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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FROM THE EDITOR

At the recent TAFEF Awards Dinner, Al Campbell, a successful *qui tam* relator, poignantly reminded the audience that "there are real lives at stake when you encourage whistleblowers to file *qui tam* suits." With continuing legal battles raging over the nuances of statutory construction, ongoing debates championing the prophetic readings of legislative history, and conflicting proclamations espousing the "true purpose" behind the Act, it is easy to lose sight of the real-life plight of America's brave whistleblowers. Campbell encouraged the Bar to listen, to remove our legal hats, and to focus on the actual and practical implications of moving a case forward.

Over the course of the last year, the "In Their Own Words" section of the *Quarterly Review* has given a voice to relators, providing an inside look into their daily struggles. I would argue that while the other sections have provided important information about legal developments, this section has provided an education on an even more important topic—human development. By sharing their stories, these relator-authors have allowed us to walk in their shoes and, in turn, to better understand the long and arduous journey of being a whistleblower.

In this issue of the *Quarterly Review*, Robert Collins courageously shares his moving story of being the son of a whistleblower. In many ways, it is not only a view into the family experience, but it also a look back into why the enactment of the 1986 FCA Amendments was so important. Before diving into the *Quarterly*, I recommend starting with the "In Their Own Words" section. It truly puts everything else into perspective.

Sincerely,

Jeb White
jwhite@taf.org

Recent False Claims Act & *Qui Tam* Decisions

OCTOBER 1–DECEMBER 31, 2005

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

U.S. ex rel. Tyson v. Amerigroup Illinois, Inc., 2005 WL 3050610 (N.D. Ill. Nov. 8, 2005)

An Illinois district court refused to dismiss an FCA *qui tam* action pursuant to Rule 12(b)(6), in which the defendants allegedly induced a state Medicaid agency to execute contracts by "falsely representing that [it] would not discriminate on the basis of health status, all the while intending to discriminate in order to strip the Government of the benefit of their bargain." The court ruled that the relators had sufficiently pled the "specific, objective manifestations" tending to show that the defendants intended to engage in a scheme to defraud the Government. The court echoed the ruling that "making a promise that one intended not to keep is fraud."

In an intervened FCA *qui tam* action, the Government alleged that the contracts between Amerigroup Illinois, Inc. and the Illinois Department of Public Aid required Amerigroup to provide written certifications disclosing "all allegations of Fraud, Abuse or misconduct of Providers, Beneficiaries." Moreover, the defendants purportedly misrepresented that they would not discriminate on the basis of an enrollee's or prospective enrollee's health status, yet nevertheless intended to do so.

Amerigroup, however, in a motion to dismiss, argued that their written certifications could not support an actionable FCA action, for the contracts only required the defendants to report the fraud, abuse or misconduct of providers, beneficiaries, or department employees. The defendants, however, claimed that they were not "providers" within the meaning of the contracts, and thus any purported fraud, abuse or misconduct on their part did not fall within the reporting requirements. Alternatively, the defendants attacked the Government's fraud-in-the-inducement theory of liability. Specifically, the defendants argued that their certifications constituted promises concerning future conduct, which could not support a fraud claim as a matter of law. After dissecting the language of the contract and ruling that the defendants could be held liable, the court quickly accepted the Government's fraud-in-the-inducement theory of liability.

Promise of Future Conduct Can Support an Actionable FCA Suit

The defendants argued that a promise of future conduct could not support a fraud claim. The Government, however, maintained that, even if the false representations pertained to future conduct, they were part and parcel of defendants' scheme to defraud the Government and thus fell within the exception to the general rule.

The "scheme exception" applies "where one party promises performance in order to induce the other party's reliance, and the other party so relies, but the promisor

never intended to keep the promise." *Advent Elec ., Inc. v. Buckman,* 918 F. Supp. 260, 264 (N.D.Ill.1996). In order to invoke the exception, a plaintiff must allege specific, objective manifestations of fraudulent intent. *Am. Diag. Med., Inc. v. Cardiovascular Care Group,* No. 03 C 8929, 2004 WL 1490268, *2 (N.D.Ill. July 1, 2004).

In the case at bar, the court ruled that the Government had sufficiently pled the "specific, objective manifestations" tending to show that the defendants intended to engage in a scheme to defraud the Government. The court proclaimed that the defendants induced the Illinois Department of Public Aid to execute contracts by "falsely representing that Amerigroup IL would not discriminate on the basis of health status, all the while intending to discriminate in order to strip the Governments of the benefit of their bargain." Quoting a recent Seventh Circuit decision, the court ruled that in the context of a FCA suit, "making a promise that one intends not to keep is fraud." *United States of America ex rel. Main v. Oakland City University,* 426 F.3d 914, 2005 WL 2665600, *2 (7th Cir. Oct.20, 2005)(holding that the university would be liable under the FCA if it knew about a Department of Education rule barring the university from paying recruiters, but told the Department that it *would comply* nonetheless).

Accordingly, finding sufficient evidence to support the Government's claims, the court refused to dismiss the case at bar.

B. FCA Liability in Multi-Stage Application Processes

U.S. ex rel. Main v. Oakland City University, 426 F.3d 914 (7th Cir. Oct. 20, 2005)

The Seventh Circuit reversed and remanded an Indiana district court's dismissal of a *qui tam* action, in which a former university recruiter alleged that the university's representation in phase-one application for eligibility that it would not pay recruiters contingent fees for enrolling students was fraudulent and led to receipt of federal monies through phase-two applications for grants, loans, and scholarships. The court of appeals ruled that the phase-two applications were themselves false because they represented that the students were enrolled in an eligible institution, which was not true.

Jeffrey Main, a former Oakland City University recruiter and Director of Admissions, alleged that he received contingent fees based on the number of students he recruited to the University. Eventually, Main filed an FCA *qui tam* action after discovering that the alleged compensation violated Federal regulations. More specifically, federal subsidies under the Higher Education Act require multiple layers of paperwork. First, the college or university submits an application to establish the institution's eligibility. If this phase-one application is granted, the institution and its students submit additional phase-two applications for specific grants, loans, or scholarships. Both a statute, 20 U.S.C. § 1094, and a regulation, 34 C.F.R. § 668.14(b)(22)(i), condition institutional eligibility on a commitment to refrain from paying recruiters contingent fees for enrolling students. According to Main, Oakland City University assured the Department of Education on its phase-one application that it would comply with the rule against contingent fees.

The district court dismissed the action under 12(b)(6), ruling that even willful falsehoods in phase-one applications did not violate the Act, because the phase-one applications request a declaration of eligibility rather than an immediate payment from the Treasury. The phase-two applications for grants, loans, and scholarships were covered by the Act, the lower court ruled, but were not false, because they did not repeat the assurance that the University abided by the rule against paying contingent fees to recruiters. Main appealed the decision to the Seventh Circuit.

FCA Liability Can Attach in a Multi-Stage Application Process

In reversing the lower court decision, the Seventh Circuit held that a multi-stage application process does not forecloses FCA liability for fraud in the first stage. Summarizing the application process in the case at bar, the court noted that the "University 'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment." The court of appeals ruled that no more is required under the FCA, for the phase-two application was itself false because it represented that the student was enrolled in an eligible institution, which was not true. In other words, "If a false statement is integral

to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork."

The Seventh Circuit rejected the defendant's argument that this approach would treat any violation of federal regulations in a funding program as actionable fraud. The court of appeals pointed out that to prevail in this suit Main must still establish that the University not only knew, when it signed the phase-one application, that contingent fees to recruiters were forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. The court highlighted that this distinction is commonplace in private law: "failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud." *See, e.g., Perlman v. Zell,* 185 F.3d 850 (7th Cir. 1999); *Bower v. Jones,* 978 F.2d 1004, 1012 (7th Cir. 1992).

In short, if the University knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the FCA.

The defendant countered by offering the court a memorandum that the Deputy Secretary of Education circulated to subordinates in 2002, supporting its permissive interpretation of the regulations. The court of appeals, however, gave the memorandum no legal effect, for it was not published for notice and comment and it did not authoritatively construe any regulation. The court was particularly swayed by the fact that the Department of Justice filed an *amicus curiae* brief in support of the relator's interpretation of the FCA. "That view, and not one implied by a back-office memo, represents the position of the United States." Accordingly, the Seventh Circuit reversed the district court's decision.

A. Section 3729(a) Damages

U.S. ex rel. Taylor v. Gabelli, 2005 WL 2978921 (S.D.N.Y. Nov. 4, 2005)

A New York district court granted the defendants' motion for partial summary judgment in an FCA *qui tam* action, alleging that the defendants committed fraud against the Government in their successful bids for and resales of wireless spectrum licenses. The court held that the FCA does not grant *qui tam* relators the remedy of disgorgement of profits, for disgorgement cannot be construed as compensation for "damages sustained" by the Government, as required by Section 3729(a).

R.C. Taylor filed an FCA *qui tam* action against Mario Gabelli and various other individuals and companies, alleging that the defendants knowingly defrauded the Government in connection with public auctions of spectrum licenses held by the FCC from 1995 to 2001. According to the complaint, the scheme involved bids by sham entities to obtain "small business" discounts and spectrum licenses, based in part on "material misstatements and omissions." Based on these bids, the FCC awarded twelve defendants wireless spectrum licenses. Subsequent to receiving these licenses, four of the twelve defendants sold their licenses to private entities, resulting in three of the four receiving a profit on the sale.

After the Government refused to intervene, the defendants moved pursuant to Federal Rule of Civil Procedure 56 for an order granting partial summary judgment on the relator's claim for disgorgement of profits. In turn, the court was faced with the issue of whether the FCA grants relators the remedy of disgorgement of profits.

FCA Does Not Reward Relators the Remedy of Disgorgement of Profits

In granting the defendants' motion for partial summary judgment, the court held that the FCA does not reward relators the remedy of disgorgement of profits. Taylor had argued that the resale proceeds were recoverable "FCA damages." First, Taylor argued that such "damages" were a standard remedy in fraud cases involving resale profits because they "approximate the return of the property in question." Second, Taylor maintained that the defendants perpetrated another fraud by obtaining FCC permission to resell the licenses. In turn, Taylor reasoned that, in such instances, courts typically measure the Government's damages by what the Government provided as a result of the false claim, which Taylor maintained was measurable by the defendants' net proceeds from the resales.

As an initial matter, the court highlighted the relevant FCA language: "[An FCA defendant] 'is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount *of damages which the Government sustains* because of the act of that person.'" 31 U.S.C. § 3729(a) (emphasis added by the court).

Taylor interpreted "damages" to include the disgorgement of the defendants' ill-received profits. The court, however, described a definitive barrier in the law of remedies that "strikes a clear distinction between damages—a compensatory form of relief—and restitution—a form of relief that prevents unjust enrichment." Moreover, the court was particularly swayed by the absence of a "restitutionary" provision in the text of the FCA.

The relator also attempted to fit its argument within the confines of the "damages which the Government sustains" language, but the court refused to bite. According to the court, "The Government, here, simply did not incur any direct damages because no money flowed from the Government when defendants resold licenses." Notably, the court stressed that the Government could still bring its own action against the defendants that could assert causes of action that provide for disgorgement of unjust profits.

The court also highlighted Supreme Court cases addressing remedies under the FCA. In *United States v. Bornstein*, the Supreme Court considered how forfeitures resulting from a subcontractor's fraud should be calculated. 423 U.S. 303, 306–07 (1976). The Supreme Court, focusing in particular on the "make-whole" purpose of the Act, stated:

> "We think the chief purpose of the (Act's civil penalties) was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." For several different reasons, this make-whole purpose of the Act is best served by doubling the Government's damages before any compensatory payments are deducted.

Id. (citing *United States ex rel. Marcus v. Hess,* 318 U.S. 537, 551–52 (1943)).

In addition, the Supreme Court discussed the remedial functions of the FCA in *Chandler*, which held that local governments are "persons" for purposes of FCA liability. *Cook County v. United States ex rel. Chandler,* 538 U.S. 119, 134 (2003). The *Chandler* Court, like the *Bornstein* Court, highlighted the compensatory purposes of the FCA, explaining as follows:

> The treble feature thus leaves the remaining double damages to provide elements of make-whole recovery beyond mere recoupment of the fraud.

Id. at 131.

The Court also noted that the Act does not have a separate provision for prejudgment interest nor expressly provides for consequential damages, which "typically come with recovery for fraud." *Id.* (citations omitted);

Next, the court reviewed the legislative history, which is replete with references to the remedial purpose of the Act and in particular to recoupment of monetary losses. Indeed, the Senate Report of the Committee on the Judiciary on legislation

to amend the FCA begins by stating that the purpose of the proposed 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S.Rep. No. 345, at 5266 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266.

Accordingly, after extensively reviewing the law of remedies, Supreme Court interpretations, and legislative history, the court found that the only allowable remedy the FCA grants the relator is compensatory damages and not restitution. In turn, the court granted the defendants' motion.

B. Section 3729(a)(1) Presentment Requirement

United States v. Squire, 2005 WL 3470297 (N.D. Ill. Dec. 12, 2005)

An Illinois district court denied a defendant's motion to dismiss an FCA action, in which the Government alleged that the defendant, as the president and chief executive officer of a health care provider, violated the FCA by submitting false Medicare claims to a Medicare fiscal intermediary. The court ruled that the Government had sufficiently alleged that the defendant caused a false claim to be presented to the Government, for the false claims caused the fiscal intermediary to request and receive reimbursement from the Federal Reserve Bank.

The United States sued Ari Squire and AccuCare, Inc. for violations of the FCA, payment by mistake, unjust enrichment, and common law fraud. The United States alleged that from January 1998 through 2001, Ari Squire was the president and chief executive officer of AccuCare, a health care provider under the Medicare program, and that Palmetto Government Benefits Administrators was AccuCare's fiscal intermediary. The Government's claims against Squire and AccuCare were based on the 1998 and 1999 cost reports AccuCare filed with Palmetto and the 2000 and 2001 cost reports AccuCare allegedly failed to file with Palmetto. Squire is claimed to have signed the certifications on both the 1998 and 1999 cost reports.

More specifically, the Government alleged that Squire fraudulently sought and received reimbursement for several fraudulent expenses on AccuCare's 1998 Cost Report, including salary expenses for a nonexistent consultant, who was not an employee of AccuCare and never performed any work for AccuCare. The Government also alleged that Squire fraudulently sought and received reimbursement for several ineligible expenses on AccuCare's 1999 Cost Report, and that AccuCare received interim payments from Medicare at the outset of 2000 and 2001 but failed to file cost reports in 2000 and 2001 reconciling its interim payments for these years with the actual Medicare-related costs it had incurred.

AccuCare was held in default. Squire moved to dismiss the claims against him, arguing that the Government failed to plead its FCA claim with sufficient particularity to the extent it is based on AccuCare's failure to file cost reports in 2000 and 2001.

Failure to File Cost Report Is Not an Actionable FCA Action

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Squire argued that the Government's FCA claims based on AccuCare's failure to file its 2000 and 2001 cost reports fall short of these requirements. The Government failed to respond to this argument. The court agreed with Squire. In contrast to its allegations of fraudulent claims in AccuCare's 1998 and 1999 cost reports, the Government identified no specific claims that it contended AccuCare fraudulently filed in 2000 or 2001. Thus, the court dismissed the Government's FCA claim to the extent it was based on AccuCare's failure to file its 2000 and 2001 cost reports.

Totten Distinguished

Squire moved to dismiss the remaining claims under Rule 12(b)(6), arguing that the Government made no allegations that Squire either presented a claim or caused a claim to be presented to an officer or employee of the government. In making this argument, Squire relied heavily on *United States ex. rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), a case in which the plaintiff brought a *qui tam* action claiming the defendants violated the FCA by delivering defective rail cars and submitting fraudulent invoices to Amtrak. The D.C. Circuit affirmed the dismissal of the complaint based partly on its interpretation of § 3729(a)(1). The *Totten* court concluded that the defendants had not "presented" or "caused to be presented" a false claim to an "officer or employee of the Government." Amtrak was not the Government, so presenting the claim to Amtrak did not meet the presentment requirement, and even though Amtrak paid the defendants with funds received from the Federal Government, Amtrak had not presented defendants' claims to an officer or employee of the Government.

The present court noted Judge Garland's dissent in *Totten*, in which he contended that 31 U.S.C. § 3729(a)(1), when read in the context of the FCA as a whole and alongside the statute's legislative history, creates liability when a defendant makes a claim to a government grantee or contractor that is paid with funds already received from the Government and when a defendant makes a claim to a grantee or contractor who seeks reimbursement from the Government.

Without siding with either side of the *Totten* debate, the present court ruled that the Government had sufficiently alleged that Squire caused a false claim to be presented to an officer or employee of the United States for payment or approval. Taking as true the allegations set forth in the Government's complaint and its response to the plaintiff's motion to dismiss, the court noted that after Squire and AccuCare submitted false claims to Palmetto, Palmetto paid those claims out of its commercial bank account and then requested and received reimbursement from the Federal Reserve Bank. This, according to the court, is sufficient to allege that Squire and AccuCare caused a false claim to be presented to an employee or officer of the Federal Government. *See United States ex. rel. Tyson v. Amerigroup Ill., Inc.*, No. 02 C 6074, 2005 WL 2667207, at *1–3 (N.D.Ill. Oct.17, 2005) (Medicaid health provider caused false claims to be presenting to federal government by submitting them to an intermediary state agency). Accordingly, the court refused to dismiss the Government's remaining claims.

U.S. ex rel. Tyson v. Amerigroup Illinois, Inc., 2005 WL 2667207 (N.D. Ill. Oct. 17, 2005)

In an FCA *qui tam* action alleging Medicaid fraud, an Illinois district court denied the defendants' motion to dismiss under Rule 12(b)(1) for lack of jurisdiction. The court rejected the defendants' argument that FCA liability did not attach because the allegedly false Medicaid claims were presented to a state Medicaid agency, not the Federal Government. The court ruled that the FCA applied, for the Federal Government reimbursed the state agency for a portion of the funds it paid for these allegedly false claims.

Cleveland Tyson filed an FCA *qui tam* action against Amerigroup Illinois, Inc. The defendant filed a motion to dismiss, arguing the FCA was not violated by its actions, for it filed allegedly false Medicaid claims with a state agency and not the Federal Government. In other words, the defendant maintained that those claims were not properly *presented* to an officer or employee of the United States Government, as required by § 3729(a)(1).

Court Distinguished *Totten*

The court rejected the defendant's reading of § 3729(a)(1), which relied almost exclusively on *United States ex rel. Totten v. Bombardier Corporation*, 380 F.3d 488 (D.C. Cir. 2004). Without commenting on whether *Totten* was correctly decided, the court found *Totten* to be inapposite to the present case and declined the defendants' invitation to dismiss the action on *Totten* grounds. The court correctly noted that *Totten* does not stand for the proposition that claims must be presented by the alleged tortfeasor *directly* to the Federal Government in order to be actionable under the FCA. Indeed, both the majority and dissent in *Totten* acknowledged that presentment can occur directly or indirectly, as indicated by the statute itself through its use of the phrase "causes to be presented" in Subsection (a)(1), and "causes to be made or used" in Subsection (a)(2). *See Totten*, 380 F.3d at 499–500 (Roberts, J.); *id.* at 507 n. 8 (Garland, J., *dissenting*). Rather, *Totten* held, *inter alia*, that a false claim ultimately must be presented to the Federal Government (whether directly or via an intermediary) in order for liability to attach, and that presentment is a prerequisite to liability under both Subsections (a)(1) and (a)(2) of the FCA. *Id.* at 499–501.

In distinguishing the facts of *Totten*, the court highlighted that this case involved Medicaid fraud. "Medicaid, which is based upon a comprehensive funding and reimbursement structure between the state and federal governments, is different from the federal funding mechanism for Amtrak, a government-sponsored private enterprise. Under Medicaid, the state pays health care providers for services rendered to Medicaid recipients, and it is reimbursed for a significant portion of those funds by the federal government after demonstrating compliance with a number of federal regulations."

Furthermore, the court was particularly swayed by Subsection (c) of the FCA, which was added in the 1986 Amendments. That subsection defines a "claim" to include:

> 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).

As the legislative history to the 1986 Amendments indicates, this new language was intended to "reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds," and applies to "other circumstances where claims are submitted to State, local, or private programs funded in part by the United States where there is significant Federal regulation and involvement ." S. Rep. 99-345 at 19–20.

Moreover, Congress itself recognized that claims made under Medicare and Medicaid programs "are not submitted directly to the Federal agency, but rather to private intermediaries," nevertheless, it stated that such claims have been "uniformly held to be within the ambit of the FCA." S. Rep. 99-345 at 19.

Here, as the court highlighted, the Federal Government ultimately approved the purportedly false Medicaid claims processed and submitted to it by the state agency. Based on those claims, the Federal Government then reimbursed the State by disbursing funds into an account drawn upon by the State of Illinois. "Accordingly, while the [state agency] may be acting as an intermediary or administrator of the Medicaid program, the federal government is actively involved in the payment and reimbursement of the claims processed by the state. In this regard, any false or fraudulent claims submitted to the [state agency], in turn, are presented to the federal government for reimbursement, thereby resulting in an impairment or misappropriation of federal funds when those claims are actually paid."

Accordingly, the court ruled that the complaint satisfied the "presentment requirement," even under *Totten*'s strained reading of the Act. Thus, the court denied the defendant's motion to dismiss.

C. Section 3729(b) *Mens Rea* Requirement

See also "Common Defenses to False Claims Act Allegations: Qualified Immunity," *U.S. ex rel. Burlbaw v. Orenduff*, 2005 WL 3078480 (D.N.M. Nov. 15, 2005), below at page 37.

U.S. ex rel. Hefner v. Hackensack University Medical Center, 2005 WL 3542471 (D.N.J. Dec. 23, 2005)

A New Jersey district court granted the defendants' motion for summary judgment and denied the plaintiff's cross-motion for summary judgment in a *qui tam* action, in which the relator alleged that a university-based medical center submitted false claims under the Medicare program, created false medical records, and engaged in a retaliatory dismissal of the relator from his employment. The court determined that while there was evidence that the defendant was negligent in the monitoring of its billing practices, the *mens rea* requirement of the FCA was not satisfied. The court also ruled that the relator failed to establish the liability of a private medical practice based on the misactions of the medical center, for there was not sufficient evidence of common ownership or financial control.

In 2000, Phil Hefner filed an FCA *qui tam* action in the U.S. District Court for the District of Maryland against Hackensack University Medical Center (HUMC), its subsidiary Center for Infectious Diseases, P.A. (CID), and North Jersey Primary Care Associates, P.A. (NJPC). On August 22, 2001, the case was transferred to the District Court of New Jersey pursuant to 28 U.S.C. § 1404. The defendants filed a motion for summary judgment. Hefner filed a cross-motion for summary judgment.

Hefner alleged that by improperly billing claims for medical services, the defendants (collectively) submitted false or fraudulent claims to the Government. Specifically, Hefner alleged that Medicare claims and federal grant invoices submitted by the defendants were false. With regard to the federal grant invoices, Hefner argued that the claims were false because language in the invoices stated the claims had not been previously submitted for reimbursement, when in fact the defendants had previously submitted Medicare claims for the same services. With regard to the Medicare claims, Hefner argued they were obviously false because the defendants subsequently repaid the claims and because the defendants represented in the Medicare claims that they were entitled to payment for services that the Government had previously agreed to fund under the grant.

HUMC countered that Hefner had failed to sufficiently allege that the claims filed were 'false' and that the relator was misguided in asserting that the duplicative or double-billing *ipso facto* rendered the claims false. HUMC, also addressing the falsity element with regard to the grant invoices, argued that the claims were not false because the submissions were based on true, actually rendered services and that even if Medicare reimbursed these services, they were still entitled to reimbursement under the grant.

The court boiled down HUMC's argument to be that services rendered for the clinic patients properly should have been first billed to Medicare, and then to the fed-

eral grant, and because that is exactly what they did, none of the submissions could be considered false. HUMC cited case law from a variety of circuits addressing the "falsity" element in a FCA claim, but the district court easily distinguished these cases. In turn, the court reduced the principal issue to whether or not the claims HUMC submitted were for money it was not in fact entitled.

In the case at bar, the Medicare claims did not appear to be false on their face. The court determined that they were generated by the billing department at HUMC because services were rendered by the clinic. "For an undetermined reason, these same services were also billed in the form of invoices to the Grant, accompanied by language attesting to the fact that the amount requested remained outstanding." In turn, the court concluded that at the time, HUMC believed that the services were rightfully to be paid by grant.

While the court recognized that there was considerable confusion with regard to the appropriate billing of grant services, the court, nevertheless, ruled that the simple fact that HUMC filed claims with both Medicare and the Grant and accepted payments for the same services created prima facie evidence that one of the claims was false. "Even assuming *arguendo* that the Medicare billings were in fact not false, and rather appropriate, the fact still remains that the Grant invoices were certified as due and owing."

Accordingly, under the deferential summary judgment standard, the court found that Hefner had alleged sufficient evidence to suggest that HUMC had filed false claims under the definition of the FCA. As such, the Court found that Hefner had satisfied its burden of proof as to the "falsity" element.

Mens Rea Element Not Satisfied

The court then assessed whether the defendants "knew the claim was false or fraudulent," as defined under 31 U.S.C. 3729(a). The relator alleged that HUMC submitted the claims at issue to the Government with actual knowledge of their falsity. Both HUMC and NJPC contended they had no knowledge as to the falsity of the claims being submitted. HUMC admitted that "there was a breakdown in the tracking of physician services and submission of reimbursement requests in connection with the HUMC Infectious Disease Clinic" and that "the sloppiness may indeed be negligence, but it is far short of the 'knowing' submission of false claims . . . required under the FCA. Likewise, NJPC stated that "[i]t may be that NJPC acted negligently in delegating all of its billing responsibilities to HUMC, but negligent conduct does not rise to actionable claims under the FCA."

The court ruled that Hefner had not presented sufficient evidence that the defendants had actual intent to defraud the Government. However, noting that specific intent is not required under Section 3729, the court faced the issue of whether the defendants were simply negligent in failing to monitor their compliance with applicable Medicare regulations and grant provisions, or whether the failure of the defendants to ensure compliance amounted to the conduct of an "ostrich" defendant who failed to inquire about facts that would alert him to the presence of fraudulent or false claims.

Hefner argued that the defendants' failure to ensure the veracity of the certifications attached to the grant invoices was the equivalent of actual knowledge of their falsity. In support of this argument, Relator cited a case from the Southern District of New York, holding that "failure to conduct a proper investigation before making a false statement may be sufficiently reckless to yield False Claims liability." *United States v. Raymond & Whitcomb Co.*, 53 F.Supp.2d 436, 447 (S.D.N.Y.1999). HUMC rebutted this contention by relying on, *inter alia*, a Third Circuit case where a *qui tam* action was based upon the carrier's alleged failure to identify and prevent duplicate claims from being presented to Medicare. *United States ex rel. Watson v. Connecticut General Life Insurance Co.*, 2003 WL 303142 (E.D.Pa. Feb. 11, 2003). The *Watson* Court commented that the "occasional failure to catch duplicate claims was not caused by anything more than negligence or mistake, which are not actionable under the FCA." *Id*. at *9 (internal citations omitted).

Similarly, in the case at bar, the court ruled that the relator had failed to convince the court that the submission of the claims to Medicare and to the grant was done either with deliberate ignorance or reckless disregard of the truth or falsity of the information. The court was particularly swayed by the fact that HUMC hired a company to monitor billing compliance and that HUMC returned the reimbursed monies to Medicare upon discovery of their erroneous acceptance. As such, the Court found that the relator had failed to establish the "knowledge" element of an actionable FCA claim. In turn, the court dismissed Hefner's complaint as to HUMC and NJPC.

Subsidiary Not Liable for Actions of Principal Corporation Unless Considered "Alter Ego"

CID, as a subsidiary of HUMC, disputed any involvement in the submission of claims for approval or payment. Hefner, on the other hand, argued that as an agent or affiliate of HUMC, CID was responsible for the submission of the claims even though it was a party other than that which actually submitted the claim. CID maintained that as a matter of law it could not be considered an agent or representative of HUMC, or to have acted with HUMC as a single entity, and thereby could not be held liable for the actions of the other defendants. Thus, the issue presented was whether Hefner had presented sufficient proof that CID could be considered to have acted with HUMC as a single entity or as the alter-ego of HUMC.

Hefner relied upon agency principles to establish liability against CID. The district court had noted that many courts had applied agency principles to suits under the FCA. *See U.S. ex rel. Magid v. Wilderman*, 2004 WL 945153 (E.D.Pa. 2004) (internal citations omitted). Under Third Circuit jurisprudence, a number of factors are considered in determining whether a subsidiary is to be considered an alter ego, including "gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, non-functioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder." *Pearson v. Component Technology Corp.*, 247

F.3d 471, 485 (3d Cir. 2001) (citations omitted). In addition, "the situation must show an element of injustice or fundamental unfairness, but a number of the aforementioned factors can be sufficient to show unfairness." *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981).

Hefner argued that CID was subject to liability under the *Pearson* standard for affiliated corporate liability. The *Pearson* court explained that "affiliated corporate liability . . . is ultimately an inquiry into whether the two nominally separate identities operated at arm's length. *Pearson*, 247 F.3d at 495. The district court observed that he integrated enterprise test looks to four labor-related characteristics of affiliated corporations: interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control. *Id.* at 485.

In the case at bar, the court determined that the "integrated enterprise" test did not support Hefner's position, for Hefner failed to provide sufficient evidence to indicate that operations were interrelated between CID and HUMC or that there was a common management between HUMC and CID. The court also noted that HUMC did not appear to have "centralized control" of CID's labor relations or other aspects of its medical practice. Finally, HUMC did not exercise common ownership or financial control of CID. In short, the court found that Hefner had not established liability on behalf of CID for the submission of false or fraudulent claims. Therefore, CID's motion for summary judgment was granted in its entirety and CID was dismissed as a party from this action.

Plaintiff Failed to Overcome Presumption That He Was Engaged in Employment Activities

As for Hefner's § 3730(h) retaliation claim, Hefner alleged that HUMC "intentionally and maliciously" caused his discharge, and that the defendant was motivated by Hefner's discovery of the alleged fraud and his actions in pursuing an FCA *qui tam* action.

Dissecting the statutory language, the court noted that the first element Hefner must establish is that he engaged in conduct protected under Section 3730(h). Hefner asserted that his "efforts to investigate the Defendants' fraud and file this action reporting Defendants' fraud were lawful and in furtherance of this action under the Act." HUMC disputed that Hefner engaged in any protected conduct. To support its argument, HUMC relied on *Hutchins*, arguing that under Third Circuit law: "where an employee's job duties involve investigating and reporting fraud, the employee's burden of proving he engaged in "protected conduct" and put his employer on notice of the "distinct possibility" of False Claims Act litigation is heightened." *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 191 (3d Cir. 2001).

Here, Hefner was hired as a "compliance consultant in connection with an audit of HUMC's hospital and physician billing and documentation activities." As such, the court stressed that Hefner had to overcome the presumption that he was merely acting in accordance with his employment obligations when he discovered the billing discrepancies, as opposed to investigating on his own accord the possibility of false claims being filed. *See Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 568 (6th Cir. 2003).

The district court reached for a Tenth Circuit decision, *U.S. ex. rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1523 (10th Cir. 1996), in which the court of appeals found that an employee whose job duties included monitoring compliance with applicable Medicaid requirements did not engage in "protected conduct" when she reported to her supervisors that the facility was not complying with various Medicaid requirements. Because the reporting was part of plaintiff's job duties, the reporting to her supervisors, without more, did not sufficiently put defendants on notice of a potential *qui tam* suit. *Id.* at 1523. Likewise, in the case at bar, the court noted that the evidence presented by Hefner did not identify any point at which Hefner made HUMC aware that he was intending to pursue a *qui tam* action. Accordingly, the court found that Hefner did not engage in conduct sufficient to rise to the level of protected conduct under Section 3730(h). In turn, the court, in ruling that Hefner failed to state a sufficient claim for retaliatory discharge under Section 3730(h), granted HUMC's motion for summary judgment.

D. Section 3730(c) Relator's Share of Settlement

U.S. ex rel. Bledsoe v. Community Health Systems, Inc., 2005 WL 3434378 (M.D. Tenn. Dec. 13, 2005)

A Tennessee district court, in dismissing an FCA *qui tam* action, ruled that the information the relator provided the Government did not lead to the Government's settlement agreement with the defendant-hospitals.

In 1997, Community Health Systems, Inc. (CHS) conducted an "internal chain-wide audit" of the system's practice of misdiagnosing patients by submitting the Medicare ICD-9-CM diagnosis codes and diagnostic related groups (DRGs) for claims relating to inpatient discharges that were not supported by the patient's medical records. Upon discovering these irregularities, on December 19, 1997, CHS met with the Office of Inspector General of the United States Department of Health and Human Services (OIG-HHS). Under the direction of OIG-HHS, CHS continued its audit, and in September 1999, the Government and CHS agreed to a settlement amount of $30,904,625.56.

Sean Bledsoe filed an FCA *qui tam* action against CHS on February 17, 1998, alleging that CHS and a number of its subsidiaries fraudulently billed Medicare and Medicaid in violation of the FCA. According to his complaint, Bledsoe provided information to the Government that contributed to the $31,000,000.00 settlement agreement between the Government and CHS, thereby entitling him to a portion of the settlement proceeds.

The defendant filed a motion to dismiss, arguing that the relator failed to satisfy the particularity requirements of Rule 9(b). The district court granted the motion, which was later reversed by the Sixth Circuit. *See United States ex rel. Bledsoe v. Cmty. Health Servs., Inc.*, 342 F.3d 634 (6th Cir. 2003). The court of appeals remanded the decision back to the lower court, with the instructions that the relator must provide "more concrete evidence that he apprised the Government of Defendants' DRG coding violations. . . . If the Relator satisfactorily complies with Rule 9(b)'s particularity requirement, and the district court is satisfied that it has subject matter jurisdiction . . ., the district court will then determine whether the conduct contemplated in the . . . Settlement Agreement overlaps with the conduct alleged by Relator in bringing his action."

In July 2004, Bledsoe filed a second amended complaint against the defendant, supplying additional details and discussing the nature of communications Bledsoe had with the Government regarding the defendants' alleged upcoding and miscoding of CPT and DRG codes.

On July 19, 2004, the Government filed a motion for judgment on the relator's claim to a share of the settlement, arguing that the relator did not plead allegations that overlap with the specific matters released by the settlement agreement and that the allegations in the second amended complaint which had no antecedent in the original complaint could provide a basis for an award to the relator.

On July 30, 2004, the defendants filed a renewed motion to dismiss, arguing that the relator's allegations failed to satisfy Rule 9(b)'s specificity requirement, and that the relator's new allegations in the amended complaint were barred by the statute of limitations under 31 U.S.C. § 3730.

The court set an evidentiary hearing on the remaining claims "[b]ecause the Sixth Circuit ordered this Court to conduct an evidentiary hearing on the issue of the possible overlap between the Settlement Agreement and Relator's original *qui tam* action, [and] the Court is bound by th[at] order[.]"

Relator's Allegations Did Not Overlap With Claims Covered in Settlement Agreement

After an extensive September 2005 evidentiary hearing, the court, in a detailed recount of the events leading up to the filing of the *qui tam* suit, found that the relator's second amended complaint, together with the proof offered at the evidentiary hearing, were legally insufficient to entitle the relator to any share of the settlement proceeds. The relator countered with the Sixth Circuit's conclusion that " '[i]f the government has recovered funds lost from *conduct* asserted in Relator's *qui tam* action, then the government has essentially settled Relator's claims."' *Id.* at 3 (quoting *Bledsoe*, 342 F.3d at 649)(emphasis added by the relator).

The court rejected the relator's argument, finding instead that the evidence presented did not establish that the relator apprised the Government of the defendants' DRG violations either before or after filing this *qui tam* action, nor did the relator's claims overlap with the settlement agreement entered into by the Government and the defendant. Accordingly, the court dismissed the relator's action.

E. Section 3730(c)(5) Alternate Remedies

United States v. Bisig, 2005 WL 3532554 (S.D. Ind. Dec. 21, 2005)

An Indiana district court, in granting the relator's motions to intervene and stay the disbursement of a defendants' assets, held that a relator is entitled under Section 3730(c)(5) to a relator's share where the Government declines to intervene and instead pursues criminal prosecution against the defendant and recovers substantially all of the defendant's available assets through criminal forfeiture proceedings.

Health Care Fraud Detection Systems, Inc. (HCFDS), a private company engaged in the detection and prosecution of fraudulent billing practices and other types of Medicaid fraud, was retained by the State of Indiana as a special consultant to the Indiana Attorney General and was given access to Indiana's Medicaid billing database. Subsequently, HCFDS investigated Home Pharm, Inc., a Kentucky corporation registered with Indiana Medicaid as a pharmacy provider, supplying Indiana Medicaid recipients with in-home pharmaceuticals products. After detecting a number of fraudulent practices stealing from the Indiana Medicaid Program, HCFDS filed an FCA *qui tam* action against Home Pharm and its two owners, Peggy and Philip Bisig. Subsequently, the United States brought an injunctive action under the Fraud Injunction Statute, 18 U.S.C. § 1345, to freeze and protect the defendants' assets, and a criminal action against Ms. Bisig.

On March 5, 2003, an indictment was filed in the criminal prosecution charging Ms. Bisig and/or Home Pharm with four counts of Health Care Fraud in violation of 18 U.S.C. § 1347, one count of Unlawful Payment of Kickbacks in violation of 42 U.S.C. § 1320a–7b(b)(2)(A), and one count of mail fraud in violation of 18 U.S.C. § 1341. The indictment also asserted a criminal forfeiture allegation that certain property of Ms. Bisig and Home Pharm was subject to forfeiture to the United States pursuant to 18 U.S.C. § 982(a)(7). Subsequently, on September 4, 2003, the parties filed, and the court accepted, a petition to enter a plea of guilty and a plea agreement between Ms. Bisig and the United States. On September 8, 2003, the court granted the United States' motion for a preliminary order of forfeiture. Ms. Bisig was sentenced on December 19, 2003. As part of her plea agreement, Ms. Bisig agreed to forfeit various pieces of real and personal property that were acquired by her personally during her fraud scheme, as well as the assets of Home Pharm. The United States seized about $265,000 from the injunctive action and recovered about $916,000 in property forfeited in the criminal action.

On November 14, 2003, HCFDS filed its Motion to Intervene and to Stay Disbursement of the Defendants' Assets in the criminal action and the injunctive action. On December 23, 2003, HCFDS filed its Notice of Claim and Petition for Adjudication of Interest in Forfeited Property in the criminal action and the *qui tam* action.

Thus, the central issue before the court was whether a relator in a *qui tam* action is entitled to a relator's share where the United States has declined to intervene in the *qui tam* action but has pursued criminal prosecution against the defendant and has re-

covered substantially all of the defendant's available assets through criminal forfeiture proceedings. In granting the relator's motion, the court held that the relator is entitled to claim its relator share under such circumstances.

Relator Entitled to Share When Government Pursues *Any* Alternate Remedy

As an initial matter, the court noted that under Section 3730(c)(5), the United States "may elect to pursue its claim through *any* alternate remedy available to the [United States]." *Id.* § 3730(c)(5) (emphasis added). If the United States pursues an alternate remedy, the relator "shall have the same rights in such proceeding as such person would have had if the action had continued under this section." *Id.*

HCFDS argued that the United States pursued its claim through an alternate remedy; specifically, the alternate remedy was choosing to prosecute the defendant and making significant recoveries through criminal forfeiture. The United States countered that a criminal prosecution resulting in criminal forfeiture cannot be considered an alternate remedy under § 3730(c)(5). The court held that when the United States declines to intervene in the *qui tam* action, but seeks recovery of defendant's assets through criminal forfeiture, the United States has engaged in an "alternate remedy" for the purposes of § 3730(c)(5).

In interpreting the meaning of § 3730(c)(5), the court highlighted the statutory language, which specifies broadly that the United States may use "any" alternate remedy available to pursue its claim. By using the word "any," the court determined that the statute unambiguously places no restriction on the alternate remedies available to the United States. However, the court was still faced with how to interpret the term "alternate remedy."

HCFDS argued that any act to seek recovery outside of the *qui tam* action constitutes an "alternate remedy" to the *qui tam* action. The United States argued for a more narrow interpretation of "alternate remedy," suggesting that a remedy is only alternate when it precludes the continuance of the *qui tam* action. More specifically, in the present case, the United States asserted that the criminal forfeiture was not an alternate remedy because the forfeiture did not preclude HCFDS from continuing to seek a recovery against the defendant under the *qui tam* action. The court, finding validity in both parties' interpretations, echoed the purpose of the FCA: Congress made it clear that its "overall intent in amending [§ 3730] [was] to encourage more private enforcement suits." S. Rep. 99-345, at 23–24, 1986 U.S.C.C.A.N. at 5288–89.

The court noted that the United States' proposed interpretation of "alternate remedy" would enable the United States to stay the *qui tam* suit, prosecute the defendant, and recover the defendant's assets through criminal forfeiture without having to share that recovery with the relator, who was first to uncover the fraudulent activities and report them to the United States. But this result, according to the court, would contradict the FCA's purpose.

Therefore, the court warned that the FCA ought to be interpreted in a manner that would maintain the incentive underlying the *qui tam* aspect of the FCA. Thus, the

court held that because the United States had achieved a monetary recovery from the defendants in a manner outside of the *qui tam* action, and that recovery made an actual monetary recovery by the relator in the *qui tam* action either impossible or futile, the United States, in effect, elected to pursue its claim through an alternate remedy under § 3730(c)(5). Simply stated, the court ruled that the United States could not sidestep the requirement to share recovery with the relator, who contends that it first discovered the fraud and informed the United States regarding the fraud, by merely electing to recover through criminal forfeiture proceedings.

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

Walburn v. Lockheed Martin Corporation, 2005 WL 3466528 (6th Cir. Dec. 20, 2005)

The Sixth Circuit affirmed an Ohio district court's dismissal of an FCA *qui tam* action. The court rejected the district court's application of the first-to-file bar, instead ruling that because a previously filed *qui tam* action failed to satisfy Rule 9(b), it could not bar a later filed *qui tam* action. Nevertheless, the court of appeals held that the FCA public disclosure bar applied, for the relator had publicly disclosed the allegations in an earlier civil action before first filing his FCA *qui tam* action.

Jeff Walburn, a former security officer at a Portsmouth plant owned by the United States, used to patrol areas of the plant used to enrich uranium and store nuclear materials. Lockheed Martin Corporation enriches uranium for commercial and national defense purposes at the plant pursuant to a contract with the United States. In order to maintain accreditation with the Department of Energy in order to conduct these operations, Lockheed employees were required to wear thermoluminescent dosimeters that would mechanically measure individual doses of radiation exposure. Lockheed was also required to keep records of the dosimeter readings together with a record of each employee's dosage.

Walburn alleged that after he was exposed to gases at the plant in 1994, Lockheed changed the recorded reading of his dosimeter, and that this was just one of at least 400 to 600 such changes Lockheed made to employees' dosage readings each year. According to Walburn, Lockheed took these actions in order to maintain its accreditation and to continue receiving payments from the Government under its contract to operate the Portsmouth plant.

On July 23, 1996, Walburn filed a multi-count action against Lockheed seeking compensatory and punitive damages as a result of his exposure to gases at the Portsmouth plant. However, on July 16, 1997, the district court entered an order dismissing the action. Subsequently, on May 25, 2000, Walburn filed an FCA *qui tam* action. After the Government refused to intervene, the lower court granted the defendant's motion to dismiss, concluding that the FCA first-to-file bar applied, for Walburn's allegations were encompassed by the allegations in an earlier *qui tam* action, *United States ex rel. Brooks v. Lockheed Martin Corp.*, No. Civ. L-00-1088 (D. Md. 2000). Walburn appealed the action to the Sixth Circuit.

Deficient *Qui Tam* Complaint Does Not Bar Later Filed *Qui Tam* Action

While affirming the lower court decision on other grounds, the Sixth Circuit addressed the issued of whether a previously filed *qui tam* action that fails to satisfy Rule 9(b) can block a later filed action under the FCA first-to-file bar. First, the court of appeals com-

pared the complaint in the present action with the complaint in *Brooks*. If both alleged "all the essential facts" of the underlying fraud, the earlier-filed *Brooks* action would bar Walburn's action, even if Walburn's complaint "incorporated somewhat different details. *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004).

Both complaints alleged that Lockheed defrauded the Government in violation of the FCA. The *Brooks* relator alleged that Lockheed "falsified, concealed and destroyed documentation" relating to "plant management and operations" and knowingly submitted these "false records and statements" to the Government, all in an effort to fraudulently induce government payment under Lockheed's contract to operate the Portsmouth plant. Walburn alleged that Lockheed maintained its Department of Energy accreditation by "knowingly concealing" its practice of "assign[ing] dosages to a person that differed from the dosages that were read from the [dosimeter] that the same person was wearing," and then "used the [Department of Energy] accreditation, which had been falsely or fraudulently obtained . . . to receive payments under the operating agreements for [the Portsmouth plant]."

The lower court read § 3730(b) broadly, concluding that the broad fraudulent scheme alleged in the *Brooks* complaint "encompassed" the specific subset of fraud regarding the falsification of radiation dosage readings alleged by Walburn. Walburn argued that the *Brooks* complaint should not be given preemptive effect under the first-to-file rule because its allegations were so fatally broad as to run afoul of the heightened pleading requirements for fraud under Federal Rule of Civil Procedure 9(b).

The Sixth Circuit, however, ruled that the *Brooks* complaint's failure to comply with Rule 9(b) rendered it legally infirm from its inception, and therefore it could not preempt Walburn's action under the first-to-file bar. The court of appeals announced that a "complaint that fails to provide adequate notice to a defendant can hardly be said to have given the government notice of the essential facts of a fraudulent scheme, and therefore would not enable the government to uncover related frauds."

In turn, the Sixth Circuit, applying the language of § 3730(b)(5), ruled that Walburn's action could not be "based on the facts underlying" the *Brooks* action when the facts necessary to put the Government on notice of the fraud alleged were conspicuously absent from the *Brooks* complaint. Therefore, the court ruled that because the *Brooks* action was legally infirm under Rule 9(b), it failed to preempt Walburn's later-filed action despite the fact that the overly-broad allegations of the *Brooks* complaint "encompass[ed]" the specific allegations of fraud made by Walburn.

FCA Public Disclosure Bar Precluded Suit

While the FCA first-to-file bar did not trip up Walburn's *qui tam* action, the FCA public disclosure bar ultimately foreclosed the action. In determining whether the bar applied to the relator's case, the Sixth Circuit considered: "(A) whether there ha[d] been a public disclosure; (B) of the allegations or transactions that form[ed] the basis of the relator's complaint; and (C) whether the relator's action [wa]s 'based upon' the publicly disclosed allegations or transactions." *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 330 (6th Cir. 1998). If so, the court of appeals

would then need to determine whether the relator nonetheless qualified as an "original source" under § 3730(e)(4)(B), in which case the suit could proceed.

The Sixth Circuit had no trouble concluding that Walburn's 1996 complaint in his civil action against Lockheed qualified as a "public disclosure." The plain language of § 3730(e)(4) includes as a public disclosure the dissemination of information through a "civil hearing." The Sixth Circuit has interpreted "civil hearing" to include court filings generally, and "a plaintiff's complaint" specifically. *Jones,* 160 F.3d at 331. In order to determine whether Walburn's 1996 complaint disclosed the "allegations and transactions" forming the basis of his later-filed *qui tam* action, the court of appeals then compared the allegations of the two complaints.

As initial matter, the court reiterated its reading of the public disclosure bar, holding that the "allegations and transactions" forming the basis of a *qui tam* have been disclosed "when enough information exists in the public domain to expose the fraudulent transaction or the allegation of fraud." *Jones,* 160 F.3d at 331. When the "misrepresented state of facts and a true state of facts" have been disclosed, there is enough information in the public domain to give rise to "an inference of impropriety." *Id.* at 332 (citing *United States ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 655 (D.C. Cir. 1994)). As in *Jones,* although Walburn's 1996 suit "may not have constituted an explicit, formal allegation of either fraud or the essential elements of fraud, it certainly presented enough facts to create an inference of wrongdoing on the part of [Lockheed]." *Id.* The 1996 complaint disclosed both the misrepresented state of facts: the falsified dosage readings submitted to the Government, as well as the true state of facts: the actual dosimeter readings.

Furthermore, the Sixth Circuit concluded that Walburn's *qui tam* action was "based upon" the allegations and transactions disclosed in his 1996 suit. Reiterating its skewed reading of the "based upon" language, the Sixth Circuit construed "based upon" broadly to mean "supported by" information previously disclosed. *Jones,* 160 F.3d at 332. According to the court, Walburn's present action was "supported by" the same alleged falsification of dosage readings alleged in his 1996 suit.

Relator Not Original Source Because He Did Not Provide Information to Government Prior to Public Disclosure

Next faced with the "original source" analysis, the Sixth Circuit again deviated from the majority of the circuits in announcing that the relator must have provided the Government with the information *prior to any public disclosure* to qualify as an "original source." *U.S. ex rel. McKenzie v. BellSouth Telecommunications, Inc.,* 123 F.3d 935, 942 (6th Cir. 1997) (adopting the approach of *United States ex rel. Findley v. FPC-Boron Employees' Club,* 105 F.3d 675, 690 (D.C. Cir. 1997)). Here, Walburn filed his 1996 action long before he filed his sealed *qui tam* action with the Government. Accordingly, Walburn's failure to report his allegations of fraud to the Government before filing his 1996 suit precluded him from qualifying as an "original source." Thus, his *qui tam* action was barred under 31 U.S.C. § 3730(e)(4). In turn, the Sixth Circuit affirmed the dismissal of Walburn's complaint.

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

See also "Jurisdictional Issues: Section 3730(b)(5) First-to-File Bar," *Walburn v. Lockheed Martin Corporation*, 2005 WL 3466528 (6th Cir. Dec. 20, 2005), above at page 25.

U.S. ex rel. MJ Research, Inc. v. Applera Corporation, **2005 WL 3099647 (9th Cir. Nov. 21, 2005)**

In an unpublished decision, the Ninth Circuit affirmed a California district court's judgment dismissing a *qui tam* action under the FCA public disclosure bar. The court of appeals ruled that the relator-corporation did not qualify as an original source under Section 3730(e)(4)(B) because it did not have direct knowledge of the fraud, but instead obtained its knowledge from either publicly available patent materials, journal articles, and grant applications, or obtained it secondhand from another's research notes and grant files.

The Ninth Circuit agreed that a lower court lacked jurisdiction over an FCA *qui tam* action, for the FCA public disclosure applied and the relator did not qualify as an original source under 31 U.S.C. § 3730(e)(4)(B). As an initial matter, even the relator conceded that the FCA public disclosure bar applied, for the information on which it relied was publicly disclosed before the relator filed its *qui tam* action.

The court of appeals highlighted that an "original source" is a relator who has "direct and independent knowledge" of the information forming the basis for the complaint and who voluntarily provides that information to the Government. 31 U.S.C. § 3730(e)(4)(B). In the present case, it was undisputed that the relator's knowledge was independent of the public disclosure, and that the relator voluntary disclosed to the Government prior to filing its complaint.

Summarizing the controlling case law interpreting "direct" knowledge, however, the court of appeals stated that "the relator must show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his 'own labor unmediated by anything else.'" *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (quoting *United States ex rel. Aflatooni v. Kitsap Physicians Servs., Inc.*, 163 F.3d 516, 525 (9th Cir. 1998)).

Here, the Ninth Circuit concluded that the relator did not possess "direct" knowledge of the alleged fraud, for "[d]espite [the relator's] extensive investigative efforts, its knowledge was either obtained from publicly available patent materials, journal articles, and grant applications, or derived secondhand from Dr. Henry Huang's research notes and grant files." In turn, in affirming the lower court decision, the court of appeals ruled that the relator was not an "original source."

U.S. ex rel. Bannon v. Edgewater Medical Center, 2005 WL 3236166 (N.D. Ill. Nov. 28, 2005)

An Illinois district court dismissed an FCA *qui tam* action under the FCA public disclosure bar, ruling that the provision applies to amended complaints that rely on publicly disclosed allegations coming after the original complaint but before the amended complaint. The court highlighted that Section 3730(e)(4)(A) determinations center on whether the "action"—not the complaint—is "based upon" the public disclosure.

Anne Bannon filed an FCA *qui tam* action against Edgewater Medical Center, alleging that the defendant violated the FCA and retaliated against Bannon in violation of the Illinois Whistleblower Reward and Protection Act, 740 ILCS 175/3. In April 2004, a district court granted the Edgewater's motion to dismiss Bannon's amended complaint for failure to plead fraud with the particularity, as required by Rule 9(b). On April 29, 2004, Anne Bannon filed another version of her FCA *qui tam* complaint. The defendant moved to dismiss this latest version under the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4).

In applying the FCA public disclosure bar analysis to the case at bar, the court first chronicled the key factual events leading up to the relator's amended complaint. The court noted that an April 1996 article in *Modern Healthcare* contained an extensive report on an FBI investigation into fraud by Edgewater, including allegations that closely mirrored the claims raised in the case at bar. In November 2000, Bannon filed her initial *qui tam* complaint against Edgewater. After the Government declined to intervene and the complaint was made public in November 2002, the defendant filed a motion to dismiss pursuant the FCA public disclosure bar. Indeed, the defendant went so far as to argue that the relator had an affirmative duty to plead that there had not been prior public disclosure of the underlying complaint or, if there had been, that the relator was the original source.

Interestingly, the court rejected the defendant's FCA public disclosure arguments, but it still dismissed the complaint without prejudice for failing to satisfy the particularity requirements of Rule 9(b). In response to the court's dismissal, the relator made explicit references to the 1996 *Modern Healthcare* article and disclosed discovery material from the Government's pending, related criminal case. According to the court, with the exception of the article and the discovery material, the amended complaint added few additional details to the complaint.

Again, the defendant raised concerns under the FCA public disclosure bar. Bannon countered that the jurisdictional bar does not apply to amended pleadings that rely on publicly disclosed allegations that were disclosed after the complaint but before the amended pleading.

FCA Public Disclosure Bar Precludes Amended Complaint Based on Publicly Disclosed Allegations

The district court, in adopting the defendant's reading of the FCA, dismissed Bannon's complaint under the FCA public disclosure bar. The court warned that the relator's interpretation of the FCA public disclosure bar would frustrate Congress's goal of "prevent[ing] 'parasitic' *qui tam* actions in which relators, rather than bringing to light independently discovered information of fraud, simply feed off of previous disclosures." *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634, 646 (6th Cir. 2003). The court saw no principled difference between a *complaint* based upon information in public disclosures (of which the relator is not the source) and an *amended complaint* that is based upon and can only be sustained by resort to that information. The court stressed, "The goal of prohibiting parasitic suits requires application of the public disclosure bar in the latter case no less than in the former." In turn, the court reduced the legal question to whether the "action"—not the complaint—was "based upon" the public disclosures.

The court quickly determined that the 1996 article barred the relator's complaint; however, the court took additional time in assessing the applicability of the discovery materials. The discovery materials were filed with the district court as early as February 2005, more than two months before the relator attached them to her amended complaint. Therefore, under its newly adopted interpretation, the court determined that the FCA public disclosure bar applied and Bannon did not qualify as an original source under § 37370(e)(4)(B). Accordingly, the court dismissed the amended complaint under the FCA public disclosure bar.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

See also "Statutory Interpretations: Section 3729(b) *Mens Rea* Requirement," *U.S. ex rel. Hefner v. Hackensack University Medical Center*, 2005 WL 3542471 (D.N.J. Dec. 23, 2005), above at page 14.

Sealed Appellant I v. Sealed Appellee I, 2005 WL 3178190 (5th Cir. Nov. 29, 2005)

In an unpublished decision, the Fifth Circuit affirmed a Texas district court's dismissal of a *qui tam* action alleging violations of and retaliatory discharge under the FCA, ruling that the relator had failed to satisfy the particularity requirements of Rule 9(b) and had failed to state a claim pursuant to Rule 12(b)(6). The court of appeals agreed that the relator had failed to plead any facts showing that the defendant was aware of the action of its employees that had caused it to submit false claims to the Government. The court also ruled the relator failed to allege a sufficient factual basis from which the court could infer that the employer had knowledge that the relator was engaged in Section 3730(h) protected activity.

Sealed Appellant I, formerly a compliance manager with Sealed Appellee I, an ambulance service company, was hired to oversee the company's compliance with Federal regulations, which require that an ambulance company obtain the patient's signature before the company can bill the Government for its services. In his capacity as a compliance manager, Appellant became aware of complaints about the lack of patient signatures from one of Appellee's billing supervisors and several billing clerks. In response, Appellant wrote a compliance intake form to his supervisor informing him of the billing clerks' complaints.

Later, as Director of Compliance for Appellee, Appellant conducted a company-wide audit to evaluate the extent of the patient signature problem. The audit revealed that a number of offices were noncompliant. Indeed, using the data from the audit to extrapolate how much Appellee had billed the Government, Appellant concluded that Appellee had falsely billed the Government approximately $200 million annually.

In July 2001, Appellant reported the results to the Appellee's Chief Compliance Officer and distributed it to several of Appellee's executive officers. Appellant also gave a presentation about the problem at a compliance retreat in August 2001. On August 31, 2001, the Appellee fired the Appellant and refused to allow him back into his office to retrieve his personal effects or the documentation that supported his allegations.

Appellant subsequently filed a *qui tam* suit alleging violations of the FCA and retaliatory discharge. After the Government declined to intervene, Appellee filed a motion to dismiss for failure to state a claim. The district court granted Appellee's motion to dismiss. Appellant appealed the decision to the Fifth Circuit.

Relator Failed to Plead Facts Showing Defendant Was Aware of Its Employees' Actions

In affirming the lower court decision, the Fifth Circuit was faced with the issues of whether the relator satisfied the pleading requirements of Rule 9(b) and whether the relator stated a claim for retaliatory discharge under § 3730(h). To satisfy Rule 9(b), the complaint must have alleged the "who, what, when, where, and how of the alleged fraud." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (internal quotations omitted) (quoting *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997)). Appellant alleged that Appellee violated the FCA by sending bills for ambulance runs representing that the patients' signatures were on file, when Appellee knew that the signatures were not on file. He further alleged that these violations occurred nationwide and cost the Government approximately $200 million annually spanning a period of five years, "[f]rom 1999 to the present."

The Fifth Circuit ruled that Appellant had failed to plead any particular facts showing that Appellee was aware of the actions of its employees and intentionally filed false claims with the Government. The complaint alleged that when Appellant conducted training sessions with the billing clerks, they complained that they were required to check the box indicating the patient's signature was on file when they knew there was no signature on file. Appellant asserted that he did not name the individual billing clerks because he contended that seventy-five individual corporations perpetrated the fraud. The complaint alleged that Appellant told his supervisor about the billing clerks' complaints and that Appellee's vice president criticized Appellant for instructing the clerks not to bill without a signature. Thereafter, Appellant was promoted to Director of Compliance and, in that capacity, he conducted an audit and submitted the results in a memo to the Appellee's corporate officers. These were the only allegations included in the complaint that Appellee was aware of the actions of its employees. The court of appeals announced that the "complaint included no more than the conclusory assertions of Appellee's knowledge and intent to file fraudulent claims."

Furthermore, the complaint did not allege how Appellant knew that Appellee submitted false billing statements after the Appellee was fired. According to Fifth Circuit, "The audit only spanned one year, thus the allegations of fraud outside of that time frame are based on Appellant's extrapolations and good faith belief; this is simply not sufficient under Rule 9(b)." *See U.S. ex rel. Thompson v. Columbia/HCA Healthcare*, 125 F.3d 899, 903 (5th Cir. 1997) (rejecting relator's claim that there was reasonable probability based on statistical studies performed by the Government, that forty percent of the claims submitted by the defendants violated the anti-kickback law or were not medically necessary).

The court of appeals was troubled that the complaint did not identify a single false claim that was actually submitted to the Government. Appellant contended that his complaint was "perfectly analogous" to the complaint held sufficient in *Benchmark*

Electronics, Inc. v. Huber Corp., 343 F.3d 719 (5th Cir. 2003). The Fifth Circuit, however, distinguished the complaint in *Benchmark*, which referred to specific documents alleged to contain false or misleading statements, as well as the month and year in which the documents were sent.

Appellant did not contend that all of the billing statements submitted from 1999 to the present contained false statements; instead he alleged that the audit revealed a noncompliance rate between thirty-five percent and forty-five percent. Nevertheless, the complaint did not identify particular invoices containing false statements by number, date, or otherwise.

Relaxed 9(b) Standard Not Available, for Information Could Have Been Obtained by Another Source

Appellant argued that he was entitled to a relaxed Rule 9(b) standard because the audit was the only evidence of Appellee's false statements and it was exclusively within Appellee's control. Pointing to *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999), the Fifth Circuit acknowledged that the Rule 9(b) standard may be relaxed when the facts relating to the alleged fraud are peculiarly in the defendant's control. However, the court of appeals countered that a plaintiff is not entitled to the relaxed standard where the information is available from another source or where the defendant fails to allege a factual basis for his beliefs. *See*; *Columbia/HCA Healthcare Corp.*, 125 F.3d at 903.

In the case at bar, the court determined that Appellant did not allege a sufficient factual basis for his beliefs, nor did he argue that he tried but failed to obtain the information. The court also rejected the Appellant's argument that he could not obtain the information from the billing clerks. According to Fifth Circuit, "The rules of professional conduct prevent *counsel* from contacting persons represented by counsel but do not 'prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party.'" Tex. Gov't Code Ann. art. 10, § 9, Rule 4.02 cmt. 2 (Vernon 2005). Thus, according to the court of appeals, nothing prevented Appellant from contacting Appellee's employees on his own, whether before commencing the litigation or after. In turn, the Fifth Circuit ruled that the district court properly granted Appellee's motion to dismiss.

Retaliation Claim Dismissed Because Defendant Did Not Have Notice of Protected Activity

The lower court had dismissed Appellant's retaliatory discharge claim under Rule 12(b)(6) because it concluded he could not show that Appellee was aware that he was engaged in protected activity. Under § 3730(h), Appellant was required to show that he engaged in protected activity, that Appellee knew he was engaged in protected activity, and that he was discharged because of it. The Fifth Circuit faulted the Appellant for not informing his supervisors that he was concerned about fraud.

In *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994), the Fifth Circuit concluded that the plaintiff could not show retaliatory discharge where his investigations were part of his job and he never characterized his concerns as involving illegal, unlawful, or false-claims investigations. In the present case, the court determined that Appellant did not allege that he expressed concerns to his supervisors outside of those that were part of his duties as Director of Compliance. In turn, the Fifth Circuit ruled that Appellant had not alleged a sufficient factual basis from which the court could infer that Appellee had knowledge that Appellant was engaged in protected activity or that he was fired because of such activity. Therefore, the court of appeals agreed with the district court's conclusion that Appellant failed to state a claim for retaliatory discharge.

U.S. ex rel. Dyson v. Amerigroup Texas, Inc., 2005 WL 2467689 (S.D. Tex. Oct. 6, 2005)

A Texas district court denied an FCA defendant's motion for summary judgment in an action under Section 3730(h) that alleged the defendant terminated the plaintiff in retaliation for her investigation of potential fraud against the Government. The court rejected the defendant's argument that because it receives its public funding from the State of Texas and does not deal directly with the Federal Government, the plaintiff's investigation could not reasonably lead to a viable FCA suit. The court highlighted the plaintiff's assertion that the defendant receives funds directly from the Federal Government.

A few months after Monica Dyson joined Amerigroup Texas, Inc., a managed health care organization that serves patients who receive federally funded health care, an employee in the corporate payroll department contacted her about a blank time sheet that had been submitted on behalf of an employee named Andre Johnson in Amerigroup's Houston office. The time sheet was purportedly signed by Dyson's supervisors, even though there was no employee named Andre Johnson in the Houston office. After investigating the matter, Dyson determined that her supervisor had submitted multiple time sheets for the nonexistent employee and collected the resulting paychecks. Dyson reported this matter to management, who encouraged her to investigate the "phantom employee."

Nine days later, Dyson was fired, allegedly because she took work home and lost it. Dyson then filed an action, alleging that Amerigroup terminated her employment in retaliation for her investigative activities, which she claims to have undertaken in preparation for a *qui tam* fraud action on behalf of the Government. Amerigroup subsequently filed a motion for summary judgment, arguing that Dyson could not establish an actionable FCA retaliation claim and that Amerigroup had offered a legitimate, non-retaliatory reason for her termination.

In denying the defendant's motion for summary judgment, the court detailed the elements of an FCA retaliation claim. Specifically, a plaintiff must show that (1) she engaged in behavior protected by the statute; (2) her employer knew of her protected

activity; and (3) her employer retaliated against her because of her protected activity. *See United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1269 (9th Cir. 1996) (citing S. REP. NO. 345, at 34–35 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5299–300).

Amerigroup argued that Dyson could not show that she engaged in a protected activity, because her investigation did not involve a claim made to the Government; (2) Dyson could not show that the defendant knew of her protected activity, because she was assigned to investigate the false time sheet and never notified the defendant that she was contemplating an FCA action; and (3) Dyson could not show that the defendant terminated her in retaliation for her protected activities, because she had no evidence of causation and because Amerigroup had offered a legitimate, non-retaliatory reason for firing her.

The court pointed out that the FCA does not require that a plaintiff develop a "winning *qui tam* suit" to receive protection against retaliation. The Act does, however, require that the plaintiff's activity relate to matters that are calculated to, or reasonably could, lead to a viable FCA case. *See United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 739–40 (D.C. Cir. 1998) (collecting opinions). Amerigroup maintained that, because it receives its public funding through the Texas state government and does not deal directly with the Federal Government, Dyson's investigation could not reasonably have led to a viable FCA suit.

However, Dyson testified that Amerigroup receives funds directly from the Federal Government, and, with Construing this evidence in the light most favorable to Dyson, the Court found that there existed a genuine issue of material fact as to whether Dyson engaged in activity protected by the FCA.

As for the second element, the court quoted form the Fifth Circuit: "The legislative history [of the FCA] makes clear that a whistleblower must show [that] the employer had knowledge [that] the employee engaged in protected activity." *Robertson*, 32 F.3d at 951 (internal quotation marks omitted). In *Robertson,* the Fifth Circuit held that the employer did not have notice of protected activity where the employee's investigation was within the scope of his regular duties and the employee did not notify his employer that he was contemplating a *qui tam* action. *Id.* at 951–52. In the instant case, Amerigroup asserted that, because Dyson was assigned to investigate the phantom employee and never notified anyone at Amerigroup of her concerns about fraud or illegality, Amerigroup did not have notice of her protected activity.

However, Dyson testified that she told at least one of her superiors that the false time sheets might get Amerigroup into trouble with the Government. While she did not explicitly mention "fraud" or "illegality," the court ruled that her statements to her superiors could lead a reasonable trier of fact to find that she gave Amerigroup notice that she was investigating "suspected wrongdoing." *Robertson v. Bell Helicopter Textron, Inc.*, 863 F. Supp. 346, 350 (N.D.Tex.1993), *aff'd,* 32 F.3d 948 (5th Cir. 1994). Moreover, in contrast to *Robertson,* in which there was no evidence that the plaintiff had "expressed any concerns to his superiors other than those typically raised as part of a contract administrator's job," 32 F.3d at 952, in the instant case, the court found that

Dyson at least arguably acted beyond the scope of her job description as a Human Resources Assistant by alerting a superior that the false time sheets might cause a problem with the Government. Therefore, the court ruled that a genuine issue of material fact existed with regard to the notice element, precluding summary judgment.

Finally, the court assessed whether the plaintiff offered evidence that would support a reasonable trier of fact in concluding that the plaintiff was terminated, at least in part, because of her protected activity. Once a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the employer to advance a legitimate, non-retaliatory reason for the adverse employment action. Once the employer satisfies this burden of production, the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the employer's proffered reason is pretextual.

Dyson argued that the timing of her termination, which occurred soon after she began her investigation of the phantom employee, was evidence of retaliation. She also highlighted Amerigroup's "vacillating reasons" for firing her. Finally, she stated that other Amerigroup employees who took work home and lost it were not terminated. Amerigroup, on the other hand, argued that this evidence was insufficient to support Dyson's retaliation claim and, in any event, that Amerigroup has presented a legitimate, non-retaliatory justification for the termination.

The court noted that the Fifth Circuit has held that "the combination of suspicious timing with other significant evidence of pretext[ ] can be sufficient to survive summary judgment." *Shackelford v. Deloitte & Touche, LLP,* 190 F.3d 398, 409 (5th Cir. 1999). The found the present case strikingly similar to *Shackelford*, for Dyson had put forward evidence that she was terminated very shortly after engaging in protected activity, that she had a history of positive performance reviews, and that she was ostensibly fired for engaging in behavior that had not cost other employees their jobs. Borrowing language from *Shackelford*, the court determined that "[t]he totality of this evidence is sufficient to support the inference that [the employer] did not actually believe that [the employee's] performance was poor, but instead terminated her in retaliation for her protected activity." *Id.*

Accordingly, because Dyson had stated a *prima facie* case of retaliation under § 3730(h) of the FCA, and because she had offered sufficient evidence to support a finding that Amerigroup's proffered reason for her termination was pretextual, the court denied Amerigroup's motion for summary judgment.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Qualified Immunity for State Employees

U.S. ex rel. Burlbaw v. Orenduff, 2005 WL 3078480 (D.N.M. Nov. 15, 2005)

A New Mexico district court granted the defendant-university officials' motion for summary judgment in a *qui tam* action, in which the relators claimed that the state university and its officials falsely certified that the university was a minority institution in connection with research contracts awarded by the Department of Defense. The court held that university officials, who were assured by the Government that the university was a minority institution for contracting and grant purposes, were entitled to qualified immunity. The court also ruled that where the Government has assured a contracting party that a certain fact is true and the contracting party has no reason to doubt those assurances, it is not a reckless or deliberate falsehood to rely on those assurances in presenting a claim to the Government.

Edward Burlbaw and Donald Bustamante, former employees at New Mexico State University, filed an FCA *qui tam* action, which alleged, among other things, that university officials violated the FCA by falsely certifying that the university was a minority institution in connection with research contracts awarded by the Defense Department. Subsequently, the university officials filed motions for summary judgment based on qualified immunity. The relators maintained that the "qualified immunity" defense is not available to state officials sued individually under the FCA.

State Employees Granted Qualified Immunity

The district court agreed that the defendant-state officials were afforded the protections of qualified immunity. The relators, however, argued that the qualified-immunity doctrine did not apply in FCA cases, for the FCA contains a provision effectively immunizing certain federal officials from liability, and this provision is the exclusive form of immunity available under the FCA. More specifically, 31 U.S.C. § 3730(e) states that under certain circumstances, "[n]o court shall have jurisdiction over an action brought" against a member of the armed forces, Congress, or the judiciary, or a senior executive branch official.

The court observed that while § 3730(e) provides a limited form of absolute immunity to particular individuals, it does not preclude application of the doctrine of qualified immunity to others. Moreover, the court's review of the legislative history of the 1986 amendments revealed nothing that would indicate such an intent on the part of Congress. Accordingly, the court, preoccupied with the defendants' status as "state employees," extended them the broad protections of the qualified immunity defense.

The court, before walking through the typical qualified-immunity analysis, outlined the salient facts: Physical Sciences Laboratory (PSL) is a part of New Mexico State University (NMSU). When the PSL first began applying for grants and contracts with the Department of Defense as a minority institution (MI), NMSU was eligible to apply as such, because it qualified as a Strengthening Institution under Department of Education guidelines. Starting in December 1993, new statutory requirements governed NMSU's eligibility, which did not include the strengthening-institution factors under which NMSU had previously qualified. Instead, the new requirements mandated that NMSU either have an enrollment of more than 50 percent minority students, or qualify as a Hispanic-serving institution. NMSU did not have a 50-percent-or-greater enrollment of minority students, and did not have information about the income levels or first-generation status of its Hispanic students, and therefore did not meet the new statutory requirements. Nevertheless, the defendants subsequently signed grant documents, which certified that NMSU qualified, despite the fact that NMSU did not qualify under the new statutory provisions.

The defendants responded that, at all times in question, the DOD used a list of MIs formulated by the DOE to determine whether an institution qualified as an MI for DOD contracting purposes. The defendants also maintained that NMSU appeared on the DOE list during the period in question, and that the MI certifications submitted by the defendants were based on the fact that NMSU appeared on the DOE list. In short, the defendants argued that the Government told them NMSU was an MI for grant purposes, and the defendants were not required to contradict the Government's own assurances when applying for contracts and grants. The relators, however, maintained that the defendants had a duty to investigate NMSU's minority enrollment and determine whether the statutory criteria were met, regardless of whether NMSU appeared on the

Complaint Failed to Satisfy the "Knowingly" Element

The court observed that when a qualified immunity defense is raised at the summary-judgment stage, the plaintiffs must overcome a "heavy two-part burden." *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005). First, the plaintiffs must establish that the facts show that there was a violation of a statutory right. If plaintiffs can do so, they must then show the statutory right was clearly established. Thus, in the context of an FCA case, the relator needs to show that there is evidence that any defendant deliberately or recklessly, and falsely, submitted claims to the Government. If there is such evidence, the court must then determine whether at the time the defendants acted, it was clearly established that their actions violated the FCA.

The court, citing the Fourth Circuit's *Becker* decision, ruled that where the Government has assured a contracting party that a certain fact is true, and the contracting party has no reason to doubt the government's assurances, it is not a reckless or deliberate falsehood to rely on those assurances in making a claim to the Government. *See United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 288–89 (4th Cir. 2002) (government agency instructed FCA defendant to change budgeting

and reporting codes; this change was basis of FCA claim; court held that defendant had a right to rely on agency's instructions, and affirmed summary judgment in favor of defendant).

The relators disagreed with the reliance on *Becker*, instead arguing that the defendants had a duty to read the statutes referenced in the contract documents and then determine whether NMSU met the requirements of those statutes, rather than simply relying on what they were told by the DOE, the DOD, or other NMSU officials.

The court, disagreeing with the relators' position, quoted, "[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations. The FCA is a fraud prevention statute; violations of . . . regulations are not fraud unless the violator knowingly lies to the government about them." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999). Without evidence that the defendant engaged in a deliberate falsehood when certifying that NMSU qualified for the grants, the court refused to hold the defendants accountable. At most, given the Government's assurances, the court proclaimed that the defendants' failure to research the statutes and investigate the facts themselves constituted only negligent behavior, rather than reckless or deliberate action.

Since the relators failed to raise an issue of fact concerning the existence of an FCA violation, the court did not address the "clearly established law" aspect of the qualified-immunity doctrine. Accordingly, the court granted the defendants' motion for summary judgment based on qualified immunity.

FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 4(m) Service of Process

U.S. ex rel. Howard v. Life Care Centers of America, Inc., 2005 WL 2674939 (E.D. Tenn. Oct. 20, 2005)

A Tennessee district court dismissed an FCA *qui tam* action because service was untimely under Fed. R. Civ. P. 4(m). The court ruled that once a *qui tam* complaint is unsealed, service must be made within 120 days to comply with Rule 4(m).

On February 5, 2003, Larry Howard filed an FCA *qui tam* action against Life Care Centers of America, Inc. On June 24, 2004, the Government declined to intervene, and the court ordered the complaint unsealed and served upon the defendant on July 22, 2004. A summons was issued for Life Care on March 31, 2005 and returned executed on April 11, 2005. The defendant filed a motion to dismiss, in which it argued that the relator failed to execute service of process in a timely manner under Federal Rule of Civil Procedure 4(m).

In granting the defendant's motion, the court observed that Fed.R.Civ.P. 12(b)(5) provides that a complaint may be dismissed for "insufficiency of service of process." Service of process is insufficient when a party has not complied with Rule 4(m) which governs the length of time permitted for service of process. Rule 4(m) provides as follows:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. . . .

Fed.R.Civ.P. 4(m). Rule 4(m) has two distinct parts. One part of Rule 4(m) gives courts discretion to enlarge the 120-day period for good cause shown and even when good cause has not been shown. *Henderson v. United States,* 517 U.S. 654, 662, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1993); *Johnson v. Hayden,* 2000 WL 1234354, at *3, n. 3 (6th Cir. Aug. 24, 2000). The other part of Rule 4(m) allows courts to dismiss a complaint without prejudice if service of the summons and complaint has not been made within 120 days from the filing of the complaint.

In this case, the court ruled that the relator had failed to show good cause. Moreover, the court ruled that once the complaint is unsealed, service must be made within 120 days to comply with Rule (4)(m) of the Federal Rules of Civil Procedure. *See United States ex rel. Gudur v. Texas Dep't of Health,* 2002 WL 511483, at * 1–2

(S.D.Tex.2002) (starting 120-day time period in a *qui tam* action once complaint was unsealed); *Mills ex rel. United States v. State of N.Y.*, 2000 WL 863451, at *1–2 (S.D.N.Y.2000) (same); *United States v. Bruno's, Inc.*, 54 F.Supp.2d 1252, 1253, 1259 (M.D.Ala.1999) (same); *see also United States ex rel. Bowman v. Computer Learning Ctrs.*, 73 Fed. Appx. 735, 735 (5th Cir. 2003) (applying 120 requirement in a *qui tam* action). Here, because the relator was over four months late in serving the complaint, the court was quick to dismiss the complaint under Rule 4(m).

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

See also "False Claims Act Retaliation Claims," *Sealed Appellant I v. Sealed Appellee I*, 2005 WL 3178190 (5th Cir. Nov. 29, 2005), above at page 31.

U.S. ex rel. Walker v. R&F Properties of Lake County, Inc., 2005 WL 3557420 (11th Cir. Dec. 30, 2005)

The Eleventh Circuit reversed and remanded a Florida district court's dismissal of a *qui tam* action, in which a former nurse practitioner for a medical clinic alleged that the clinic filed false claims for Medicare reimbursement. The court of appeals held that triable issues existed regarding the clinic's compliance with regulations regarding services of nurse practitioners and physicians assistants rendered "incident to the service of a physician." The court also held that the relator's discovery was not limited to the date range of her employment at the clinic.

From February 1997 until May 1999, Karyn L. Walker worked as a nurse practitioner for R&F Properties of Lake County, Inc., formerly Leesburg Family Medicine. According to Walker, she and other nurse practitioners and physician assistants regularly treated patients at the clinic, even though a physician was not physically present at the facility. Subsequently, Walker filed a *qui tam* action against R&F Properties, alleging that the defendant submitted false claims by billing Medicare for services rendered by nurse practitioners and physician assistants as if those services were rendered "incident to the service of a physician," securing an additional 15 percent in Medicare reimbursement funds. Interpreting the language of the controlling regulation, 32 CFR § 410.26, Walker argued that the "incident to the service of a physician" language requires the physician to be physically present at the facility in order to bill under this provision. Walker also circled the language on the HCFA 1500 claim forms, which certified that the service was "under the physician's immediate personal supervision."

The defendant countered that as a matter of law the claims could not have been false, for the regulatory language was confusing and vague, and thus susceptible to various reasonable interpretations. Indeed, under the defendant's interpretation, the treatment was considered "incident to the service of a physician" when a physician was merely available for consultation via the telephone. The defendant also sought to limit the scope of Walker's suit, arguing that she could only raise allegations concerning claims that were filed during the course of her employment.

The district court, in buying the defendant's argument, granted the defendant's summary judgment motion, ruling that the claims could not be false as a matter of law, for the relevant regulatory terms were "inherently imprecise." The lower court also agreed to limit discovery to the time period of Walker's employment.

Walker appealed the lower court decision to the Eleventh Circuit. The defendant filed a cross-appeal, contending that the district court erred in denying its motion to dismiss.

Sufficient Evidence to Consider Claims "False"

The Eleventh Circuit, in reversing the lower court's decision, held that there was sufficient evidence of the falsity of the claims to resist summary judgment. In determining whether the district court erred in granting summary judgment, the court of appeals was faced with the issue of whether the Medicare regulations and HCFA 1500 form were unclear regarding the criteria that must be fulfilled in order for services of a nurse practitioner or physician assistant to be billed as services "incident to the service of a physician."

As an initial matter, the court of appeals pointed out that the lower court granted summary judgment on the entire complaint, even though some of the claims were filed after a clarifying 2002 regulation which proclaimed that "the physician must [have been] present in the office suite and immediately available to furnish assistance and direction throughout the performance of the procedure." 42 CFR § 410.26(a)(2) (2002), 410.32(b)(3)(ii) (2002). With a clear definition of services in place, the Eleventh Circuit ruled that the suit could proceed with any claims that were submitted after January 1, 2002, the date the definition became effective.

Moreover, while the Eleventh Circuit agreed that the pre-January 1, 2002 language was ambiguous, the court of appeals ruled that this did not, as a matter of law, foreclose Walker from proceeding in his *qui tam* action. The court noted that Walker had submitted a number of items to the court to help clarify how the relevant language was interpreted in the Medicare community. Specifically, she submitted provisions from the Medicare Carrier's Manual, Medicare bulletins, seminar programs, and expert testimony regarding proper billing "incident to the service of a physician," as used in 42 U.S.C. § 410.26. Unlike the lower court, the court of appeals considered this evidence relevant to determining whether or not the claims were false at the time of submission.

The Eleventh Circuit distilled the issue to whether any evidence outside the language of a Medicare regulation (including guidance issued by the governmental agency charged with administering the regulatory scheme) could be consulted to understand the meaning of that regulation. Notably, the Supreme Court had proclaimed that agency interpretations were "entitled to respect . . . to the extent that those interpretations have the power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 1662, 146 L.Ed.2d 621 (2000). The Eighth Circuit had also held, "If a statement alleged to be false is ambiguous, the government (or here, the relator) must establish the defendant's knowledge of the falsity of the statement, *which it can do by introducing evidence of how the statement would have been understood in context.*" *Minnesota Assoc. of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) (emphasis added by the court). In fact, faced with a remarkably similar list of supporting evidence, the Eighth Circuit had found the evidence to be relevant to a determination of the Medicare regulation's meaning and that there was a question of fact as to the defendants' understanding of the meaning of the regulatory language. *Id.* at 1053–54. Likewise, the Eleventh Circuit determined that the evidence supplied by the relator in the present case was relevant to the meaning of the Medicare regulation

at issue and the defendant's understanding of that meaning. Accordingly, the court of appeals, in ruling that summary judgment was inappropriate, ruled that Walker raised an issue of fact as to the falsity of defendant's billing for nurse practitioner and physician assistant services "incident to the service of a physician."

Discovery Incorrectly Limited to Time of Relator's Employment

Walker also challenged the district court's decision to limit discovery in the case to the date range of her employment as a nurse practitioner. The Eleventh Circuit found that the district court misconstrued the False Claims Act when it limited discovery to the term of Walker's employment. The court of appeals, in reversing the discovery order, pointed out that any person may serve as a *qui tam* relator, and that the relator need not have any relation at all to the defendant.

Moreover, under the Federal Rules of Civil Procedure, discovery is limited to "matter [s], not privileged, that [are] relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Thus, according to the Eleventh Circuit, Walker should have been permitted discovery of all information relevant to her claims, on behalf of the United States, that false claims for payment were made by the defendant.

Thus, because Walker's complaint did not limit the allegations of false claims to the time period during which she was employed by the defendant and instead alleged an ongoing practice, the court ruled that the proper temporal range for discovery was February 1997 through the date of the original complaint.

Distinguished Clausen *and* Corsello

In clarifying the Eleventh Circuit's interpretation of Rule 9(b), the court of appeals rejected the lower court's dismissal that proclaimed that the complaint failed to satisfy Rule 9(b). The court of appeals distinguished the present case from *United States ex rel. Clausen v. Laboratory Corporation of America, Inc.*, 290 F.3d 1301 (11th Cir. 2002), in which a "corporate outsider" made speculative assertions that claims "must have been submitted, were likely submitted or should have been submitted to the Government," 290 F.3d at 1311, and *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005), in which the relator's complaint was deficient under Rule 9(b) because it "failed to explain why he believe[d] fraudulent claims were ultimately submitted." 428 F.3d at 1014.

In the case at bar, Walker's complaint identified her as a nurse practitioner who was employed by the defendant. Walker alleged that, during her employment, she never had her own billing number and that she was instructed each day "which doctor she would be billing under." The Eleventh Circuit determined that these allegations were sufficient to explain why Walker believed that the defendant submitted false or fraudulent claims for services rendered by nurse practitioners and physician assistants "incident to the service of a physician." Thus, the court of appeals affirmed the district court's order denying the defendant's motion to dismiss.

Corsello v. Lincare, Inc., 428 F.3d 1008 (11th Cir. Oct. 20, 2005)

The Eleventh Circuit affirmed a Georgia district court's dismissal of a *qui tam* action, in which a salesperson who had previously been employed by medical equipment companies alleged that his former employers had submitted fraudulent claims to the Government and that they had conspired with physicians to have these fraudulent claims paid or approved. The court of appeals held that the relator failed to plead the fraud with requisite particularity, for the complaint failed to allege when, where, and what violations occurred, and the complaint contained only vague allegations that improper practices took place everywhere the company did business throughout the statutory time period. The court also ruled that the complaint lacked "some indicia or reliability," for the relator failed to provide an underlying basis for his assertions.

From 1995 to 1997, Kirk Corsello was employed as a sales manager by Lincare, Inc., a nationwide provider of oxygen services and equipment to patients in their homes. After being terminated by Lincare, Corsello worked for Rotech, Inc. as a salesperson from 1998 until his termination in 1999. In 1998, Corsello filed an FCA *qui tam* action, alleging his two former employers engaged in various fraudulent schemes, including paying illegal kickbacks to physicians to induce referrals, falsifying certificates of medical necessity to provide unnecessary treatment, and billing for unnecessary or non-existent treatment to unlawfully obtain Medicare payments.

After the Government declined to intervene, the lower court granted the defendants' motion to dismiss the relator's complaint on the grounds that Corsello's complaint failed to plead fraud with particularity, as required by Rule 9(b). The district court also denied Corsello's motion to file a third amended complaint. Corsello appealed the decision to the Eleventh Circuit.

Rule 9(b) Not Satisfied Because No Evidence That Claims Were Actually Submitted

In affirming the lower court's decision, the court of appeals distilled the issue to "whether a former sales employee of multiple defendants pleaded fraud with particularity, under Federal Rule of Civil Procedure 9(b), by baldly asserting that improper practices 'resulted in the submission of false claims.'" The court found it dispositive that the complaint failed to provide any factual support that false claims were actually submitted to the Government.

Court Refused to Infer That Claims Were Actually Submitted to the Government

In applying Rule 9(b) to the case at bar, the Eleventh Circuit first diagramed the existing law. In *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1307 n. 11 (11th Cir. 2002), the Eleventh Circuit had stated that the complaint must contain "some indicia of reliability" to satisfy Rule 9(b). 290 F.3d at 1311. In that case,

the court of appeals dismissed the relator's complaint under Rule 9(b), for Clausen, who was a competitor of the defendant's, was a "corporate outsider" and he failed to include a "credible set of facts to support his vague allegations rendered his complaint deficient under Rule 9(b)." *Id.*

In *Hill v. Morehouse Medical Associates,* an unpublished opinion, the Eleventh Circuit elaborated on the "indicia of reliability" required by *Clausen.* 82 Fed.Appx. 213 (11th Cir. 2003) (*per curiam*). Hill, who was a former employee in the billing department of the defendant's, alleged a billing process and details about five fraudulent billing schemes that the defendant used to submit claims to the Government. Unlike the relator in *Clausen,* who was a "corporate outsider," Hill had "firsthand information" about the billing practices of the defendant. Because Hill "worked in the very department where she alleged the fraudulent billing schemes occurred," the court found her allegations that fraudulent claims were submitted on a daily basis factually credible. The Eleventh Circuit Court held that Hill's complaint satisfied Rule 9(b) because Hill was "privy to . . . the internal billing practices" of the defendant and thus provided factual support for the allegations of fraudulent billing in her complaint. *Id.* at 5.

In the case at bar, however, Corsello was neither a "corporate outsider" nor an employee in the billing department. Corsello argued that he was unlike the relator in *Clausen* because, as a sales employee, he was "aware" of the manner by which the defendants submitted fraudulent claims and had "learned from his colleagues the national reach of the schemes." Corsello also argued that his second amended complaint, like the complaint in *Hill,* contained "indicia of reliability" to satisfy Rule 9(b) because the complaint alleged many details of numerous schemes, employees, and claims.

Corsello also argued that a pattern of improper practices of the defendants leads to the inference that fraudulent claims were submitted to the Government. The court of appeals rejected the relator's arguments, for "it is the submission of a fraudulent claim that gives rise to liability under the False Claims Act," and "that submission must be pleaded with particularity and not inferred from the circumstances." In turn, the Eleventh Circuit, citing *Clausen,* 290 F.3d at 1312 n. 21, refused to make inferences about the submission of fraudulent claims "because such an assumption would 'strip[ ] all meaning from Rule 9(b)'s requirements of specificity.'"

The Eleventh Circuit held that Corsello's complaint failed to satisfy Rule 9(b) for the complaint failed to allege when, where, and what FCA violations occurred. The complaint instead used vague allegations that improper practices took place "everywhere Lincare does business throughout the statutory time period." The court of appeals also faulted the relator for failing to provide a factual basis to conclude fraudulent claims were ever actually submitted to the Government.

Relator Lacked *Clausen* "Indicia of Reliability"

As for the required "indicia of reliability," the court ruled that although Corsello worked in sales, he lacked the "indicia of reliability" required by *Clausen* because his allegations failed to provide an underlying basis for Corsello's assertions. More specifically, the court was troubled that Corsello did not explain why he believed fraudulent

claims were ultimately submitted to the Government. Ultimately, the Eleventh Circuit announced that underlying improper practices alone are insufficient to state a claim under the FCA absent allegations that a specific fraudulent claim was in fact submitted to the Government. Because Corsello failed to satisfy this requirement, the court of appeals agreed that Rule 9(b) was not satisfied.

The Eleventh Circuit also ruled that the district court did not err when it denied Corsello's motion to file a third amended complaint. Accordingly, the Eleventh Circuit affirmed the dismissal of Corsello's amended complaint and the denial of his motion to amend that complaint.

U.S. ex rel. Branigan v. Bassett Healthcare Network, 2005 WL 3244186 (N.D.N.Y. Nov. 29, 2005)

A New York district court granted a defendant-hospitals' Rule 9(b) motion to dismiss a *qui tam* action, in which the relator, as the former chief registered nurse anesthetist and manager of the defendant's anesthesiology department, alleged that the defendant submitted false Medicare claims to the Government. The court rejected the relator's "pleading by example" method, pointing out that even if this was allowed, the examples supplied by the relator failed to satisfy the particularity requirements of Rule 9(b), for they did not indicate who made the statements or advance any explanations as to why the claims were fraudulent.

Michael Branigan, a former manger of the Bassett Healthcare Network's anesthesiology department and a chief registered nurse anesthetist, filed an FCA *qui tam* action against his former employer and several anesthesiologists, alleging that the defendants submitted false and fraudulent claims to Medicare for the provision of anesthesia services, which they did not perform. Branigan alleged that the defendants submitted bills to Medicare for prescribing the anesthesia plan, choosing the anesthesia, injecting the anesthesia, monitoring the patient, and intubating and extubating patient, even when they had not met the patient, were not in the operating room during surgery, and were not present when the patient emerged from the anesthesia at the end of surgery. Branigan claimed that he witnessed these practices daily, and that the defendant anesthesiologists told him that it was their custom and practice to assign CRNAs to perform anesthesia services in the rooms instead of anesthesiologists. In short, Branigan claimed to have "personal knowledge" that the defendant anesthesiologists did not perform the services they were billing for and that those services were performed instead by nurses trained in anesthesia. After the Government elected not to intervene, the defendants filed a motion to dismiss the complaint.

Complaint Failed to Satisfy Rule 9(b)

The defendants argued that the complaint failed to inform each individual defendant of the nature of his alleged participation in the fraud. The amended complaint referred to "defendants," "defendant anesthesiologists," or "defendant hospitals" but nowhere identified a particular procedure in which an individual defendant was involved or

for which an individual defendant billed Medicare despite his failure to comply with Medicare regulations.

Branigan countered that the complaint contained representative examples as to each defendant's submission of false claims and thus satisfied Rule 9(b)'s particularity requirements. The court noted, however, that the complaint did not identify which defendant anesthesiologist submitted the allegedly fraudulent bill. Instead, the examples referred to a Medicare billing number which Branigan claimed identified the anesthesiologist who submitted the bill. Branigan maintained that the defendants should be "intimately familiar" with their "Medicare billing numbers".

The court, however, was troubled that the complaint provided no means of linking any of the defendant anesthesiologists to the bills. The amended complaint did incorporate by reference computer discs which Branigan claimed contain "every bill submitted by the defendants to Medicare during the relevant time period which is alleged to be fraudulent." Branigan argued that these discs had been supplied to the defendants and that the only reason he set forth the defendants' provider numbers instead of their names was to protect their "confidentiality." These computer discs, however, were not provided to the court, so the court had no way of linking the billing numbers to the individual defendants or ascertaining whether the computer discs provided adequate notice to the defendants. Moreover, according to the court, the complaint contained no allegations regarding the defendant hospitals' involvement in the alleged fraud, other than that the anesthesia procedures at issue were performed at the "defendant hospitals." The court ruled that these allegations failed to meet the specificity requirements of Rule 9(b).

Examples Supplied by the Relator Failed to Provide Necessary Specifics

The defendants also argued that the bills listed as examples of the alleged false claims failed to meet the requirements of Rule 9(b), for the complaint did not provide any specifics as to how those particular bills were fraudulent, which Medicare regulations they did not meet, and thus, in the words of the defendants, the relator "provides no theory of his case against the challenged bills to which the defendants may respond."

Branigan, however, argued that because the alleged fraudulent bills were voluminous, he selected certain instances of fraudulent billing for personal performance, medical direction, and medical supervision to set forth as examples in the amended complaint. The court, in rejecting this argument, proclaimed, "Even assuming pleading by example in a case were there are numerous allegedly fraudulent claims is appropriate, these examples did not contain the specificity required of allegations of fraud because they do not indicate . . . who made the statement, or advance any explanation as to why that bill, in particular, was fraudulent." Accordingly, the court granted the defendants' motion to dismiss the complaint pursuant to Rule 9(b) for failure to plead fraud with particularity.

C. Rule 26(b) Discovery Scope and Limits

U.S. ex rel. Purcell v. MWI Corporation, 2005 WL 3046684 (D.D.C. Nov. 14, 2005)

In an FCA *qui tam* action, a District of Columbia district court denied a defendant's motion to compel production of documents and responses to interrogatories. The court ruled that the production of a single document, which represented the relator's work product, did not constitute a complete waiver of the work product privilege or waiver of the joint prosecution privilege.

MWI Corporation, an FCA defendant, filed a motion to compel production of documents and responses to interrogatories, which both the relator and the Government opposed on the grounds that the motion was untimely and that the information sought is protected by the work product privilege and the joint prosecution privilege.

Joint Prosecution Privilege Barred Defendants' Motion to Compel

While the court quickly determined that the defendants' motion was timely, the court ultimately ruled that the joint prosecution privilege posed a bar to the defendants' request. More specifically, the court quoted its earlier statement that "in [False Claims Act] cases in which the government intervenes, a joint-prosecutorial privilege exists between the government and the relator." *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 27 (D.D.C.2002). Thus, the court determined that the discovery of the sort which was the subject of the defendants' motion to compel was precluded by the application of, at a minimum, the joint prosecution privilege.

The defendants maintained that "[a]ny potentially applicable privilege was waived when the government finally agreed to produce the relator's statement of material evidence." The court, however, observed that the relator's disclosure statement was not the Government's work product. Moreover, the court noted that the defendants "offer[ed] no authority for the proposition that the production of a single document which represents the relator's work product constitutes a complete waiver of the work product privilege, or a waiver of the joint prosecution privilege."

While the court agreed that the defendants could overcome the privilege by showing a "substantial need" for the information, the court ruled that the defendants did not make a showing of "substantial need" sufficient to overcome the applicable privileges. Most importantly, the defendants readily acknowledged, that they had the relator's statement of material evidence. Thus, according to the court, the defendants already had the discovery for which a "substantial need" has been recognized. *See, e.g., United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1338, 1346 (E.D.Mo.1996). Furthermore, under Rule 26, the defendants failed to show that the information which they sought was unavailable from other sources. *See* Fed. R. Civ. P. 26(b)(3). Accordingly, the court denied the defendants' motion.

U.S. ex rel. Tyson v. Amerigroup Illinois, Inc., 2005 WL 3111972 (N.D. Ill. Oct. 21, 2005)

An Illinois district court granted the motion of a non-party state agency to quash an FCA defendants' subpoena *dueces tecum* calling for production of emails from three agency employees. The court ruled that the subpoena would be unduly burdensome, especially given the agency status as a non-party in the litigation.

U.S. ex rel. Yannacopoulos v. General Dynamics, 231 F.R.D. 378 (N.D. Ill. Oct. 7, 2005)

An Illinois district court granted in part and denied in part an FCA defendant's motion to compel production of the unredacted versions of the disclosure statements that the relator had provided the Government. The court ruled that in an FCA *qui tam* action, ordinary work product contained in the disclosure statement was potentially discoverable, while opinion work product was non-discoverable.

***U.S. ex rel. Scott v. Metropolitan Health Corporation*, 2005 WL 3434830 (W.D. Mich. Dec. 13, 2005)**

A Michigan district court granted a defendants' motion for attorney fees and expenses in a Section 3730(h) retaliation suit, even though the defendant had settled the relator's underlying FCA suit with the Government. The court found that the filing of the retaliation claim was motivated by an "improper purpose" to harass and extort the plaintiff's former employer. The court proclaimed that suit was in "bad faith" due to the relator's "pursuit of the factually baseless retaliation claim as part of a multi-million dollar lawsuit, the intentional concealment of multiple tape recordings, including the crucial minutes tapes, and the filing of intentionally false affidavits."

***U.S. ex rel. Bennett v. Monem*, 2005 WL 3132314 (D.Or. Nov. 18, 2005)**

An Oregon district court dismissed a relator-inmate's *pro se qui tam* action, which alleged that the Oregon Department of Corrections violated the FCA by causing "expired, spoiled, and otherwise unfit food" to be served to inmates. The court, dismissing the action under Rule 12(b)(6), ruled that the relator failed to allege that the defendant knowingly submitted a fraudulent claim for payment to the Federal Government.

Douglas Bennett, an inmate at the Two Rivers Correctional Institution, brought an FCA *qui tam* action against the food service administrator for the Oregon Department of Corrections, alleging the defendant caused "expired, spoiled, and otherwise unfit food" to be served at the prison. Bennett argued that these actions violated the FCA, for he "assum[ed][the] Oregon penal system still receives federal financial assistance as it did in 1994." In support of his claim, Bennett relied upon several affidavits filed in another case filed by Bennett, *Bennett v. Misner,* CV 02-1662-HA.

The court, in rejecting the relator's argument, pointed out that liability under the FCA is based solely upon the creation or presentation of false claims to the Government, not upon the underlying conduct used to establish the falsity of such a claim. *See* 31 U.S.C. § 3729(a); *United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1266 (9th Cir. 1996).

The court noted that Bennett failed to allege that the defendant knowingly submitted a fraudulent claim for payment from the Federal Government. Moreover, the court observed that the underlying facts upon which Bennett based his claim were the subject of a prior civil rights lawsuit, in which summary judgment was granted against Bennett on allegations of constitutional violations. While seeming to give Bennett points for creativity, the court refused to allow Bennett a chance to relitigate those same facts in an FCA action. Accordingly, the court dismissed the complaint for failing to state a claim upon which relief could be granted.

***United States v. Szilvagyi*, 2005 WL 2769002 (E.D. Mich. Oct. 25, 2005)**

A Michigan district court granted the Government's motion for summary judgment in an FCA suit brought against a home health care company and its owner and employee who had pled guilty to conspiracy to commit health care fraud and mail fraud. The court held that the defendants were collaterally estopped from denying liability under the FCA, for they admitted as part of the factual basis of their guilty pleas to conspiracy to commit health care fraud and mail fraud that they knowingly caused a false claim to be presented to the Government. The court also ruled that the pendency of appeals from those criminal convictions did not prevent application of collateral estoppel.

Interventions and Suits Filed/Unsealed

OCTOBER 1–DECEMBER 31, 2005

***U.S. ex rel. Raymer v. University of Chicago Hospitals*, (N.D. IL)**

The Illinois Attorney General's office has intervened an FCA *qui tam* case, alleging the hospital improperly "double bunked" babies in cribs intended for one baby. The double bunking forced babies to share "set-ups," which include oxygen and other bedside supplies, and violated state rules that require infants to be 4 to 6 feet apart, the State contends. But the hospitals billed the state full price for those services, according to the complaint. The relators are former nurses Donald Raymer and Michael Grosche. Steve Cohen of the Cohen Law Group (Chicago) represents the relators.

***U.S. ex rel. Ali v. P.A. Landers, Inc.*, (D. MA)**

The Government has intervened in a civil FCA action against road construction company P.A. Landers, Inc. for committing fraud against the Department of Transportation on highway projects. The Government alleges that from 1995 to 2003, the company generated fake and inflated asphalt weight tickets on construction projects for the Massachusetts Highway Department and the Massachusetts Bay Transportation Authority. Former employee Omar Ali filed this *qui tam* suit in 1999. Assistant U.S. Attorney George Henderson II represents the Government.

[Note: This intervention was announced just days after a series of criminal indictments against P.A. Landers' owners were announced. The criminal charges are still pending.]

***U.S. v. McCarus*, (D. MD)**

The Government has commenced a civil FCA action against a Towson University doctor, David McCarus, for submitting false claims to Medicare, the Federal Health Employees Health Benefits Program and TRICARE. The complaint seeks more than $500,000 in damages and penalties ranging from 5,500 to 11,000 for each of 267 alleged false claims prosecutors said he submitted. The complaint states that McCarus devised a fraudulent scheme, where he billed the agencies for the treatment of cosmetic conditions that are not covered such as varicose veins and stretch marks and hair removal.

***U.S. ex rel. Relator v. Cabrini Medical Center*, (S.D.N.Y.)**

The Government has intervened in a civil FCA action against the Cabrini Medical Center. The Government alleges the Manhattan hospital submitted false claims to Medicaid on behalf of hundreds of illegally referred patients from 1997 to 2000. A consulting company that has already agreed to pay the Government $2.75 million to settle claims against it referred the patients to Cabrini. David Koenigsberg represents the relator. U.S. Attorney Michael Garcia is managing the case for the Government.

Judgments and Settlements

OCTOBER 1–DECEMBER 31, 2005

***U.S. ex rel. Relators v. Serono S.A.*, (D. MA)**

In October 2005, the DOJ announced that drug manufacturer Serono S.A. had agreed to pay **$704 million** to settle allegations of Medicare fraud. The Government alleged that Serono used an illegal scheme to promote, market, and sell its drug Serostin to treat AIDS wasting. The Government further alleged Serono offered Doctors free kickback trips for writing up Serostin prescriptions and conspired to produce a new test for AIDS wasting without FDA approval. Approximately 85 percent of the Serostin prescriptions were medically unnecessary. $136.9 million of the settlement is related to the criminal penalties, the remaining $567 million will go toward the payment of civil penalties. Two executives have already pleaded guilty and four more have been indicted.

Five former lab employees filed a variety of *qui tam* suits that were rolled into this settlement. The relators' share was $51 million. Stephen Simms (Washington), Robert Thomas (Boston), and Carl Valvo (Boston) represented the relators. HHS OIG and the FBI investigated the matter. U.S. Attorney Michael Sullivan represented the Government.

[Note: This is the 3rd largest settlement ever recovered by the Government in a health care fraud case.]

***U.S. v. Erlanger Medical Center*, (E.D. TN)**

In October 2005, the DOJ announced that Erlanger Medical Center had agreed to pay **$40 million** to settle allegations of Medicare fraud. The Government alleged that Erlanger, a teaching hospital connected to the University of Tennessee, violated the anti-kickback statute and had financial arrangements with the hospital that triggered the Stark physician anti-referral ban. The hospital entered into a number of purported professional services agreements with large physician group practices in the area that were then used to pay remuneration to certain doctors for referrals. HHS OIG, the Tennessee Valley Authority OIG, the Tennessee Bureaue of Investigation, and the FBI investigated the matter. Assistant U.S. Attorneys Elizabeth Tonkin and Will Mackie represented the Government.

[Note: This is one of the first cases to base allegations of false claims submissions on a Stark violation. $37 million of the settlement will be paid to the Federal Government, $3 million to the State of Tennessee.]

U.S. ex rel. Free v. Paul R. Brilles, Inc.

In October 2005, the DOJ announced that Paul R. Brilles, Inc. (doing business as P.B. Fasteners) had agreed to pay **$2.5 million** to settle allegations of DOD contract fraud. The Government alleged that P.B. Fasteners falsified "magnetic particle inspection" tests to be conducted on fasteners and bolts used in military aircraft construction. Former technicians Michael Free and Armand Romero filed this *qui tam* suit in 2001. DOD OIG, DCIS, DCAA, and Army CID investigated the matter.

U.S. ex rel. Cartwright v. Balfour Beatty Construction, (D. CT)

In October 2005, the DOJ announced that Balfour Beatty Construction and Massachusetts Electric Construction Co. had agreed to pay **$24.75 million** for overcharging on a government contract. The Government alleged the companies overcharged Amtrak for the installation of a system used to deliver electricity to trains between New Haven and Boston. Former employee Ian Cartwright filed this *qui tam* suit. The relator's share was $3.89 million, or 15 percent. U.S. Attorney Kevin J. O'Connor managed the case for the Government.

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

In October 2005, the DOJ announced that Staples had agreed to pay **$7.4 million** to settle allegations of contract fraud against the General Services Administration (GSA). The Government alleged Staples 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 was $1.1 million, 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. Relators v. OptionCare of Nevada, (D. NV)

In October 2005, the DOJ announced that OptionCare of Nevada had agreed to pay **$1.35 million** to settle allegations of Medicaid fraud. The Government alleged that from 1998 to 2002, OptionCare improperly diluted the chemical Synagis, improperly instructed nurses to retain the remainder of the chemical after treatment, and improperly administered the chemical beyond the appropriate 6-hour window following its mixing. The relators were former nurses at OptionCare. The relators' share was $337,500, or approximately 25 percent. Brian Kenney of Kenney, Lennon & Egan and Mark Winters represented the relator.

U.S. v. GA Paper International, (S.D.N.Y.)

In October 2005, the DOJ announced that GA Paper International and Ramtech Overseas, Inc. had agreed to pay **$1.31 million** to settle allegations of fraud against the U.S. Agency for International Development (USAID). The Government alleged that GA Paper and Ramtech submitted more than 100 false and inflated claims for reimbursement on freight and insurance costs while participating in USAID's Commodity Import program. Assistant U.S. Attorney David Kennedy represented the Government.

***U.S. ex rel. Relator v. American Healthcare Management*, (E.D. MO)**

In October 2005, the DOJ announced that American HealthCare Management Inc. (AHCM) had agreed to pay **$1.25 million** to settle allegations of nursing home Medicare and Medicaid fraud. The Government alleged AHCM submitted claims to Medicare and Medicaid for services that were not provided because nursing homes run by AHCM did not have enough staff to provide residents with adequate care. The Government further alleged that patients suffered from dehydration, malnutrition, went extended periods of time without cleaning or bathing, and developed preventable bedsores. The nursing homes were Claywest House HealthCare LLC, Lutherna HealthCare LLC, and Oak Forest North LLC. Tony Dewitt of Bartimus, Frickleton, Robertson & Obetz, PC (Jefferson City, MO) represented the relators. HHS OIG, the FBI, and the Missouri Medicaid Fraud Control Unit investigated the matter. U.S. Attorney Catherine Hanaway managed the case for the Government.

[Note: As part of the settlement, the nursing homes all agreed to be permanently barred from the Medicaid and Medicare programs.]

***U.S. v. Allied Home Medical Inc.,* (M.D. TN)**

In October 2005, the DOJ announced that medical equipment supplier Allied Home Medical Inc. had agreed to pay **$930,075** to settle allegations of Medicare fraud. The Government alleged that from 2001 to 2002, Allied submitted claims to Medicare and TennCare for medically unnecessary K0011 power wheelchairs. Assistant U.S. Attorney Robert C. Watson represented the Government.

[Note: The settlement was reached before a suit was filed. $900,000 will be paid to MediCare and $30,000 to TennCare.]

***U.S. ex rel. Levis v. Lawall,* (E.D. PA)**

In October 2005, the DOJ announced that four Philadelphia-area orthotic device makers and practitioners had agreed to pay **$645,000** to settle allegations of improper Medicare billing. The Government alleged that from 1994 to 2004, Harry J. Lawall & Son Inc, Lawall at Hershey Inc., and Lawall Prosthetics-Orthotics, Inc. submitted improper claims for Medicare payments for components of orthotic and prosthetic devices. Former employees Eileen Levis, John Swoyer, John Izak, and Gergory Pieri flied this *qui tam* suit in 2003. The relator's share was $109,650, or approximately 17 percent. Howard Bruce Klein (Philadelphia) represented the relators. HHS OIG investigated the matter. Assistant U.S. Attorneys Margaret Hutchinson and Viveca Parker represented the Government.

***U.S. ex rel. Bogart v. King Pharmaceuticals, Inc.*, (E.D. PA)**

In November 2005, the DOJ announced that King Pharmaceuticals, Inc. and its subsidiary Monarch Pharmaceuticals, Inc. had agreed to pay **$124 million** to resolve allegations of Medicare fraud. The Government alleged that from 1994 to 2002 King underpaid rebates for its drug products owed to the federal and state governments participating in the Medicaid Drug Rebate Program. The drug involved is Altace, an angiotensin-converting enzyme inhibitor. Former Contract Director Edward Bogart filed this *qui tam* suit in 2003. The relator's share has not yet been determined. Joel Androphy of Berg & Androphy (Houston) represented the relator. HHS OIG and the DOJ Civil Fraud division investigated the matter. Assistant U.S. Attorneys Virginia Gibson and Barbara Rowland represented the Government.

***U.S. ex rel. Corapi and Zerga v. Tenet Healthcare*, (E.D. CA)**
***U.S. ex rel. Campbell v. Tenet Healthcare*, (E.D. CA)**

In November 2005, the DOJ announced that Tenet Healthcare Corp. had agreed to pay **$32.5 million** to settle allegations of Medicare fraud. The Government alleged that five doctors at Redding Medical Center performed unnecessary heart surgeries on more than 700 patients, often immediately following the first consultation with them. Former patient John Corapi and his friend Joseph Zerga filed the first *qui tam* lawsuit in 2002. Three days later, Redding internist Patrick Campbell filed his suit. The settlement obviates the need for a trial court review of Campbell's claims by including Campbell as a whistleblower. The relator's share was $2.7 million each for relators Corapi and Zerga, and $4.4 million for relator Campbell, or approximately 15 percent total. David Rude of Clark & Rude (San Jose) represented the Campbell. HHS OIG, the Medical Board of California, and the FBI investigated the matter. Assistant U.S. Attorney Michael Hirst represented the Government.

[Note: As part of the settlement, prosecutors agreed not to file criminal charges against the doctors in question. This settlement ends a three-year investigation that resulted in over half a billion dollars worth of settlements and fines.]

***U.S. ex rel. Gonter v. Hunt Valve*, (N.D. OH)**

In November 2005, the DOJ announced that Hunt Valve had agreed to pay **$13.2 million** to settle allegations of providing faulty parts for Navy submarines. The Government alleged that Hunt falsified quality inspection documents and had unqualified workers performing inspections on the production of the valves that regulate the flow of liquid and gas on board the naval submarines. Former employees Tina and Charles Gonter filed this *qui tam* suit in 2001. The relators' share has yet to be determined. Rick Morgan of Volkema Thomas (Cincinnati) represented the relators. Assistant U.S. Attorney Richard Blake represented the Government.

***U.S. ex rel. Coleman v. Fluor Corp.*, (C.D. CA)**

In November 2005, it was reported that Fluor Corp. had agreed to pay $**12.5 million** to settle allegations of cost inflation on several government contracts. The Government alleged that from 1995 to 1998 Fluor knowingly over billed the Government under the many cost-reimbursable contracts held by its Fluor Daniel subsidiary (now known as Fluor Enterprises) with the Departments of Energy and Defense. Former Senior Finance Manager Cosby Coleman filed this *qui tam* lawsuit in 2000. The costs disputed by Coleman included multi-million dollar bonuses to Fluor's management $13.2 million invested in raw land, $7.3 million spent for improvements to office buildings Fluor leased to other companies, $2.6 million spent for construction of a parking garage Fluor leased to another company, $410,000 spent for luxury condos in Palm Springs, $1.8 million spent on a fine art collection, $75,000 spent for a Mercedes Benz convertible driven by the company's President and $20,000 spent for an antique Chippendale chair. Coleman alleged that he made numerous attempts to point out the violations to senior management, but no action was taken. The relator's share was $2.75 million, or approximately 22 percent. Paul Lawrence of Lawrence, Arenella & Satija (Austin) represented the relator. U.S. Attorney Debra Wong Yang managed the case for the Government.

***U.S. v. Evertec, Inc.*, (N.D. CA)**

In November 2005, the DOJ announced that Evertec, Inc. had agreed to pay **$4.2 million** to settle allegations of E-Rate fraud against the FCC. The E-Rate program, created by Congress in the Telecommunications Act of 1996, provides funding for needy schools and libraries to connect to and utilize the Internet. The Government alleged that Evertec (formerly known as "GM Group, Inc.") received E-Rate funds for ineligible goods and services while acting as a subcontractor to Video Network Communications, Inc. on a project in Highland Park School District, Michigan from 2001 to 2002. Assistant U.S. Attorney Sara Winslow and Trial Attorney Alicia Bentley from the DOJ Civil Division represented the Government.

[Note: The settlement with Evertec Inc. arose from an ongoing federal investigation of fraud and anti-competitive conduct in the E-Rate program. The investigation is being conducted by the U.S. Department of Justice's Antitrust and Civil Divisions, and the United States Attorney's Office for the Northern District of California, along with the assistance of the San Francisco, Los Angeles, Fresno, and Detroit offices of the Federal Bureau of Investigation, and the FCC's Office of Inspector General.]

***U.S. ex rel. Relator v. Star Physical Therapy*, (W.D. WA)**

In December 2005, the DOJ announced that Star Physical Therapy had agreed to pay **$655,000** to settle allegations of Medicare fraud. The Government alleged Star upcoded Medicare reimbursement claims for physical therapy sessions, overbilling Medicare. The relator's share was $45,000, or approximately 8 percent. U.S. Attorney John McKay managed the case for the Government.

U.S. v. St. Barnabas Health Care System, **(D. NJ)**

In December 2005, the DOJ announced that St. Barnabas Health Care System had agreed to pay **$3.9 million** to settle allegations of Medicare upcoding. The Government alleged that from 1992 to 1999, the health system's 9 hospitals filed inpatient claims for patients who received only same-day treatment. In addition, the Government alleged that during the same time, St. Barnabas Medical Center upcoded pneumonia claims for higher reimbursement rates. Assistant U.S. Attorney John G. Silbermann represented the Government.

U.S. ex rel. Teytelboym v. M.L. Energia Inc., **(D. NJ)**

In November 2005, the DOJ announced that M.L. Energia, Inc. had agreed to pay **$1.1 million** to settle allegations of Small Business grant fraud. The Government alleged that the company and its owner, Moshe Lavid, obtained funding from different federal agencies for the same research, doing little more than 'recycling' the same research, data, and technology. Further, the Government alleged that Energia improperly subcontracted several of its projects to Rutgers and Princeton Universities. Former Energia chemist Moisey Teytelboym filed this *qui tam* suit. The relator's share was $242,000, or approximately 22 percent. Timothy McInnis (New York City) represented the relator. Assistant U.S. Attorney Stuart Minkowitz represented the Government.

U.S. v. Dr. Hueser, **(W.D. MO)**

In November 2005, the DOJ announced that Dr. James Hueser had agreed to pay **$1 million** and surrender his medical license to settle allegations of Medicare fraud. The Government alleged that from 1999 to 2001, Hueser submitted false claims for reimbursement for medically unnecessary Herceptin cancer treatments. The Government further accused that Hueser reused vials of chemotherapy drugs intended for single use. Assistant U.S. Attorney Joel May represented the Government.

[Note: In addition to the monetary payment and surrendering his medical license, Hueser agreed to be permanently barred from Medicare and agreed not to obtain another medical license in the future.]

U.S. v. Williams Brothers Construction Co., **(S.D. TX)**

In December 2005, the DOJ announced that Williams Brothers Construction Co. had agreed to pay **$3 million** to settle allegations of fraud on Department of Transportation contracts. The Government alleged that Williams Brothers knowingly violated the Disadvantaged Business Enterprise contracting requirements on federally funded highway construction projects. The Department of Transportation OIG and the Federal Highway Authority investigated the matter. U.S. Attorney Chuck Rosenberg managed the case for the Government.

***U.S. ex rel. Pervez v. Beth Israel Medical Center*, (S.D.N.Y.)**

In December 2005, the DOJ announced that Beth Isreal Medical Center had agreed to pay **$72 million** to settle allegations of Medicare fraud. The Government alleged that the hospital was using Medicare funds to improperly pay for everything from basic administrative overhead to methadone maintenance, from fundraising and marketing to employee housing and parking. Former Financial Executive Najmuddin Pervez filed this *qui tam* suit in 2001. The relator's share was $15 million, or approximately 20 percent. Philip Michael of Troutman Sanders (New York) represented the relator. HHS OIG investigated the matter. Assistant U.S. Attorneys Sheila Gowan and Heidi Wendel represented the Government.

***U.S. v. Life Care Centers of America*, (N.D. GA)**

In December 2005, the DOJ announced that Life Care Centers of America ("LCCA"), Gwinnett Operations, and Developers Investment Co. had agreed to pay $**2.5 million** to settle allegations of Medicare and Medicaid fraud. The Government alleged inadequate medical care at the Life Care Center of Lawrenceville, a skilled-nursing care facility owned by the defendants. The Government attributed the deficient care to systemic problems of severe understaffing, inadequate training, poor documentation, and insufficient budgetary allowances. The resulting inadequate care also resulted in the premature deaths of several residents.

The Federal Government's share of the settlement was $1.7 million ($1 million for Medicare, $600,000 for Medicaid) and the State of Georgia's share was $400,000 for Medicaid. Five relators with family members that were residents at the Lawrencville facility filed this *qui tam* suit in 2002. The relators' share was $400,000, or approximately 16 percent. HHS OIG investigated the matter. U.S. Attorney David Nahmias managed the case for the Government. As part of the settlement, LCCA and Lawrenceville entered into a Corporate Integrity Agreement with HHS OIG. LCCA agreed to apply the policies and procedures in the agreement to all its facilities across the country.

[Note: This settlement represents the largest recovery against a single skilled nursing facility under the False Claims Act based on a failure-of-care case to date.]

***U.S. v. Rush University Medical Center*, (N.D. IL)**

In December 2005, the DOJ announced that Rush University Medical Center had agreed to pay **$1 million** to avoid allegations of Medicare fraud. Rush University officials discovered the overbilling for cancer treatments on their own and voluntarily notified prosecutors in 2003. The settlement was reached without a suit being filed. In addition to the settlement, Rush has agreed to make regular compliance reports to HHS for the next three years. U.S. Attorney Patrick Fitzgerald managed the matter for the Government.

U.S. v. MediCenter Diabetic Supply, **(D. CO)**

In December 2005, the DOJ announced that MediCenter Diabetic Supply had agreed to pay **$1.6 million** to settle allegations of Medicare fraud. The Government alleged that from 1998 to 2003, MediCenter double billed on reimbursement requests from Medicare for diabetic supplies. MediCenter's owner, Jack Stephen Cates, sold the company and agreed to be excluded from any future participation in the Medicare program.

U.S. v. Development Alternatives, Inc.**, (D. MD)**

In December 2005, the DOJ announced that Development Alternatives Inc. had agreed to pay **$1.2 million** to settle allegations of fraud against the U.S. Agency for International Development. The Government alleged that the company's wholly owned subsidiary MAS International Inc. overcharged USAID for materials used in economic development work on three contracts. Two contracts involved economic assistance programs in Bosnia-Herzegovina. The third contract was to spur the increase of available credit to small businesses in developing countries.

U.S. v. ABN Amro Mortgage Group, Inc., **(E.D. MI)**

In January 2006, the DOJ announced that ABN Amro had agreed to pay **$42 million** to settle potential allegations of mortgage fraud. The Government alleged ABN Amro made false certifications to the U.S. Department of Housing and Urban Development on 28,097 federally insured mortgages. The Government alleged 229 of the falsely certified mortgages led to defaults, which were insured by HUD, resulting in losses to HUD of $6.25 million. HUD OIG and the Office of Comptroller Currency investigated the matter. Assistant U.S. Attorneys Leslie Wizner and David Leviss represented the Government.

[Note: This settlement was reached as a result of an investigation and voluntary disclosure—no suit was filed.]

U.S. ex rel. Roberts v. Bearingpoint**, (C.D. CA)**

In January 2006, the DOJ announced that Bearingpoint, Booz Allen Hamilton, Ernst & Young, and KPMG had agreed to pay a total of **$25 million** to settle allegations of reimbursement fraud on various government agency contracts. The Government alleged the four companies systematically failed to disclose rebates when billing the U.S. in violation of the Federal Acquisitions Regulations. Neal Roberts filed this *qui tam* suit. The relator's share has not yet been determined. DCIS, DCAA, NASA OIG, Department of Transportation OIG, Department of Energy OIG, USPS OIG, GSA OIG, EPA OIG, and USAID OIG all participated in the investigation. U.S. Attorney Debra Yang managed the case for the Government.

[Breakdown: Bearingpoint: $15 million, Booz Allen Hamilton: $3.3 million, Ernst & Young: 2.4 million, KPMG: $4.5 million.]

STATE & LOCAL FCA NEWS

State of California ex rel. Relator v. ITT Technical Institute

In October, 2005, the California Attorney General's office announced that ITT Technical Institute had agreed to pay **$725,000** to settle allegations of grade inflation. The Government alleged that ITT inflated 93 students' grade point averages so they would qualify for "Cal Grants" from the state Department of Education. The suit was originally filed in 2002 under the Federal and California False Claims Acts. Mark Kleiman (Los Angeles) and Lane Seisky of Barber Shoulders and Seisky (Evansville) represented the relators. The U.S. Department of Justice has elected not to intervene in the Federal portion of this claim.

State of Texas ex rel. Ven-A-Care v. Boehringer Ingelheim

In November 2005, the Texas Attorney General's office announced that Boehringer Ingelheim had agreed to pay **$10 million** to settle allegations of Medicaid fraud. The Government alleged the company marked up prices on wholesale drugs as much as 500 percent to distributors, pharmacies, group purchasing organizations, home health care providers and others delivering prescriptions to Medicaid patients.

State of California ex rel. San Francisco v. City Tow

In November 2005, the California Attorney General's office announced that City Tow had agreed to pay **$5.7 million** to settle allegations of fraud in towing cars. The Government alleged that City Tow operated an illegal auction scheme for more than a decade through which the company underreported the proceeds from the sales of towed cars, denying a fair share to the city and the state. The money recovered will be split evenly between the City of San Francisco and the State of California.

State of New York v. Americare Certified Special Services

In December 2005, the New York Attorney General's office announced that Americare Certified Special Services had agreed to pay **$7 million** to pre-emptively settle allegations of Medicaid fraud. The settlement offer was made in response to an investigation by the New York State Medicaid Fraud Control Unit.

State of Arizona v. 42 Drug Manufacturers

In December 2005, the Arizona Attorney General's office announced it had filed suit against 42 drug manufacturers for inflation of Average Wholesale Price.

[Note: This suit is under Arizona's Consumer Fraud Act (A.R.S. §§ 44-1521–44-1534), which allows for fines up to $10,000 per violation.]

State of Ohio v. Merck

In December 2005, the Ohio Attorney General's office won a **$7.8 million** verdict in a suit against Merck and its former subsidiary Medco Health Solutions, Inc. for defrauding the State Teachers Retirement System of Ohio (STRS). The suit was filed in 2003 to recover damages from the company for overcharging STRS for certain prescription drugs and mail-order dispensing fees and for wrongfully withholding drug makers' rebates from STRS. The verdict marks the first time a pharmacy benefits manager has been found by a court to have committed constructive fraud.

State of Connecticut v. Winsted Pediatrics

In January 2006, the Connecticut Attorney General's office announced that Winsted Pediatrics had agreed to pay **$206,000** to settle allegations of Medicaid fraud. The Government alleged that Winsted Pediatrics had billed Medicaid for children's vaccines provided for free by the Federal and State Vaccines-for-Children (VCF) program.

[Note: In addition to paying the U.S. and State governments, Winsted will pay $27,000 to the private insurance companies it billed in violation of VCF rules.]

Developments in the Law

Raising the Bar: The Public Disclosure Bar and the Original Source Exception

RAISING THE BAR:
The Public Disclosure Bar and the Original Source Exception

William Louis Hurlock[1]

Without Justice: Courage is Weak
—Benjamin Franklin[2]

As we start the new year it important to take stock of the recent developments that took place last year in the ever-emerging area of the False Claims Act. This article focuses on the public disclosure bar and the original source exception. As detailed below, these two important components of the False Claims Act[3] received a great deal of attention this past year.[4]

Indeed, attorneys are increasingly asking courts to take a much closer look at the public disclosure bar[5] and the original source exception.[6] As illustrated by the cases cited in this article, last year, the United States Court of Appeals for the Third,[7] Sixth,[8] Seventh,[9] Ninth,[10] and Tenth[11] Circuits have all addressed some tenet of these two important aspects of the False Claims Act. In addition, the United States District Courts from the Northern[12] and Eastern[13] Districts of California to the District of Connecticut[14] and the District Courts from the Northern District of Illinois to the Southern District of Texas[15] have all ruled on aspects of these two issues. Indeed, one District Court addressed these issues twice in the same case this past year.[16]

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1. Senior Associate Boies, Schiller & Flexner, LLP Short Hills, New Jersey.

2. Benjamin Franklin, Poor Richard's Almanac, (Sept. 1734).

3. 31 U.S.C. §§ 3729–33

4. This article is a review of cases decided between October 2004 and December 2005.

5. 31 U.S.C. § 3730 (e)(4)(A).

6. 31 U.S.C. § 3730 (e)(4)(B).

7. United States ex rel. Paranich v. Sorgnard, 396 F.3d 326 (3d Cir. 2005) (discussed *infra*).

8. United States ex rel. Dingle v. Bioport Corp., 388 F.3d 209 (6th Cir. 2004) (discussed *infra*).

9. United States ex rel. Gross v. AIDS Research Alliance-Chicago, 415 F.3d 601 (7th Cir. 2005). (Relator, subject in a research study, files False Claims Act complaint alleging mismanagement and negligence relating to medical study. Court dismisses plaintiff's complaint because, among other deficiencies, relator's claims were based on public disclosure in that the FDA sent a warning letter to those responsible for the study and relator failed to allege that he was an original source).

10. United States ex rel. Campbell v. Redding Med. Ctr., 421 F.3d 817 (9th Cir. 2005) (discussed *infra*).

11. United States ex rel. Grynberg v. Praxair, Inc. 389 F.3d 1038 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 2964 (2005) (discussed *infra*).

12. United States ex rel. Ernst v. Tenet Healthcare Corp., 2005 WL 474244 (N.D. Cal. Mar. 1, 2005) (Relator filed a False Claims Act complaint alleging fraudulent payments for certain medical claims. After granting defendant's motion to dismiss because of a public disclosure, court permits relator to amend complaint where relator claims he is an original source, but failed to plead allegations to support the claim in the amended complaint.).

13. United States ex rel. Englund v. L.A. County, 2005 WL 2089216 (E.D. Cal. Aug. 30, 2005) (discussed *infra*).

14. United States ex rel. Smith v. Yale-New Haven Hospital, Inc., 2005 WL 2072514 (D.Conn). Aug. 25, 2005) (discussed *infra*).

15. United States ex rel. Farmer v. Houston, 2005 WL 1155111 at *1 (S.D. Tex. May 5, 2005) (discussed *infra*).

16. *Bannon*, 2005 WL 991757 at *1 (N.D. Ill. Apr. 14, 2005) ("*Bannon I*"); *Bannon*, 2005 WL 3236166 at *1 (N.D. Ill. Nov. 28, 2005) ("*Bannon II*") (discussed *infra*).

For the most part, courts are engaging in a detailed analysis of the public disclosure bar and the original source exception and this analysis is beginning to have a significant impact on False Claims Act cases. Unfortunately, counsel and even certain courts, often blend these issues with certain aspects of the Federal Rules of Civil Procedure (such as Rule 9(b)) and other components of the False Claims Act. Thus, the arguments and attendant opinions often become blurred, resulting in unintended consequences. This article attempts to navigate through the recently issued decisions and provide a summary of the important trends emerging in the False Claims Act cases.

I. INTRODUCTION

The False Claims Act bars courts from hearing *qui tam* cases when the allegations contained in the relator's complaint are based upon publicly disclosed information.[17] The public disclosure bar is jurisdictional in nature and it prevents a relator from pursuing a False Claims Act claim. Quite simply, a court lacks jurisdiction over the relator's claim.

The original source exception is a limited exclusion to the jurisdictional bar contained in the public disclosure doctrine. Under this exception, a relator is not barred from pursuing a False Claims Act matter if the relator was an original source of the publicly disclosed information.[18] Both doctrines have recently received a great deal of attention and have significantly impacted False Claims Act jurisprudence.

A. The Public Disclosure Bar

As stated above, courts lack jurisdiction over a False Claims Act case if the allegations in the relator's complaint are "based upon" certain publicly disclosed information.[19] Courts may raise the issue *sua sponte*.[20] The United States Court of Appeals for the Sixth Circuit recently addressed the meaning of "based upon" as set forth in the Act.[21]

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17. "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

31 U.S.C. § 3730 (e)(4)(A).

18. "For purposes of this paragraph, 'original source' means 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 action under this section which is based on the information."

31 U.S.C. § 3730 (e)(4)(B).

19. 31 U.S.C. § 3730 (e)(4)(A).

20. *See* United States ex. rel. Church v. Mississippi Baptist Health Sys., Inc., 2005 WL 2375161 at * 1 (S.D. Miss. Sept. 26, 2005) (Relator filed a False Claims Act complaint alleging medical facilities paid doctor salary in excess of fair market value for services in exchange for doctor referring patients to medical facilities to enable facilities to submit false Medicare and Medicaid claims relating to patients referred by physician. Court finds that where relator pled he was an officer in the medical facility and in that capacity he became aware of the conduct at issue, he had direct and independent knowledge of the allegations, and no party challenged his assertions and no defendant argued that his claims were based on information already publicly disclosed, relator was an original source.).

21. *Dingle*, 388 F.3d at 209.

In *Dingle*, the relators, filed a False Claims Act complaint alleging a certain drug company made false statements relating to the proper manufacture of anthrax vaccines.[22] The United States District Court for the Western District of Michigan dismissed the relators' complaint on the basis that their claims were publicly disclosed and relators were not original sources.[23] Relators appealed to the Sixth Circuit Court of Appeals arguing that the disclosures did not concern the specific deficiencies alleged in their complaint and that the disclosures did not qualify under the "allegations or transactions" test adopted by the Sixth Circuit.[24] The Court of Appeals focused its review on the "allegations or transactions standard."[25] Quite simply courts adhering to this standard reduce the analysis to a formula wherein X + Y = Z.[26] Z = the allegation of fraud. X and Y represent its essential elements.[27] To disclose the fraudulent transaction (Z) publicly, the combination of X and Y must be exposed in such a way that one can infer Z.[28] In essence, the Court adopted the formula established by the United States Court of Appeals for the District of Columbia Circuit.[29]

The Court of Appeals considered the "based upon" language contained in the Act.[30] It declined to reevaluate the "based upon" language of section 3730 (e)(4)(b) (original source) adopted by the prior Appeals panel that stated "based upon" meant "supported by" because it was the controlling law in the Sixth Circuit unless and until the Court of Appeals had occasion to revisit the issue *en banc*.[31] Here, the Court found that the allegations and transactions contained in the public disclosures were sufficient to remove the District Court's jurisdiction over the *qui tam* and dismissed the complaint.[32]

The United States Court of Appeals for the Sixth Circuit had a second occasion to analyze the public disclosure bar and original source exception in the last year. In the second case, the court addressed the types of disclosures that place the Government on notice of potential false claims.[33] In *Gilligan*, the relators filed a False Claims Act complaint alleging fraud relating to heart pacemaker leads.[34] Relators, two attorneys who previously filed product liability claims against the manufacturers, acknowledged that they were not original sources.[35] In essence, the relators filed the *qui tam* action based, in part, on the information gleaned through the product liability actions.[36]

22. *Id.* at 211.

23. *Id.* at 212.

24. *Id.* at 211.

25. *Id.* at 212.

26. *Id.*

27. *Id.*

28. *Id.*

29. United States ex. rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653–54 (D.C. Cir. 1994).

30. "No court shall have jurisdiction over an action under this section based upon the public disclosures of *allegations or transactions. . . .*" 31 U.S.C. § 3730 (e)(4)(A).

31. *Id.* at 215.

32. *Id.*

33. United States ex rel. Gilligan v. Medtronic, Inc., 403 F.3d 386 (6th Cir. 2005).

34. *Id.* at 388.

35. *Id.* at 389.

36. *Id.* at 388.

Relators argued that the alterations to the pacemaker leads made them unapproved by the Food and Drug Administration and that because the devices were unapproved, the submission of Medicare claims for the leads was fraudulent.[37] The United States Court of Appeals for the Sixth Circuit recognized two types of disclosures to place the Government on notice of fraud: (1) information of a false state of facts and a true set of facts was disclosed and; (2) there is a public allegation of fraud, despite the specificity of the allegation.[38] Thus, there need not be a specific disclosure of fraud to find public disclosure if the information publicly available as to the true state of facts and the false state of facts underlying the alleged fraud warrants dismissal as a public disclosure. Here, the court determined it lacked jurisdiction over the False Claims Act suit because it determined that there was a public disclosure, based in part, on the information from the prior product liability lawsuits that formed the basis, in part, for the attorneys *qui tam* suit against the manufacturers and relators were not original sources.[39]

B. The Need to Cite To Specific Examples of Alleged Public Disclosures

Courts are becoming increasingly frustrated by the defendant's failure to cite to specific examples of alleged public disclosures. Defendants must cite to specific examples of an alleged public disclosure when pleading there has been a public disclosure.[40] The United States District Court for the Eastern District of California denied a defendant's motion to dismiss for lack of jurisdiction under the public disclosure bar because the defendant failed to cite to specific examples of the alleged public disclosure.[41]

In *Englund*, the relator filed a False Claims Act complaint alleging Los Angeles County made false statements and claims to receive unwarranted Federal Medicaid funds via intergovernmental transfers (transfers of public monies between governmental entities).[42] In support of its motion to dismiss based on the public disclosure bar, the defendant submitted "numerous lengthy exhibits with pages numbering in the hundreds," but the defendant failed to provide specific page numbers or citations to where the public disclosures were contained.[43] In essence, defendant argued that relator's allegations were publicly disclosed in letters to the Los Angeles County Board of Supervisors, the Los Angeles County annual financial report, and statements made in certain county staff meetings,[44] but it failed to cite the specific disclosures.

The court noted that when deciding if there had been a public disclosure it must first determine if the public disclosure originated in one of the sources enumerated

37. *Id.*

38. *Id.* at 390.

39. *Id.* at 392.

40. *Englund*, 2005 WL 2089216, at *1.

41. *Id.*

42. *Id.* at *2.

43. *Id.* at *6.

44. *Id.* at *7.

in the statute.[45] If there has been a disclosure, the court must then determine if the content of the disclosure consisted of the allegations or transactions" that gave rise to the relators' claim and was not "mere information."[46] In undertaking this analysis, the court became frustrated with the defendant's counsel's failure to cite to specific instances of the alleged disclosure, adhering to the United States Court of Appeal for the Seventh Circuit's admonishment that "Judges are not like pigs, hunting for truffles buried in briefs."[47] The court denied the defendant's motion to dismiss finding no public disclosure of relator's claims because, among other things, defendant failed to establish that the public disclosures originated in one of the sources contained in the Act and the content of the disclosures set forth "allegations or transactions" that gave rise to relator's claims.[48]

II. THE PUBLIC DISCLOSURE BAR AND THE FALSE CLAIMS ACT

A. The Public Disclosure Bar and the First-to-File Doctrine

As stated above, the public disclosure bar often converges with other aspects of the False Claims Act. It recently converged with the first-to-file bar[49] when the United States Court of Appeals for the Ninth Circuit recognized that the first-to-file bar of the False Claim Act does not preclude the filing of a later complaint when an earlier complaint is rendered jurisdictionally defective because the relator was not an original source of the publicly disclosed information.[50]

In *Campbell*, the first pair of patient relators filed a False Claims Act complaint against a medical center alleging that the center fraudulently billed for "thousands" of unnecessary invasive cardiac procedures.[51] A physician relator then filed a False Claims Act action against the same defendants also alleging fraudulent billing for unnecessary cardiac procedures.[52] The United States moved to dismiss the physician's complaint because it believed the patients were the first-to-file.[53] The United States District Court for the Eastern District of California granted the Government's motion and dismissed the physician's complaint.[54] In so doing, the court did not reach the question of whether the patient relators were original sources because they were the first-to-file and this, in and of itself, barred any later complaints.[55] The Government

45. *Id.* at *5.

46. *Id.*

47. *Id.* at *6 n.25, *citing* United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

48. *Id.* at * 7–10.

49. Under the False Claims Act, when a relator files a complaint, "no person other than the Government can intervene or file a related action based on the facts underlying the relator's action." 31 U.S.C. § 3730(b)(5).

50. *Campbell*, 421 F.3d at 817.

51. *Id.* at 818.

52. *Id.* at 819.

53. *Id.* at 819–20.

54. *Id.* at 819.

55. *Id.* at 825.

settled the matter and the physician relator filed an objection to the settlement.[56] The objection was dismissed for lack of standing.[57] The Physician appealed the dismissal of the complaint and the dismissal of the objection to the settlement.[58]

The United States Court of Appeals remanded the matter back to the District Court to determine if the patient relators were original sources. In so doing, the Court of Appeals recognized that when public disclosure is an issue, the False Claims Act first-to-file bar prohibits only those complaints filed after a complaint that fulfills the jurisdictional requirements of section 3730(e)(4).[59] In essence, the originally filed complaint does not exist for purposes of the first-to-file bar if the court lacks the jurisdiction over the complaint.

In a second case, the United States Court of Appeals for the Sixth Circuit very recently addressed the first-to-file bar and original source exception.[60] In *Walburn*, the relator filed a *qui tam* action alleging the defendants altered and submitted false documents to receive payment and compensation to operate a gaseous diffusion plant.[61] Four years previously, the relator filed suit alleging exposure to gases while employed at the subject plant.[62] The United States District Court dismissed the complaint for lack of subject matter jurisdiction because the relator was not the first-to-file pursuant to the False Claims Act.[63] However, the complaint that was first filed was subsequently dismissed for failure to satisfy Federal Rule of Civil Procedure 9(b) and thus, could not serve as a basis to preempt relator's complaint.[64]

In its analysis, the court recognized that the dismissal of a False Claims Act action for lack of subject matter jurisdiction is reviewed *de novo*.[65] The Court *sua sponte* raised the public disclosure issue.[66] In analyzing the case, the court determined that the allegations contained in the relator's *qui tam* complaint were publicly disclosed as they were based on the allegations contained in his previous complaint for exposure to substances emitted from the plant.[67] Finding that the *qui tam* complaint was based upon publicly disclosed information, the court then determined whether the relator qualified as an original source.[68] The court concluded that the relator did not qualify as an original source because he failed to disclose the allegations in his first complaint prior to filing the second, qui tam complaint.[69] Thus, the court confirmed the dis-

56. *Id.* at 819.

57. *Id.*

58. *Id.* at 820.

59. *Id.* at 825.

60. United States ex rel. Walburn v. Lockheed Martin Corp., 2005 WL 3466528 at *1 (6th Cir. 2005).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at *7 n.5.

65. *Id.* at *2.

66. *Id.*

67. *Id.* at *6.

68. *Id.* at *7.

69. *Id.*

missal of the action, not based on the first-to-file doctrine, but because relator was not an original source.[70]

III. THE PUBLIC DISCLOSURE BAR AND THE FEDERAL RULES OF CIVIL PROCEDURE

A. Public Disclosure and Federal Rule of Civil Procedure 9(b)

Counsel have become increasingly creative in their attempts to dismiss False Claims Act cases and the public disclosure bar and original source exception are used in increasing ways to terminate relators' cases. A case illustrative of this point recently occurred in the Northern District of Illinois. As stated previously, this court addressed these issues twice in the same case this past year.

In the first set of motions, in a novel twist, counsel for defendants moved to dismiss relator's complaint arguing, among other reasons, that relator had an "affirmative duty to allege compliance with the public disclosure bar" and claims should be dismissed where a relator fails to allege with the requisite specificity of Federal Rule of Civil Procedure 9(b) that the information is not based on publicly disclosed information or that they are an original source of the information.[71] In *Bannon I*, counsel for the defendants moved to dismiss relator's complaint pursuant to Federal Rules of Civil Procedure 12(c) (judgment on the pleadings) and 9(b).[72] Defendants argued that the relator's complaint should be dismissed under Rule 12(c) because the complaint failed to sufficiently allege compliance with the public disclosure requirements and the negligence claims failed as a matter of law.[73] In addition, the defendants argued that the complaint itself and the *lack of public disclosure* was not specifically pled in the complaint and thus failed to satisfy Federal Rule of Civil Procedure 9(b).[74] The United States District Court for the Northern District of Illinois recognized that Federal Rule of Civil Procedure 9(b) does not require that relator's averments as to public disclosure be stated with particularity since information indicating the original source of fraudulent claims is not an averment of fraud.[75] However, the court dismissed the complaint, with leave to amend, under Rule 9(b) because relator failed to state with particularity the underlying fraudulent conduct to support the claim, such as when misrepresentations were made and which defendant submitted fraudulent claims.[76]

Shortly thereafter, relator filed a third amended complaint.[77] In *Bannon II*, the relator filed amended her complaint to cure the deficiencies recognized by the court in *Bannon I*. Defendants moved to dismiss, arguing not that the amended complaint

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70. *Id.*

71. *Bannon*, 2005 WL 991757 at *1 ("*Bannon I*").

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at *2.

76. *Id.* at *3.

77. *Bannon*, 2005 WL 3236166 at *1 ("*Bannon II*").

failed to affirmatively plead that it was in compliance with the public disclosure bar, but that it affirmatively recognized that it was based on material that was in the public domain *after* relator filed her amended complaint.[78]

Thus, with the newly filed complaint, the court must now determine if the public disclosure bar precluded the relator from curing the defects in the previous complaint by basing the amended complaint on information that was publicly disclosed after the initial complaint was filed, but before the amended complaint.[79] The court recognized that there was "no principled difference between a *complaint* based upon information contained in public disclosures (of which [relator] was not a source) and an *amended complaint* that is based upon and can only be sustained by resort to that information."[80] The court determined that to allow the relator to rely on publicly disclosed material to make the case in her amended complaint because the disclosure came after the initial complaint was filed, undermined the Congressional intent behind the False Claims Act.[81] Thus, the court dismissed the relator's complaint with prejudice since it was the third time the relator amended the complaint and it did not appear to the court that relator could cure the defect.[82]

B. The Public Disclosure Bar and Federal Rule of Civil Procedure 12(b)(1)

The public disclosure bar also converged with Federal Rule of Civil Procedure 12(b)(1). This raised an interesting procedural question on the proper avenue for making a motion to dismiss under the public disclosure bar. Arguments concerning the public disclosure bar and the original source exception are brought in a myriad of ways. Motions to dismiss under the public disclosure bar are made pursuant to Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief may be granted), Federal Rule of Civil Procedure 12(b)(1) (lack of jurisdiction over the subject matter) or a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.[83]

The United States District Court for the District of Connecticut recently addressed the application of the public disclosure bar to Rule 12(b)(1).[84] In *Smith*, the relator filed a False Claims Act complaint alleging that certain healthcare providers engaged in false billing for radiological procedures.[85] One defendant filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) (in addition to Rule

78. *Id.* at *2.

79. *Id.* at *7.

80. *Id.* at *14 (emphasis in original).

81. *Id.*

82. *Id.* at *17.

83. *See Bannon II*, 2005 WL 3236166 at * 9 ("it is not entirely clear whether . . . § 3730(e)(4)(A) [raises] a question of subject matter jurisdiction or a question of substantive law." Matters addressed under Rule 12(b)(6) or 12(b)(1)).

84. *Smith*, 2005 WL 2072514 at * 1.

85. *Id.* at *1.

12(b)(6)) asserting that the relator's allegations were publicly disclosed.[86] In this case, relator, in opposition to the defendant's motion, argued that the pending motion should have been brought under Rule 12(b)(6).[87]

In deciding the issue, the court recognized that when a motion to dismiss is brought under both Rules 12(b)(1) and 12(b)(6), a court must first address the Rule 12(b)(1) arguments since, if the court lacks subject matter jurisdiction, the additional defenses and objections become moot.[88] The court further concluded that it is possible, in principle, to resolve the public disclosure issue pursuant to Federal Rule of Civil Procedure 12(b)(1), however the factual record in the case precluded such a determination.[89] In addition, the Court determined that it was within its discretion to order discovery on the limited issue of whether a public disclosure occurred.[90] However, the court dismissed the relator's complaint because relator was not the first-to-file.[91]

IV. THE ORIGINAL SOURCE EXCEPTION

As stated previously, the original source doctrine is an exception to the public disclosure bar in that the relator is not barred from pursuing a False Claims Act case if the relator was an original source of the publicly disclosed information.[92] Thus, the court must apply a two-step process. It must first determine if there has been a public disclosure.[93] If such a disclosure has occurred, it must then determine if relator was an original source thereby permitting the relator to go forward with the complaint.[94]

The original source exception of the False Claims Act has also received a great deal of attention this past year. Indeed, the United States Court of Appeals for the Tenth Circuit had occasion to address this issue.[95] In *Grynberg*, the relator filed a False Claims Act complaint alleging reverse false claims for royalty payments due and owing to the United States Government for the use of certain federal lands.[96]

At the close of discovery, the defendants filed motions for summary judgment for, among other things, that the *qui tam* complaint was based on publicly disclosed information.[97] The court declined to adopt the mathematical formula established by the United States District Court for the District of Columbia, referenced previously in this article.[98] The Court found that the transactions which formed the basis for

86. *Id.* at *4.

87. *Id.* at *5.

88. *Id.* at *3.

89. *Id.* at *8.

90. *Id.*

91. *Id.* at *11.

92. 31 U.S.C. § 3730 (e)(4)(A).

93. *Id.*

94. 31 U.S.C. § 3730 (e)(4)(B).

95. *Grynberg*, 389 F.3d at 1038.

96. *Id.* at 1041.

97. *Id.* at 1042.

98. *Id.* at 1051.

relator's allegations were publicly disclosed in a response to a Freedom of Information Act (FOIA) request containing a response to an administrative report.[99] The court determined that all of the material elements of the transaction that formed the basis for the relator's claims were in the public domain.[100] The court further found that the relator's complaint was based upon the publicly disclosed information.[101]

Having determined that there was a public disclosure that formed the basis for the relator's suit, the court next examined whether the relator was an original source.[102] In doing so, the court recognized that the relator bears the burden of proving that he is an original source and he must meet this burden by demonstrating "direct and independent knowledge" marked by the absence of intervening factors and uncompromised by anything, but his own labor.[103] Based on the manner in which the relator investigated and discovered the fraud, for among other reasons, using the FOIA request to obtain information, relator did not satisfy the direct and independent knowledge requirement and was thus, not an original source.[104] The court dismissed his complaint.[105]

The United States District Court for the District of Columbia also addressed these issues this past year.[106] In *Ervin*, the relator filed a complaint alleging reverse false claim as a result of the Department of Housing and Urban Development (HUD) receiving less than it was entitled to for a mortgage note sale.[107] In an earlier Order, the court found that the relator's allegations were based upon publicly disclosed information contained in FOIA requests and newspapers articles, but that relator must provide sufficient evidence during trial that he was an original source.[108]

Having previously determined that the relator's allegations were based upon publicly disclosed information, the court then proceeded to analyze whether the relator was an original source at the conclusion of the trial. In so doing, the court recognized that a relator is an original source if they demonstrate that they have direct and independent knowledge of the fraud and they voluntarily provide the information to the United States Government prior to filing suit.[109]

The company relator discovered information relating to the fraud at issue as a result of the work undertaken for HUD and its experience in the housing arena.[110] As a result, the court determined that the relator had direct knowledge of the information that the complaint was based upon.[111] The court further determined that although

99. *Id.*

100. *Id.* at 1050.

101. *Id.* at 1052.

102. *Id.*

103. *Id.* at 1052–53.

104. *Id.* at 1054.

105. *Id.*

106. United States ex rel. Ervin v. Hamilton Sec. Group, Inc., 370 F. Supp. 2d 18 (D.D.C. 2005).

107. *Id.* at 34–35.

108. *Id.* at 37–38.

109. *Id.* at 38.

110. *Id.*

111. *Id.*

relator buttressed its False Act claims by obtaining material in FOIA requests, its own independent research and analysis brought the alleged fraudulent activity to light.[112] Finally, the court determined that the relator provided information to the Government as it became available before filing its complaint.[113] Thus, relator satisfied the original source requirements of section 3730(e)(4).

In another case, the United States District Court for the Southern District of Texas addressed the original source doctrine in a False Claims Act case filed in the aftermath of tropical storm Allison.[114] In *Farmer*, relator filed a False Claims Act complaint against the City of Houston and the Houston Area Urban League ("HAUL") alleging over billing in connection with a state sponsored repair program.[115] Relator, who had recently repaired her roof, applied for assistance under the City's emergency program to again repair her roof after the tropical storm.[116] The City of Houston selected HAUL to implement the repair program.[117] HAUL inspected the roof and material needed for the repair.[118] In the estimate, HAUL allegedly doubled the amount of material needed to make the necessary repairs.[119] Relator knew there was an overstatement on the amount of material needed for the repair based on the previous work done on her house.[120]

Defendants moved to dismiss the relator's complaint on the basis that there had been a public disclosure and she was not an original source.[121] The court treated the motion to dismiss as a motion for summary judgment because "a challenge under the FCA jurisdictional bar is necessarily intertwined with the merits."[122]

In so deciding the defendant's motion, the court found that the relator's action was based on information gleaned from requests made under the Texas Public Information Act which was a public disclosure.[123] The court then determined that since there had been a public disclosure, relator must satisfy a two-part test to be an original source under the False Claims Act. She must "demonstrate that she has direct and independent knowledge of the information on which the allegations are based and she must demonstrate that she voluntarily provided the information to the Government before filing suit.[124] The court found that relator was an original source due to her investigation as a result of the knowledge she gleaned from the similar repair to roof made years earlier.[125] Thus, the court denied the defendants' motion to dismiss.[126]

112. *Id.* at 39–40.

113. *Id.*

114. *Farmer*, 2005 WL 1155111 at *1 (S.D. Tex. May 5, 2005).

115. *Id.* at *2.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at *8.

122. *Id.* at *8–9.

123. *Id.* at *10.

124. *Id.* at *12–13.

125. *Id.* at *15.

126. *Id.*

The United States District Court for the Northern District of Illinois again addressed the public disclosure bar and the original source exception in a case this last spring.[127] In *Gear*, the relator, a senior resident who also worked as an attending physician during residency hours, alleged that the defendant healthcare provider engaged in double billing where defendants encouraged doctors to work as senior residents and attending physicians during residency hours.[128] Relator alleged that defendants then double billed for their time.[129] In addition, defendants' allegedly engaged in upcoding for certain procedures.[130]

Relator was the resident editor of American College of Emergency Physicians'.[131] During his time as editor, the journal published an article concerning the billing irregularities.[132] Defendants filed a motion for summary judgment arguing that the allegations contained in his complaint were publicly disclosed in the news media and in a General Accounting Report and he was not an original source.[133]

The court determined that the relator's allegations were publicly disclosed.[134] The court further determined that the relator was not an original source since he admitted to never speaking to the Government prior to filing suit.[135] The court dismissed his complaint.[136]

A. The Original Source Exception and the Issuance of a Subpoena

As stated above, under the statute, a court lacks jurisdiction over a False Claims Act case if the relator's complaint is based upon the public disclosure unless the relator was an original source of the publicly disclosed information.[137] For purposes of the False Claims Act, an "original source" is an individual possessing "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 action under this section which is based on the information."[138]

This issue of whether a potential relator voluntarily provided information to the Government before filing suit often arises when the relator receives a subpoena *before* filing a *qui tam* complaint. The United States Court of Appeals for the Third Circuit recently addressed this issue.[139]

127. United States ex rel. Gear v. Emergency Med. Assoc. of Ill. Inc., 2005 WL 991789 at *1 (N.D. Ill. Apr. 13, 2005).

128. *Id.* at *1.

129. *Id.*

130. *Id.*

131. *Id.* at *6.

132. *Id.*

133. *Id.* at *5.

134. *Id.* at *6.

135. *Id.*

136. *Id.*

137. 31 U.S.C. § 3730 (e)(4)(A).

138. 31 U.S.C. § 3730 (e)(4)(B).

139. *Paranich*, 396 F.3d at 326.

In *Paranich*, the relator, a chiropractor, filed a False Claims Act complaint alleging that the defendants fraudulently induced him to file Medicare claims for certain treatments.[140] The relator claimed that the defendants advised him to bill at a higher rate for certain procedures undertaken.[141] Before filing the complaint, the Federal Bureau of Investigation was investigating allegations of over billing for certain procedures.[142] Prior to filing the complaint, the relator was served with a grand jury subpoena in connection with the investigation.[143]

The defendant filed a motion to dismiss because there was a public disclosure of the alleged fraud and relator was not an original source as defined in the False Claims Act.[144] After engaging in a lengthy analysis, the court determined that the relator's allegations were based on publicly disclosed information.[145] Having found such, the Court then analyzed whether the relator was an original source.[146] According to the Court, to satisfy the original source requirement, relator need have direct and independent knowledge of the information that formed the basis for the allegations and must have provided the information voluntarily *before* filing the complaint.[147] The court determined that the relator had direct knowledge of the fraud because of his involvement in the matter.[148] The Court also determined that the relator had independent knowledge of the fraudulent conduct.[149]

However, as a result of receiving a subpoena <u>prior</u> to filing suit and producing approximately seventy boxes of material, realtor did not voluntarily disclose the information prior to filing suit and thus, was not an original source.[150] The court dismissed relator's complaint. It is important to be wary of situations where the relator received a subpoena and provided information to the Government as a result of the subpoena. The *Paranich* Court took a long hard look at the "voluntarily" aspect of the statute where, the relator turned over approximately seventy boxes of documents in response to a subpoena *before* filing suit.

Courts have taken a very close look at the original source exception this past year.[151] It is an issue of considerable significance for the False Claims Act.

140. *Id.* at 328.

141. *Id.* at 329.

142. *Id.*

143. *Id.*

144. *Id.* at 328.

145. *Id.* at 335.

146. *Id.*

147. *Id.*

148. *Id.* at 336.

149. *Id.* at 337–38.

150. *Id.* at 341–42.

151. *See also* United States ex rel. MJ Research v. Applera Corp., 2005 WL 3099647 (9th Cir. 2005) (Relator filed *qui tam* action. The United States District Court for the Central District of California dismissed complaint under Federal Rule of Civil Procedure 12(b)(1) because relator was not an original source. Court of Appeals affirmed because relator did not have direct knowledge of the fraud at issue and thus, was not an original source.).

V. CONCLUSION

As noted above, last year, courts across the country took an extensive look at the public disclosure bar and the original source exception. It is evident from a review of the cases in this article that these issues can surface a in variety of contexts. As we start a new year, those lawyers engaged in False Claims Act practice must be mindful of the myriad of ways in which these issues may appear.

In Their Own Words

Whistleblowing: A Family Experience

WHISTLEBLOWING:
A Family Experience

Robert Collins

Although it is well known that there are great struggles experienced by whistleblowers and their families, ranging from bankruptcy to divorce or worse, all as part of the fallout that nearly always follows the whistleblower's report of wrongdoing, the story is seldom told from a perspective inside a whistleblower's family. Taxpayers Against Fraud Education Fund has given me the opportunity here to share mine.

My father, W. Kay Collins, was a brilliant man who had studied physics and sound engineering with and from the inventor of Dolby stereo and the co-inventor of the transistor, Harvey Fletcher. He was further a student and colleague of Philo Farnsworth—the inventor of television, the electron microscope, the infrared telescope, and the first infant incubator. My father himself, along with a co-worker, invented a remote control system in 1977 to be used by emergency responders to control stop lights at intersections as easily as individuals now change channels on their televisions, thereby eliminating dangerous high-speed accidents when individual drivers fail to hear the siren of approaching responders. After careful thought, however, he concluded that such inventions always have negative consequences when they reach the wrong hands, and therefore, concerned about choosing the greatest good, opted to scrap plans for patenting or marketing the product. Not unexpectedly, within two decades the same product was created by yet a separate inventor and is now in use by many municipalities across the country, and to the great financial reward of its patent holder. But this story, and many like it, illustrates my father's profound intelligence and moral code, and adds deep poignancy to what happened next.

The year following this invention my father became a whistleblower at a major university where he had worked for 18 years, until ultimately he was constructively discharged in 1979 as the "reward" for his integrity. The False Claims Act, in its current form with its enhanced protections for whistleblowers, did not exist until seven years later. And, unfortunately, even if the revised Act had existed, people like my father would likely have not known about it, as, even two decades later a surprisingly small portion of the public is aware of the existence of False Claims Acts or what they are for. And, in this area, we are still failing to adequately inform our citizenry generally.

The University where my father worked from 1961 to 1979 had, in 1978 and 1979 contracted for the construction of a new football stadium, along with purchasing a state-of-the-art (for its day) jumbo-tron television-projecting scoreboard for its basketball arena, and for the purchasing of sound systems for each of these venues, the baseball stadium and the university ballroom. My father knew far more than enough to detect that the equipment the University President himself had signed off on was of the poorest quality, and that this purchase was intentionally throwing away large sums of money that could otherwise have been made available to supplement the tuition of low-income students at the school. It was only thereafter that he learned that

the contractor selling and installing the equipment was a close friend of the University President, Provost and Vice President of Student Affairs. My father, with the help of his immediate boss tried to block the purchase of this merchandise, but to no avail. He went to the Board of Trustees and the Board of Regents, both before the purchase and again after finding out about the quid pro quo between the President et. al, and the contractor. In retaliation, that President and his associates ensured the most tormenting and miserable of working conditions for my father and his boss over the next 4 months, creating so much stress for the two of them that, as this boss was leaving work one afternoon, he collapsed there in the parking lot with a massive heart attack and died. That event left my father as the sole target of all the existing wrath for the next 13 months as everything possible to harass and run him out was attempted, he was finally re-assigned to an "extension" campus as he was increasingly isolated, harassed, and given menial tasks, ending ultimately in his constructive discharge when, for the sake of his family, he chose to resign. As a young boy I did not understand much of what was going on. I only knew that there were some serious problems at work for my dad that were making him angry and irritable all of the time when he had never been like that before.[1]

So, what happened with the sound systems? The one in the university ballroom seemed ok at first, but fell apart quickly and had to be replaced within 16 months. The one in the basketball arena gave continual feedback, words that were spoken never could be correctly "made out" by the audience and it had to be replaced before graduation commencement and convocation. The sound system in the football stadium lasted through the first year, but when Notre Dame came to town for a pre-Conference game the following fall, coaches on both sides were *infuriated* at the "cross-talking" on their new "cordless" headsets. That is to say, when Notre Dame's coach was communicating with his offensive coordinator in the Press Box calling plays, the home team's coach could hear their entire conversations and what plays they were calling and, conversely, Notre Dame's coach could hear everything being said between the home team's coach and *his* offensive coordinator. In a stadium full with 60,000+ fans already seated—members of the Board of Trustees and Regents among them—combined with an echoing sound system, and crosstalk on coaches' headsets . . . all the needed elements were in place for heads to roll for what had happened. Yet my father's was the lone voice that had attempted to prevent all of this. And, ironically, it was that effort for which he had been retaliated against, harassed, and ultimately discharged[2]—for simply attempting to block the purchase of this shoddy merchandise sold at a "padded-invoice price" of more than $1.46 million to the University's Budget.

My father, by this point had lost a very good salary and benefits—including insurance for his family—and yet still had four small children, a mortgage, and a former employer who would not give him a positive recommendation because of his whistle-

1. Not only had my father never been like that before, but even in the midst of all of the economic and physical stress that followed during the 25 years after his discharge, he was never angry and irritable like that again.

2. Interestingly, this University President coordinating the retaliation and discharge resigned the following year. Unfortunately, it came too late to have helped my father.

blowing. With the only alternative being to leave an eighteen-year gap in his employment history—which clearly would have been unacceptable—finding new work now at the age of 40 was next to impossible, and the family was in very dire straits. In fact, for multiple years of the decade that followed our family continued below the federal poverty line and would have qualified for food stamps and welfare, but our father's pride, whether for good or bad, never allowed for that.

My mother, who had previously been a stay-at-home mom, was no longer able to volunteer at our elementary school, as she now had to go back to work. Although she had other talents and training, in order to obtain now desperately needed health insurance for the family, she applied for and obtained work as a full-time cashier in the local hospital's cafeteria. This job required her to get up every morning between 4:00 and 4:30 am to arrive in time at work to assist with the food service and cafeteria preparations before doctors and employees began arriving for the breakfast rush early each morning. She has diligently worked at this job now for nearly twenty-five years with rarely ever a complaint. Yet, the idea that she had to take on such a schedule or such work always pained my father, as men of his generation measured much of their self-worth by their ability to provide adequately for their family's needs and comforts on their own. This became a source of great depression for my father, and our family's economic condition was the only thing I ever heard my parents argue about—and yet those arguments came often during that time and at one point nearly brought a separation between them.

My father picked up part-time work wherever he could while trying to get a business he was starting off the ground in 1980.[3] This was initially a recording and television repair business that later branched out into an independent contracting business installing and repairing audio/visual systems and equipment in schools and other government buildings and corporate offices. Because of our circumstances at the time, my father also didn't have money to hire employees, and yet always had to compete against bids by businesses that reduced their costs by doing shoddy work or hiring illegal immigrants for lower than minimum wage. So my brother and I as elementary school children became our father's employees, along with us picking up newspaper routes and lawn-mowing jobs to be able to contribute to the family's finances. At the ages of eight and nine we began crawling through schools' rough rocky tunnels, under asbestos-laden pipes, through, what to us were, creepy attics fighting off mice, spiders and wasps nests to pull audio and video cables to their needed destinations. Those were awfully lean times, and, when other kids we knew spent their afternoons playing basketball, going to movies, or having extra time for homework, my brother and I spent afternoons throughout elementary school, junior high and high school working in this manner as our family continued to struggle financially, and as our sisters also picked up baby-sitting jobs and newspaper routes to pitch in to the family budget and would also do work for my dad as availability permitted.

3. Several independent financial analysts in 1998 and 1999 determined 1980 and 1981 to have been the worst years in the 20th century for a self-employed or small business to have been launched—based on the number of failed businesses started in those two years as compared to any other years of the century.

When I was seventeen my father obtained seasonal employment at Disneyland where he soon helped to create the dramatic laser-water show "Fantasmic"—a *major* nighttime draw for visitors to the Park in the "Peak Seasons." Yet, because my father's work with Disney was seasonal, and because my mother had obtained by that time both benefits and at least some level of seniority at her job, our family never moved to California but instead remained where we were—separated from Dad by nearly 1,000 miles for several months of each year. This separation was particularly hard on Dad, but especially when his employer would not allow him to come home when Mom became quite ill as a result of multiple breast and uterine tumors that were ultimately diagnosed and surgically removed. Yet, to have Dad unable to come home for the surgery while Mom was so sick was an experience that was not only difficult for both of them, but for everybody, and forced each of the kids to grow up and deal with adult-sized problems quickly.

Eight years away from his family during summers and holidays finally took their toll and Dad opted to just stay home for good and try to get by with the income from his business. Yet by this time each of his children were either married or in college and he now ended up typically having to do the work of three people by himself—a difficult task as age catches up with a person, and yet finances required that he continue.

Ironically, during this time, he witnessed yet further fraud while performing the installation of audio/visual equipment as government customers were over-billed—the State School Board, School Districts, State Dept. of Public Safety, State Public Employee Retirement System, and even the U.S. Forest Service and the U.S. Postal Service—by his supplying general contractor who billed the government separately at a marked-up rate of nearly 235 percent.

Even with such a long history of negative experiences while trying to stop fraud against the government, my father was one who would have fought here again if he had known how. But there neither was, nor yet is, a state False Claims Act in his state, and he did not know about the Federal False Claims Act or the process for helping to recover those funds for the Forest Service and the Postal Service until the last two months of his life, long after the statute of limitations had already expired.

The twenty-five years of my father's life after being discharged from that university as a whistleblower were spent working twelve- to sixteen-hour days—typically arising at 4:30 a.m. to commute long distances and carry out hard manual labor. Usually after all business expenses were factored in he came away making no more than minimum wage, just trying to survive and help his kids with school and living expenses where he could. And yet, with a final twist of irony, as a result of the family's economic hardship, each of his children required more time to complete college than is average—causing even his children lost professional income as a long-term result of his earlier discharge. The years of unbelievable exhaustion, fatigue, stress, and worry over finances took their toll and he ultimately suffered a very sudden and premature death in the Summer of 2004 when his heart gave out while preparing to begin yet another job.

Being a whistleblower cost my father dearly—not only emotionally and monetarily[4], but even in longevity.[5] Yet for me, the impact of his legacy of integrity has motivated sacrifice and even delays of other goals and desires in order to complete what has been necessary to draft and bring about the enactment of a False Claims Act in my own state, which will help to protect whistleblowers like my father—and the families they raise—from experiencing the travails our family endured, simply for trying to stop waste and fraud against consecrated government funds.

Harvard's Moral/Ethicist, Lawrence Kohlberg, defined the moral elite as those few in society who reaches the highest (6th) level of moral development. This level consists, in part, of those willing to sacrifice any personal need or comfort in order to *not* jeopardize their integrity, as well as possessing a respect for the dignity and needs of others, often above the needs of themselves. Plato and Aristotle, in theoretically engineering the optimal society, determined that in order for a Society to survive it must be either led or anchored by the moral elites; and that, consequently, the republic and society have a vested interest in protecting and sustaining their moral elites, even when doing so necessitates sacrifice.

This is, and can be, at least a part of the function of whistleblower and qui tam laws. This is the work nationally that defines Taxpayers Against Fraud, its Education Fund, and the *Qui Tam* Attorney network; and it is their work, combined with such legislative efforts as Senator Grassley's, that are helping to protect not only the Treasury, but also our society, by sustaining our own moral elites and easing the suffering of families who sacrifice everything in their lives by simply choosing to do the right thing. Each false claims case filed represents such a family, and I appreciate the opportunity here to put a real face on the family, and experiences, of each client-family that TAF members represent.

4. It has been explained that a whistleblower making $53,000 per year in salary and benefits ten years before retirement risks $530,000 plus their pension to help the government recover what it lost through fraud. If this model is to be used, my father lost roughly $1.8 million in lifetime salary and benefits in his unsuccessful attempt to save the University $1.46 million. But my father would not look at it this way. To him it would be solely a matter of integrity and each citizen's civic responsibility to correct the wrongs they see, particularly in areas of fiscal or social integrity. He did not see himself as having sacrificed $1.8 million, he instead saw himself as having *not* sacrificed his integrity or the example he had set for his children—something of far greater value to him than money.

5. While my father's parents lived well into their 80s, these many years of stress and exhaustion resulted in cutting *his* life short at the age of 63.

Legal Ethics

Getting the Winning Edge:
Appreciating the Permissible Boundaries,
in *Qui Tam* and Other Litigation Contexts,
for Contacting Your Adversary's
Current & Former Employees

GETTING THE WINNING EDGE: Appreciating The Permissible Boundaries, in *Qui Tam* and Other Litigation Contexts, For Contacting Your Adversary's Current & Former Employees

*Dean S. Rauchwerger, Shawn K. Jones & Allison K. Baten**

> *Perseverance is a great element of success. If you knock long enough and loud enough at the gate, you are sure to wake up somebody.*
>
> —Henry Wadsworth Longfellow

To say the least, litigation is frequently competitive, hard-fought and fraught with many hurdles. Developing a winning case requires that you seek the edge at every step in the journey. Big opportunities for marshalling critical testimony and evidence exist by pursuing permissible *ex parte* contacts with your adversary's current and former employees. Below is a general discussion of the ethical boundaries and practical tips for effectively contacting and interviewing such witnesses.

The first step is to understand the proscriptions of ABA Model Rule 4.2 of the Rules of Professional Conduct, ABA Rules of Conduct, Disciplinary Rule 7-104,[1] state equivalents and your jurisdiction's applicable case law. Model Rule 4.2, Communication With Person Represented by Counsel, provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person[2] the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[3]

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1. This version of the Rule—actively serving as a model for the ethics rules of most states between 1969 and 1983—is still in place in some jurisdictions. It is entitled "Communicating With One of Adverse Interest" and states that "(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

2. The newest version of the ABA Rule reaffirms the ABA's decision in 1995 to replace the 1983 Rule's reference to a "party" with the more inclusive reference to a "person"; thus, the choice for states became one where they could choose between one that more broadly prohibits communication with a represented "person" or one that prohibits communication with a represented "party." Some decisions bear on a state's view of the desired breadth of that jurisdiction's no-contact rule. *See also* Informational Report of the Standing Comm. on Ethics & Prof'l Responsibility, 120 Reports of the Am. Bar Ass'n 92 (1995) (House's action was in response to a recommendation from the Ethics Committee, which proposed a change to conform the text of the rule to its opinion that the reference to "party" in the 1983 Rule should be interpreted to cover anyone who was represented by counsel in a matter, not just those who were parties to a lawsuit or transaction; *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995)).

3. Model Rules of Prof'l Conduct (2004), *at* http://www.abanet.org/cpr/mrpc/model_rules.html.

Although Model Rule 4.2 was amended in 1995 to substitute "person" in the place of "party," *supra* note 2, many courts find that the rationale for this substitution was to show the rule's applicability to circumstances pre-petition as well as those after a complaint is filed.[4] Despite the ABA Model Rule's revision to "person" in 1995, many states' rules still retain their pre-1995 reference to "party."[5] Additionally, in line with the body of attorney-client privilege case law, various courts have observed that any "protection of privilege extends only to *communications* and not to facts" that may have been communicated.[6]

A. In Search of the Talkative Employee Witness: Contacting Current Employees

Certain employees of a represented corporation or other organizational entity are considered to be represented by the corporation's or organization's lawyer for purposes of Rule 4.2 and are off-limits.[7] The hook, however, is that a corporation or organization may not assert blanket representation for all of its constituent employees[8] or request "across the board noncooperation" by its employees.[9]

In the case of current employees, rules regarding *ex parte* contacts range from "blanket" bars, to the "scope of the employment" test, the "managing-speaking-agent" test and its variant, the "alter-ego" test, the "control group" test, and the "case-by-case

4. Penda Corp. v. STK, LLC, No. Civ. A. 03-5578, Civ. A. 03-6240, 2004 WL 1628907 (E.D. Pa. 2004) (rule applies to pre-complaint contacts); *see also* United States v. Grass, 239 F. Supp. 2d 535, 540–41 (M.D. Pa. 2003) (although Pennsylvania utilizes the "party" version of rule 4.2, the court found that the rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question based on the official comment to the rule); Inorganic Coatings, Inc. v. Falberg, 926 F. Supp. 517, 519–20, 521 (E.D. Pa. 1995) (finding that *ex parte* communications with a person the attorney knows to have representation in a matter and is likely to be a named party-defendant in the resultant litigation, despite the contact being within the pre-petition timeframe, are prohibited by Rule 4.2).

5. *See, e.g.*, Stahl v. Wal-Mart Stores, Inc., 47 F. Supp. 2d 783 (S.D. Miss. 2000); *see also, e.g.*, Kan. S. Ct. R. 226: 4.2 (1999); Wis. S. Ct. R. 20:4.2; Cal. R. of Prof'l Conduct 2-100 (2005); Me. Bar R. 3.6(f); Mich. R. Prof'l Conduct 4.2 (*see* Smith v. Kalamazoo Opthalmology, 322 F. Supp. 2d 883 (W.D. Mich. 2004)); *but see* S.D. Rules of Prof'l Conduct R. 4.2 (identical to the amended ABA Model Rule).

6. Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000), *quoting* Upjohn Co. v. United States, 449 U.S. 383, 395–96 (1981) and *citing* Valassis v. Samuelson, 143 F.R.D. 118, 123 (E.D. Mich. 1992).

7. *See, e.g.*, Groppo v. Zappa, Inc., 03-CV-10384-MEL, 2005 U.S. Dist. LEXIS 5651, at *3–4 (D. Mass. 2005) (examining the Massachusetts Supreme Judicial Court rule that "only certain kinds of current employees properly fall within the prohibitions of [Rule 4.2]: those agents or employees (1) who exercise managerial responsibility in the matter, (2) who are alleged to have committed the wrongful acts at issue in the litigation, or (3) who have authority on behalf of the organization to make decisions about the course of the litigation," and holding that *ex parte* contact is prohibited with the principal of the defendant corporation (and Captain of the vessel where the injury occurred) and the employee who allegedly caused the injury).

8. *See* Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 1, 6 (D.D.C. 2004) (holding that counsel for defendant may not use their concomitant right to withhold their consent as a means to prevent plaintiff's counsel from interviewing present or former employees); Michaels v. Woodland, 988 F. Supp. 468 (D.N.J. 1997) (holding that an employer cannot unilaterally impose its counsel's representation on all employees); Harry A. v. Duncan, 330 F. Supp. 2d 1133 (D. Mont. 2004) (holding a school district's blanket letter to its employees advising that the district's counsel represented each of them did not create a lawyer-client relationship for the purposes of the anti-contact rule, nor would individual employee's failure to respond and opt out constitute manifestation to assent); Terra Int'l, Inc. v. Miss. Chem. Corp., 913 F. Supp. 1306, 1319–21 (N.D. Iowa 1996) (rejecting automatic representation by virtue of an employee's employment in favor of examining an employee's nature or status of employment).

9. G.C. Hazard, Jr. & W. Hodes, The Law of Lawyering § 38.7 (3d Ed. 2005-2 Supp.).

balancing" test.[10] While a small minority of jurisdictions have imposed a blanket prohibition on contact with current managerial employees of an organization,[11] in light of Comment [7] to Model Rule 4.2, as amended in 2002, more jurisdictions are considering the articulated formula for assessing the employee's role and authority to determine which employees are considered off-limits.[12] Comment [7] explains that *ex parte* communications are prohibited with an employee[13] who "supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Thus, those current employees tied to the corporate attorney-client relationship, who can bind the company or whose acts and/or omissions give rise to vicarious liability, are deemed off-limits. The wording of the comments to the newest version of Model Rule 4.2 implies a current relationship (by replacing "person" with "constituent") and thus courts may be more likely to find the no contact rule applicable to current employees of a certain significance than to former employees.

10. Brown v. St. Joseph County, 148 F.R.D. 246, 253–54 (N.D. Ind. 1993) (referencing the various tests utilized by courts, applying the test embodied in the official Comment to Rule 4.2, and holding "that a lawyer representing a client in a matter adverse to a corporate party may, without violating Rule 4.2, communicate about the subject of the representation with an unrepresented current employee, provided that the employee does not have the managing authority to speak for and 'bind' the corporation, is not an employee whose acts or omissions in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability, and is not a person whose statement may constitute an admission on the part of the corporation").

11. *See* Bobele v. Super. Ct., 199 Cal. App. 3d 708, 714 (1988) (finding the ethical rule prohibits contact with any current employees of the defendant corporation and any former employees who remain members of the corporation's "control group" as defined in *Upjohn*); Lang v. Reedy Creek Improvement Dist., 888 F. Supp. 1143 (M.D. Fla. 1995) (holding that *ex parte* communications with current employees was impermissible absent prior consent of the employers' counsel or the court because of the increased risks of prejudice to the employers that would arise, the plain language of the ethical rules, and the employers' opposition to such contact); *see also* Pub. Serv. Elec. & Gas. Co. v. Assoc. Elec. & Gas. Ins. Servs. Ltd., 745 F. Supp. 1037 (D.N.J. 1990) (extending a blanket prohibition against contacting current employees to former employees as well when holding erroneous an order which provided that defendant's counsel could contact former employees of the plaintiff only after notifying plaintiff corporation and employee in advance and finding that the rules of professional conduct prohibited any informal contact with plaintiff's former employees).

12. *See, e.g.*, Snider v. Super. Ct., 113 Cal. App. 4th 1187 (2003) (providing an exhaustive analysis of what kinds of employees should be off-limits); Patriarca v. Ctr. for Living & Working, Inc., 778 N.E.2d 877, 884 n. 10 (Mass. 2002) (citing to Comment [7] in holding that all current and former employees were not represented for purposes of rule barring *ex parte* contact); United States v. W.R. Grace, No. CR 05-07-M-DWM, 2005 WL 3149342 (D. Mont. 2005) (analyzing Comment [7] when granting the government's motion for an order authorizing *ex parte* contact with former employees of defendant); Clark v. Beverly Health & Rehab. Serv., Inc., 797 N.E.2d 905, 911 n. 10 (Mass. 2003) (considering the language of proposed Comment [7] and holding that the no-contact rule of professional conduct did not prohibit private contacts between counsel and defendant's former employees); *see also* Palmer v. Pioneer Inn Assoc., Ltd., 59 P.3d 1237, 1242 (Nev. 2002) (noting that the revisions to the comment were meant "to 'clarif[y] application of the Rule to organizational clients'" and acknowledging that the ABA rules are guidance, but adopting the managing-agent speaking test as its preferred approach).

13. Comment [7] uses the term "constituent" - Rule 1.13 uses the term to refer to various persons with whom a lawyer may interact while representing an organizational client, some of whom will be "duly authorized" to act on behalf of the organization in its status as the lawyer's client. As used in Rule 1.13, "constituent" includes corporate directors, officers, employees, shareholders, and "positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizations clients that are not corporations." Model Rules of Prof'l Conduct R. 1.13 cmt. [1] (1995).

The judicial goal is to ensure that a corporation's legal rights, including the attorney-client privilege and work product doctrine, are protected.[14] Still, the fact that a current member of an organization may possess privileged information or general information about the entity does not in itself make an *ex parte* contact with that individual unethical under Rule 4.2. Some courts have held that in order to be subject to the no contact rule, an employee must be a member of the "control group"—for example, those employees who manage and speak for a corporation.[15] In contrast, a small but important minority of courts have barred attorneys from interviewing current employees of a corporate defendant without consent of opposing counsel whenever the interview concerns matters within the scope of the employee's employment based on the structure of Federal Rule of Evidence 801(d)(2)(D), which permits admission into evidence against a corporation its employee's out-of-court statements concerning matters within the scope of the employee's employment.[16] Still other courts have declined to create or apply any general rule defining categories of current employees who may be contacted, instead adopting intermediate case-by-case fact-specific balancing tests in which one party's need to gather information informally is balanced against the other party's need for effective representation. The results of this test generally favor broad access to witnesses, while requiring some procedural safeguards.[17] The key to opening the door to *ex parte* contacts is understanding how the ethical rules apply, the governing jurisdiction's law and the appropriate practical steps to follow.

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14. *See* Orlowski v. Dominick's Finer Foods, Inc., 937 F. Supp. 723, 728–31 (N.D. Ill. 1996) (holding that "not all employees with supervisory or manager-type positions, or titles, fall into the category of 'managerial' employees" for purposes of Rule 4.2 and allowing contact with certain employees but barring any discussion of privileged information).

15. *See, e.g., Upjohn*, 449 U.S. 383; Wright v. Group Health Hosp., 691 P.2d 564, 566 (Wash. 1984) (holding that employees who do not have managing authority sufficient to speak for and bind the corporation are not subject to the "no contact" rule).

16. *E.g.* Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) (relying heavily on the admission of an employee being used against an employer for its rationale, the court barred *ex parte* contacts with the railroad's current employees, finding them "represented persons" under Rule 4.2); Chambers v. Capital Cities/ABC, 159 F.R.D. 441 (S.D.N.Y. 1995) (noting that unsupervised *ex parte* interviews conducted by adversary's counsel with current employees is likely to produce employer-employee distrust with unfavorable implications for the employee and difficulty in determining whether confidential information was revealed; also holding that current employees should not be interviewed *ex parte* but that if they are, only nonmanagerial personnel); *Lang*, 888 F. Supp. 1143; *Terra Int'l*, 913 F. Supp. at 1319–21 (noting the validity of the argument against allowing *ex parte* communications with current employees of a nonmanagerial nature based on the possibility of admissions against the corporation but failing to reach that issue as Terra obviated the need by offering certain employees for *ex parte* contact); *but see* EEOC v. Ill. Dep't of Employment Sec., 6 F. Supp. 2d 784, 789 (N.D. Ill. 1998), citing *Orlowski*, 937 F. Supp. at 730 (*Ill. Dep't of Employment Sec.* notes that *Orlowski* stands for the proposition that a party can either conduct informal interviews with corporate defendant's employees or use statements from these individuals at trial, which would be admitted under Rule 801(d)(2)(D), but a party cannot do both of the above because an employee cannot simultaneously be an agent under Rule 801(d)(2)(D) but not an agent under Rule 4.2).

17. *See, e.g.,* NAACP v. Florida, 122 F. Supp. 2d 1335, 1341 (M.D. Fla. 2000) (holding that plaintiffs and their counsel may conduct *ex parte* communications with current employees under guidelines including, but not limited to: (1) not interviewing "managerial" or "control group" employees without permission of defendant's counsel; (2) identifying themselves immediately upon contact, their role and purpose of the contact; (3) advise the current employee to avoid disclosure of privileged material; (4) do not attempt to solicit privileged information; and (5) terminate the conversation should it appear that the current employee may reveal privileged matters); B.H. v. Johnson, 128 F.R.D. 659, 661 (N.D. Ill. 1989) (allowing plaintiffs to conduct interviews of agents or servants of defendant and offering such statements in evidence without calling the persons as witnesses, but not permitting plaintiffs to use such informally gathered evidence obtained from agents, who were not a "party" for purposes of the Model Code of Professional Responsibility DR 7-104, as admissions of party-opponents); PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118, 122 (W.D. Pa. 1990) (allowing contact with the employee subject to counsel providing the employee, and instructing him to read, a copy of the court's memorandum and thereafter avoiding the disclosure of privileged matter and advising the employee that he may not disclose any prior communication between himself and corporate counsel).

Bottom line—proceed with caution before contacting a current employee of an opposing party and, generally speaking, diligently observe the ground rules:

- Key points:

  a. Avoid speaking with current employees who regularly consult with the organization's lawyer regarding the matter;
  b. Avoid speaking with current employees who have the authority to obligate the organization with respect to the matter; and
  c. Avoid speaking with current employees whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

- If you contact a current employee:

  a. Do not use methods of obtaining evidence that violate the corporation's legal rights; and
  b. Do not probe into areas subject to attorney-client privilege or work-product doctrine.

- Preliminary questions should cover:

  a. What is your status at the organization?
  b. Are you represented by counsel?
  c. Have you spoken to the organization's counsel concerning the matter at issue?
  d. Evaluate whether the employee witness was personally involved in the underlying events that may give rise to the employer's vicarious liability for the employee's acts and/or omissions, imputable to the employer.

B. In Search of Burned Bridges: Contacting Former Employees

The majority of courts, including those of at least thirty states, allow lawyers to interview *ex parte* all former employees, including managers, of corporate parties as former employees are no longer agents, cannot bind or speak for the organization, and their statements cannot be introduced as admissions of the organization.[18] Professor Geoffrey C. Hazard Jr., in the treatise *The Law of Lawyering*, keenly sums up the gist of

18. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. Nos. 95-393 and 91-359 and numerous court decisions have held that an attorney may communicate *ex parte* with unrepresentative former employees of a corporate party. *See, e.g.,* EEOC v. Dana Corp., 202 F. Supp. 2d 827 (N.D. Ind. 2002); ABA Formal Ethics Op. 95-396 (1995) (no blanket ban against contact); Utah Ethics Op. 04-04 (2004) (former employee cannot be considered a representative of an organization or a member of the control group); *See* Aiken v. Bus. & Indus. Health Group, Inc., 885 F. Supp. 1474 (D. Kan. 1995) (rejecting the "management-speaking agent" test and adopting a bright-line rule allowing lawyers to interview *ex parte* all former employees of corporate parties); *Infosystems*, 197 F.R.D. at 306 (finding that the general rule is that "communications with a former employee of the client corporation . . . should be treated no differently from communications with any other third-party fact witness" while noting that "privileged communications which occur during the period of employment do not lose their protection when the employee leaves the client corporation"); *Clark*, 797 N.E.2d 905; Cont'l

the rationale for rejecting the no contact framework for former employees: "Speaking with a former employee therefore does not do damage to the policy underlying Rule 4.2—undercutting or 'end-running' an ongoing lawyer-client relationship."[19] The ABA Committee cautions that when communicating with such persons, counsel must be careful not to induce the former employee to violate any attorney-client privilege that the former employee may have incurred, or been privy to, during the course of his or her former employment.[20] Counsel must also comply with ABA Model Rule of Professional Conduct 4.3, requiring the attorney to identify the nature of his or her role in the matter for which counsel is contacting the person. Specifically, Rule 4.3 requires that the attorney identify his or her client and that the client is an adverse party to the unrepresented person's former employer. One must also ensure that the former employee is not represented by his or her own counsel or by the former employer's counsel.[21]

Ins. Co. v. Super. Ct., 32 Cal. App. 4th 94 (1995) (holding that *ex parte* contacts with former employees who were not being represented by the corporation's counsel were not prohibited by California Rule of Professional Conduct 2-100 and noting that "[s]everal problems inhere in an approach that prohibits *ex parte* communications with former employees of a corporate adversary": (1) contacts with former employees do not end-run around protections afforded by the corporate attorney-client relationship since the former employee is not involved in the corporation's attorney-client relationship; (2) former employees are no longer agents of the corporation and cannot bind the corporation as evidentiary admissions; and (3) blanket prohibition on contacting former employees unduly and unnecessarily impedes the flow of information and increases the cost of litigation (much like the prohibition against *ex parte* contacts with current employees)); Centennial Mgmt. Servs., Inc., v. Axa Re Vie, 193 F.R.D. 671 (D. Kan. 2000) (holding that Rule 4.2 is inapplicable to the context of contacting former employees); *see also*, *Bobele*, 199 Cal. App. 3d at 713–14 (noting that a former employee is not an employee, but a third-party witness and "fair game" for opposing counsel because they are not considered "parties" for the purposes of the rule but also commenting that former employees who remain members of the corporation's "control group" would be off-limits); *Valassis*, 143 F.R.D. at 123 (a former employee is no longer an agent of the company); Polycast Tech. Corp. v. Uniroyal Inc., 129 F.R.D. 621 (S.D.N.Y. 1990) (corporation cannot barricade former employees against *ex parte* contacts); H.B.A. Mgmt. Inc. v. Estate of Schwartz, 693 So. 2d 541 (Fla. 1997) (when the employer-employee relationship is dissolved, Rule 4.2 no longer applies); Humco Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000) (former employee is no longer under company's control, in position to speak for it or make admissions on its behalf); Smith v. Kan. City S. Ry. Co., 87 S.W.3d 266 (Mo. Ct. App. 2002) (rejecting blanket prohibition against contacting former employees); FleetBoston Robertson Stephens Inc. v. Innovex Inc., 172 F. Supp. 2d 1190, 1195 (D. Minn. 2001) (rule is not violated where counsel interviewing former managerial employee did not solicit, and employee did not relate, any privileged information); *Orlowski*, 937 F. Supp. at 728 (holding that former employees, including former managers, are not encompassed by Rule 4.2 and may freely engage in communications with plaintiff's counsel regarding all information except for privileged information to which they were privy during their employment); Cram v. Lamson & Sessions Co., 148 F.R.D. 259, 266 (S.D. Iowa 1993) (finding *ex parte* communications with former employees permissible under Rule 4.2 even if damaging information may arise); Dubois v. Gradco Sys. Inc., 136 F.R.D. 341, 346 (D. Conn. 1991) (finding *ex parte* interviews with former employees of opposing party permissible under Rule 4.2); *Smith*, 322 F. Supp. 2d at 888–89 (holding that "[a] majority of courts that have considered the issue have held that Rule 4.2 [of the Michigan Rules of Professional Conduct] does not bar *ex parte* communications with an adversary's former employees who are not themselves represented in the matter."); P.T. Barnum's Nightclub v. Duhamell, 766 N.E.2d 729, 733 (Ct. App. Ind. 2002) (holding that a lawyer may have *ex parte* contact with a corporate party's former employees and allowing such contact with defendant's former general manager with no restrictions).

19. G.C. Hazard, Jr. & W. Hodes, The Law of Lawyering § 38.7 (3d Ed. 2005-2 Supp.), citing ABA Formal Op. 91-359 and Formal Op. 95-396, 11 Law. Man. Prof. Conduct 226 (1995); *see also* Carnival Corp. v. Romero, 710 So. 2d 690, 692–94 (Fla. App. 5th Dist. 1998) (no violation to hire opponent's former employees as expert witnesses or trial consultants where they were not employed by the adversary at the time of the incident giving rise to the lawsuit, neither were high-ranking, managerial employees, and it was not shown that either had access to any confidential or privileged attorney-client or work-product doctrine information).

20. ABA Formal Op. 91-359.

21. *See ABA/BNA Lawyer's Manual on Professional Conduct*, § 71:313.

Some courts have adopted an intermediate approach to determining the propriety of contacting former employees. For example, in 1998, the District Court for the Eastern District of Pennsylvania explained that the middle ground included:

> [an] assessment [that] would depend upon weighing such factors as the positions of the former employees in relation to the issues in the suit; whether they were privy to communications between the former employer and its counsel concerning the subject matter of the litigation, or otherwise; the nature of the inquiry by opposing counsel; and how much time had elapsed between the end of the employment relationship and the questioning by opposing counsel.[22]

The court noted that the goal of weighing these factors was to establish whether there was a substantial risk that the *ex parte* communications will delve into privileged matters; if so, then former employees should be given appropriate notice against *ex parte* communications with opposing counsel.[23] Additionally, a few courts have held that Rule 4.2 prohibits *ex parte* communication with former employees whose acts or omissions in connection with the matter may be imputed to the corporation, or who had access to corporate confidences.[24]

Other courts have disagreed on the rationale to support allowing open-access to former employees and the applicable boundaries. For instance, a Louisiana district court identified a three-part policy-based rationale to support its decision:

> 1. Rule 4.2's policies do not justify exclusion of former employees from discovery, and the flow of information, even if harmful, should only be stopped to preserve attorney-client privilege;
>
> 2. Former employees are probably not included in the Rule; and
>
> 3. Since former employees do not qualify as agents of the corporation, they do not fall within the imputation language of Rule 4.2.[25]

However, that rationale was called into question by a Maryland court decision that same year, on unique facts, where the court held it was proper to disqualify a lawyer for

22. Spencer v. Steinman, 179 F.R.D. 484 (E.D. Pa. 1998); *see also, e.g.*, Olson v. Snap Prod., Inc., 183 F.R.D. 539, 544–45 (D. Minn. 1998) (adopting a flexible approach by recognizing that the underlying policy of Minnesota Rules of Professional Conduct 4.3 and 4.4 is "prohibiting an attorney from unfairly taking advantage of unrepresented parties when acting on behalf of a client, while still allowing leeway for the proper search for truth," and adopting a flexible analysis of Rule 4.2 noting that the key factor in evaluating the propriety of a lawyer's contact with a former unrepresented employee of an adverse party is the likelihood that privileged information will be disclosed to an opponent in litigation).

23. *Spencer*, 179 F.R.D. at 491.

24. *See, e.g.*, Lang v. Super. Court, 826 P.2d 1228, 1233–35 (Ariz. Ct. App. 1992) (holding that attorney was prohibited from contacting former employee of corporate party, which is represented by counsel, if: (a) the acts or omission of the former employee gave rise to the underlying litigation; or (b) the former employee has an ongoing relationship with the employer in connection with the litigation).

25. Contact with former employees is generally acceptable but counsel must not delve into areas protected by attorney-client privilege. Barron Builders & Mgmt. Co. v. J & A Air Conditioning & Refrigeration, Inc., 1997 U.S. Dist. LEXIS 17407 (E.D. La. 1997) (basing its decision on the reasons and considerations utilized by the court for *In Re* Torch, Inc., 1996 U.S. Dist. LEXIS 5053 (E.D. La. 1996).

engaging in *ex parte* contacts with a former employee (a lawyer) who had been exposed to confidential client information during the course of his representation of other interested parties.[26] The Maryland court went on to find that the disqualified counsel knew or should have known that the former employee had been exposed to confidential information.[27] Federal courts in Maryland have, however, limited the importance of this "confidential client information" consideration to only information concerning the case sub judice.[28] Yet other courts have concentrated on the distinction between a "party" and a "non party" and the broader language regarding a "person" represented by counsel.[29]

While the majority of courts allow lawyers to interview *ex parte* all former employees, subject to certain precautions, the lessons to be learned regarding contacting former employees are to know the ins and outs of the respective rules of the applicable jurisdictions. Although two rules could be verbatim the same, the courts in those jurisdictions may interpret them differently based on precedent, an ethics committee's written or inferred intent, or any other varied reasons. Ultimately, it is paramount to appreciate the governing laws of the applicable jurisdictions to ensure adherence to the appropriate prophylactic measures designed to be on safe ground, as noted *supra* regarding Rule 4.3.

C. In the *Qui Tam* Context

Although the ethical issue of communicating with former or current employees of an adversary often appears in the False Claims Act ("FCA")[30] arena, not many courts have dealt directly with the issue in published decisions. Three illustrative cases, out of District Courts for the Eastern District of Missouri, the Northern District of Ohio and the Eastern District of Pennsylvania, have grappled with the issue of *ex parte* contacts with current and former employees of an adversary in the FCA context.

26. Zachair, Ltd. v. Driggs, 965 F. Supp. 741 (D. Md. 1997).

27. *Id.* The Model Rules define "knows" as "actual knowledge" rather than "reasonably knows or should know;" thus, a lawyer should not be faulted (or worse, sanctioned), for interviewing current or former employees not yet known to come within the rule's prohibitions. Model Rules of Prof'l Conduct, *Terminology* (1995). However, the lawyer must terminate the interview when he or she learns through inquiry, such as that suggested above, that the employee falls within a prohibited category. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) (no bar to communicating with represented person absent actual knowledge of representation); *See also* Gaylard v. Homemakers of Montgomery, Inc., 675 So. 2d 363 (Ala. 1996) (no sanction where no litigation had commenced and no reason to believe that potential defendant had retained counsel).

28. For example, the court in Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956 (D. Md. 1997), held that the *ex parte* contact rule did not apply to a former employee whose access to trade secrets and confidential information was not related to the claim at hand; *See also* Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996).

29. *See, e.g.*, State ex rel. Charleston Med. Ctr. V. Zakaib, 437 S.E.2d 759, 762 (W. Va. 1993) (holding that the no contact rule only applies to parties and since former employees are not "parties," they are not subject to the rule unless they have secured counsel for legal advice); *See also* Dent v. Kaufman, 406 S.E.2d 68 (W. Va. 1991).

30. The False Claims Act, 31 U.S.C. 3729–3733, generally prohibits certain acts designed to defraud the federal government. A private person may bring a civil action, called a *qui tam* action, for a violation of the act for him or herself and the U.S. government. The person is called the relator, and the Act provides that his or her complaint not be served on the defendant, and be filed and kept under seal for 60 days while the government decides whether to intervene and take over the prosecution of the action. After the government decides whether to intervene, the complaint is unsealed and served on the defendant.

1. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*

In 1997, the District Court for the Eastern District of Missouri dealt with the ethical parameters of contacting an adversary's current and former employees in *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*[31] The issue arose in the context of a *qui tam*[32] case in which the government intervened and sought information from current and former employees of defendant McDonnell Douglas Corp. regarding overcharging for work performed on Air Force and Navy aircraft. The *ex parte* contacts at issue involved a questionnaire issued by the Inspector General of the Department of Defense at the direction of the Justice Department.[33] That questionnaire asked whether the employees had ever engaged in mischarging of labor and, if so, at whose direction.[34] The key discovery motion before the court was defendant's request for a protective order: (1) barring the Government from contacting its current employees *ex parte* about the subject matter of the litigation; (2) requiring the Government to give defendant ten days notice before contacting any former employee concerning the subject matter of the action; (3) requiring the Government to provide defendant with a list of all employees it had contacted *ex parte* since intervening in the *qui tam* action; (4) requiring the Government to provide defendant with all information obtained from its employees; and (5) barring the Government from using any documents or information obtained through *ex parte* contacts.[35]

McDonnell Douglas argued that the Government's *ex parte* contacts violated Missouri Supreme Court Rule 4-4.2 (fashioned after ABA Model Rule 4.2), which states that "a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[36] According to the comment to Missouri Supreme Court Rule 4-4.2, when an organization is involved, a lawyer is prohibited from communicating with a person with managerial responsibility in the organization, and with any other person whose act or omission may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission by the organization.[37] The Government countered that Rule 4-4.2 does not encompass all employees whose conduct may be imputed to the organization.[38] The court rejected the Government's position as inconsistent with the plain language of the rule and its comment.[39]

31. United States ex rel. O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288 (E.D. Mo. 1997).

32. *Qui tam* comes from the Latin expression *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which in translation means "who brings the action for the king as well as for himself."

33. *O'Keefe*, 961 F. Supp. at 1291.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1292.

39. *Id.* (the court also found that Department of Justice attorneys are bound by Missouri Rules of Professional Responsibility).

The *O'Keefe* court found that, under the FCA, defendant may be held liable for the acts or omissions of its current employees who were involved in the alleged mischarging.[40] Accordingly, the court ruled that the Government may not make *ex parte* contact with defendant's current employees who were allegedly involved in the wrongdoing.[41] The court noted, however, that some current employees may be only "fact witnesses" (i.e., they hold factual information about what they observed others doing).[42] As such, the court found that these employees would not be considered "parties" under Rule 4-4.2 and ruled that the Government may conduct *ex parte* contacts with employee "fact witnesses."[43]

Regarding former employees, *O'Keefe* agreed with the Government that Rule 4-4.2 does not prohibit all *ex parte* contacts but only as to former employees who are represented by counsel.[44] However, because some former employees may subject an organization to liability, the court agreed with defendant that some limits should be placed on the Government's access to them. The court ruled that the Government could contact former employees of the defendant *ex parte* but would have to maintain a list of the names of those contacted and contact dates.[45] The Government was also required to preserve statements, notes, and answers to questionnaires obtained so that defendant could review the lists and notes, subject to work product limitations.[46]

A. INSIGHTS FROM *O'KEEFE*: CURRENT EMPLOYEES

As to current employees, this case is significant because it stands with other decisions and ethics authorities permitting *ex parte* communications with fact witnesses. Along with many courts, *O'Keefe* drew the line to bar contact only with employees whose acts or omissions could be imputed to the organization for purposes of civil liability. One may anticipate that future courts, in the *qui tam* litigation context, may draw a similar line. Accordingly, there is *qui tam* precedent for allowing *ex parte* communications with current employees who were not involved with the suspected misconduct but who hold relevant factual information.

B. INSIGHTS FROM *O'KEEFE*: FORMER EMPLOYEES

As to former employees, *O'Keefe* follows the majority position that only former employees who are, in fact represented by counsel, are off-limits. However, in keeping with its view that, under the FCA context, the statements of some employees may subject

40. *Id.*

41. *Id.* at 1293.

42. *Id.*

43. *Id.*

44. *Id.* at 1295.

45. *Id.*

46. *Id.* This case was decided under unique circumstances, involving the use of questionnaires, in which the court granted defendant's request for an order that the Government provide it with a list of all current and former employees it had already contacted *ex parte* in the case, and with all information obtained from those contacts. The court, however, denied the defendant's request to prohibit the Government from using the information it had obtained through the *ex parte* contacts at trial, finding that any advantage the Government may have gained from those contacts would be vitiated when the defendant received the information about the contacts. *Id.*

the defendant to liability, the court applied the following limits and requirements: (1) that plaintiff provide defendant with a list of all current and former employees already contacted *ex parte* and all information obtained from such contacts; (2) that plaintiff maintain a list of the names of former employees contacted and dates of contact; and (3) that plaintiff preserve statements, notes, and answers to questionnaires obtained so that defendant could potentially review such, subject to work product limitations. The court's ruling, if viewed beyond its unique context, exceeds the requirements imposed by other courts that have allowed *ex parte* contacts and cuts against the *sine qua non* of the work product doctrine—"[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[47] This point is particularly significant because of the principle that no party get a "free-ride" by unduly taking advantage of an adversary's own work product efforts.

2. *United States v. Beiersdorf-Jobst, Inc.*

That same year, 1997, the issue of *ex parte* contacts with former employees was decided soundly in favor of the Government in *United States v. Beiersdorf-Jobst, Inc.*[48] This FCA case involved a manufacturer of, among other things, heart pumps for home use. Under the Medicare program, patients are reimbursed for purchase of certain medically necessary devices, including heart pumps.[49] The United States claimed that defendant Jobst misrepresented the capabilities of its Extremity Pump System 7500 in order to obtain inflated reimbursement. Jobst sought a protective order that would require Government notification to and approval from Jobst before interviewing any of its former employees.

Jobst analyzed DR 7-104(A)(1), Ohio's counterpart to Rule 4.2, and held that the purpose of the bar against communication with represented parties is "to safeguard a party's right to counsel by preventing an opposing party from obtaining uncounseled admissions from a represented party."[50] The court held that "the majority of jurisdictions . . . allow attorneys to contact former employees without notification of or approval by the former employer."[51] *Jobst* followed the majority position and held that the bar against communications with represented parties does not extend to former employees of a represented corporation and denied defendant's motion for a protective order.[52]

The court's rationale is insightful: "the underlying rationale behind the rule, *i.e.*, maintaining the integrity of the attorney-client relationship, is not undermined by al-

47. Hickman v. Taylor, 329 U.S. 495, 510 (1947). Federal Rule of Civil Procedure 26(b)(3) codifies the *Hickman* decision and creates a qualified immunity, allowing discovery of work product material only after the adversary has met his or her burden by showing a "substantial need of the materials in the preparation of [his or her] case and ... is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

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

49. *Id.* at 259.

50. *Id.* (citing Insituform of N. Am., Inc. v. Midwest Pipeliners, Inc., 139 F.R.D. 622, 625 (S.D. Ohio 1991)).

51. *Id.* at 260.

52. *Id.* at 262.

lowing uncounseled interviews with former employees who have no existing relationship with, and therefore cannot bind, a represented corporation."[53] *Jobst* also reasoned that policy considerations favor communications with former employees because a "basic cornerstone of our judicial system is the unimpeded flow of information between adversaries to encourage the early detection and elimination of both undisputed and meritless claims."[54] The court further observed, "requiring the approval and the presence of corporate counsel would have the inevitable effect of chilling the exchange of information. . . ."[55] *Jobst* provides an example of the permissive majority position in the *qui tam* litigation context.

3. *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*

In 2004, the District Court for the Eastern District of Pennsylvania also tackled the *ex parte* contact issue in *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*.[56] This opinion was issued after consideration of a Motion to Compel Testimony of a former employee of Medco defendants filed by plaintiffs.[57] At the time the former employee was deposed, she asserted that she was not represented by her own counsel nor that of Medco defendants.[58] However, in spite of her representations to the contrary, counsel for the Medco defendants asserted attorney-client privilege and instructed the witness to not answer any questions concerning communications between Medco defendants and herself in preparation for her deposition or concerning communications occurring during breaks in her deposition, and the witness complied with all of the Medco counsel's instructions.[59]

The fuel behind plaintiffs' Motion to Compel Testimony was that statements made under oath by the former employee witness at her deposition *clearly differed* from material statements she previously made in the Medco defendants' Final Report regarding the investigation.[60] Thus, as a result, plaintiffs sought additional testimony by the former employee regarding four specific categories: (1) statements made by Medco defendants' counsel to the witness regarding the nature of the case; (2) statements made by the witness to Medco defendants' counsel regarding her conversations with Government investigators; (3) descriptions and/or summaries of witness testimony provided to the witness by counsel for Medco defendants; and (4) conversations between counsel for Medco defendants and the witness while she was under oath during her deposition.[61] Plaintiffs argued that they were entitled to question the former employee witness about these topics because her communications with corpo-

53. *Id.*

54. *Id.*

55. *Id.*

56. United States *ex rel.* Hunt v. Merck-Medco Managed Care, LLC, 340 F. Supp. 2d 554 (E.D. Pa. 2004).

57. *Id.* at 555–56.

58. *Id.* at 556.

59. *Id.*

60. *Id.*

61. *Id.*

rate counsel had the potential to "affect, influence or change" the witness' testimony.[62] Medco defendants opposed the Motion to Compel Testimony on the basis that the communications between the former employee witness and counsel should be protected by attorney-client privilege because the privilege should be applied to former employees as it is for current employees.[63]

The *Merck-Medco* court cited *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981), where the Supreme Court held that a corporation's attorneys' conversations with *current* corporate employees could be covered by attorney-client privilege; however, the *Merck-Medco* court, also citing *Upjohn*, noted that the privilege applies only when conversations: (1) were made to corporate counsel, acting as such; (2) at the direction of corporate supervisors for the purpose of securing counsel's legal advice; (3) concerning matters within the scope of the employees' corporate duties; and (4) to employees that were amply aware that they were being questioned so the corporation could obtain legal advice.[64]

When the court decided *Merck-Medco* in 2004, the Third Circuit had not yet directly addressed the question left open by the Supreme Court in 1981 of whether the *Upjohn* privilege applies to former as well as current employees.[65] Therefore, the court cited to cases of other jurisdictions that were decided under factually similar circumstances although not in an FCA context.[66] The court was persuaded by the reasoning expressed in these cases, including the reasoning and practical solutions described by district courts in *Peralta* and *Coastal Oil*. In deciding to grant plaintiffs' Motion to Compel Testimony for the four specific avenues of inquiry, the *Merck-Medco* court acknowledged that although there are potential difficulties in separating facts developed during litigation, which are not privileged under the case law, from facts known by the

62. *Id.*

63. *Id.*

64. *Id.* at 556–57.

65. *But see* Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, No. Civ. A. No. 91-6184, 1992 WL 68563 (E.D. Pa. 1992) (district court had noted in this 1992 case that a former employee was privy to communications with the organization's counsel regarding the lawsuit and was a key participant in union contract negotiations such that there was a risk of disclosure of protected confidential information, found that opposing counsel should not have sought an *ex parte* interview, provided that opposing counsel produce copies of all statements or other documents memorializing the *ex parte* interview, but declining to ban the use of the evidence in the litigation). *Stabilus* was factually distinguished by the *Merck-Medco* court because it did not specifically address whether corporate counsel's communications with a former employee are privileged as to the four discrete topics at issue in the Motion to Compel Testimony.

66. *See Infosystems*, 197 F.R.D. at 305–07 (affidavit of former employee was not protected by either attorney-client privilege or the work product doctrine based on the corporate counsel's assertion that communications with the former employee in advance of his deposition concerned the former employee's conduct and knowledge during his employment, finding that *Peralta* "sweeps too broadly" because protection of privilege does not extend to facts such as those contained in the affidavit); City of New York v. Coastal Oil New York, Inc., No. 96 Civ. 8667(RPP), 2000 WL 145748, at *2 (S.D.N.Y. 2000) (court addressed the same issue presented in *Merck-Medco Managed Care* and concluded that because corporate counsel did not represent the former employee and there was no evidence that the conversations occurred for the purpose of legal advice, record did not contain any basis for assertion of attorney-client privilege); Peralta v. Cendant Corp., 190 F.R.D. 38, 40–41 (D. Conn. 1999) (court rejected defendant corporation's attempt to utilize attorney-client privilege to block all questions about communications between corporate counsel and a former employee and limited the privilege to communications concerning either knowledge obtained or conduct that occurred during the course of the former employee's employment or related to communications which were themselves privileged and which occurred during the employment relationship; the court also specified that the privilege would not apply to information given by corporate counsel to former employees about testimony of other witnesses or discussions between former employees and corporate counsel during breaks in a deposition).

employee as a result of her employment, which may be privileged, the line-drawing is not difficult: if the communication sought to be elicited related to the former employee's conduct or knowledge *during* her employment or if it concerns conversations with corporate counsel that occurred *during* her employment, the communication is privileged; if not, the attorney-client privilege does not apply.[67]

The precedential value of *Merck-Medco* may be somewhat limited as it contains an abbreviated discussion under a unique set of circumstances. Additionally, it seems to mischaracterize the holding of *Peralta* by loosely noting the following statement:

> [t]he distinction drawn by the Court between attorney-client privileged and non-privileged communications with former employees should not be difficult to apply if the essential point is kept in mind: did the communication relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment? If so, such communication is protected from disclosure by defendant's attorney-client privilege under *Upjohn*.[68]

The *Peralta* court found that any privileged information obtained by former employee during her employment with employer, including information conveyed by employer's counsel during that period, remained privileged upon termination of employment but that the privilege did not extend to any communications between employer's counsel and the former employee, whom counsel does not represent, which bears on or otherwise potentially affect the witness' testimony, consciously or unconsciously.[69] By subtly altering the paradoxical language of *Peralta*, the *Merck-Medco* court mischaracterized the holding of *Peralta* which is that "privilege may extend to *communications between corporate counsel and a former employee*, where *these communications* either (i) concern knowledge obtained or conduct occurring during the course of the former employee's employment with the corporation, or (ii) relate to communications which themselves were privileged and which occurred during the employment relationship."[70]

4. False Claims Act Policy Considerations Support Challenging Blanket Assertions of Representation & Noncooperation

The False Claims Act has strong public policy principles that support challenging a corporation or organizational entity's blanket assertion of legal representation for all employees, current and/or former, and any request by the entity for noncooperation of its employees. An FCA violation occurs when a person, *inter alia*, "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval,"[71] or "knowingly makes, uses, or causes to be made or used, a

67. *Merck-Medco Managed Care*, 340 F. Supp. 2d at 558, *citing Peralta*, 190 F.R.D. at 41–42.

68. *Peralta*, 190 F.R.D. at 41–42.

69. *Id.*

70. *See Infosystems*, 197 F.R.D. at 304–05 (emphasis added).

71. 31 U.S.C. § 3729(a)(1).

false record or statement to get a false or fraudulent claim paid or approved by the Government."[72] Even where there is nothing false on the face of the claim submitted to the government, courts have repeatedly stated that "withholding of such information—information critical to the decision to pay - is the essence of a false claim."[73] FCA lawsuits are filed by the United States, utilizing taxpayer funds to litigate the case, or by whistleblowers/relators investing their own time, resources and monies, and often involve taking on large powerhouse corporate entities that enlist multiple litigation counsel "teams" deep and have the advantage of boundless war-chests. Thus, in order to have a level playing field, relators must seek alternative discovery avenues to adequately prepare for battle without leaving "justice" to only those who can afford costly and time-consuming formal discovery, including depositions, and who have the resources to overcome the plethora of discovery objections and extensive motion practice. As Justice Douglas pointed out, the breadth of discovery must be broad in order to ensure that civil trials are "less a game of blindman's bluff and more a fair contest."[74] It is important to recognize that, in the current era, depositions and written discovery requests are often limited by rules and court orders; thus, informal discovery becomes crucial in uncovering the truth, properly preparing your case, and discovering all relevant facts without the endless hurdles, substantial costs and protracted delays of formal discovery.

A close review of the case law on informal discovery and *ex parte* communications supports the road to "justice" being paved with less costly (and frequently higher-impact) informal discovery methods. Because most jurisdictions provide that blanket, tactical assertions of representation, or automatic representation, and requests for noncooperation are not proper, counsel may have the opportunity to contact an adversary's employees if they are fact witnesses and if the attorney ensures that all are legal and ethical rules are followed. If counsel is in doubt as to the proper course of conduct, counsel should consider seeking guidance from the court, highlighting the applicable authorities. However, if unnecessary, be mindful that doing so would potentially apprise your adversary of your strategic game plan and insights into your attorney work product strategies.

D. Conclusion

The strategic benefits of obtaining valuable evidence and information through informal discovery focusing on permissible contacts with your adversary's current and former employees cannot be overestimated. Amazingly, these are powerful opportunities that are often overlooked and not pursued because of the mistaken perception that they are not ethically allowed or pose too many landmines. While important boundaries do exist, if you proceed prudently by assiduously following the ethical rules and governing law of your jurisdiction, you have the opportunity to score big points by developing your case through permissible *ex parte* contacts with your adversary's cur-

72. 31 U.S.C. § 3729(a)(2).

73. United States v. TDC Mgmt. Corp., Inc., 288 F.3d 421, 426 (D.C. Cir. 2002).

74. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

rent and former employees. This type of informal case development will significantly bolster the strength of your case, undercut your adversary's positions and go beyond the typical costly deposition process—all of which enables your side to "Getting the Winning Edge!"

Legal Analysis

Alternate Remedies Under the False Claims Act

ALTERNATE REMEDIES UNDER THE FALSE CLAIMS ACT

James B. Helmer, Jr. and Erin M. Schenz[1]

INTRODUCTION

The Commercial Litigation Branch of the Civil Division of the Department of Justice employs approximately 280 attorneys, making it the largest branch of the Civil Division.[2] Among other responsibilities, this branch handles False Claims Act actions for the government. Despite the size of the Commercial Litigation Branch, the Department of Justice's website acknowledges that: "[a] primary source for the section's cases are actions filed by whistleblowers pursuant to the *qui tam* provisions of the False Claims Act."[3]

Historically, the Department of Justice has overtly and covertly resisted *qui tam* cases. For example, in the 1930s the Attorney General brought criminal actions against several defendants.[4] After three years of inaction, the suit was dismissed against the "big boys" and the "little fellows" were fined.[5] After the expiration of the statute of limitations, the Attorney General then brought a civil suit against the "big boys" for $1.2 million dollars "know[ing] that it cannot recover one single dollar."[6]

In 1943, when several *qui tam* cases were being filed around the country, Attorney General Francis Biddle attempted to have Congress repeal the *qui tam* provisions of the False Claims Act.[7] General Biddle was spurred to action by the Supreme Court's invitation to him to file an *amicus curiae* brief in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).[8] In *Marcus*, over General Biddle's objection, the Supreme Court upheld a False Claims Act recovery of $315,000 in a case where the relator obtained

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2. Civil Division U.S. Department of Justice, Commercial Litigation Branch, http://www.usdoj.gov/civil/brochure/brochure.html (last visited Dec. 1, 2005).

3. *Id*. This acknowledgment is curious because the Department of Justice, as far as we are aware, has never advanced the position that the *qui tam* provisions are constitutional. For several years relators and their private counsel battled the largest criminal corporations in the world over this issue and attainted a virtually unblemished record of success in defending the Act. *See* James B. Helmer, Jr., False Claims Act: Whistleblower Litigation § 4.1 n.8 (3rd ed., LexisNexis 2002).

4. 89 Cong. Rec. 7577 (1943) (remarks of Sen. Langer).

5. *Id*.

6. *Id*. Because of these games, and because of the Attorney General's failure to prosecute any anti-trust violations, some Senators doubted the Attorney General's ability to investigate and prosecute False Claims Act violations in the 1943 Senate debates on the False Claims Act. 89 Cong. Rec. 7575 (remarks of Sen. Van Nuys and Sen. Murray).

7. S. Rep. No. 345, 99th Cong., 2d Sess. 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276. In the House hearings over the 1986 False Claims Act amendments, Representative Bedell further explains that defense contractors were responsible for "persuad[ing] the Attorney General to push through Congress a *qui tam* revision that vested almost all discretion with the Justice Department." 132 Cong. Rec. H 6483 (1986) (remarks of Rep. Bedell).

8. *Id*., S. Rep. No. 345 at 11; 1986 U.S.C.C.A.N. at 5276.

his information from a criminal indictment.[9] Outraged by his thumping in the Supreme Court, and driven by his belief that *qui tam* actions were parasites to the criminal prosecutions of his office, General Biddle went to Congress seeking to repeal the *qui tam* provisions of the False Claims Act.[10]

The House obliged the Attorney General by speedily passing a bill to abolish the False Claims Act's *qui tam* provisions on April Fool's Day in 1943, with only 26 members present for the vote.[11]

Fortunately, the debate in the Senate was more thorough and spirited.[12] Senator Langer played a key role in stopping the repeal of the *qui tam* provisions by filibustering until the Senate agreed to keep them, albeit with a strict public disclosure bar and a limited relator's share provision.[13] In addition, a new provision allowing courts to dismiss cases when the government had any knowledge of the fraudulent claim ensured the dismissal of all *qui tam* cases after 1943.[14]

In 1986, Congress was again faced with defense contractors profiteering through $400 hammers and $1000 toilet seats. Congress realized that due to its tampering in 1943, the False Claims Act did little to stop rampant government contractor fraud.[15]

Several members of Congress consulted the Department of Justice about potential changes to the False Claims Act. While the Department of Justice favored additions to strengthening the False Claims Act such as by increasing damages and penalties and reducing the government's burden of proof, it expressly opposed improving the *qui tam* provisions. In his written and oral remarks to the House Subcommittee for Administrative Law and Governmental Relations, Assistant Attorney General Richard Willard explains that the *qui tam* provision are an "anachronism" adopted when the government did not have adequate investigative resources to bring fraudulent contrac-

9. 89 Cong. Rec. 2801 (1943) (remarks of Rep. Kefauver).

10. Members of the House of Representatives noted that General Biddle sought to repeal the *qui tam* provisions because he "fe[lt] that the work of [his] office is . . . impaired . . ." by this rash of actions. 89 Cong. Rec. 10847 (1943) (remarks of Rep. Hancock); *See also* 89 Cong. Rec. 7596 (1943) (remarks of Sen. Revercomb) (The Department of Justice came to the Senate Judiciary Committee to get the False Claims Act repealed.).

11. 89 Cong. Rec. 2800–01 (1943). There was very little discussion and no testimony concerning the amendments when initially passed in the House with a result some members of the House had little idea as to what bill they were voting on. Representative Rankin asked if the bill pertained to recent indictments of the Daughters of the American Revolution and the American Legion. *Id.* at 2801. Representative Bishop asked if the bill pertained to farmers whose land was taken by people posing as representatives of the Department of Agriculture. *Id.*

12. *See generally* 89 Cong. Rec. 7437–44, 7570–79, 7585, 7596–99, 10696–701, 10741–52.

13. 89 Cong. Rec. 10696–10701, 10741–10752 (1943). The public disclosure bar prevented anyone from filing a *qui tam* suit "based on information in the possession of the Government unless the relator was the original source of that information." S. Rep. No. 345 at 12; 1986 U.S.C.C.A.N. at 5277. The relator's share provision allowed the relator up to a ten percent share in the government's recovery. However, the relator had no minimum guaranteed share and the judge had complete discretion in choosing to award a relator share. 89 Cong Rec. 10844 (1943).

14. *See* James B. Helmer, Jr., False Claims Act: Whistleblower Litigation § 2.5 and n.123–24 (3rd ed., LexisNexis 2002).

15. S. Rep. No. 345 at 1–3, 1986 U.S.C.C.A.N. at 5266–67; H. Rep. No. 660, 99th Cong. 2d Sess. 16 (1986).

tors to justice.[16] Mr. Willard believed that the FBI and the Inspectors General generated most False Claims Act cases.[17] However, Mr. Willard thought no change in the *qui tam* provisions was necessary because "the *qui tam* statute *occasionally* motivates an informer to come forward with a meritorious suit, which the Department can then prosecute in the name of the United States."[18] Nonetheless, Mr. Willard disfavored a proposed change allowing a *qui tam* relator to be a full party in an intervened case because of concerns of whether the United States would retain control of the suit.[19]

In direct contrast to Mr. Willard's testimony, Congress heard testimony from a single relator and his counsel about the difficulties in pursuing *qui tam* cases and how such difficulties could be remedied.[20] Congress rejected Mr. Willard's advice and amended the *qui tam* provisions specifically to encourage more whistleblowers to bring these actions.[21]

But even with the new Amendments designed to encourage *qui tam* cases, the Department of Justice continues by both action and inaction to discourage such suits.[22]

Given the background of literally decades of opposition to *qui tam* cases by the Department of Justice, as part of the False Claims Act Amendments of 1986, Congress included a subsection referred to as the alternate remedies provision to protect relators:

> Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another

16. *False Claims Act Amendments: Hearing Before the House. Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong. 2d Sess. 174 (1986) (remarks of Richard K. Willard, Assistant Attorney General of the Civil Division of Department of Justice); *Id*. at 136 (statement of Mr. Willard). Congress plainly did not believe that the FBI and the Inspectors General were up to the job of uncovering fraud. S. Rep. No. 345, at 4, 1986 U.S.C.C.A.N. at 5269 ("Through hearings and research on Government fraud, the Committee has sought and is continuing to seek out the reasons why fraud in Government programs is so pervasive yet seldom detected and rarely prosecuted. It appears there are serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools.").

17. 99th Cong. 2d Sess. 174 (1986); *Id*. at 136. Given the "any government knowledge" provision of the 1943 Amendments to the False Claims Act, this view was probably correct. There is no successful *qui tam* case between 1943 and 1986 as they all appear to have been dismissed pursuant to this provision. *See* James B. Helmer, Jr., False Claims Act: Whistleblower Litigation § 2.5 and n.123–24 (3rd ed., LexisNexis 2002).

18. 99th Cong. 2d Sess. 136 (1986) (emphasis added). Mr. Willard also told Representative Berman that it was not necessary to repeal the *qui tam* provisions because "we don't think that under existing law the[*qui tam* provisions] cause so much trouble that it is necessary to repeal them, and they may occasionally draw forth additional information. But, quite frankly, I don't think the *qui tam* provisions of existing law contribute very much at all." *Id*. at 174.

19. 99th Cong. 2d Sess. 136–137 (1986).

20. James B. Helmer, Jr. and Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act and Their Application in* United States ex rel. Gravitt v. General Electric Co., 18 Ohio N.U. L. Rev. 35 (1991).

21. 132 Cong. Rec. H 9388 (1986) (Legislative History submitted by Rep. Berman) (The False Claims Act provides "full party status" for the qui tam plaintiff because: "[t]he public will be well served by having more legal resources brought to bear against those who defraud the Government" and "to keep pressure on the Government to pursue the case in a diligent fashion.").

22. *See* James B. Helmer, Jr., False Claims Act: Whistleblower Litigation §1.4 *Sooner or Later, You Will Fight With Your Government* (3rd ed., LexisNexis 2002).

> proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.[23]

On its face, this section is designed to protect relators from the arbitrariness of the Department of Justice. Congress was clearly aware of the sorry record of how *qui tam* cases had been treated by the Department of Justice. The legislative history also demonstrates this.

At the same time that Congress was debating the False Claims Act amendments, Congress also considered enacting a Program Fraud Civil Remedies Act ("Program Fraud"). There were several versions of Program Fraud, but they essentially provide that when the Attorney General declines to prosecute an action under the False Claims Act, the 'authority head' for each executive agency could bring an administrative proceeding to investigate and remedy the fraud.[24] At the February, 1986 hearings before the House Subcommittee on Administrative Law and Governmental Relations, the Committee considered Program Fraud at the same time as it debated the False Claims Act amendments.[25] Many concerns were expressed about different aspects of Program Fraud at this hearing by industry representatives,[26] a relator's attorney,[27] an Inspector General,[28] and a Congressman.[29]

Nonetheless, Senator Grassley was pushing for the enactment of Program Fraud as late as September 11, 1986,[30] after the Senate and House passed S.1562 (the False Claims Act Amendments),[31] but before the Senate agreed to the House's changes to S.1562 on October 3, 1986.[32] And in fact, on October 21, 1986, Congress passed Program Fraud as part of the Omnibus Budget Reconciliation Act of 1986.[33]

23. 31 U.S.C. § 3730(c)(5).

24. 99th Cong. 2d Sess. at 4–27, 67–91 (1986).

25. 99th Cong. 2d Sess. 4–92 (1986).

26. 99th Cong. 2d Sess. 257–60, 493–95, 497–98 (1986) (statements of Frank H. Menaker, Jr., for Aerospace Indus. Assoc. of America, Inc; The Associated General Contractors of America; and The American Farm Bureau Federation).

27. 99th Cong. 2d Sess. 374 (1986) (statement of James B. Helmer, Jr.).

28. 99th Cong. 2d Sess. 180–84 (1986) (remarks of Richard Kusserow, Inspector General Department of Health and Human Services).

29. 99th Cong. 2d Sess. 440 (1986) (remarks of Rep. Glickman).

30. 132 Cong. Rec. S 12438 (1986) (statement of Sen. Grassley).

31. 132 Cong. Rec. S 11250 (1986). 132 Cong. Rec. H 6474–488 (1986). The House actually amended S.1562 by changing the text of S.1562 to the text of H.R. 4827 before passing S.1562. 132 Cong. Rec. H 6488 (1986).

32. 132 Cong. Rec. S 15064 (1986).

33. Program Fraud Civil Remedies Act of 1986, 99 P.L. 509, 100 Stat. 1874 (codified at 31 U.S.C. §§ 3801–3812).

Many months earlier, in May, 1986, Representative Glickman introduced H.R. 4827, the first bill to include the language of § 3730(c)(5) ultimately passed by Congress.[34] As Congress considered enacting Program Fraud along with the False Claims Act amendments, and did eventually enact Program Fraud later in 1986, Congress probably did not mean for § 3730(c)(5) to replace Program Fraud. This is especially likely considering Senator Grassley's statement on September 11, 1986, that he and Senator Cohen, the primary sponsor of Program Fraud, had been working together to "ensure that essential elements of [their] bills . . . are consistent."[35]

Instead, as initially suggested, the alternate remedies provision was added to the House version of the False Claims Act Amendments, and later to the Senate version, to protect the relator's rights when the government pursued any sort of alternate remedy, administrative or otherwise. In fact, § 3730(c)(5) would have only complemented the administrative remedy process provided by Program Fraud when the Attorney General declines to prosecute.

Congressional concern for protecting the rights of the relator when the Department of Justice pursues an alternate remedy is evident in several other manners.

First, after the Senate passed the same version of S.1562 as the House, Senator Grassley and Senator Thurmond had the following conversation:

> Mr. THURMOND. I would like to inquire of the principal sponsor of S. 1562, the distinguished Senator from Iowa, Senator Grassley, what role is contemplated for the *qui tam* relator when the Government chooses to proceed in a fraud action in an administrative setting? It is my understanding that S. 1562 has limited the role that the *qui tam* will play in an administrative proceeding? Is this the understanding of the principal sponsor?
>
> Mr. GRASSLEY. The distinguished chairman of the Judiciary Committee is correct. *In the event the Government chooses to proceed administratively, the* qui tam *relator retains the same rights available in the judicial action*. Although the Senate compromised with the House concerning the *qui tam* relator's participation, both Houses of Congress clearly contemplated allowing for limitations on the *qui tam*'s participation in judicial and administrative actions. The Senate and House agreed upon language which set out the limitations that a court could impose on a *qui tam* in civil actions when active participation by the *qui tam* could harm the proceeding.
>
> Upon a showing by the Government that unrestricted participation during either an administrative or judicial proceeding of a *qui tam* would interfere with or unduly delay the action, the court may, in its

34. 132 Cong. Rec. H 2814 (1986).

35. 132 Cong. Rec. S 12438 (1986) (statement of Sen. Grassley). *See also* 132 Cong. Rec. S 9805 (1986) (statement of Senator Cohen).

> discretion, impose limitations on the *qui tam*'s participation. Upon a showing by the defendant that the action would be for purposes of harassment or would cause undue burden or unnecessary expense, the court may similarly limit the *qui tam*'s participation. Additionally, an administrative law judge has great discretion in an administrative proceeding to consider the cause of action in an expeditious fashion, and the legislation contemplates that administrative proceedings should be conducted with a minimum of undue delay or interference by *qui tam* relators.
>
> Mr. THURMOND. I thank the distinguished Senator from Iowa.[36]

This conversation illustrates that the principal sponsor of the False Claims Act Amendments in the Senate contemplated that a *qui tam* relator would have the same rights and the same limitations in an administrative action brought as an alternate remedy as the relator has in a judicial action.

Secondly, Congress believed that the most effective way to bring perpetrators to justice is to provide some source of personal gain.[37] And Congress understood that to tempt whistleblowers to come forward, it would have to protect whistleblowers' rights to a share of the proceeds from judicial arbitrariness.[38] The alternate remedies provision would serve as a further aid in protecting the whistleblowers from the arbitrariness of the Department of Justice and other executive departments of the United States government.

Congress was well aware from Assistant Attorney General Willard's remarks that the Department of Justice distrusted relators and had no wish to cede even partial control of False Claims Act actions to them. Therefore, Congress wisely chose not to trust the government to suddenly favor relators and award them a share of the proceeds of an alternate remedy if they had no legal requirement to do so. In this fashion, the government's discretional power to pursue a fraud feasor other than by using the weapons of the False Claims Act cannot eliminate the rights, responsibilities and benefits due to the relators who comes forward to bring a *qui tam* case.

Current handling of *qui tam* relators demonstrates this wisdom of Congressional protection of the alternate remedies provision. While the Department of Justice now often recognizes the contributions of *qui tam* plaintiffs and relators, as it does on its website, many times the Department of Justice has failed to insist on protecting the rights of relators when the government pursues an alternate remedy to prosecuting the fraud uncovered by the relator in an alternate proceeding. Relators have had great

36. 132 Cong. Rec. S 15064 (1986) (emphasis added).

37. S. Rep. No. 345, at 11, 1986 U.S.C.C.A.N. at 5276 (citing *Marcus*, 317 U.S. at 545 ("[The False Claims Act] was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing fraud on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.")).

38. S. Rep. No. 345, at 28, 1986 U.S.C.C.A.N. at 5293 ("If a potential plaintiff reads the present statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds to the person who brought the action, the potential plaintiff may decide it is too risky to proceed in the face of a totally unpredictable recovery.").

difficulty asserting their rights to a share of alternate remedies. In part, this is because judicial development of § 3730(c)(5) is still in its infancy, even though nearly twenty years have passed since Congress' enactment of the 1986 Amendments to the False Claims Act.

This article will peruse the caselaw concerning the alternate remedies provision and will offer some insight and guidelines into how to determine when a proceeding qualifies an alternate remedy under §3730(c)(5).

A. When Is a Proceeding an Alternate Remedy Under 31 U.S.C. § 3730(c)(5)?

Courts have directly held that proceedings qualify as alternate remedies under § 3730(c)(5) under only three instances: (1) a settlement agreement between qui tam defendants in an un-intervened action, (2) a suspension and debarment proceeding when the Government was foreclosed by claim preclusion from bringing an False Claims Act action, and (3) a criminal forfeiture proceedings brought while the underlying un-intervened civil case was stayed.

For a proceeding to qualify as an alternate remedy under § 3730(c)(5), the proceeding must meet one of two initial criteria and one final criterium.

Initially, the proceeding must either: (1) redress the fraud alleged in the relator's complaint or (2) impair the relator's right to proceed with the False Claims Act action.

If one of these two initial criteria is met, the proceeding will be considered an alternate remedy if it meets a final criterium of providing a recovery to the government.

1. First Initial Criterium: Redressing the Fraud

The first of the two possible initial criteria that must be met in order for a proceeding to qualify as an alternate remedy is whether the proceeding addresses the fraud alleged in the relator's complaint. This criterium is consistent with the text and legislative history of the False Claims Act, as the District of Columbia District Court recently held in *Ervin and Assocs., Inc. v. United States*, 2003 U.S. Dist. LEXIS 25064 (D.D.C. 2003).

Ervin filed a *qui tam* action alleging that the defendants conspired to defraud the government while conducting mortgage auctions on behalf of HUD.[39] One of the *qui tam* defendants filed an action in the Court of Federal Claims, seeking the balance of its contract with HUD.[40] The government counterclaimed for breach of contract.[41] Ervin then filed another suit in district court, alleging that the government's counterclaim in the Court of Federal Claims was an alternate remedy to the *qui tam* case.[42]

The court held that in order to qualify as an alternate remedy, the alternate proceeding must seek "to redress acts of fraud against the government."[43] In delivering

39. *Ervin*, 2003 U.S. Dist. LEXIS 25064 at *1–2.

40. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *3.

41. *Id.*

42. *Id.*

43. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *14.

this opinion, the court explains how this holding comports with the text of the False Claims Act, the legislative history of the False Claims Act, the basis for the relator's standing in a *qui tam* action, and the nature of the damages provided by the False Claims Act.

First, the court explains how the text of § 3730 supports its holding. Section 3730(c)(5) itself does not limit the scope of potential alternate remedies.[44] But the word "claim" in the phrase "the Government may elect to pursue its claim through any alternate remedy" in § 3730(c)(5) indicates that in order for a proceeding to qualify as an alternate remedy, the proceeding must be an alternate remedy to the government's § 3730 claims to redress violations of § 3729.[45] Since breaching a contract does not violate § 3729, the government's breach of contract counterclaim in the Court of Federal Claims is not a viable § 3730 claim.[46] Thus, a breach of contract counterclaim cannot be an alternate remedy to a § 3730 claim under § 3730(c)(5).[47]

Secondly, the court supported its holding by reference to the legislative history of the False Claims Act. The court quotes the Senate Judiciary Committee's Report as follows: "the government 'may elect to pursue any alternate remedy for recovery of the *false claim* which might be available under the administrative process.'"[48] The court noted: "the Government must elect to pursue the *false claims* action either judicially or administratively."[49] According to the court, Congress' reference to false claims in the legislative history of § 3730(c)(5) "evidences a clear emphasis on recovery for false claims."[50]

Thirdly, the court noted that the relator's standing in a False Claims Act action does not extend to a breach of contract action, even when the breach of contract claims arises out of the same transaction as the False Claims Act claims.[51] Unlike a False Claims Act action, the relator has no financial stake in the outcome of the breach of contract claims because Congress did not statutorily assign the relator part of the Government's cause of action for breach of contract.[52]

Fourthly, the court explained that the nature of the remedies available in a breach of contract claim and in a False Claims Act action are different.[53] In the breach of con-

44. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *15.

45. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *14–15.

46. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *14–15.

47. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *15.

48. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *15 (alteration in original) (citing S. Rep. No. 345 at 27, 1986 U.S.C.C.A.N. at 5292). Congress later modified the alternate remedies provision to allow the relator to have rights in alternate remedies other than in proceedings brought under an administrative process. *Id.* at 16.

49. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *16 (emphasis in original) (citing S. Rep. No. 345 at 27, 1986 U.S.C.C.A.N. at 5292).

50. *Id.*, 2003 U.S. Dist. LEXIS 25064 at *16.

51. *Ervin*, 2003 U.S. Dist. LEXIS 25064 at *16 (citing *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218, 225–26 (D. Md. 1995)).

52. *Id.*

53. *Ervin*, 2003 U.S. Dist. LEXIS 25064 at *17.

tract counterclaim, the government can only recover single damages plus interest.[54] In the false claims action, the government can recover treble damages and civil penalties which could exceed the value of the breach of contract remedy.[55] In a citation, the court noted that the distinction between the "defendant's potential exposure" in each action is important because it "distinguishes a *qui tam* action from other[actions]."[56] By this, the court seems to imply that the difference between the affect of the remedies on the defendant makes it less likely that the Congress intended that a breach of contract action qualify as an alternate remedy to an False Claims Act action.[57]

Finally, the *Ervin* court distinguished the Ninth Circuit's decision in *United States ex rel. Barajas v. Northrop Corp*, 258 F.3d 1004 (9th Cir. 2001). In *Barajas*, both the government and the relator could not pursue False Claims Act claims since the False Claims Act action was barred by claim preclusion.[58] Instead, the government brought suspension and debarment proceedings based on the precluded False Claims Act claims.[59] The Ninth Circuit held that such proceedings are alternate remedies in this particular situation because the government achieved "essentially the same result" that the government would have achieved by intervening in the relator's False Claims Act action.[60] That is, the government redressed the fraud alleged in the relator's complaint through the alternate proceedings. Therefore, the government cannot avoid paying the relator the share that the relator "would have been entitled to if the relator's second action had been permitted to go forward to a successful conclusion."[61] Thus, in *Ervin*, the court recognizes that the "[m]ost important" factor distinguishing the breach of contract claims in *Ervin* from the alternate proceedings in *Barajas* is that the alternate proceedings in *Barajas* "were part of the Government's effort to sanction the fraudulent and criminal behavior by the contractor in that case."[62]

2. Second Initial Criterium: Impairing the False Claims Act Action

The second possible initial criteria for determining if an alternate proceeding qualifies as an alternate remedy occurs when the alternate proceeding impairs the relator's

54. *Id.*

55. *Ervin*, 2003 U.S. Dist. LEXIS 25064 at *18.

56. *Id.* (citing *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 739 (3rd Cir. 1997).

57. Relator's counsel should be careful when handling the fourth reason in *Ervin* for why a proceeding must remedy the fraud alleged in the relator's complaint to qualify as an alternate remedy. This is a distinction without a difference: no alternate remedies are likely to compensate the government with the full treble damages and civil penalties allowed by the False Claims Act. Congress does not restrict the range of possible alternate remedies by the type or the amount of damages recoverable in an alternate proceeding. Therefore, reference to this argument may allow the government and defendants to impermissibly limit the broad scope of § 3730(c)(5) in a manner unendorsed by Congress.

58. *Barajas*, 258 F.3d at 1012.

59. *Id.*

60. *Id.*, 258 F.3d at 1012–13.

61. *Id.*

62. *Ervin*, 2003 U.S. Dist. LEXIS 25064 at *19–20. The *Ervin* court also states that *Barajas* is distinguishable because the government was precluded from pursuing the False Claims Act action in *Barajas*. *Id.* at *18–19.

right to proceed with the *qui tam* action. The government may not have brought the alternate proceeding to address the fraud alleged in the relator's complaint, but nonetheless, the proceeding may impair the relator's and the government's ability to proceed with the *qui tam* action.

This situation would occur when the government settles the relator's *qui tam* claims as part of a global settlement in an unrelated action. For example, the government could give up the right to proceed with the *qui tam* case as part of a global settlement agreement in a breach of contract action.[63]

In *Bisig*, even the United States acknowledges that a remedy is an alternate remedy when it "precludes the continuance of a *qui tam* action."[64] Of course, the United States may not faithfully adhere to this position, because in *Bisig*, the government unsuccessfully attempted to persuade the court that a criminal forfeiture proceeding is not an alternate remedy because it does not preclude the civil false claims action.[65]

Therefore, if a relator can show either that the government has impaired the relator's action in an alternate proceeding which may or may not address the fraud alleged in the relator's complaint, or that an alternate proceeding addresses the fraud in the relator's complaint, then the relator meets the initial criterium of proving that such proceeding qualifies as a § 3730(c)(5) alternate remedy.

3. Final Criterium: Recovery to the Government: The Relator Is Entitled to a Share of Any Proceeds Recovered

If one of the two initial criteria is met, then the relator can show that an alternate proceeding is a § 3730(c)(5) alternate remedy if the alternate proceeding provides a recovery to the government. This criterium is mandated by § 3730(c)(5)'s directive that: "If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section." Since under § 3730(d) the relator's rights under the False Claims Act include the right to a share of the "proceeds" of government's recovery of the False Claims Act action or a settlement of the claim, the government must obtain "proceeds" in order for a proceeding to qualify as an alternate remedy for share purposes.

The courts interpret "proceeds" broadly. In *Barajas*, the Ninth Circuit explained that proceeds "need not 'always consist of money or some tangible asset' " while holding that the value of the replacement and repair of airline parts constitutes proceeds to the government which the relator is entitled to share.[66] Similarly, the Fifth Circuit held that "proceeds" include non-cash items, such as the value of claims released against the

63. In *Ervin*, the court notes as one of its reasons why the breach of contract remedy is not an alternate remedy is that "Ervin's *qui tam* action" is not "hindered by the counterclaim." *Ervin*, 2003 U.S. Dist. LEXIS 25064 at *18.

64. *Bisig*, at *6.

65. *Id.*

66. *Barajas*, 258 F.3d at 1013 (quoting *United States v. Estacio*, 64 F.3d 477, 480 (9th Cir. 1995); citing *Phelps v. Harris*, 101 U.S. 370, 380 (1879)).

government in return for the government's release of the False Claims Act claims.[67] In addition, a district court held that the value of a three year monitoring agreement, though not involving cash, is "proceeds" for the purposes of determining the relator's share of a government settlement of False Claims Act claims.[68] Finally, when the government accepted "restitution payments" to settle civil False Claims Act suits, the Ninth Circuit held that a relator is entitled to a share of the payments.[69] The Ninth Circuit rejected the government's contention that the "restitution payments" are not proceeds of the relator's claims because such an argument "would allow the government to eliminate recovery for relators by simply characterizing the nature of the conduct."[70]

This broad interpretation of "proceeds" is beneficial to United States, to relators, and to defendants. It allows the parties to explore creative remedies when appropriate. Yet there is less danger that the relators could be deprived of their statutorily mandated reward for bringing fraud to light.

4. Opinions Determining Whether Proceedings or Recoveries Are Alternate Remedies Mirror the Outcome Called For by the Guidelines

There are only three opinions in which a court holds that a proceeding qualifies as an alternate remedy. In *Bledsoe*, the Sixth Circuit found that a settlement between the government and the *qui tam* defendants qualified as an alternate remedy.[71] Though the Sixth Circuit did not undertake the alternate remedy analysis given herein, the result would be the same. The first initial criterium was met in *Bledsoe* because the settlement redressed the fraud committed by the defendants. The final criterium was also met in *Bledsoe* because the settlement itself provided a recovery to the government.

In *Barajas*, the Ninth Circuit found that suspension and debarment proceedings can constitute an alternate remedy.[72] The *Barajas* remedy also satisfies the guidelines provided here. The first initial criterium was met in *Barajas* because the *qui tam* action addressed the fraud alleged in the relator's complaint. As detailed more fully *supra*, the Ninth Circuit noted that usually suspension and debarment proceedings would rarely be an alternate remedy to a *qui tam* action.[73] But in this case, since the "suspension and debarment proceedings allowed [the government] to achieve essentially the same result it could have achieved" in the *qui tam* action; therefore, these proceedings are alternate remedies.[74] The second and final criterium was met because the money

67. United States ex rel. Thornton v. Science Applications Int'l Corp., 207 F.3d 769, 771 (5th Cir. 2000).

68. United States ex rel. Nudelman v. Int'l Rehabilitation Associates, Inc., 2005 U.S. Dist. LEXIS 9605 *3–4 & n. 1 (E.D. Pa. 2005). The Court and parties valued the monitoring agreement at $1.5 million for the purposes of determining the relator's share. *Id*. at 3.

69. Covington v. Sisters of the Third Order of St. Dominic, 1995 U.S. App. LEXIS 20370 *9 n.1 (9th Cir. 1995). Thanks to Mitchell R. Kreindler, Esq. of Kreindler & Associates, P.C. for bringing this citation to our attention.

70. *Id*.

71. *Bledsoe*, 342 F.3d at 649.

72. *Barajas*, 258 F.3d at 1012–13.

73. *Id*., 258 F.3d at 1012.

74. *Id*. This appears to be an overstatement by the Ninth Circuit. The False Claims Act does not provide for suspension and debarment as remedies. Instead, regulations from the defrauded government agency set forth the procedures for suspension and debarment when fraud is determined.

provided to the government in the suspension and debarment proceedings was a recovery to the government.

The third case, *Bisig*, is discussed *infra* § (b), where we specifically focus on why criminal recoveries are alternate remedies in some circumstances.

While there are only three cases in which the court has found a recovery to be an alternate remedy to the government under § 3730(c)(5), there are several other cases in which courts have not found other proceedings and recoveries to qualify as alternate remedies. As discussed in the section *supra*, in *Ervin*, the court found that the breach of contract counterclaim in the court of claims was not an alternate remedy in part because the counterclaim did not sound in fraud[75] and because the *qui tam* action was not hindered by the counterclaim.[76] Each of these reasons is one of our initial criteria for a proceeding to qualify as an alternate remedy. Since neither of the two initial criteria are met, the breach of contract counterclaim would still not qualify as an alternate remedy under our proposed criteria.

On the other hand, if the government and the defendant settled the breach of contract case and the settlement impairs the *qui tam* case in some respect, then the breach of contract counterclaim would be an alternate remedy to Ervin's *qui tam* case. This is because the settlement impairs the *qui tam* action from continuing while providing a recovery to the government. So in a sense, Ervin's motion to intervene was premature. Counsel for relator in a similar situation should monitor the case and be prepared to move quickly to intervene if a settlement may potentially impair a *qui tam* action.

In other common law actions besides breach of contract, the proceeding may remedy the fraud. In a common law unjust enrichment case or common law fraud case brought by the government against a *qui tam* defendant, the relator should be vigilant to intervene. The difference is that in these types of actions, the first initial criterium of remedying the fraud is met, so as long as the government obtains a recovery, the relator will be entitled to a share of the recovery as an alternate remedy.

As another example, in *Dunleavy*, the Third Circuit was concerned as to whether the relator's right to continue with his *qui tam* action was impaired by an administrative settlement between HUD and the defendants.[77] The situation in *Dunleavy* was procedurally different than the cases discussed up to this point because the Third Circuit was determining whether the *qui tam* case was barred by this settlement. The Third Circuit analyzed this question under § 3730(c)(5). But (c)(5) says nothing about when or how a *qui tam* action should be barred by another proceeding. The Third Circuit should have applied § 3730(e)(3), the provision of the False Claims Act that bars a *qui tam* action from continuing when the government has already brought a civil action or an administrative civil monetary penalty proceeding.[78]

75. *Ervin*, 2003 U.S. Dist. LEXIS at 19–20.

76. *Id.*, 2003 U.S. Dist. LEXIS at 18–19.

77. *Dunleavy*, 123 F.3d at 738.

78. 31 U.S.C. § 3730(e)(3) provides:

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

Despite its misapplication of § 3730(c)(5), the Third Circuit properly found that since the government had not intervened in Dunleavy's *qui tam* action, the government could not compromise the relator's claim, and the relator's claim could proceed.[79] However, the Third Circuit recognized that if the government had intervened in the False Claims Act action, then the government could have impaired the *qui tam* action.[80] In that situation, the court would have had to decide if the HUD settlement was a § 3730(c)(5) alternate remedy to the *qui tam* action.

While the Third Circuit did not reach the question of whether the settlement was an alternate remedy, the Third Circuit gave some insight into its opinion on that issue. The Third Circuit doubted that the settlement was an alternate remedy because: (1) the government stated in its declination of intervention that the government did not believe that the defendant's actions amounted to fraud and (2) the audit and payment demands likely did not constitute the type of alternate proceeding contemplated by § 3730(c)(5).[81]

Thus, the Third Circuit correctly surmised that the HUD settlement would not have been an alternate remedy to Dunleavy's False Claims Act action. The first initial criterium was not met because the settlement could not have addressed the fraud alleged in the relator's complaint if the government did not believe that any fraudulent actions were ongoing. The second initial criterium was not met because the settlement did not appear to bar the relator's *qui tam* action from continuing.

Finally, in *Johnson*, another §3730(e)(3) case, the court found that a 'proceeding' was not an alternate remedy that would bar the relator's action under § 3730(e)(3).[82] The court held that "a few payment demands and an audit of [the defendant]'s royalties practices do not constitute the type of proceedings" addressed by § 3730(e)(3).[83] Under the guidelines given *supra*, these demands do not constitute an alternate remedy either. The audit and payment demands possibly could have addressed the fraud alleged in the relator's complaint. However, since there was no recovery to the government by the audit, the proceeding did not meet the final criterium of a recovery to the government. Therefore, the court's ruling in *Johnson* would have come out the same under these guidelines, finding that the audit and payment demands are not an alternate remedy.

B. Criminal Proceedings as Alternate Remedies

In a trail blazing decision, Judge Tinder of the Southern District of Indiana held that the relator is entitled to share in the proceeds of a criminal forfeiture action where the United States has not intervened but recovered substantially all of the defendant's assets through the criminal forfeiture proceedings.[84] The Judge examined the statutory

79. *Dunleavy*, 123 F.3d at 739.

80. *Id*.

81. *Id*., 123 F.3d at 739 n.8.

82. United States ex rel. Johnson v. Shell Oil Co., 26 F. Supp. 2d 923, 928 (E.D. Tex., 1998).

83. *Id*.

84. *Bisig*, at 4.

language allowing the United States to "pursue its claim through any alternate remedy" means that the statute "unambiguously places no restriction on the alternate remedies available to the United States."[85] Finding that the meaning of "alternate remedy" itself was ambiguous, the court looked to the legislative history of the False Claims Act.[86] Noting that Congress's purpose in amending the False Claims Act "was to encourage more private enforcement suits,"[87] and that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds,"[88] the court rejects the government's argument that Congress limited the relator's ability to share in an alternate remedy to when the *qui tam* action is precluded by the alternate remedy.[89] As the court explains, the government can:

> Stay a *qui tam* suit, prosecute the Defendant, and recover the Defendant's assets through criminal forfeiture without having to share that recovery with the relator, who was first to uncover the fraudulent activities and report them to the United States. The advantage that this interpretation would grant the United States is clear: it would not be forced to share its recovery with relators. As a result, the United States would carry the incentive in most cases to stay the *qui tam* action and seek recovery through the criminal prosecution and forfeiture proceedings.[90]

The problem with this result, the court decides is that it:

> [W]ould contradict the [False Claims Act]'s purpose. First, when dealing with a defendant who violates the [False Claims Act[, the United States will likely recover most, if not all, of the defendant's available assets through the criminal forfeiture proceedings. This results in the defendant becoming judgment-proof. And while the United States' interpretation would allow the relator to continue with the *qui tam* action against the defendant, there would be nothing left for the relator to recover from a judgment proof defendant. Consequently, this interpretation would have the effect of destroying Congress' unambiguous purpose that the government and private citizens collaborate in battling fraudulent claims, and it would impede Congress' legislative intent to encourage more private citizens to file *qui tam* suits.[91]

85. *Id.* at 6.

86. *Id.* at 6–7.

87. *Id.* at 7, *citing* S. Rep. 99-345, at 23–24, 1986 U.S.C.C.A.N. at 5288–89.

88. *Id.*, *citing* S. Rep. 99-345, at 2, 1986 U.S.C.C.A.N. at 5267.

89. *Id.* at 6.

90. *Id.* at 8.

91. *Id.*

Deciding that "the [False Claims Act] ought to be interpreted in a manner that will maintain the incentive underlying the *qui tam* aspect of the False Claims Act" the court held that the relators were entitled to share in the government's proceeds of the criminal forfeiture.[92]

Judge Tinder's understanding of the scope of the alternate remedies provision is correct. As noted *supra*, the False Claims Act only provides one example of an alternate remedy contemplated by Congress: "any administrative proceeding to determine a civil money penalty."[93] But Congress' use of the word "including" means that an "administrative proceeding to determine a civil monetary penalty" is just one of many possible alternate remedies in which the relator has the same rights as under the *qui tam* provisions of the False Claims Act. Therefore, the inclusion of the administrative proceeding in the statute does not foreclose the possibility of other alternate remedies.

Congress does mention two possible types of alternate proceedings in the legislative history of the 1986 amendments to the False Claims Act. The Senate Report refers to the use of civil monetary penalty proceedings as an alternate remedy.[94] And the House Report specifically states that a criminal prosecution is an alternate remedy contemplated by § 3730(c)(5):

> The section further provides that, notwithstanding the filing of a *qui tam* action, the *Government may pursue its claim through alternate remedies available to it, such as a criminal prosecution* or an adjudication under the administrative remedy section of this Act. If the Government elects to pursue an alternate remedy, however, the rights of the relator shall be protected, and he shall have the same rights as in the civil action.[95]

The statement in the House Report that a criminal prosecution may be an alternate remedy is particularly important because the House Report refers to the language of § 3730(c)(5) as ultimately enacted by Congress,[96] whereas the Senate Report refers to an earlier version of that section.[97]

The courts empathetically conclude that § 3730(c)(5) encompasses a wide range of possible alternate remedies. In *Bledsoe*, when asked if the relator was entitled to a share of settlement proceeds when the government did not intervene in his *qui tam* action, the Sixth Circuit held that an alternate remedy "refers to the government's pursuit of *any* alternative to intervening in a relator's *qui tam* action."[98] In *Barajas*, the Ninth Circuit recognizes that there are broad differences between a False Claims Act remedy

92. *Id*.

93. 31 U.S.C. § 3730(c)(5).

94. S. Rep. No. 345, at 27, 1986 U.S.C.C.A.N. at 5292.

95. H.R. Rep. No. 660 at 24 (emphasis added).

96. H.R. Rep. No. 660 at 43.

97. S. Rep. 345, at 42.

98. 342 F.3d at 647 (emphasis added).

and a suspension or debarment proceeding; nevertheless, the court determines that these proceedings may constitute an alternate remedy because:

> The language of § 3730(c)(5) places no restrictions on the alternate remedies the government might pursue. It specifies broadly that the government may pursue 'any alternate remedy available to [it]' . . . The term any is generally used to indicate lack of restrictions or limitation on the term modified.[99]

The courts' understanding that a wide variety of alternate remedies are available under § 3730(c)(5) further supports the fact that criminal prosecutions can be alternate proceedings under § 3730(c)(5).

The frequent use of civil fines and monetary penalties as both alternatives and supplements to criminal prosecutions[100] further supports the conclusion that Congress intended that the government could use criminal prosecutions as an alternate remedy to intervention in a *qui tam* action.

Finally, the courts advance the purpose of the False Claims Act by allowing the relator to share in the government's proceeds of a criminal prosecution when that prosecution is an alternate remedy to a False Claims Act action. When the relator uncovers the fraud and brings it to the government's attention, but the government decides to pursue or must pursue an alternate remedy, the relator should not lose his share of the recovery. Congress intended that: "[i]f the Government elects to pursue an alternate remedy . . . the rights of the relator shall be protected, and he shall have the same rights as in the civil action."[101]

Therefore, because Congress professes its understanding that a criminal prosecution is an alternate remedy, because courts universally conclude that the text of § 3730(c)(5) states that *any* alternate to the government's intervening in a *qui tam* action is an alternate remedy, and because treating a criminal prosecution as an alternate remedy furthers Congressional intent to protect the relator's rights to share in the proceeds of an False Claims Act action, a criminal prosecution can be an alternate remedy. Judge Tinder's opinion in *Bisig* is a first step in the right direction. Congress has tasked the courts with a duty under § 3730(c)(5) to protect the relator's rights to a share of the government's proceeds when a criminal prosecution is an alternate remedy to an False Claims Act action.

1. When Criminal Prosecutions Are Alternate Remedies

Just as under some circumstances a civil or administrative proceeding is not an alternate remedy, under identical circumstances a criminal prosecution is not an alternate

99. 285 F.3d at 1010–11 (citations omitted).

100. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325, 1336–37 (1991). For example, Congress provides both civil and criminal means of redressing a single offense in other statutes such as the Sherman Act. *Marcus*, 317 U.S. at 556 (Frankfurter, J., concurring).

101. H.R. Rep. No. 660 at 24.

remedy. By following the guidelines articulated *supra* for determining when a civil or administrative proceeding is an alternate remedy, we can determine when the courts would consider a criminal prosecution to be an alternate remedy. Therefore, a criminal prosecution is an alternate remedy when one of the two initial criteria is met (the criminal prosecution addresses the fraud alleged in the relators complaint or the criminal prosecution impairs the False Claims Act action), and when the final criterium is met (when the government gains a recovery as a result of the criminal prosecution).

We first use some hypothetical examples and then some real life examples to illustrate how the guidelines apply in a criminal prosecution. First, the relator files a civil False Claims Act action. After the complaint is unsealed, the government brings criminal prosecutions under 18 U.S.C. §§ 287 or 1001 based on the same acts and omissions alleged in the relator's civil complaint. The *qui tam* defendant agrees to a plea bargain, or is sentenced, and pays the government criminal fines. Under these circumstances, the relator is entitled to a share of the government's recovery under 31 U.S.C. § 3730(c)(5) because: (1) the alternate proceeding redresses the fraud alleged in the government's complaint and (2) the government is awarded a recovery in the alternate proceeding. There is no question that the criminal fines are "proceeds" of the alternate proceeding in this case.

Take the same case, but the civil proceeding is stayed while the criminal proceeding is ongoing. Again the *qui tam* defendant agrees to a plea bargain or is sentenced, and pays the government criminal fines. Nothing is changed just because the *qui tam* action is stayed pending resolution of the criminal matter. The alternate proceeding still redresses the fraud alleged in the government's complaint and the government is still awarded a recovery to which the relator is entitled to share in under § 3730(c)(5).

This second case hypothetical is similar to the situation in *Bisig*. The relator in *Bisig* brought the *qui tam* action under seal.[102] The government stayed the civil action, and froze the defendant's assets under the Fraud Injunction Statute, 18 U.S.C. § 1345.[103] One of the defendants entered a guilty plea and agreed to forfeit her real and personal property and the assets of her business.[104] The relator filed a motion to intervene and stay the asset disbursement.[105] Under the guidelines, the relator properly was permitted to share in the proceeds of the government's criminal forfeiture. The criminal proceeding redressed the fraud alleged in the relator's complaint and the government obtained proceeds of the alternate proceeding.[106]

102. *Bisig*, at 2.

103. *Id*. at 2–3.

104. *Id*. at 3.

105. *Id*.

106. The relator's original complaint only alleged a cause of action against one of the defendants. After the case was unsealed, the relator amended the complaint to bring causes of action against the rest of the defendants. The court deferred its determination of whether the relator is an original source of its amended complaint until the parties briefed the issue. The result is important to the relator because most of the forfeited goods were not provided by the defendant brought in the relator's original complaint. *Id*. at 14.

In *United States ex rel. Stevens v. McGinnis, Inc.*, the plaintiffs brought a False Claims Act action alleging that the defendants violated:

> 31 U.S.C. §§ 3729(a)(1), (a)(2) and (a)(7) by (1) presenting fraudulent claims for payment to the United States when it knew that McGinnis[, the subcontractor boat-owner defendant,] was intentionally violating the Clean Water Act . . . [by pumping bilge water containing oil from its boats into the Ohio River], (2) presenting fraudulent claims to the United States when Ashland[, the prime contractor petroleum manufacturer defendant,] was violating the [Clean Water Act], (3) making or using false records or statements to obtain payment of the false claims by the United States, and (4) failing to record and report pollution incidents, thereby avoiding the fines, penalties and clean-up costs that may be imposed for [Clean Water Act] violations.[107]

McGinnis pled guilty to violations of the Clean Water Act as a result of its persistent pollution of the Ohio River as disclosed to the government because of the relator's case.[108]

Even though McGinnis paid fines and penalties to the United States as a result of its conviction, the criminal recovery would not qualify as an alternate remedy to the relator's False Claims Act action. The first initial criterium is not met because the criminal conviction did not address the fraud alleged in the relator's complaint. The criminal conviction was solely meant to punish McGinnis for pumping in violation of the Clean Water Act,[109] not for the fraud alleged in the relator's complaint. Secondly, the criminal conviction did not foreclose or impede the relator's False Claims Act suit. Therefore, neither of the initial criteria that must be met for a proceeding to qualify as an alternate remedy. Thus, the criminal conviction in *Stevens* was not an alternate remedy to the False Claims Act action, and the relator would not have succeeded in claiming an entitled to a share of the criminal recovery had he tried.

Similarly, in *Pickens*, the relators brought claims that a prime contractor and two sub-contractors violated the False Claims Act when all three dumped oily bilge water into the Ohio River in violation of the Clean Water Act.[110] The general contractor's agreement with the government required Clean Water Act compliance, as did the sub-contractors' contracts with the general contractor.[111] The relator brought claims that the subcontracts violated § 3730(a)(2) when submitting bills to the general contractor without acknowledging the Clean Water Act violation, that the general contractor likewise breached (a)(2) when seeking payment from the government, and that all the defendants violated § 3730(a)(7) by failing to maintain records of the bilge pump-

107. United States ex rel. Stevens v. McGinnis, Inc., 1996 U.S. Dist. LEXIS 22109 *3–4 (S.D. Ohio 1996).

108. *Id.*, 1996 U.S. Dist. LEXIS 22109 at *30.

109. *Id.*

110. United States ex rel. Pickens v. Kanawha River Towing, 916 F. Supp. 702, 704–05 (S.D. Ohio 1996), *aff'd*, 194 F.3d 1314 (6th Cir. 1999).

111. *Id.*, 916 F. Supp. at 705.

ing, and thereby avoided paying Clean Water Act fines to the government.[112] One of the subcontractor defendants pled guilty to a Clean Water Act violation.[113] Just as in *Stevens*, any payments to the government by the subcontractor in *Pickens* would not constitute an alternate remedy because the recovery neither redresses the fraud nor impeded the relator's False Claims Act action.

Eventually the courts will flesh out these simple examples. Relator's counsel should not hesitate to assert their clients' rights to a share of the government's recovery in a criminal prosecution which satisfies the above requisite criteria.

2. The Relator Is Statutorily Entitled to Share in All of the Proceeds of a Criminal Prosecution

The United States regularly recovers both fines and restitution in criminal cases. Under 18 U.S.C. § 3553(c) (2005), a section that 18 U.S.C. § 3551 directs courts to follow when sentencing an organization or an individual, a court must explain if it does not order restitution or if it only awards partial restitution. Therefore, courts are highly likely to impose payment of restitution when sentencing defendants for violations of 18 U.S.C. §§ 287 or 1001. The relator can be entitled to a share of criminal restitution as the relator is to any other recovery to the government under 31 U.S.C. § 3730(c)(5) and (d).

Restitution is simply "[c]ompensation or reparation for the loss caused to another."[114] Congress specifies that the relator is entitled to a share of *any* proceeds to the government that the government receives for a violation of § 3729. Furthermore, "there are cases in which the successful party obtains restitution of something he did not have before . . . ."[115] Since restitution can include something the party did not previously have, there is no reason why the treble damages provisions should alter the fact that criminal restitution can be a proceed of an False Claims Act action.

Moreover, as discussed *supra*, the courts interpret "proceeds" broadly to apply to many different monetary and nonmonetary recoveries. Courts have never limited "proceeds" based on the government's characterization or classification of the recovery in an alternate proceeding.

Indeed, the Ninth Circuit easily determined that the relator was entitled to share in payments of civil restitution in settlement of civil False Claims Act suits.[116] The Ninth Circuit rejected the government's contention that the relator is not entitled to a share of the restitution payments because such an argument "would allow the government to eliminate recovery for relators by simply characterizing the nature of the conduct."[117] Likewise, the government cannot simply characterize a recovery a 'criminal restitution' and expect the court to shield that recovery from the relator simply because

112. *Id.*

113. United States ex rel. Pickens v. Kanawha River Towing, C-1-93-790, slip op. at 17 (S.D. Ohio Aug. 16, 2000).

114. Black's Law Dictionary 1315 (7th ed. 1999).

115. Black's Law Dictionary at 1315 (citing 1 George E. Palmer, The Law of Restitution, § 1.1, at 4 (1978)).

116. *Covington*, 1995 U.S. App. LEXIS 20370 at *9 n.1.

117. *Id.*

the government has so characterized it. No matter how the government and the defendants characterize the payment scheme, the relator is entitled to a share of any of the proceeds of a criminal prosecution which is an alternate remedy to the relator's False Claims Act claims.

Therefore, in *Bisig*, the court holds that the proceeds of a criminal forfeiture action are in fact the proceeds of an alternate remedy.[118] As described *supra*, the court finds that this result is consistent with the purposes of the False Claims Act, as well as consistent with the *Bledsoe* and *Barajas* courts' focus on rewarding the relator as the source of the government's information.[119] Judge Tinder rightfully rejects several arguments made by the government as to why criminal forfeitures are not the proceeds of an alternate remedy. First, the government argues that the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A(a)(1), which requires that the court order the defendants "to make restitution to the victims of the criminal offense" conflicts with the court's finding.[120] The court dismisses this contention, because the Act "does not require the United States to use the forfeiture proceeds to satisfy the restitution order."[121] Since the proceeds of the criminal forfeiture may be partial satisfaction of the restitution order, the United States simply "must turn over the relator's share of the recovery" before applying the forfeiture proceeds to the restitution order.[122] The government protests the fairness of this result, but the court explains that the False Claims Act itself states that it is fair to allow the relator to recover "alongside the victim[]," the United States.[123]

Secondly, the court dismisses the government's contention that since § 3730(c)(5) grants the relator the same rights in the alternate proceedings as in the *qui tam* action, the relator would have the right to become "a prosecuting party in a criminal case, a result that is clearly not intended by Congress."[124] The court clarifies that the true alternate proceeding which the relator has rights in is the criminal forfeiture proceeding, not the criminal prosecution.[125] And in any event, the court has discretion under § 3730(c)(2)(D) "to limit the relator's rights in the alternate litigation."[126]

Thirdly, the defendant protests that the relator lacks standing to participate in the forfeiture proceedings because to do so, the relator must show a "third-party interest" pursuant to 21 U.S.C. § 853(n)(6). The court dispatches this argument handily, finding that the relator does not need to show a third-party interest. Instead, the has an interest "as a relator, or on behalf of the United States itself."[127] This interest, the court

118. *Bisig*, at 8.

119. *Bisig*, at 9–10.

120. *Id*. at 11.

121. *Id*.

122. *Id*.

123. *Id*.

124. *Id*. at 12.

125. *Id*.

126. *Id*.

127. *Id*. at 13.

explains, "is not a direct interest in the defendant's property itself, but rather it is an interest in the United States' interest in that property."[128] The relator's standing, the court concludes, is granted by § 3730(c)(5) itself, "which ensures that the relator maintains the 'same rights' in the alternate proceedings as it would have had in the *qui tam* proceeding."[129] These rights include participation in an alternate remedy, such as a forfeiture proceedings, and rights to share in the proceeds of the forfeiture proceeding.[130]

This result is to the benefit of both the government and the relator. Congress enacted the *qui tam* provisions of the False Claims Act in order to encourage citizens to bring the unscrupulous looters of the Treasury to justice.[131] In fact, Congress favorably quotes *Marcus v. Hess* for the proposition that: "[The False Claims Act] is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and *should be construed accordingly*."[132] Therefore, if the courts allow the Government to take away a deserved and statutorily mandated share of an alternate remedy by simply characterizing the remedy as "fines" or "restitution," the courts would violate Congressional intention that the False Claims Act should be construed to protect the Treasury. The best way to protect the Treasury is to incentivize private citizens to bring the violators of the False Claims Act to justice.

When the criminal damages are attributable to the same conduct alleged in the relator's complaint, the relator is entitled to a share of any damages recovered in a criminal prosecution which is an alternate remedy to a civil False Claims Act action under § 3729, *et. seq*.

CONCLUSION

The alternate remedies provision of the False Claims Act is a little used but often considered portion of the False Claims Act. Congress included this provision in the False Claims Act to ensure that the rights of relators would be protected no matter how fickle the Department of Justice. Therefore, relators will only benefit by educating the courts and the Department of Justice about Congressional intent in providing protection for relators when the government pursues alternate remedies. In addition, relators should not hesitate to assert their rights under the alternate remedies provision. Adventurous relators' counsel may well successfully argue to courts that other proceedings brought by the government such as common law fraud cases, unjust enrichment cases, or even contract cases which reduce the *qui tam* recovery, could also qualify as alternate remedies.

128. *Id*.

129. *Id*. at 13–14, citing § 3730(c)(5).

130. *Id*. at 14.

131. *See* H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) ("The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."). *See also* Cong. Globe, 37th Cong., 3rd Sess. 958 (1863) (remarks of Senator Howard) ("It is one of the crying evils of the period, if report is any degree to be credited, that our Treasury is plundered from day to day by bands of conspirators, who are knotted together in this city and other large cities for the purpose of defrauding and plundering the Government.").

132. S. Rep. No. 345 at 11, 1986 U.S.C.C.A.N. at 5276 (emphasis added) (quoting *Marcus v. Hess*, 317 U.S. 537 (1943)).

Upcoming Legal Battles

Totten Troubles & *Custer Battles* Clarifications: Debate Over the Required Nexus Between False Claims and the U.S. Treasury

TOTTEN TROUBLES & *CUSTER BATTLES* CLARIFICATIONS: Debate Over the Required Nexus Between False Claims and the U.S. Treasury

Shelley R. Slade[1]

The last year has seen significant court rulings on two, separate aspects of the False Claim Act, both of which concern the pivotal question of how close a nexus is required between a claim and a call upon the U.S. Treasury before the claim is subject to the False Claims Act (FCA). The first issue is whether a claim upon a grantee or other recipient of U.S. funds is subject to the FCA when the claim is not resubmitted to a U.S. government official. This issue involves the interplay between: (i) the FCA clauses that impose liability only when a claim is "presented . . . to an officer or employee of the United States Government" or "paid or approved by the Government,"[2] and (ii) the FCA definition of claim, added to the statute in 1986, which expressly includes claims upon grantees and other recipients of U.S. funds when the government provides or will reimburse any portion of the money.[3] The second question is whether the FCA, in imposing liability for claims paid or approved by the Government only covers claims for funds belonging to the United States, and, if so, how one can determine whether monies in fact belong to the United States.

After setting forth a summary and analysis of the D.C. Circuit's troubling decision last year in the *Totten* case, this paper summarizes the recent district court case law on the "presentment" and "paid or approved by the Government" issues.

I. *TOTTEN* AND THE "PRESENTMENT" ISSUE

A. Summary and Analysis of the D.C. Circuit's Holding in *Totten*

In August 2004, the presentment issue was decided by a federal Court of Appeals for the first time in *U.S. ex rel. Totten v. Bombardier Corporation*,[4] a 2–1 decision by the

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2. 31 U.S.C. § 3729(a)(1) imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(2) imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."

3. 31 U.S.C. § 3729(c) defines a claim as: "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."

4. 380 F.3d 488 (D.C. Cir. 2004), *reh'g en banc denied*. 2004 U.S. App. LEXIS 25245, *cert. denied*. 161 L.Ed. 2d 1059.

Court of Appeals for the District of Columbia.[5] In *Totten*, the D.C. Circuit held that liability can attach to a claim under 31 U.S.C. § 3729(a)(1) and (a)(2) only if the claim has been presented directly to a U.S. government official or employee for payment or approval. Writing for the majority, Judge Roberts (now Chief Justice Roberts) held that the "plain" language of the statute required this result for § 3729(a)(1), and that legislative history compelled this result for § 3729(a)(2). With regard to its interpretation of both (a)(1) and (a)(2), the majority appeared to be influenced by its view that it was ultimately "unclear whether 'federal monies' . . . are still 'federal monies' when passed along to sub grantees or subcontractors, employees and suppliers of sub grantees and subcontractors, and so on."

With regard to § 3729(a)(1), the majority found no ambiguity in a statute that on the one hand defined the "claims" subject to the Act to include claims submitted to grantees and other recipients of federal funds, and on the other hand imposed liability only when claims were "presented to an officer or employee of the U.S. government." Judge Roberts opined that the statute viewed in its entirety plainly required presentment. Because he held that the statutory language was clear on its face, he declined to give any weight to the Senate and House Judiciary Committee Reports that accompanied the 1986 amendments to the FCA. *Id*. at 493–95. Those Reports clarified that the definition of claim in subsection (c) was intended to cover claims that resulted in a financial loss to the United States *even when* the claims "were made to a party other than the Government." S. Rep. No. 99-345, at 10; H.R. Rep. No. 99-660, at 21.

Judge Roberts cited a number of canons of statutory construction in support of the majority's reliance on the plain language and refusal to give any weight to the legislative history of § 3729(c). However, in interpreting § 3729(a)(1) in conjunction with § 3729(c), he failed to employ the following canons of statutory interpretation:

- When Congress acts to amend a statute, the courts should presume that it intends its amendment to have real and substantial effect.[6]
- In determining the meaning of the statute, the courts should look not only to the particular statutory language, but also to the design of the statute as a whole and to its object and policy.[7]

When these canons are called into play, it becomes clear that the "presentment" language in § 3729(a)(1) is as ambiguous in the overall statutory context as is the "paid

5. Prior to *Totten*, in a thoughtful opinion that considered the legislative history to the 1986 amendments, as well as the overall object and policy of the FCA, the D.C. Circuit discussed without deciding whether (a)(1) required presentment. U.S. ex rel. Yesudian v. Howard University, 153 F.3d 731, 737–38 (D.C. Cir. 1998). In addition, several district courts concluded that the FCA did not require direct presentment of claims to U.S. government employees. *See* United States ex rel. Costa v. Baker & Taylor, 1998 WL 230979 (N.D. Cal. 1998) (permitting claims to proceed under (a)(2) in case involving false invoices submitted by booksellers to federally-funded libraries); United States v. Nazen, 1993 WL 459966 (N.D. Ill. 1993) (permitting (a)(1) allegations to proceed in case involving false claims submitted to Medicare carrier); and, Wilkins ex rel. United States v. State of Ohio, 885 F. Supp. 1055 (S.D. Ohio 1995)(holding that the FCA's definition of claim is "broad enough to include any funds provided directly or indirectly by the United States, regardless of whether the grant was in a fixed amount or open-ended.")

6. Stone v. INS, 514 U.S. 386, 397 (1995).

7. K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

or approved by the Government" language of § 3729(a)(2). Requiring the direct presentment of a false claim to a United States employee before liability may be imposed under § 3729(a)(1) gives no substantive effect to § 3729(c), a provision added to the FCA through 1986 amendments. Requiring direct presentment also runs afoul of the statute's object and policy as reiterated throughout the legislative history and in many Supreme Court opinions: to sweep broadly to redress all types of fraud that result in losses to the United States.[8] Accordingly, the more reasonable interpretation of § 3729(a)(1), as clarified by subsection § 3729(c), is that the FCA imposes liability for false claims knowingly submitted to recipients of federal funds as those claims are "effectively" presented to the United States.[9]

With regard to § 3729(a)(2), which does not contain an express presentment requirement, Judge Roberts did decide to consult legislative history to clarify what he apparently felt was an ambiguity in the interaction of § 3729(a)(2) and § 3729(c). However, he utilized as an interpretive aid only that legislative history that predated Congressional consideration of the 1986 amendments to the FCA, including § 3729(c). Thus, he relied exclusively on pre-1982 legislative history that indicated that § 3729(a)(2) originated in a pre-1982 FCA clause that contained a presentment requirement, and that Congress had no intention of altering the substance of the original clause when it broke out § 3729(a)(2) in 1982. *Id*. at 499–500. Judge Roberts continued to ignore the legislative history to the 1986 amendments to the FCA, *i.e.*, the legislative history of § 3729(c). In support of his ruling that § 3729(a)(2) contained a presentment requirement, he also cited the views expressed in the treatise of Jack Boese, Esq., an attorney known for his skilled representation of FCA defendants. Judge Roberts referred to the views expressed in the treatise as "scholarly commentary" despite the facts that: i) the treatise cited no cases in support of its position that (a)(2) contained a direct presentment requirement, and ii) Jack Boese is a practitioner who regularly represents FCA defendants as opposed to an academic writing from an independent standpoint. *Id*. at 501.

Ironically, Judge Robert's interpretation of § 3729(a)(2) ignores the "plain language" of the provision, which requires only "payment" or "approval" of the claim by the government, reaching instead into legislative history to find a "presentment" requirement not suggested by the express statutory language. In addition to violating the canon of statutory construction that requires courts to give effect to the clear language of laws, his interpretation of § 3729(a)(2) also ignores the principles cited above that

8. *See, e.g.*, S. Rep. 99-345, 99th Cong., 2d Sess. 19, reprinted in 1986 U.S.C.C.A.N. 5266, 5284, *quoting* U.S. v. Neifert-White Co., 390 U.S. 228, 232 (1968) ("the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the government"); United States ex rel. Marcus v. Hess, 317 U.S. 537, 544 (1943) (federal funds granted to third parties "are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices.").

9. *See* U.S. ex rel. Yesudian v. Howard University, 153 F.3d 731, 738 (D.C. Cir. 1998), quoting S. Rep. 99-345, *supra*, at 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 ("It is also possible to read the [statutory] language to cover claims presented to grantees, but 'effectively' presented to the United States because the payment comes out of funds the federal government gave the grantee . . . [a]s the Senate Judiciary Committee put it, without adding any 'presentation' caveat, 'a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States is a false claim to the United States.'").

require courts to give substantive effect to amendments, and to interpret statutory language within the framework of the statute as a while, and with regard to the statute's overall object and policies.

B. *Totten* Progeny

In the last year-and-a-half, in published opinions,[10] only two U.S. district courts—the district courts for the Northern District of Alabama and the Southern District of Ohio—have followed the *Totten* ruling and applied it in a restrictive fashion. These courts dismissed the plaintiffs' claims notwithstanding the fact that the United States government reimbursed the entities that paid the defendants' false claims. In comparable circumstances, three other district courts—the district courts for the Central District of California, the Northern District of Illinois and the Eastern District of Virginia—have refused to dismiss plaintiffs' claims under *Totten*, and have clarified that even under *Totten* an FCA action may proceed so long as the defendant's false claims to a non-government entity were used by that entity to seek payment from the U.S. government. Finally, the U.S. District Court for the Southern District of Texas has ruled that the FCA does not require "presentment" without discussing or even referencing *Totten*, and the U.S. District Court for the District of Utah has rejected the holding as it applies to 31 U.S.C. § 3730(a)(2).[11]

1. *Totten* Followed

• *U.S. EX REL. ATKINS V. MCINTEER* (N.D. ALABAMA)

The first case to follow *Totten* was *U.S. ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Alabama 2004), a case that raised the disturbing possibility that Judge Robert's analysis in *Totten* could carve Medicaid fraud out of the jurisdiction of the FCA. The *Atkins* case involved alleged fraud on the Alabama Medicaid program—a program for which the United States covers 70 percent of the costs. In *Atkins*, Judge William M. Acker, Jr. held that he lacked subject matter jurisdiction over the relator's claims under 31 U.S.C. § 3729(a)(1) and (3) since the complaint alleged fraud only on a federal government grantee (the Alabama Medicaid agency), with there being no "allegation or suggestion of the direct presentation of any false claim by any defendant to a federal officer or employee." *Id*. at 1304. The court noted that "[i]f the Totten court is correct,

10. This paper does not cover the non-published opinions on the presentment issue. For example, *in U.S. ex rel. Wong v. Consul-Tech Engineering*, Case No. 02-23081 (S.D. Fla.), in an unpublished March 16, 2005 order, the district court adopted *Totten*'s reasoning with regard to subsection (a)(1), but rejected it with regard to (a)(2). There may well be other unpublished opinions unknown to the author at this time.

11. It is worth noting that the author of the one opinion which expressly rejected Judge Robert's analysis of § 3729 (a)(2) was Judge Paul Cassell of the Utah District Court, a well-respected conservative judge considered by the Bush Administration to be one of the nation's leading experts on criminal justice and crime victims' rights According to the Department of Justice biographical sketch that accompanied his nomination to the bench, Judge Paul Cassell (Stanford Law '84) was elected President of the Stanford Law Review, was a member of Order of the Coif, clerked for Judge Antonin Scalia on the D.C. Court of Appeals and for Chief Justice Warren Burger on the U.S. Supreme Court, served in the U.S. Department of Justice as Associate Deputy Attorney General following his clerkships, spent three years as an Assistant U.S. Attorney in the E.D. Va. and then taught criminal justice law at the University of Utah College of Law. He has testified numerous times before Congress as an expert on criminal justice matters.

fraud perpetrated upon a non-federal agency cannot form the basis for an FCA claim just because the non-federal agency thereafter presents a claim for payment to a federal agency." *Id*.

• *U.S. ex rel. Sanders v. Allison Engine Co.* (S.D. Ohio)

The second case to adopt the reasoning of *Totten* was *U.S. ex rel. Sanders v. Allison Engine Co.*, 2005 U.S. Dist. LEXIS 5612 (S.D. Ohio 2005), a case brought under 31 U.S.C. § 3729(a)(1), (2) and (3), alleging false claims by government subcontractors making parts for the U.S. military. This case illustrates the troubling implications of *Totten* in the area of subcontractor fraud. Since the relators in this case agreed that (a)(1) liability required the presentment of a false claim to a U.S. government official or employee, the court focused its analysis primarily on the relator's (a)(2) and (a)(3) claims. The court ruled that Allison Engine and the other defendants could not be liable under § 3729(a)(2) or (a)(3) since their allegedly false claims were submitted to government prime contractors rather than directly to the U.S. government. The court opined that "at least nine Federal Circuit Courts have determined that a defendant must, in claims based upon § 3729(a)(1) and (a)(2) of the FCA, show that a false or fraudulent claim was submitted to the government." In support of this statement, Judge Rose cited *Totten* as well as a number of cases that have done no more than require a " false claim" or a "call upon the federal fisc" as an element of an FCA action.

2. *Totten* Clarified:

• *U.S. ex rel. DRC, Inc v. Custer Battles, LLC* (E.D. Va.)

• *United States v. AM Squire and Accucare, Inc.* (N.D. Ill.)

• *United States v. Sequel Contractors, Inc.* (C.D. Cal.)

• *United States ex rel. Tyson v. Amerigroup Illinois* (N.D. Ill.)

U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617 (E.D. Va. 2005), was the third case to follow *Totten*. This case involved alleged false claims submitted to the Coalition Provisional Authority (CPA) in Iraq. The case is notable in that the Court clarified that the majority's holding in *Totten* does not negate the "causation" prong of the FCA's liability provisions; even under *Totten*, an FCA action may proceed if defendant's actions allegedly caused another entity to submit false claims to the federal government. Thus, while the district court agreed with Judge Roberts that liability can arise under § 3729 (a)(1) only if a false claim has been presented to an official or employee of the United States, the court found that this requirement did not pose an obstacle to FCA liability in the case at hand since the claims in questions had been presented to U.S. military officials working on procurement matters for the CPA, which then requested payment from the U.S. Army. In the court's view, the presentment requirement was met either because the CPA was an instrumentality of the United States (a question that the court acknowledged was not clearly resolved), or, if it wasn't, because the defendants "caused" the CPA to submit inflated payment requests to the U.S. Army.

The U.S. District Courts for the Northern District of Illinois and the Central District of California have since clarified *Totten* in the same fashion, issuing three opinions that have denied defendants' motions to dismiss because, even under *Totten*, as interpreted by these courts, the case was properly pled. *United States v. Am Squire and Accucare, Inc.*, 2005 U.S. Dist. LEXIS 35749 at *10–12 (N.D. Ill. December 12, 2005); *United States v. Sequel Contractors, Inc.*, 2005 U.S. Dist. LEXIS 31446 at *13–18 (C.D. Cal. November 14, 2005); *United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, 2005 U.S. Dist. LEXIS 24032 (N.D. Ill. October 17, 2005). At issue in these cases were claims submitted to a Medicare fiscal intermediary (*U.S. v. Am Squire and Accucare, Inc.*), claims submitted to a Medicaid state agency (*U.S. ex rel. Tyson v. Amerigroup Illinois, Inc.*), and claims submitted to Orange County, California for work that would be paid for by the FAA (*U.S. v. Sequel Contractors, Inc.*). In each of these cases, the district courts decided not to decide whether the *Totten* majority was correct. In each case, they focused instead on the causation language in the False Claims Act, ruling that, even under *Totten*, a defendant can be liable if it causes someone else to present false claims to the United States. In each case, the district court then pointed to allegations in the complaint that the entity that paid the defendants' false claims subsequently sought reimbursement for its payment of the claims from the United States.

Interestingly, in the cases involving reimbursement by Medicare and the FAA, the district courts did not point to any allegations by the plaintiffs that *the defendants' false claims* had been passed on the United States—it was enough that the intermediate entity had submitted claims for reimbursement that were inflated as a result of the defendants' fraud. In the decision involving false claims to Medicaid, however, the district court did observe that plaintiffs had alleged that the state had passed on defendants' false claims to the federal government.[12]

3. *Totten* Rejected

✦ *U.S. EX REL. FARMER V. CITY OF HOUSTON* (S.D. TEX.)

In May 2005, two cases declined to follow the reasoning of the *Totten* court—one implicitly and the other expressly. The implicit rejection of *Totten* arose in *U.S. ex rel. Farmer v. City of Houston*, 2005 U.S. Dist. LEXIS 18387 (S.D. Tex. May 5, 2005), a case involving alleged fraud on the Houston Area Urban League (HAUL). HAUL is a non-profit entity that is financed with grants for emergency home repairs from the U.S. Department of Housing & Urban Development (HUD). In *Farmer*, the district court rejected the defendants' argument that no claim had been submitted to the federal government when the Complaint alleged false claims—in the form of a Request for Payment (RFP)—submitted to only HAUL. The Court ruled:

12. *Amerigroup, supra*, 2005 U.S. Dist. LEXIS 24032. The *Amerigroup* court also grounded its decision on the fact that Medicaid "is based upon a comprehensive funding and reimbursement structure between the state and federal governments, observing that other courts have highlighted "the substantial role played by the federal government in its funding and enforcement of Medicare and Medicaid programs." *Id*. at *6–7.

> Even though an RFP is submitted by HAUL to the City, the City uses federal funds to pay an RFP, therefore a request under the Program to be paid by the City is a request to be paid by federal funds, and payment by the City is payment by the federal government.

2005 U.S. Dist. LEXIS 18387 at *8.

• *U.S. EX REL. MAXFIELD V. WASATCH CONSTRUCTION* (D.UTAH)

Shortly after *Farmer* was decided, Judge Paul Cassell, writing for the federal district court in Utah, expressly rejected Judge Robert's ruling on § 3729(a)(2) in a case involving claims on a Utah Department of Transportation program that was financed with Federal Highway Administration (FHA) monies. *See U.S. ex rel. Maxfield v. Wasatch Construction*, 2005 U.S. Dist. LEXIS 10162 (D. Utah May 27, 2005). After noting that the plaintiffs had not alleged that false claims were "presented directly" to a federal government officer or employee, and that *Totten* consequently would compel dismissal of the case, Judge Cassell declined to follow *Totten*, agreeing instead with what he termed Judge Garland's "well-reasoned dissent" in *Totten*. At first looking only at the language of § 3729(a)(2), Judge Cassell determined that the language in § 3729(a)(2) requiring the claim to be paid or approved "by the government" simply meant that "the government must be the ultimate source of the funds, either directly or indirectly." 2005 U.S. Dist. LEXIS *22. He noted that any doubt on this point was erased by the definition of "claim" in § 3729(c), and cited the legislative history to the 1986 amendments as additional confirmation of Congress' intent. He also agreed with Judge Garland's argument as to how policy considerations factor into construction of the statute, noting that "to construe the FCA as covering only false claims presented directly to the government rather than to federal grantees would leave literally hundreds of millions of federal dollars outside the act." *Id*. at *26.[13]

II. *CUSTER BATTLES* & "U.S. FUNDS"

In the *Custer Battles* case, the question of how close a nexus must be established between a false claim and a call upon the federal fisc came up not only with regard to the "presentment issue," but also with regard to the origin of the funds ultimately used to pay the claims. The court had to decide whether claims paid with funds administered by the U.S. but not belonging to the U.S, or with funds of the former Iraqi regime that had been seized or confiscated by the United States, were subject to the FCA.

Custer Battles involved alleged false claims submitted by Custer Battles and its affiliates to the Iraqi Coalition Provision Authority (CPA) for security and related services at the Baghdad International Airport and at the Iraqi Currency Exchange. The funds used to pay the defendants, who allegedly billed for goods and services not delivered, came from three sources: (i) Former Iraqi Regime funds in bank accounts in the United States that had been confiscated by the President and vested in the

13. On October 6, 2005, upon the defendants' motion for reconsideration, Judge Cassell dismissed the case on the ground that the fourth amended complaint did not allege violations of § 3729(a)(2) with respect to the claims that remained in the case. He denied the plaintiffs' motion for leave to amend their complaint a fifth time.

Department of the Treasury; (ii) Iraqi state assets, primarily currency and negotiable instruments, seized by the occupying Coalition Forces in Iraq; and (iii) funds from the Development Fund for Iraq, composed of repatriated Iraqi assets, international donations, oil and gas sales revenue, and deposits from surplus funds in the U.N. "Oil for Food" program.

In a thirty-five page opinion that meticulously set forth pertinent details of each category of funding, as well as available information about the legal status, operations and procedures of the CPA, the *Custer Battles* court clarified what is necessary before a claim can be considered to have been paid or approved "by" the United States as required by the FCA. The court ruled that the FCA comes into play only when claims are paid with funds owned by the United States, rejecting arguments by the government and the relator that all is required is administration of the payment process by the United States. Subject to this standard, the court then analyzed whether each of the three categories of funds used to pay the defendants' claims was "owned" by the United States.

A. Former Iraqi Regime Funds Seized From Bank Accounts in U.S.

With regard to the Iraqi Regime funds confiscated in bank accounts in the U.S., the court held that these funds were United States funds since they had been seized by the President under an Executive Order issued under the authority of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701 *et seq*. The IEEPA authorizes the President to confiscate property within the jurisdiction of the U.S. belonging to any foreign entity that the President determines has planned, authorized, aided or engaged in armed conflict with the United States. The court found determinative the fact that the IEEPA provides that "all right, title and interest" in property vests in the United States following confiscation under the authority of the IEEPA.

B. Former Iraqi Regime Property Confiscated by Coalition Forces in Iraq

The court reached the same conclusion with regard to Iraqi Regime property confiscated by the Coalition Forces in Iraq, holding that claims paid with such funds were subject to the FCA. The court cited in support of its holding Article 53 of the Hague Regulations of 1902, which permits an occupying force to seize public movable property and appropriate such property for its own uses. Significant to the court was the fact that international law gave the occupying force discretion to use the property as it saw fit. The court held that: "[w]hile possession, by itself, is not sufficient to trigger FCA liability—indeed, neither is possession and administration for the benefit of a third party—possession plus the freedom to use or waste property for the government's own benefit is sufficient to establish ownership." *Id*. at n. 76. The court noted but did not find significant the fact that the seized funds were reported on Department of Defense and Department of Army financial statements in a "Statement of Custodial Activity," and were reported on balance sheets as "Non-entity Seized Iraqi Cash" separate from "entity assets."

C. Iraqi Monies in Development Fund of Iraq

The court had a different view, however, with regard to claims paid by the Development Fund of Iraq (DFI). The court noted that it was undisputed that the funds in the DFI belonged to Iraq, as they constituted repatriated funds, revenue from Iraqi industry, and international contributions made to benefit the new regime. Indeed, the United States conceded in its brief that the funds in the DFI, which are recorded on the books of the Central Bank of Iraq, have always been Iraqi funds. Accordingly, the court ruled that the FCA did not cover fraud upon the DFI. In light of its view that the FCA comes into play only when claims are paid with property owned by the United States, the court found immaterial the fact that the United States, through its role in the CPA, played a role in administering the DFI.

III. CONCLUSION

Perhaps in response to the many FCA cases clogging court dockets, and the Department of Justice's and relators' increasingly aggressive use of new legal theories to support FCA cases, last year's most significant decisions on FCA liability restrict the reach of the statute. Far more worrisome than the *Custer Battles* decision on "source of the money," however, are *Totten* and its progeny. Not only do the *Totten* cases threaten to place billions of dollars of federal procurement and grant money outside the reach of the FCA, they also evidence the willingness of some courts to stray from Congress' stated intent to enact a statute that redresses all fraud on the federal Treasury, regardless of the form of the fraud or the bookkeeping devices used to distribute the money. It is certain that the curtain has yet to drop on the "presentment" debate. Among the circuit courts, only the D.C. Circuit has squarely addressed the issue, and has done so in the face of a strong dissent by a well-respected judge.

The decision in *Custer Battles* regarding "source of the funds" will have a far more limited financial impact on the reach of the FCA. The decision, by its very terms, will not affect any cases involving expenditure of U.S. government-owned monies, including the approximately $30 billion that the United States as of September 2005 had appropriated for Iraq reconstruction activity.[14] The contractors paid this money remain subject to the FCA. While the decision does preclude FCA cases involving non-U.S. funds administered by the U.S., the impact in this area should be negligible. The United States' involvement as the primary procurement agency for entities like the CPA is minimal.

Most importantly, the *Custer Battles* decision as a whole is helpful for plaintiffs in that the court, in contrast to the *Totten* majority, reached its conclusion by looking at the overall design, object and policy of the FCA. It focused on the substance of the challenged transactions, and whether they could cause losses to the U.S. Treasury, rather than getting caught up in the form of the transactions and a hyper-technical

14. October 30, 2005, Report of Special IG for Iraq Reconstruction (SIGIR), Stuart Bowen, at App. B-1 (available on the Inspector General's website.) These funds are being apportioned primarily for projects in the following sectors: Security & Law Enforcement; Electric; Water Resources & Sanitation; Justice, Public Safety & Civil Society; and Oil Infrastructure. *Id*.

reading of the statutory language. It found that transactions paid with Iraqi funds could not harm the Treasury even if the U.S. officials were involved in the procurement process, and thereby dismissed the claims that concerned contracts funded with Iraqi funds. However, when it turned to the contracts funded with U.S. money, but potentially paid by officials of non-U.S. agencies, the court honored Congress' intent by noting that false claims on entities funded by the United States inevitably "cause" the submission of inflated claims to the United States, and refused to let the "presentment" issue stand as a bar to liability with regard to those contracts.