admitting guilt, remaining silent and arousing suspicion, or facing the consequences of falsely denying guilt. *Id.* The Court explained that the "cruel trilemma" is "wholly of the guilty suspect's own making" and accepting an argument based on the "cruel trilemma" would erroneously expand the protections of the Fifth Amendment to encompass the "privilege to lie." *Id.*

96. Brogan v. United States, 522 U.S. 398, 404-05 (1998).

97. *Id.*

98. *Id.* at 408 (Souter, J., concurring) (joining the portion of Justice Ginsberg's concurring opinion that "espous[es] congressional attention to the risks inherent to the statute's [§ 1001] current breadth").

99. *See* U.S. DEP'T OF JUST. CRIM. RESOURCE MANUAL, No. 916 at 9-1476 (2000) (stating "[i]t is the Department's policy not to charge a § 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government").

100. *Brogan*, 522 U.S. at 409-11 (Ginsburg, J., concurring).

2. Ambiguity

The defense of ambiguity is of varying strength in false statement prosecutions under § 1001.[101] The ambiguity defense asserts that a defendant cannot be convicted under § 1001 for a statement that may be accurate within a reasonable construction of a contract or contract clause.[102] When reporting requirements are ambiguous, the burden falls on the government to "negate any reasonable interpretations that would make the defendant's statements factually correct."[103] The government counters an ambiguity defense by: (i) establishing beyond a reasonable doubt what the defendant meant by the allegedly false statement and thereby eliminating any ambiguity, or (ii) proving beyond a reasonable doubt the falsity of any reasonable interpretation that "would make the defendant's statement factually correct."[104]

3. Double Jeopardy

Like prosecutions under the False Claims Act,[105] § 1001 prosecutions can often be maintained whether or not another federal statute applies.[106] In *United States v. Woodward*, the Supreme Court held that government prosecution of a defendant under § 1001 does not constitute a violation of the Double Jeopardy Clause, even if a more

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101. *See* United States v. Culliton, 328 F.3d 1074, 1078 (9th Cir. 2003) (holding the existence of some ambiguity in a falsely answered question will not shield the respondent from a perjury or false statement prosecution, but if a question is excessively vague, or fundamentally ambiguous, the answer may not, as a matter of law, form the basis of a prosecution for perjury or false statement); United States v. Manapat, 928 F.2d 1097, 1099–1102 (11th Cir. 1991) (stating questions about traffic and criminal convictions on medical history form were so fundamentally ambiguous as to preclude conviction under § 1001 as matter of law).

102. *See* United States v. Kosth, 257 F.3d 712, 721 (7th Cir. 2001) (finding defendant's submitted estimates to be false statements because he knew SBA would assume they did not contain profit); United States v. Dale, 991 F.2d 819, 832–33 (D.C. Cir. 1993) (holding defendants' statements on security clearance applications were not accurate or true under reasonable interpretation of applications); *cf.* United States v. Upton, 91 F.3d 677, 684 (5th Cir. 1996) (holding whether federal acquisition regulation governing reimbursement of bond premiums was ambiguous was question of law for court, not question of fact for jury). *But see* United States v. Reilly, 33 F.3d 1396, 1415 (3d Cir. 1994) (rejecting argument that defendant should not be convicted for responding to ambiguous question).

103. United States v. Migliaccio, 34 F.3d 1517, 1525 (10th Cir. 1994); *see* United States v. Gatewood, 173 F.3d 983, 988 (6th Cir. 1999) (holding evidence to be insufficient to support conviction because government failed to negate "any reasonable interpretation that would make the defendant's statement factually correct" (quoting United States v. Gahagan, 881 F.2d 1380, 1383 (6th Cir. 1989))); United States v. Moses, 94 F.3d 182, 188 (5th Cir. 1996) (holding evidence to be insufficient to sustain a § 1001 conviction for making false statement on INS form because the statement in question, although misleading, was literally true).

104. *See* United States v. Gatewood, 173 F.3d 983, 988 (6th Cir. 1999); United States v. Diogo, 320 F.2d 898, 907 (2d Cir. 1963).

105. *See* 18 U.S.C. § 287 (1986).

106. *See* United States v. Turner, 130 F.3d 815, 817 (8th Cir. 1997) (stating that courts have regularly held that when a statute targets individual acts rather than a course of conduct as a whole, offenses charged with respect to separate dates, even though "of the same nature," are not the "same" offense for double jeopardy purposes); United States v. Woodward, 469 U.S. 105, 108 (1985) (*per curiam*) (allowing separate punishments under both § 1001 and Customs' currency reporting statute).

specific statute also covers the crime.[107] In *Woodward*, the court held the defendant was properly convicted under both § 1001 and a statute governing currency reporting violations.[108] Only when the statutory elements for two crimes are identical does prosecution under both violate the Double Jeopardy Clause.[109] As long as each statute requires proof of an additional fact that the other does not, there is no violation of the Double Jeopardy Clause.[110] The courts will not review a prosecutor's decision to charge under one statute and not another unless the court finds that the prosecutor's decision discriminates against a class of defendants.[111]

4. Other Defenses

Other effective defenses include: the five-year statute of limitations;[112] the good faith belief that a false statement was not a binding obligation;[113] and duress, so long as the

107. 469 U.S. at 109–10 (reasoning that Congress did not intend to restrict prosecution to one statute where the statutes involved have different purposes and entail different, though possibly overlapping, proof and elements). *See also* United States v. Frazier, 53 F.3d 1105, 1111 (10th Cir. 1995) (allowing simultaneous conviction under § 1001 and 18 U.S.C. § 666 (2000)); United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994) (upholding convictions under § 1001 and 18 U.S.C. § § 371 and 2(b)); United States v. Cruce, 21 F.3d 70, 75-76 (5th Cir. 1994) (holding prior § 1001 conviction did not bar prosecution for subsequent false statement at same location because no overlap of overt acts set out in indictments and because second indictment charged additional offenses and additional co-conspirator); United States v. Merklinger, 16 F.3d 670, 677 (6th Cir. 1994) (stating false statements and forgery offenses are "entirely separate").

108. 469 U.S. at 109.

109. *See* United States v. Blockburger, 284 U.S. 299, 304 (1932) (establishing general double jeopardy standard), limited by Missouri v. Hunter 459 U.S. 359 (1983) (standing for proposition that just because two criminal statutes proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes); United States v. Avelino, 967 F.2d 815, 815–16 (2d Cir. 1992) (finding conviction under both § 1001 and § 542 violated Double Jeopardy Clause because every necessary element of one statute was required by the other and no congressional intent could be found to provide for cumulative punishment); United States v. Hernandez, 572 F.2d 218, 219 (9th Cir. 1978) (holding new perjury charge violates Double Jeopardy Clause because jury must pass on truth of original statements under § 1001).

110. *See Blockburger*, 284 U.S. at 304 (finding two offenses were committed where two distinct sections of an anti-narcotics act were violated by one sale).

111. *See* United States v. Batchelder, 442 U.S. 114, 123–24 (1979) (holding when an act violates more than one criminal statute, the government may prosecute under either statute so long as it does not discriminate against any class of defendants): United States v. Parsons, 967 F.2d 452, 456 (10th Cir. 1992) (holding false statements to the IRS could be prosecuted either under § 1001 or specific provisions of Internal Revenue Code); United States v. Bilzerian, 926 F.2d 1285, 1299–1300 (2d Cir. 1991) (stating that it is permissible to charge defendant under § 1001 for false statements on SEC form despite existence of more specific securities statute with more stringent proof requirement); United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990) (upholding prosecution of savings and loan officer under either § 1001 or election law for making false entries regarding campaign contributions, despite fact that election law was more specific and prescribes misdemeanor whereas § 1001 prescribes felony). Before instituting charges under § 1001, however, a United States Attorney must first consult with the appropriate section of DOJ's Criminal Division. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-2.133 (1995).

112. Under § 1001 the statute begins to run when the statement is submitted to the federal agency; § 1001 does not require that the agency actually receive or rely on the statement. United States v. Heacock, 31 F.3d 249, 257 n.13 (5th Cir. 1994) (upholding applicability of statute of limitations to false statements section of § 1001); *see* United States v. Smith, 740 F.2d 734, 736 (9th Cir. 1984) (dismissing indictment because statute of limitations began to run when statement was mailed to agency, not when agency received it).

113. *See also* United States v. Whittington, 783 F.2d 1210, 1217 (5th Cir. 1986) (finding no grounds for conviction if trier-of-fact believed defendant had good faith belief due to ignorance or misinformation that lease was not binding obligation).

defendant proves duress by a preponderance of the evidence.[114] Additional defenses, though thus far unsuccessful, include: multiplicity and duplicity of indictment,[115] entrapment,[116] collateral estoppel,[117] good faith reliance on expert advice,[118] "active misleading" by past governmental conduct,[119] good faith reliance on custom,[120] "literally true" answers that actively mislead the government,[121] and recantation.[122]

The Supreme Court has ruled that illegal government questioning does not constitute a defense to a violation because misstating the truth is not a valid legal method to challenge the government's right to ask questions.[123] Finally, in *United States v. Hubbell*,[124] the D.C. Circuit rejected Hubbell's procedural challenge to a false statement charge on

114. *See* United States v. Dominguez-Mestas, 687 F. Supp. 1429, 1431–36 (S.D. Cal. 1988) (stating defendant must prove duress by a preponderance of evidence); *see also* United States v. Zagari, 111 F.3d 307, 330 (2d Cir. 1997) (acknowledging viability of duress as § 1001 defense that allows downward departure when calculating sentence under the Federal Sentencing Guidelines, while rejecting its applicability of defense in present case).

115. *See* United States v. Salas-Camacho, 859 F.2d 788, 791 (9th Cir. 1988) (upholding filing of two separate counts against defendant under § 1001 as proper where same false statement was made to two separate customs inspectors because officials had different duties, and thus, second iteration caused additional harm); United States v. Segall, 833 F.2d 144, 146 (9th Cir. 1987) (holding three separate, non-identical statements made to Customs Service Investigator were sufficient to support three separate counts under § 1001, even though all three pertained to defendant-broker's receipt of refunded duties); *cf.* United States v. Cisneros, 26 F. Supp. 2d 24, 44 (D.D.C. 1998) (identifying two criteria in determining the propriety of multiple counts: whether the statements were identical answers to previously asked questions, and whether a governmental function has been "further impaired"); United States v. Trent, 949 F.2d 998, 999–1000 (8th Cir. 1991) (holding defendant could not be charged with two separate violations where he had made identical statements to FBI on two separate occasions because second statement did not cause "an additional impairment" to government function); *But see* United States v. Guzman, 781 F.2d 428, 433 (5th Cir. 1986) (*per curiam*) (deciding that two-count indictment under § 1001 was not multiplicitous where defendant falsely represented her name on two different documents even though both documents were presented in same transaction and contained same falsity).

116. *See, e.g.*, United States v. Cardoen, 898 F. Supp. 1563, 1573 (S.D. Fla. 1995) (requiring proof of two elements for entrapment defense). The two elements are: (i) material government inducement of crime; and (ii) the defendant's lack of predisposition to make false statements. If both elements are proven, the burden of proof shifts to the government. *Id.*

117. *See, e.g.*, United States v. Levy, 803 F.2d 1390, 1399–1400 (5th Cir. 1986) (stating collateral estoppel did not bar prosecution for statements made to FDIC following defendant's acquittal on prior charge for misrepresentations to bank officials).

118. *See, e.g.*, United States v. Anderson, 879 F.2d 369, 377 (8th Cir. 1989) (listing elements of test for good faith reliance); United States v. Hansen, 772 F.2d 940, 947 (D.C. Cir. 1985) (affirming conviction of defendant under § 1001 for omissions in financial statements where jury had rejected defendant's assertion that attorneys advised him transactions were not reportable).

119. *See, e.g.*, United States v. White, 765 F.2d 1469, 1482 (11th Cir. 1985) (holding government's prior negotiations created estimates that were similarly over-inflated in the past were not an assurance that the offense would go unpunished and did "not make available the defense of 'active misleading' by the government"); United States v. Lichenstein, 610 F.2d 1272, 1280 (5th Cir. 1980) (stating past failure of Customs Service to prosecute widespread abuse of "reasonable quantity" limitation on "vessel supplies" not found to have actively misled defendants who misrepresented goods as "vessel supplies").

120. *See, e.g.*, United States v. Jackson, 714 F.2d 809, 813 (8th Cir. 1983) (holding defendant failed to request "good faith" instruction on false statements made in reliance on industry custom and trial court's failure to give such an instruction was not plain error).

121. *See, e.g.*, United States v. Stephenson, 895 F.2d 867, 873-74 (2d Cir. 1990) (stating defendant misrepresents or conceals information by actively seeking to mislead government official to believe that another person was responsible for defendant's own act of bribery, even if statements were literally true).

122. *See* United States v. Sebaggala, 256 F.3d 59, 64 (1st Cir. 2001) (stating statute does not contain recantation defense).

123. Bryson v. United States, 396 U.S. 64, 72 (1969) (stating "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood"); accord United States v. Rodriguez-Rios, 14 F.3d 1040, 1049-50 (5th Cir. 1994) (holding right to remain silent does not create right to respond to inquiry with outright lie).

124. 177 F.3d 11 (D.C. Cir. 1999).

the ground that the indictment was impermissibly vague.[125] In response to Hubbell's claim that the indictment failed to fairly inform him of the charges against him, the court held that § 1001 allows for the charging of "scheme crimes." Therefore, a false statement count need not specify each and every alleged false statement at issue.[126]

C. Sentencing

According to the United States Sentencing Guidelines ("Guidelines"), § 1001 violators face a preliminary base offense level of six under section 2B1.1(a).[127] Certain factors, such as the monetary loss suffered,[128] the amount of bodily harm threatened or incurred in perpetrating the offense,[129] the use of foreign bank accounts or transactions in committing the offense,[130] any danger caused to the soundness of a financial institution,[131] misrepresentation by the defendant as a representative of a particular organization or government agency,[132] and violation of a judicial or administrative order[133] may result in an increased offense level. Likewise, in a conspiracy the court may

125. *Id.* at 13.

126. *Id*

127. U.S. Sentencing Guidelines Manual § 2B1.1(a) (2004) [hereinafter "U.S.S.G. Manual"].

128. U.S.S.G. MANUAL § 2B1.1(b)(1) (2004) (providing for increases in level of offense according to monetary loss offense has created); *see* United States v. Ravelo, 370 F.3d 266, 267 (2d Cir. 2004) (affirming sentence of defendant under § 1001 and based on section 2B1.1(b)(1) loss table); United States v. Sheets, 65 F.3d 752, 753 (8th Cir. 1995) (affirming augmented base offense level for defendant who filed false income tax forms intending to inflict financial loss on IRS); *cf.* United States v. Toussaint, 84 F.3d 1406, 1407-08 (11th Cir. 1996) (finding court could increase offense level if defendant intended monetary loss but did not actually cause monetary loss).

129. U.S.S.G. MANUAL § 2B1.1(b)(11) (2004) (providing offense that consciously or recklessly risks serious injury will increase base offense level by two levels or to level of fourteen if original offense level is less than fourteen). *But cf.* United States v. Zagari, 111 F.3d 307, 325 (2d Cir. 1997) (dismissing defendant's two-point enhancement under former section 2F1.1(b)(4) for allowing landfill to contaminate water wells and recklessly risking serious bodily injury because offense took place in 1989, thereby requiring that sentence be allocated under 1989 Guidelines which did not include this provision against reckless endangerment).

130. U.S.S.G. MANUAL § 2B1.1(b)(8)(A) (2004) (providing for an increase in base level offense to twelve for such activities).

131. U.S.S.G. MANUAL § 2B1.1(b)(12)(B) (2004) (requiring four-level increase or increase to twenty-four for activities affecting financial institutions if base offense level is less than twenty-four); *see* United States v. Pappert, 112 F.3d 1073, 1081 (10th Cir. 1997) (upholding enhancement under former section 2F1.1(b)(6) where "losses were a 'contributing factor' of the [bank's] closing"). *But see* United States v. Sarno, 73 F.3d 1470, 1502 (9th Cir. 1995) (rejecting enhancement under former section 2F1.1(b)(6)(A) because defendant's actions, although totaling $11 million, represented small fraction of financial institution's $500 million loss).

132. U.S.S.G. MANUAL § 2B1.1(b)(7)(A) (2004) (stipulating defendants falsely claiming to represent charitable, political, or educational organization or government agency are subject to two-level increase over base offense level or increase to level ten); *see* United States v. Hussey, 254 F.3d 428, 432 (2d Cir. 2001) (upholding enhancement of sentence where defendants misrepresented themselves as members of a licensed stock brokerage company to investors); United States v. Achiekwelu, 112 F.3d 747, 755 (4th Cir. 1997) (upholding district court's enhancement decision because defendant misrepresented himself as representative of Nigerian Finance Ministry which is "government agency" as specified in Guidelines).

133. U.S.S.G. MANUAL § 2B1.1(b)(7)(C) (2004) (providing violation of judicial or administrative order, injunction, decree or process warrants two-level increase, to minimum of level ten); *see* United States v. Cheek, 69 F.3d 231, 233 (8th Cir. 1995) (holding enhancement under former section 2F1.1(b)(3)(B) for abusing bankruptcy process did not constitute impermissible double-counting).

increase or decrease the level of the offense based upon the individual defendant's role in committing the crime.[134]

Moreover, the Guidelines permit a discretionary upward departure in cases where the established monetary loss "does not fully capture the harmfulness or seriousness of the conduct."[135] Courts may also increase penalties for crimes violating other federal statutes that are committed in conjunction with a § 1001 violation.[136]

III. FALSE CLAIMS

Congress enacted the first False Claims Act[137] ("FCA" or the "Act") in 1863 to combat rampant fraud and corruption in the sale of supplies and provisions to the Union army during the Civil War.[138] Over the years, the FCA was used periodically to protect government funds and property from fraudulent claims.[139] In 1986, Congress responded to a proliferation of fraud cases in the defense industry, and reinvigorated the False Claims Act through a series of amendments.[140] The amendments were intended to send a strong message to the courts that the FCA should be broadly construed and that it had a remedial purpose.[141] In addition to increasing penalties, the amendments called for a coordinated effort "between the government and its citizenry" to decrease

134. U.S.S.G. MANUAL § 3B1.1 (2004) (requiring an increase of four levels if defendant was organizer or leader of criminal activity that involved five or more participants; increase of three levels if defendant was manager or supervisor and criminal activity involved five or more participants; increase of two levels if defendant was organizer or leader in any other criminal activity); *see* United States v. Dietz, 950 F.2d 50, 54 (1st Cir. 1991) (holding defendant merited four-level increase because court counted unwitting participants toward number involved in conspiracy). *But see* U.S.S.G. MANUAL § 3B1.2 (2003) (providing for decreases in offense level if defendant played minimal or minor role in criminal activity).

135. U.S.S.G. MANUAL § 2B1.1 cmt. 15(A) (2004) (listing examples that may justify upward departures); *see* United States v. Scott, 915 F.2d 774, 776 (1st Cir. 1990) (adjusting sentence upwards because actual dollar loss did not capture extent of harmfulness of defendant's conduct). *But see* United States v. Roberston, 324 F.3d 1028, 1031–32 (8th Cir. 2003) (holding that the districts court's upward departure was not warranted because defendant's lying to a federal officer was not outside the "heartland" of § 1001).

136. *See* United States v. LeMaster, 54 F.3d 1224, 1232–33 (6th Cir. 1995) (affirming upward adjustment under § 5K2.9 where defendant made false statements to conceal attempted extortion).

137. 18 U.S.C. § 287 (2000); 31 U.S.C. § § 3729-3733 (2000).

138. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 781 (2000), citing United States v. Bornstein, 423 U.S. 303, 309 (1976) (explaining that Congress's reason for passing the FCA in 1863 was "stopping massive frauds perpetrated by large contractors during the civil war"); *see also* S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273; Patricia Meader & Elizabeth S. Warren, The *False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458–61 (1998) (providing a useful history of the False Claims Act).

139. *See* United States v. Gilliland, 312 U.S. 86, 93 (1941) (stating language and history of the FCA reveals Congress's intent "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices"); United States. *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 917 (4th Cir. 2003) (stating that "policing the integrity of the government's dealings with those to whom it pays money" is a primary purpose of the FCA).

140. *See* H.R. Rep. No. 99-660, p. 2 (1986) (estimating that during the early 1980's, defense contractor fraud increased by 30 percent and the government was losing more than $50 billion a year due to false claims in all areas of government).

141. *See* Cook County, III. v. United States *ex rel.* Chandler, 538 U.S. 119, 145 (2003), (quoting S. Rep. No. 99-345, p. 2 (1986)) ("the basic purpose of the 1986 amendments was to make the FCA a 'more useful tool against fraud in modern times.'"); Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1040–42 (8th Cir. 2002) ("The goals of the 1986 Amendments Act were (1) to encourage those with information about fraud against the government to bring it into the public domain; (2) to discourage parasitic *qui tam* actions by persons simply taking advantage of information already in the public domain; and (3) to assist and prod the government into taking action on information that it was being defrauded.").

the "wave of defrauding public funds."[142] Since 1986, the FCA has been used in virtually every area where government money is spent.[143] The DOJ has become increasingly vigilant in pursing the recovery of losses attributable to false claims[144] and the courts have subsequently followed Congress's lead in interpreting the Act's coverage broadly.[145]

The FCA has two parts. Section 287 of Title 18 of the U.S. Code imposes criminal liability[146], while 31 U.S.C. § § 3729-3733 establishes civil liability.[147] This section will focus on criminal violations under 18 U.S.C. § 287. Section III will discuss the civil false claims statutes. Part A of this section discusses the elements of a § 287 offense. Part B outlines the defenses available to those accused of making a false claim. Finally, Part C addresses enforcement.

Under § 287, it is illegal to present a false, fictitious, or fraudulent claim to the federal government.[148] The government has used § 287 to prosecute a wide array of false

142. H.R. Rep. No. 99-660, p. 2 (1986).

143. *See* COMMON TYPES OF FRAUD AGAINST THE GOVERNMENT, *available at* http://www.allaboutquitam.org (last visited Nov. 29, 2004) (discussing the areas where the FCA could be used to combat fraud, including public works projects, federal government construction, or Federally subsidized housing; research programs; customs; environmental clean-up programs; loan guarantees; agricultural subsidies; municipal bonds; and underpayment of oil and gas royalties on government-leased land).

144. DOJ has been especially vigilant in the area of health care fraud. *See* Stuart M. Gerson & Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law*, 51 ALA. L. REV. 163, 170 (1999) (stating annual criminal convictions for health care fraud numbered only ninety in 1992, but now exceed 300); *see also* Sherry E. Michaelson, *Federal Initiatives in the Prosecution of Health Care Fraud*, HEALTH CARE REFORM LAW INST. 379, 381 (1994); Press Release, U.S. Dep't of Justice, *Justice Department Recovers More Than $3 Billion in False Claims Act Awards and Settlements* (Feb. 24, 2000) (stating government recoveries exceeded $3 billion by 2000, almost half of which was recovered in the last two and a half years), *available at* http://www.usdoj.gov/opa/pr/2000/February/079civ.htm (last visited Apr. 1, 2004).

145. *See* United States v. Neifert-White Co., 390 U.S. 228, 232 (1968) (stating, "[T]he Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government . . . the Court has consistently refused to accept a rigid, restrictive reading. . . ."). Congress subsequently "strongly endorse[d] this interpretation of the [A]ct" and amended the FCA so as to resolve any ambiguity. S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284. *See also* United States v. Gilliland, 312 U.S. 86, 93 (1941) (stating 1934 amendments leave no adequate basis for limited construction, so courts cannot frustrate congressional intent by narrow statutory interpretation); United States v. Jackson, 845 F.2d 880, 882 (9th Cir. 1988) (noting that § 287 "is an exception to the tradition of giving strict construction to criminal statutes").

146. 18 U.S.C. § 287 states:

> [w]hoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years or both.

See 18 U.S.C. § 3571 (2000) (setting forth the criminal penalty provision triggered by 18 U.S.C. § 287); *see also* 9 U.S.C. § 931 (increasing penalties for false claims in defense procurement to up to $1,000,000).

147. 31 U.S.C. § § 3729-3733 (2000). Civil liability for filing false claims arises under § 3729. Section 3730 empowers the Attorney General and/or a private party to bring action under § 3729 and sets forth their respective rights and potential awards. Section 3731 sets forth the procedure for raising a false claims action. Section 3732 addresses false claims jurisdiction. Finally, § 3733 governs civil investigative demands.

148. 18 U.S.C. § 287 (2000).

claims,[149] including federal income tax fraud,[150] Medicare and Medicaid fraud,[151] fraud against the Department of Defense,[152] government contract impropriety,[153] fraudulent claims for unperformed services under government programs,[154] and other fraudulent claims submitted to the federal government.[155] As noted above, these charges can also be brought in conjunction with false statement charges under 18 U.S.C. § 1001.[156]

A. Elements of a § 287 Offense

The prosecution must prove three elements to establish a § 287 violation: (i) the defendant presented a claim to the United States or any agency or department thereof; (ii) the claim was false, fictitious, or fraudulent; and (iii) the defendant knew the claim

149. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR tbl. D-4 (2001) (noting variety of false claims prosecuted). From April 2001 through March 2002, there were 1,636 final judgments for criminal prosecutions of false claims and false statements offenses. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, *available at* http://www.uscourts.gov/caseload2002/contents.html (last visited Apr. 1, 2004). A large percent of these defendants (1,503) were convicted and sentenced, and the vast majority (1,456) of those who were convicted pled guilty. *Id.* However, this data includes both false claims and false statements. *Id.*

150. *See* United States v. Alli, 344 F.3d 1002, 1003 (9th Cir. 2003) (upholding a criminal FCA conviction for filing fraudulent tax returns and claiming the resulting tax credits); United States v. Barnes, 324 F.3d 135, 137 (3d Cir. 2003) (affirming the conviction of defendant who filed fraudulent claims for his clients); United States v. Nash, 175 F.3d 429, 431 (6th Cir. 1999) (affirming conviction of defendant who falsely claimed that he was a nonresident alien, not subject to federal income taxes).

151. *E.g.*, United States v. Bolden, 325 F.3d 471, 478 (4th Cir. 2003) (upholding FCA convictions of nursing home directors who engaged in a complex scheme to defraud Medicare); United States v. Freitag, 230 F.3d 1019, 1020-21 (7th Cir. 2000) (affirming conviction of ambulance service operator for submitting false claims to Medicare); United States v. Gilliard, 133 F.3d 809, 811 (11th Cir. 1998) (upholding conviction of medical diagnostics corporation's chief executive officer for submitting false claims to Medicare and Medicaid).

In July 1998, Blue Cross and Blue Shield of Illinois pled guilty to defrauding Medicare and agreed to pay $144 million in federal fines for routinely overstating claims and receiving $1.29 million in undeserved bonuses from the government. *See Inside the Industry—Medicare Fraud: Illinois Blue Cross Fined $144 Million*, 6 AM. HEALTH LINE, July 17, 1998, *available at* http://nationaljournal.com/pubs/healthline (reporting the guilty plea by Illinois Blue Cross to Medicare fraud). *See generally* Gerson & Gladieux, *supra* note 144, at 170 (discussing criminal prosecutions of false claims relating to health care);.

152. *E.g.*, United States v. Silver, 245 F.3d 1075, 1077 (9th Cir. 2001) (affirming conviction for a product substitution scheme that involved resale of supplies to the Department of Defense); United States v. Glymph, 96 F.3d 722, 724 (4th Cir. 1996) (upholding conviction for knowingly supplying the Department of Defense with parts that did not conform with purchase order specifications).

153. *E.g.*, Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1375 (Fed. Cir. 1998) (holding that contractor on flood control project submitted numerous false claims for additional payment); United States v. Upton, 91 F.3d 677, 683 (5th Cir. 1996) (affirming roofing contractor's conviction for false claim to Air Force for reimbursement of unpaid bond premiums).

154. *E.g.*, United States v. Leahy, 82 F.3d 624, 628 (5th Cir. 1996) (affirming conviction of roofing company owner who billed Veteran's Administration in the form of a progress payment, although little work had been performed); United States v. Boutte, 13 F.3d 855, 857 (5th Cir. 1994) (affirming conviction of defendant who falsely claimed to have provided accounting services to minority businesses in order to receive Department of Commerce funds).

155. *See* United States v. Fullwood, 342 F.3d 409, 410 (5th Cir. 2003) (upholding a conviction of defendant farmer who had made fraudulent crop disaster claims); United States v. Randazzo, 80 F.3d 623, 626 (1st Cir. 1996) (affirming conviction for selling shrimp to Department of Defense that had been altered to increase weight and cost).

156. 18 U.S.C. § 1001 (2000) (prohibiting making fraudulent or false statements knowingly and willfully in any matter within the jurisdiction of the executive, legislative, or judicial branch of the United States government); *see also* United States v. Allen, 13 F.3d 105, 107–09 (4th Cir. 1993) (holding charges of violating both § 287 and § 1001 were not multiplicitous because each statute covered a distinct offense).

was false, fictitious, or fraudulent at the time the defendant made the claim.[157] Some circuits hold materiality is an additional essential element.

1. Presentation of a Claim

To satisfy the presentation element, the government must show that the defendant actually presented a claim to the government.[158] Although § 287 does not explicitly define "claim,"[159] the civil FCA defines the term as any "request or demand ... for money or property" from the United States.[160] In addition to requests for direct payment or reimbursement, "reverse claims,"[161] which are filed to avoid or decrease payments to the government, and claims for credit[162] both constitute "claims" under the FCA. Some courts have also recognized the existence of false claims based on implied certification theory.[163] Courts use implied certification theory to find a claim false under the FCA

157. *See* 18 U.S.C. § 287 (2000); *see also* United States v. Bolden, 325 F.3d 471, 494 (4th Cir. 2003) (discussing the knowledge requirement for a criminal FCA claim). United States v. Thayer, 201 F.3d 214, 222-23 (3d Cir. 1999) (listing essential elements of FCA claim); United States v. Burns, 162 F.3d 840, 850 (5th Cir. 1998) (same).

158. *See* United States v. Cohn, 270 U.S. 339, 346 (1926) (holding general fraud is not enough; fraud must be used to make claim against Government); United States v. Kline, 922 F.2d 610, 611 (10th Cir. 1990) (finding evidence insufficient to prove defendant, and not another individual, presented Medicare claim forms); United States v. Coachman, 727 F.2d 1293, 1303 n. 43 (D.C. Cir. 1984) ("The claim must have actually been presented to the Government.").

159. 31 U.S.C. § 3729(c) (2000) states:

> claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (2000). The District of Columbia Circuit has construed the term "claim" narrowly by using the number of reimbursement forms submitted by defendant, and not the total number of charges on each form. *See* United States v. Krizek, 111 F.3d 934, 939–40 (D.C. Cir. 1997) (stating sanctions should be based upon eleven forms submitted, not 1,149 charges on those eleven forms).

160. False claims against the United States are construed broadly. *See, e.g.*, United States v. Precision Medical Laboratories, Inc., 593 F.2d 434, 436 (2d Cir. 1978) (holding that argument that because forms were submitted to insurance company, and not directly to the government was without merit because insurance companies were mere contractors of the U.S. Department of Health, Education, and Welfare for servicing of medical claims); United States v. Catena, 500 F.2d 1319, 1321 (3d Cir. 1974) (holding that Medicare claims to private insurance carriers with reimbursement contracts with the government were still claims with the United States because the defendant caused the insurance companies to submit false claims to federal agencies).

161. *See* 31 U.S.C. § 3729(a)(7) (2000) (imposing liability on a person who submits a false claim "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government"). *See also* United States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1238 (11th Cir. 1999) (stating that government contractor's knowingly false accounting and subsequent purchase of government property is sufficient to state a "reverse false claim" under FCA). *Cf.* United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1519 (8th Cir. 1994) (holding FCA did not apply to reverse false claims prior to 1986 amendment).

162. United States v. Duncan, 816 F.2d 153, 155 (4th Cir. 1987) (holding voucher used o credit account against previously advanced funds constitutes a "claim").

163. *E.g.*, Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531-33 (10th Cir. 2000) (finding, even in situations where there has been no false declaration, FCA liability can arise when a contractor submits invoice to government, having failed to comply with legal or regulatory requirements); Ab-Tech Constr. Inc. v. United States, 31 Fed. Cl. 429, 434 (1994) (applying implied certification theory to find defendant liable under the False Claims Act). *But see* United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996) (ruling implied certification theory cannot be used to prosecute an action under the FCA, particularly when "regulatory compliance [is] not a *sine qua non* of receipt of state funding").

"[i]f a defendant . . . submits a claim which implies compliance with laws and regulations it in fact violated."[164] In general, a false claim need not have been honored or have successfully defrauded the government for the presentation element to be satisfied.[165]

This element requires that the claim must have been presented to the federal government, or a United States department or agency.[166] The definition section of Title 18 suggests that the terms "department" and "agency" include any institution in which the United States has a proprietary interest.[167] Courts have held these terms to include not only specific government entities like the Department of Housing and Urban Development,[168] the Internal Revenue Service,[169] and the United States Department of Defense,[170] but some wholly-owned federal corporations as well.[171] However, it is uncertain whether the judiciary or legislature falls within the scope of the "department or agency" requirement of § 287.[172] A claim against the federal government made through a third party constitutes a claim "upon or against the United States" for the purposes

164. United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1163 (10th Cir. 1999) (discussing use of implied certification to find claims "false" under the FCA).

165. *E.g.*, United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir. 1984) (stating "there is no requirement that the claim has actually been honored").

166. 18 U.S.C. § 287; *see supra* note 146 (quoting 18 U.S.C. § 287).

167. Title 18 explains:

> department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative or judicial branches of the government. . . . '[A]gency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6 (2000)

168. *E.g.*, United States v. Logan, 250 F.3d 350, 357–58 (6th Cir. 2001) (finding false claim made to Federal Housing Administration of the Department of Housing and Urban Development violated § 287).

169. *See supra* note 150 (listing § 287 cases involving false tax refund claims against the Internal Revenue Service).

170. *E.g.*, United States v. Glymph, 96 F.3d 722, 724 (4th Cir. 1996) (affirming conviction for selling the Department of Defense parts that failed to conform to specifications).

171. Rainwater v. United States, 356 U.S. 590, 592 (1958) (finding Commodity Credit Corporation, a wholly owned government corporation, "is a part of the 'Government of the United States' for purposes of the False Claims Act"). *But cf.*, United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 492 (D.C. Cir. 2004) (holding that Amtrak, a federal grantee, is not a part of the Government of the United States for purposes of the False Claims Act).

172. In *Hubbard v. United States*, 514 U.S. 695, 715 (1995), the Supreme Court held that a federal court is neither a "department" nor an "agency" within 18 U.S.C. § 1001, the statute prohibiting false statements to the government. Congress subsequently overruled *Hubbard* in 1996 by enacting the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § § 1–2, 110 Stat. 3459 (1996), amending 18 U.S.C. § 1001 by applying the false statements statute to executive, legislative and judicial branches of the United States government. It remains to be *see*n whether 18 U.S.C. § 287 will similarly be applied to claims submitted to the judiciary branch. *But see* 18 U.S.C. § 6 (2000) (defining department to include "executive, legislative, or judicial branches").

of the FCA.[173] The claim may reach the federal government after passing through a State or local government,[174] an insurance company,[175] a government contractor,[176] or another individual.[177]

2. False, Fictitious, or Fraudulent Claims

A claim must be "false, fictitious, or fraudulent" to violate § 287.[178] Courts have consistently treated the phrase "false, fictitious, or fraudulent" as including three alternative bases for liability rather than requiring that a claim be false, fictitious and fraudulent.[179]

173. *See* S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 (stating "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States"); *see also* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 544–45 (1943) (holding defendant who causes another to make a claim to the federal government has made a claim to the federal government). *Hess* interpreted 18 U.S.C. § 5438, the predecessor to § 287, which forbade an action that "causes [a false claim] to be made" to the government. *Id.* 18 U.S.C. § 2(b) makes up for this lost wording, as the Reviser's Note of § 287 makes clear. 18 U.S.C. § 287 (2001) ("Reference to persons causing or procuring was omitted as unnecessary in view of definition of 'principal' in § 2 of this title."); *see also* United States v. West Indies Transp., 127 F.3d 299, 307 (3d Cir. 1997) (stating under § 2(b), "criminal intent of the intermediary is not an element of the offense"); United States v. Montoya, 716 F.2d 1340, 1343 (10th Cir. 1983) ("[Section] 287 must be read to include causing a false claim to be presented to the government. Such a reading is consonant with the history of the statute, the surrounding statutory provisions and case law construing the statute."); United States v. Blecker, 657 F.2d 629, 633-34 (4th Cir. 1981) (stating because of § 2(b), "'intermediary' theory of *Hess* remains good law").

174. United States v. Littlefield, 840 F.2d 143, 151 (1st Cir. 1988) (holding fraudulent claims for state unemployment benefits constituted claims against government where federal funds reimbursed part of payments); *Montoya*, 716 F.2d at 1342-43 (affirming conviction for claims made to state agency where agency's funds came from the Department of Energy). Where state and federal funds are mixed, the amount of federal funds must meet a certain threshold. *See Littlefield*, 840 F.2d at 151 ("[P]roportion of federal funds is irrelevant . . . at least when substantial sums are involved."); Montoya, 716 F.2d at 1343 ("[F]ederal involvement must be more than nominal.").

175. *See* United States v. Bolden, 325 F.3d 471, 494 (4th Cir. 2003) ("Importantly, the submission of a false claim to a state agency to obtain federal funds that were provided to the state falls within the parameters of § 287"); United States v. Peterson, 223 F.3d 756, 758 (8th Cir. 2000) (affirming conviction of X-ray company officers who submitted inflated charges to Arkansas Blue Cross and Blue Shield for services provided to Medicare beneficiaries); United States v. Campbell, 845 F.2d 1374, 1382 (6th Cir. 1988) (holding physician criminally liable for submitting false claim "to the government through an insurer"). *But see* United States v. Gumbs, 283 F.3d 128, 131 (3d Cir. 2002) (holding that defendant is not liable under the FCA for defrauding a local government if he has no way of knowing that the money paying for the project originated from Federal funds).

176. United States v. Blecker, 657 F.2d 629, 633–34 (4th Cir. 1981) (affirming conviction for submitting invoices to contractor, knowing claims would be presented to General Services Administration for reimbursement).

177. United States v. Motley, 940 F.2d 1079, 1082 (7th Cir. 1991) (finding preparer of income tax returns violated § 287, although he did not actually submit claim); United States v. Causey, 835 F.2d 1289, 1291 (9th Cir. 1987) (affirming conviction under § 287 of tax protester who counseled others to submit tax returns they did not know were false).

178. 18 U.S.C. § 287 (2000).

179. United States v. Gieger, 190 F.3d 661, 666 (5th Cir. 1999) (noting courts have found that because the three terms are stated in the disjunctive, three kinds of claims may be submitted in violation of § 287); United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979) ("[Section] 287 states the terms . . . in the disjunctive and . . . three kinds of claims are prohibited by the statute."). United States v. Hercules, Inc., 929 F. Supp. 1418, 1426 (D. Utah 1996) ("The juxtaposition of the three adjectives 'false, fictitious, or fraudulent' probably resulted from a draftsman's desire to encompass the varying ways in which fraud is defined."). The Ninth Circuit has described the difference between "false or fictitious" and "fraudulent" as "a statement is false or fictitious if untrue when made, and then known to be untrue by the person making it or causing it to be made. A statement or representation is fraudulent if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom submitted." *Milton*, 602 F.2d at 233 (citations and internal quotation marks omitted).

Generally, courts construe the falsity requirement as broadly covering a variety of situations.[180] For example, individuals have been convicted for falsely submitting that medical procedures were supervised;[181] for submitting over-inflated labor and equipment charges;[182] and for falsely representing oneself as a licensed professional.[183] Defendants regularly dispute the falsity of their claims,[184] but are, for the most part, unsuccessful.[185]

3. Knowledge

In addition to the requirement that a defendant have presented a false claim, § 287 requires that the defendant must have tendered such a claim while "knowing" it was false.[186] The circuits are divided on the degree of intent necessary to constitute a "knowing" presentation of a false claim. Most circuits define the requisite state of mind as "knowledge of falsity."[187] Accordingly, the Seventh Circuit has noted that § 287 "does not explicitly require proof of willfulness."[188] The Fourth Circuit holds the knowledge

180. *See* Kercher v. United States, 409 F.2d 814, 818 (8th Cir. 1969) (finding falsity must be determined in view of facts and circumstances attending presentation). *But cf.*, United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) (noting that mistakes, imprecise statements, and disputes over legal interpretations are not "false").

181. *E.g.*, United States v. Custodio, 39 F.3d 1121, 1122–23 (10th Cir. 1994) (affirming conviction of obstetrician-gynecologist who billed Civilian Health and Medical Program for the Uniformed Services for procedures he did not supervise); *see also* United States v. Siddiqi, 959 F.2d 1167, 1171–72 (2d Cir. 1992) (holding oncologist violated § 287 by filing for Medicare reimbursement for chemotherapy sessions he neither performed nor supervised).

182. *E.g.*, United States v. Erickson, 75 F.3d 470, 473 (9th Cir. 1996) (affirming conviction for over-billing the Department of Health and Human Services for nurse anesthetists' activities); United States v. White, 765 F.2d 1469, 1481 (11th Cir. 1985) (affirming contractor's conviction for fabricating additional costs under equitable contract price adjustment order); United States v. Peterson, 223 F.3d 756, 758-60 (affirming conviction of X-ray company director involved in over-billing Medicare for services).

183. *E.g.*, United States v. Lott, 630 F. Supp. 611, 612 (E.D. Va. 1986) (convicting nurse who misrepresented herself as trained and licensed in Virginia).

184. *See* United States v. Catton, 89 F.3d 387, 392 (7th Cir. 1996) (ordering new trial for farmer who allegedly submitted false claims to FDIC on grounds that government must prove defendant knew claim was false); United States v. Barker, 967 F.2d 1275, 1279 (9th Cir. 1991) (overturning conviction for submission of certain false claims and accepting defense that his claims were not false).

185. For example, defendants have argued that their claims were not "false" because the contract led the defendant contractor to believe that payment was deserved. *E.g.*, United States v. Johnson, 410 F.2d 38, 44 (8th Cir. 1969) (rejecting defendant's argument that his contract compliance claims were merely statements of what he believed the contract between him and the government entitled him to receive payment). Similarly, courts have rejected arguments that contract invoices failed to represent the goods as being of any particular quality. *E.g.*, Imperial Meat Co. v. United States, 316 F.2d 435, 440 (10th Cir. 1963) (finding meat supplier who delivered substandard beef to Army guilty under § 287), Finally, courts have rejected the argument that construction bids were merely estimates presented to the government for negotiation purposes and did not constitute over-inflated labor and equipment charges. *E.g.*, *White*, 765 F.2d at 1478 (holding evidence refuted defendant's argument that estimations made from actual work records conformed to industry standards and not defendant's experience).

186. 18 U.S.C. § 287 (2000).

187. *See* United States *ex rel.* Hochman v. Nackman, 145 F.3d 1069, 1073 (9th Cir. 1998) (holding requisite element is the "knowing presentation of what is known to be false," which does not require a representation to be scientifically untrue); Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998) (finding contractor is "deemed to have known that a claim it submitted was false if it had actual knowledge of falsity of the claim or if it acted in deliberate ignorance or reckless disregard of the truth or falsity of the claim"); United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir. 1997) (finding court must conclude defendant acted with reckless disregard as to falsity of submissions); United States v. Precision Med. Labs., Inc., 593 F.2d 434, 443 (2d Cir. 1978) (stating the element in a Medicare claim under § 287 is that of knowledge); United States v. Maher, 582 F.2d 842, 843 (4th Cir. 1978) (determining defendant should be found guilty of violating § 287 if defendant acted "knowing" claim was false, fictitious, or fraudulent).

requirement met if "the defendant 'acted with knowledge that the claim was false . . . and with a consciousness that he was either doing something which was wrong or which violated the law."[189] In most jurisdictions, knowledge of the federal nature of the claim is not required in order to convict a person under § 287.[190] The Third Circuit, however, does require that a defendant has knowledge of Federal involvement in a claim and interprets § 287 to contain a willfulness requirement.[191]

Several courts have held that knowledge may be inferred from the defendant's reckless disregard for the truth or from deliberate ignorance of the falsity of the claim.[192] Courts have found the knowledge requirement met where the submission of false claims was the result of the defendant's failure to learn proper claim procedures.[193] In contrast to other Circuits, the Ninth Circuit requires specific intent to

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188. United States v. Catton, 89 F.3d 387, 392 (7th Cir. 1996) (holding § 287 does not require specific intent to defraud government). Seventh Circuit precedent falls on both sides of the circuit split. *Compare id.* ("It is implicit in the filing of a knowingly false claim that the claimant intends to defraud the government."), *with* United States v. Nazon, 940 F.2d 255, 260 (7th Cir. 1991) (holding intent to defraud is element of § 287), *and* United States v. Haddon, 927 F.2d 942, 950 (7th Cir. 1991) (same). The *Catton* court explained that those earlier cases, which required specific intent to defraud, had made "assumptions, not holdings." 89 F.3d at 392.

189. United States v. Bolden 235 F.3d 471, 494 (4th Cir. 2003) (quoting *Maher*, 582 F.2d at 847).

190. Ignorance of federal involvement in a program or project is not a defense to a § 287 violation when the defendant's intent was to present a false claim. *See* United States v. Martin, 772 F.2d 1442, 1445 (8th Cir. 1985) (holding government representative's involvement in false claim neither absolved defendant from § 287 liability nor estopped government from alleging falsity of claims since defendant's ultimate intent was to deceive); United States v. Montoya, 716 F.2d 1340, 1345 (10th Cir. 1983) (rejecting defense of ignorance of involvement of federal monies in state project in light of defendant's intent to deceive).

191. *See* United States v. Gumbs, 283 F.3d 128, 131 (3d Cir. 2002) ("[T]o be convicted of willfully causing an intermediary to present a false claim to a federal department, a defendant must at least know that he is causing the intermediary to present a false claim to someone. . . .").

192. *See Bolden*, 325 F.3d at 495 (stating that finding that an accused acted recklessly should be enough to sustain a verdict because a jury could then infer the requisite intent); Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998) (finding contractor is "deemed to have known a claim it submitted was false if it had actual knowledge of falsity of the claim or if it acted in deliberate ignorance or reckless disregard of the truth or falsity of the claim"); United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir. 1997) (finding court must conclude defendant acted with reckless disregard as to falsity of submissions). The Seventh Circuit in *Nazon* upheld the following jury instruction relating to the legal meaning of "knowingly" necessary for culpability under § 287:

> knowledge may be proven by the defendant's conduct and by all the facts and circumstances surrounding the case. You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they *see*med or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted 'knowingly.'

940 F.2d at 258. Upholding such jury instructions "prevents a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." United States v. Holloway, 731 F.2d 378, 381 (6th Cir. 1984).

193. *See* United States v. Nazon, 940 F.2d 255, 259–260 (7th Cir. 1991) (finding evidence demonstrating defendant physician had duty to know and understand Medicaid billing procedures relevant to prove his knowledge of submitting false claim); United States v. Hooshmand, 931 F.2d 725, 732–35 (11th Cir. 1991) (ruling evidence demonstrating defendant should have known and understood claim procedures and terms was relevant to prove defendant's intent to commit crime).

deceive,[194] but has allowed a jury to infer such intent when the defendant knew the claim was false.[195]

4. Materiality

Only the Fourth and Eighth Circuits have held that the materiality of the falsehood is an essential element of a false claim offense.[196] The test for materiality of a false claim is whether the falsification would have a tendency to influence government action regarding that claim.[197]

B. 18 U.S.C. § 287 Defenses

Defenses to a false claim count fall into two categories: (i) intent-based defenses; and (ii) double jeopardy claims. Both types of defenses have been largely unsuccessful.

1. Intent-Based Defenses

Because the courts have mostly interpreted the knowledge requirement of § 287 broadly, intent based defenses are mostly unsuccessful. In order to prove the requisite

194. United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1265 (9th Cir. 1996) (explaining request for payment containing falsities was made with scienter, for which knowledge and a specific intent to deceive must exist).

195. United States v. Rifen, 577 F.2d 1111, 1113 (8th Cir. 1978) (holding it permissible to infer intent to defraud from knowledge of falsity). The Ninth Circuit has also held that knowledge of the law and inducing others to file false tax returns, regardless of whether the taxpayers knew they were false, satisfies the knowledge requirement of the statute. *See* United States v. Causey, 835 F.2d 1289, 1291–92 (9th Cir. 1987) (finding taxpayer's knowledge irrelevant where defendant-tax preparer knew his advice violated tax laws) cited favorably in United States v. Mohrbacher, 182 F.3d 1041, 1050 (9th Cir. 1999); *see also* United States v. Motley, 940 F.2d 1079, 1081–83 (7th Cir. 1991) (discussing applicability of § 287 to tax preparer charged with making false claims).

196. *See* United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983) (holding that materiality is an essential element of § 287); United States v. Adler, 623 F.2d 1287, 1291 (8th Cir. 1980) (holding materiality is essential element of a false claim offense, and explaining that "the test for determining the materiality of the falsification is whether the falsification is calculated to induce action or reliance by an agency of the United States, [whether it is] one that could affect or influence the exercise of government functions, [and whether it has] a natural tendency to influence or is . . . capable of influencing [an] agency decision"), cited with approval in United States v. Baker, 200 F.3d 558, 561 (8th Cir. 2000) (stating jury instruction that materiality is an element of a false statement violation is consistent with law of the circuit); United States v. Snider, 502 F.2d 645, 652 n.12 (4th Cir. 1974) (stating materiality has been required as an element of the offense). Most circuits, however, have explicitly held that materiality is not an element. *E.g.*, United States v. Logan, 250 F.3d 350, 358 (6th Cir. 2001) (ruling materiality is not element of § 287); United States v. Harvard, 103 F.3d 412, 419 (5th Cir. 1997) (same); United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995) (holding while materiality is an element of a false statement offense, materiality is not an element of a false claim offense); United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992) (stating materiality is not an element of § 287); United States v. Elkin, 731 F.2d 1005, 1010 (2d Cir. 1984) (upholding district court's decision not to "submit to the jury any issue of materiality with respect to the § 287 count"). Some courts remain undecided. *E.g.*, United States v. Durenberger, 48 F.3d 1239, 1243 n. 2 (D.C. Cir. 1995) (stating although the issue has yet to be decided, the court would assume for purposes of particular case that materiality is an element of § 287); United States v. White, 27 F.3d 1531, 1534-35 (11th Cir. 1994) (stating court is undecided on issue of materiality but does not need to decide the issue in the particular case); Nazon v. United States, 936 F. Supp. 563, 571 (N.D. Ind. 1996) (noting that "[s]everal circuits have issued conflicting rulings or comments on whether § 287 . . . has a materiality element [and,] [f]or its part, the Seventh Circuit has only sent uncertain hints.").

197. United States *ex rel.* Berge v. Bd. of Trs. of Univ. of Ala., 104 F.3d 1453, 1459 (4th Cir. 1997) (holding materiality of false statement turns on "'whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action'") (quoting United States v. Norris, 749 F.2d 1116, 1122 (4th Cir. 1984)). *Berge* overturned *Norris* with the exception of this test. *Id.* at 1460.

intent, the government generally needs to show only some degree of knowledge—often through circumstantial evidence.[198] Moreover, in most circuits, ignorance of federal involvement in a program or project is not a defense to a § 287 violation if the defendant's intent was to present a false claim.[199]

In making an intent based defense, defendants often claim that, although they submitted a false claim, they did so unwittingly and thus lacked the requisite intent to defraud.[200] Instances where the defendant claimed good faith reliance on a third party's action would also fall under this category.[201]

2. Double Jeopardy

The Double Jeopardy Clause[202] prohibits prosecuting criminal defendants twice for the same crime.[203] A common defense for those who have already received civil FCA penalties is that a defendant has already been punished once for a crime, often through hefty fines under 31 U.S.C. § § 3729. Prior to December 1997, defendants often successfully argued under *United States v. Halper*[204] that the imposition of both civil and criminal penalties for the same false claim amounted to a double jeopardy violation.[205] However, in *Hudson v. United States*[206] the Court abandoned the *Halper* test declaring that the Double Jeopardy Clause "only protects against the imposition of multiple criminal punishments for the same offense."[207] Under *Hudson*, a court must first find

198. *See* United States v. Bolden 235 F.3d 471, 494 (4th Cir. 2003), (quoting United States v. Larson, 581 F.2d 664, 667 (7th Cir. 1978)) ("Indeed, 'the question of one's intent is not measured by a psychic reading of [the defendant's] mind but the surrounding facts and circumstances.'").

199. United States v. Montoya, 716 F.2d 1340, 1345 (10th Cir. 1983) (rejecting defense of ignorance of involvement of federal monies in state project in light of defendant's intent to deceive); *cf.* United States v. Montemayor, 712 F.2d 104, 107–09 (5th Cir. 1983) (stating knowledge that federal agency was involved is not an element of § 1001 offense of making false statements in matters within the jurisdiction of federal agencies). *But see* United States v. Gumbs, 283 F.3d 128, 131 (3d Cir. 2002) (reversing a conviction because defendant did not know that local government contract was funded by the Federal government).

200. *See* United States v. Nash, 175 F.3d 429, 431 (6th Cir. 1999) (affirming conviction of defendant who claimed that in good faith he concluded he was a citizen of the "Republic of Michigan" and therefore a nonresident alien, not subject to federal income taxes).

201. *See* United States v. Austin, 774 F.2d 99, 103 (5th Cir. 1985) (ruling good faith reliance on accountant is defense). *But see* United States v. Dorotich, 900 F.2d 192, 194 (9th Cir. 1990) (holding where trial court gives jury proper instructions about intent required for guilt, failure to give specific instructions "on good faith reliance upon expert advice" does not constitute reversible error).

202. U.S. Const. amend. V. The Fifth Amendment provides in relevant part that "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." *Id.*

203. *Id.*

204. 490 U.S. 435 (1989).

205. *See id.* at 449 ("Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.") The Supreme Court granted discretion to the trial court to determine the size of the civil sanction the Government may receive without crossing the line between remedy and punishment. *Id.* at 450.

206. 522 U.S. 93 (1997).

207. *Id.* at 99; *see* United States v. Ursery, 518 U.S. 267, 279–84 (1996) (reiterating narrowness of Halper holding and finding it does not apply to civil forfeitures); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 48–52 (1993) (criticizing *Halper* decision).

the civil punishments to be either explicitly criminal or "so punitive in form and effect as to render them criminal despite Congress' [sic] intent to the contrary" before finding a Double Jeopardy violation.[208]

C. § 287 Enforcement

Over time Congress has become increasingly aggressive about ensuring the DOJ has the necessary tools for effective prosecution of false claims.

1. Enforcement Provisions

Section 287 mandates imposition of both a fine and imprisonment for all convictions.[209] The maximum prison sentence is five years.[210] The maximum fine is linked to the general penalty provisions of Title 18;[211] thus, an individual criminal defendant may incur a fine of up to $250,000 for each false claim charge.[212]

Through the civil provision of the FCA which offer a substantial portion of a civil fine, whistleblowers have a greater incentive to come forward with information about a fraud. These provisions not only allow for the government to recover losses as a result of fraud,[213] they also open the door for criminal prosecutions as well. A provision of the civil statute allows the DOJ to issue a civil investigative demand ("CID") for information relating to an FCA investigation prior to the initiation of litigation.[214] A CID may require the production of documents, written answers to interrogatories, and/or oral testimony.[215] While the statute specifically applies to civil actions, it also allows

208. 522 U.S. at 104. The Supreme Court further explained that the mere presence of a deterrent purpose, without more, was insufficient to render such sanctions "criminal." *Id.* at 105. The *Hudson* Court did acknowledge that the Eighth Amendment proscription of excessive fines may provide an independent constitutional basis for challenging large civil penalties, despite the Court's rejection of *Halper*. *Id.*; *see* Joan Biskupic, *Supreme Court Rules That Civil Fines Don't Bar Later Criminal Prosecution*, WASH. POST, Dec. 11, 1997, at A6 (discussing impact of *Hudson* decision). Even prior to *Hudson*, district courts were reluctant to apply punitive civil penalties when the government could show that the penalty was reasonable compensation for its loss, despite the *Halper* rule. *See generally* United States v. Fliegler, 756 F. Supp. 688, 697 (E.D.N.Y. 1990) (citing cases not applying Halper).

209. 18 U.S.C. § 287 (2000) ("Whoever makes or presents . . . any claim upon or against the United States ... knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to the fine in the amount provided in this title.").

210. *Id.*

211. 18 U.S.C. § 287. Title 18 provides that felony convictions carry a maximum fine of $250,000 for individuals and $500,000 for organizations. *See* 18 U.S.C. § 3571 (2000). A misdemeanor may carry a maximum fine of $100,000 for individuals and $200,000 for organizations, as long as the misdemeanor did not result in death. *Id.*

212. However, "Reviser's Note: Increased Penalties for False Claims in Defense Procurement," to 18 U.S.C. § 287 states notwithstanding 18 U.S.C. § § 287 and 3623, the maximum fine for a false claim presented to the United States relating to a contract with the Department of Defense is $1,000,000.

213. *See* S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266–67 (discussing need to modernize enforcement mechanisms, increase recoverable damages, and encourage whistle blowing). Each of these provisions was implemented by the False Claims Amendment Act of 1986. 31 U.S.C. § 3701 (1994) (Historical and Statutory Notes).

214. 31 U.S.C. § 3733 (2000).

215. § 3733(a)(1).

disclosure of evidence gathered under a CID to other authorized officers of the DOJ to pursue a criminal investigation.[216]

In addition to the possibility of civil charges leading to criminal charges, a criminal conviction also does not prevent a subsequent civil suit. While the Federal Rules of Criminal Procedure provide that a *nolo contendere* plea has no collateral estoppel effect in related civil proceedings,[217] the civil provision of the FCA prevents a criminal defendant who enters a *nolo contendere* plea from denying liability in a later civil false claims action.[218]

2. Sentencing

Chapter Two, Part B of the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G.") determines the penalties for violations of § 287.[219] Where the false claim has resulted in a loss of $5,000 or less, the base offense level is six.[220] As the monetary loss resulting from the crime increases the base offense level increases up to a maximum of eighteen levels for crimes involving more than $100 million.

Other offense characteristics may increase the base offense level. Examples of offense escalation include: (i) an increase of two levels if the crime had more than ten but less than fifty victims,[221] (ii) an increase of two levels if the defendant obtained more than one million dollars from a financial institution, or four levels if the defendant otherwise jeopardized its safety and soundness,[222] and (iii) an increase of two levels if the defendant's offense violated an administrative or judicial order.[223]

Furthermore, although § 287 considers each filing of a false claim as a separate act subject to a maximum of five years of imprisonment,[224] the Guidelines dictate that a single offense level must be calculated in order to encompass all counts on which the defendant is convicted.[225] When a defendant has been convicted on more than one

216. § 3733(i)(2)(C) (stating evidence gathered by CID may be reviewed without judicial hearing by false claims law investigator or other officer or employee of DOJ authorized under subparagraph B). Subparagraph B, in turn, allows release of CID material to DOJ employees authorized for such use under regulations which the Attorney General shall issue. 31 U.S.C. § 3733(i)(2)(B) (1994).

217. Fed. R. Crim. P. 11(e)(6) (explaining evidence of a *nolo contendere* plea "is not, in any civil or criminal proceeding, admissible against the defendant who made the plea").

218. 31 U.S.C. § 3731(d) (2000) ("Notwithstanding any other provision of law ... a final judgment rendered in favor of the United States in any criminal proceeding charging fraud ... upon a plea of guilty or *nolo contendere*, shall estop the defendant from denying the essential elements of the offense."); *see also* United States v. Nardone, 782 F. Supp. 996, 997-98 (M.D. Pa. 1990) (holding defendant found guilty of violating § 287, whether by jury verdict or guilty plea, is precluded from contesting the issues determined by those guilty verdicts in subsequent action under the civil false claims statute).

219. U.S. S.G. MANUAL § 2B1.1 (2004).

220. U.S.S.G. MANUAL § 2B1.1(a) (2004). *See also* U.S.S.G. MANUAL § 5E1.2(c)(3) (listing minimum and maximum fines for each offense level).

221. U.S.S.G. MANUAL § 2B1.1(b)(2) (2004).

222. U.S.S.G. MANUAL § 2B1.1(b)(12) (2004).

223. U.S.S.G. MANUAL § 2B1.1(b)(7)(C) (2004).

224. 18 U.S.C. § 287 (2000); *see also* Swepston v. United States, 289 F.2d 166, 169 (8th Cir. 1961) (finding separate violation for each false claim).

225. U.S.S.G. MANUAL § 3D1.1 (2004) (outlining procedure for determining offense level on multiple counts).

count, the Guidelines require the counts to be grouped and given an offense level according to specific rules;[226] the court then determines a combined offense level for all groups.[227]

IV. CIVIL PROSECUTIONS UNDER 31 U.S.C. § § 3729-3733

In addition to criminal sanctions, the FCA allows for significant civil monetary damages to be awarded against a defendant who submits a fraudulent claim to the government.[228] The elements of the civil action are similar to the elements in a criminal prosecution.[229] A defendant is liable for up to treble damages under the statute in addition to a penalty of $5,000 to $10,000 per false claim.[230] The Supreme Court has characterized the treble damages, which are sometimes substantial[231], as "essentially punitive in nature."[232] However, they are sufficiently remedial as not to prohibit the subsequent criminal prosecution of a defendant found civilly liable for asserting a fraudulent claim.[233]

To initiate a FCA action, the attorney general may file a suit, or a private person, known as a "relator," may bring a *qui tam* action.[234] In the latter instance, the relator acts as a private attorney general and brings a *qui tam* action "in the name of the government" with hopes of sharing in part of any recovery.[235] With the passage of the 1986 amendments,[236] which strengthened the *qui tam* provisions, Congress intended

226. *See* U.S.S.G. MANUAL § § 3D1.1-3D1.3 (2004) (discussing grouping of counts).

227. U.S.S.G. MANUAL § 3D1.4 (2004) (outlining procedure for determining combined offense level); *see also* U.S.S.G. MANUAL § 3D1.5 (2004) (outlining procedure for determining total punishment); United States v. Alli, 344 F.3d 1002, 1009 (9th Cir. 2003) (explaining the sentencing guidelines for a person convicted of multiple counts of a violation of the FCA).

228. *See* 31 U.S.C. § 3729 (2000) (listing seven specific acts that provide a basis for liability under the FCA if proven by a preponderance of the evidence).

229. *Id.*

230. 31 U.S.C. § 3729(a)(7) (2000).

231. *See*, *e.g.*, United States v. Mackby, 339 F.3d 1013, 1018 (9th Cir. 2003) (holding that simply because civil fines can be fairly high, does not meant that such fines are out of proportion to the crime).

232. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 781 (2000). *But see* Cook County, Ill. v. United States *ex rel.* Chandler, 538 U.S. at 119, 130 (2003) (holding that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives).

233. *See* United States v. Hudson, 522 U.S. 93, 100–01 (1997) (holding that sanctions need not be "solely" remedial to avoid implicating the Double Jeopardy Clause); *see also Cook County, Ill.*, 538 U.S. at 120 (stating that "the FCA's damages multiplier has a compensatory function as well as a punitive one");.

234. 31 U.S.C. § 3730(b) (2000);

235. *See* 31 U.S.C. § 3730(b) (2000); *see also* Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 155–56 (5th Cir. 1997) (describing government's procedural options under § 3730 and ruling government retains right to veto *qui tam* plaintiff's voluntary settlement). *But see* § 3730(c)(2)(C) (stating court has discretion, upon government showing, to limit *qui tam* plaintiff's participation); § 3730(c)(2)(A) (stating government may dismiss action notwithstanding *qui tam* plaintiff's objections); § 3730(c)(2)(B) (stating that the government may, notwithstanding *qui tam* plaintiff's objections, settle a case if settlement is "fair, adequate, and reasonable").

236. 31 U.S.C. § 3730(b). Known as the "Whistleblower Act," the 1986 amendments provides whistleblowers with increased protection against retaliation, a greater percentage of damages, and payment of attorney fees. 31 U.S.C. § § 3729–3733 (2000). *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997) (holding that the 1986 FCA amendment does not apply retroactively as to include claims submitted prior to its enactment of the amendment).

to encourage whistleblowers to come forward with information creating a public/private partnership to enhance the enforcement of the FCA.[237]

If the fraud has not been publicly disclosed, a relator may bring a *qui tam* action whether or not she has direct or first hand knowledge of the fraud.[238] However, when a *qui tam* action is based upon information previously disclosed to the public[239] the relator may bring suit only if she is the "original source"[240] of the information. Additionally, a relator must inform the DOJ of her intention to bring a *qui tam* action before proceeding with the suit. [241]Once informed by the relator, the Government is given 60 days to decide whether to intervene and litigate the case on its own.[242]

The relator's recovery depends on whether the government intervenes and also the level of contribution provided by the relator to the prosecution of the claim.[243] When the government intervenes, a relator is awarded fifteen to twenty-five percent of the proceeds.[244] When the government does not intervene, the relator receives twenty-five to thirty percent of the settlement or fine.[245] In addition to the allowing for the pos-

237. *See* United States *ex rel.* Rodgers v. Arkansas, 154 F.3d 865, 868 (8th Cir. 1998) ("The *qui tam* mechanism exists to motivate individuals to further the interest of the government in remaining free from frauds perpetrated against it."); Costner v. URS Consultants, Inc., 153 F.3d 667, 675 (8th Cir. 1998) (noting Act's jurisdictional scheme is "designed to promote private citizen involvement in exposing fraud against the government" (quoting United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1511 (8th Cir. 1994))).

238. *See* United States v. Bank of Farmington, 166 F.3d 853, 859 (7th Cir. 1999) (stating that whether a *qui tam* relator is an original source is immaterial unless there has been public disclosure); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 969–70 (9th Cir. 1999) (stating 1986 amendment bars recovery if action is based upon publicly disclosed information and the relator is not the original source of the information).

239. *E.g.*, United States *ex rel.* McKenzie v. Bellsouth Telecomms., Inc., 123 F.3d 935, 938–43 (6th Cir. 1997) (barring *qui tam* action because material had been publicly disclosed in newspaper reports); United States *ex rel.* O'Keeffe v. Sverdup Corp., 131 F. Supp. 2d 87, 90–93 (D. Mass. 2001) (discussing parameters of the public disclosure bar). Section 3730 describes three ways in which previous public disclosure can occur: (i) in a civil, criminal, or administrative hearing; (ii) in a congressional, administrative or General Accounting Office report, audit, or investigation; or (iii) in the media. 31 U.S.C. § 3730(e)(4).

240. 31 U.S.C. § 3730(e)(4) (2000). Section 3730 defines an original source as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an [FCA] action" based on such information. 31 U.S.C. § 3730(e)(4)(B) (2000). *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 969-70 (9th Cir. 1999) (stating 1986 amendment bars recovery if action is based upon public disclosure and the relator was not the original source of the information), *cert. denied*, 120 S. Ct. 2196 (2000); United States *ex rel.* Jones v. Horizons Healthcare Corp., 160 F.3d 326, 330 (6th Cir. 1998) (holding *qui tam* relator can maintain a false claim action only if the relator is found to be the original source); *Costner*, 153 F.3d at 676 (stating where the government files an action to enforce FCA, would-be relators may not bring any action based on the same underlying facts).

241. 31 U.S.C. § 3730(b).

242. *Id.*; *see also* 31 U.S.C. § 3730(c).

243. 31 U.S.C. § 3730(d).

244. 31 U.S.C. § 3730(d)(1) (2000).

245. § 3730(d)(2). Between 1986 and 2000, the government intervened in 554 of 3361 cases and is currently investigating 841 cases. *See* also Fried Frank *Qui Tam* Page—FCA Statistics, *available at* http://www.friedfrank.com/quitam/fcastats.htm (last visited Nov. 29, 2004) (providing statistics on *qui tam* lawsuits reported by the DOJ through September 30, 2002). *Qui tam* plaintiffs have received an average of 16 percent of the government's damages where the government intervenes and 28 percent where the government does not intervene. *Id.*

sibility of substantial recoveries,[246] the Act provides relief for those relators who as employees are "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" as a result of reporting a false claim.[247]

A state or state agency is not a "person" for purposes of *qui tam* liability.[248] Accordingly, *qui tam* suits under the FCA against a state government are generally barred.[249] The Supreme Court noted that there is "a serious doubt" as to whether a *qui tam* suit against a state would run afoul with the Eleventh Amendment, but declined to address the issue[250] and instead barred *qui tam* suits against states based on statutory construction.[251] Local governments, however, are "persons" amenable to suit under the False Claims Act.[252] As with the two criminal statutes, *qui tam* suits are an important piece of false statement and false claim prosecutions.

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246. For example, *qui tam* plaintiffs received $8.7 million of a $55 million settlement with Bicoastal Corp., which had inflated cost estimates for flight simulator contracts with the Department of Defense. *See Fraud, House Passes Bill to Allow Federal Employees to File Qui Tam Suits*, 58 FED. CONTONT. REP. (BNA) No. 7, at 5 (Aug. 1, 1992). While in the past *qui tam* suits have primarily targeted the defense industry, there is an increasing trend towards using *qui tam* suits in the health care industry. In 1996, there were more than 200 health care *qui tam* cases compared to approximately ninety in the defense arena. The largest recovery in the history of the FCA occurred in February 1997 when SmithKline Beecham Clinical Laboratories Inc., Philadelphia, paid the government $325 million to settle a *qui tam* suit that stemmed from fraudulent Medicare and Medicaid billing for laboratory tests. *See* N*ot What the Doctor Ordered: A Record Whistleblower Suit; Philadelphia Venue Strikes Again*, U.S. BUS. LITIG., June 1997, at 13. *See generally* Adam G. Snyder, The *False Claims Act Applied to Health Care Institutions: Gearing up for Corporate Compliance*, 1 DEPAUL J. HEALTH CARE L. 1 (1996) (describing application of FCA to health care fraud).

A prevailing *qui tam* plaintiff is also entitled to reasonable expenses, attorneys' fees, and costs. 31 U.S.C. § 3730(d)(1)-(2) (2000).

247. 31 U.S.C. § 3730(h) (2000).

248. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 779–87 (2000). The Court has a "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 797; *see also* United States v. Cooper Corp., 312 U.S. 600, 614 (1941) (establishing presumption that "person" does not include the sovereign).

249. *Id.*

250. The Supreme Court has observed generally that subjecting a state to suit for damages under federal law would fundamentally alter the federal-state balance. See U.S. Const. amend. XI ("[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State..."). *See also* Alden v. Maine, 527 U.S. 706, 757 (1999) (holding that subjecting states to suits in state court under the Fair Labor Standards Act is a violation of Eleventh Amendment state sovereign immunity); Coll. Sav. Bank v. Fla. Pre-Paid Post-Secondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding suits against states based on federal patent law are barred by Eleventh Amendment state sovereign immunity).

Although states are not be subject to *qui tam* liability under the FCA, it might be possible that states "can be 'persons' for purposes of commencing an FCA *qui tam* action." Inyo County v. Paiute-Shoshone Indians of Bishop County of the Bishop Colony et al., 583 U.S. 701, 710 (2003).

251. *See* Vt. Agency of Natural Res., 529 U.S. at 787 (citing Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring) (internal quotation marks and citation omitted)).

252. Cook County, III. v. United States *ex rel.* Chandler, 538 U.S. 119, 129 (2003) (affirming the Seventh Circuit's holding that, unlike states, municipalities are not immune from *qui tam* actions, thus resolving a Circuit split on the issue).

The Big Picture

Fighting Fraud at the Source:
Modifying the Federal False Claims Act to Deter Corporate Fraud at the Individual Level

FIGHTING FRAUD AT THE SOURCE: Modifying the Federal False Claims Act to Deter Corporate Fraud at the Individual Level

Joseph E. B. White, J.D.

A villager is walking by the river early one morning. The villager looks out into the water and sees a baby floating down the river. Horrified, the villager races into the water, grabs the baby, and brings the baby to shore. The baby is fine. Relieved, the villager looks back into the water and sees another baby floating down the water. The villager again dives into the water and rescues this baby as well. Once more, the villager looks into the water . . . and sees dozens of babies floating down the river. The villager calls out an alarm, and the entire village comes running to the river to rescue as many babies as they can before the water carries them away. This is a village that is mobilized. Every villager is at the river, trying to save the babies from the water. This is a village that is improving lives. Many of the babies are being saved. But the babies keep on coming . . . because no one is going upstream to put a stop to the ogre that is throwing the babies into the water in the first place.

In the wake of the infamous corporate scandals that rocked the stock market at the turn of the century, Congress headed upstream, proactively addressing the problem at the individual level—the true source of corporate fraud. Specifically, by passing the Sarbanes-Oxley Act (SOX), Congress enacted a landmark corporate responsibility initative that instituted preventive measures against future malefeasance.

These measures lift the shadow of secrecy previously hiding corporate wrongdoings. SOX demands enhanced corporate disclosure requirements that expose fraudulent schemes before they materialize into business plan frauds. The Act also mandates that each publicly-held company establish an independent audit committee to review "confidential, annoymous submission[s] by company employees of concerns regarding questionable accounting and auditing matters," encouraging employees to reveal internal problems at the first corporate misstep. Furthermore, by requiring directors and officers to personally certify the veracity of the company's annual and periodic reports, SOX lowers the corporate veil shielding the potential masterminds of the fraud, ensuring a higher level of accountability and responsibility. With over 250 corporate fraud convictions or guilty pleas in the first year of the Act's existence, the U.S. Government has moved decisively to combat corporate fraud and to restore investor confidence in the marketplace.

As the stream of commerce has become more transparent, corporate fraudfeasors have now set sail for a less regulated revenue steam—the federal tresury. Indeed, a revealing GAO report proclaims that, in the health-care industry alone, ten cents of every federal dollar spent on medical care has been systematically looted from the

Government coffers. Perhaps more disturbing, seven out of the top ten Fortune 500 companies have been investigated for violating the federal False Claims Act, the Government's primary statute for ferreting out fraud. However, with nearly a quarter of all *qui tam* suits ever filed currently occupying the Justice Department's inbox, the False Claims Act has been reduced to a mere pipe draining an ocean of fraudulent claims.

In turn, for the individual whistleblower looking to reverse the tide of fraudulent activity in his company, the False Claims Act (FCA) increasinly appears ineffective and impotent. The language of the Act paints a complex picture of restrictions, demanding the devoted guidance of a highly skilled attorney. Moreover, potential whistleblowers soon discover that the FCA route is a long and arduous journey, which has required up to a sixteen-year period of uncertainty. Particularly frustrating to the whistleblower, the reactive nature of the Act not only permits the initial emergence of the fraudulent scheme, but it also allows the fraud to spread while the Government begrudingly attempts to assess its magnitude. Any sense of personal satisfaction oftentimes disappears, for the FCA rarely pierces the corporate veil protecting the responsible individuals, freeing the fraudfeasors to scheme another day.

Alternatively, existing corporate compliance programs rarely represent a viable alternative to the False Claims Act. Harkening back to the pre-SOX era of the private investment market, the current patchwork of internal checks and balances lack the necessary independence, impartiality, and confidentiality that is required for effective regulation. Weighing the benefits of potentially reporting the fraud to the very author of the scheme versus taking your place in the long line of FCA prosecutions, most employees understandably choose to stand in silence, watching the fraud to continue its course.

In order to stop the fraudulent drain of federal funds, the Government should apply the lessons of SOX to the federal False Claims Act. Most importantly, as a precondition to receipt of federal funds, the FCA should require each corporate recipient to establish an independent auditing committee, empowered with the ability to review whistleblower complaints and to proactively address corporate fraud against the Government. Moreover, the Act must demand enhanced disclosure requirements from recipients, allowing for increased corporate transparency. Lastly, the FCA should hold directors and officers personally liable for fraudulent claims submitted to the Government, piercing the corporate veil presently shielding repeat offenders of the Act.

These proposed amendments to the FCA make sense and cents. In this era of drastic cutbacks of federal programs, the Government should first adequately oversee and protect the current expenditures of federal funds. As a first step, Congress should amend the FCA, merging the compliance mechanism of SOX with the incentive structure of the FCA qui tam provisions. The qui tam provisions encourage employees to disclose vital information necessary to feret out complex fraud; the SOX model provides an effective internal mechanism that supplements the overburdened False Claims Act.

This four-part article series proposes a modified approach to combatting fraud against the Federal Government. The January 2006 article will examine some of the

key factors undermining current FCA enforcement. The April 2006 article will explore the inherent limitations of the self-policing compliance programs or annoymous government hotlines that presently guard the Government's expenditures. The July 2006 article will highlight some of the lessons learned from SOX enforcement, and argues that increased levels of corporate transparency and personal accountability ultimately deter fraud. Finally, the October 2006 article will describe how the compliance mechanisms of SOX should be combined with the FCA qui tam provisions so as to proactively protect the federal treasury. The article series will conclude that the Government should rid the budget of fraudulent expenditures before it slashes federal programs. The proposed legislation outlined in this article series will offer a possible solution: supplement the current FCA enforcement with preventive frontlines measures against fraud.