GROWING PAINS: USING THE FALSE CLAIMS ACT TO COMBAT HEALTH CARE FRAUD

*Pamela H. Bucy**

I. INTRODUCTION

The False Claims Act ("FCA") is one of the major tools in the government's arsenal to combat fraud against the federal government, especially health care fraud. This Article reviews the FCA by discussing its role in the fight against health care fraud (Part I), the elements of an FCA case (Part II), and the "*qui tam*" provisions of the FCA, the most complex and heavily litigated aspect of the FCA (Part III).

The FCA is aimed at the "world's second oldest profession . . . stealing"[1] and provides "the primary vehicle by which the [g]overnment prosecutes civil fraud."[2] The FCA gives the federal government, as well as "any person," a cause of action against those who submit false claims to the government.[3] Private plaintiffs who sue under the FCA are known as "*qui tam*" relators.[4] *Qui tam* comes from the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur," which

---

* Bainbridge Professor of Law, The University of Alabama, B.A., Austin College, J.D., Washington University, Assistant U.S. Attorney, Criminal Division, EDMO (1980-87). The author expresses her appreciation to Dean Ken Randall, the University of Alabama Law Foundation and the William H. Sadler Fund for their support. The author is especially grateful to Thomas F. Monk II (UA Law '99) and Michelle M. Kizziah (UA Law '01) for their research assistance. Portions of this article build upon PAMELA H. BUCY, HEALTH CARE FRAUD: CRIMINAL, CIVIL AND ADMINISTRATIVE LAW § 4.01 (1996 & Supp. 1999).

1. 132 CONG. REC. 22,339 (1986) (statement of Rep. Bedell).

2. 132 CONG. REC. 22,335 (1986) (statement of Rep. Glickman). *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2-27 (1993 & Supp. 1999) [hereinafter BOESE, CIVIL FALSE CLAIMS]. Boese's treatise is an excellent source on the False Claims Act.

3. 31 U.S.C. § 3730(a)-(b) (1994).

4. *Id.* § 3730(d).

means he "[w]ho sues on behalf of the King as well as for himself."[5]

The statutorily set damages and penalties are formidable: treble damages plus a mandatory penalty of $5,000 to $10,000 per false claim.[6] This mounts up. Between 1986, when the FCA was substantially amended, and 1998, total fraud recoveries as a result of FCA actions filed by private persons have exceeded $2.085 billion.[7] Although a civil statute, the FCA, like the Racketeer Influenced and Corrupt Organizations Act ("RICO")[8] and the civil asset forfeiture statutes,[9] requires proof of criminal conduct to establish civil liability.

Originally, few FCA cases concerned health care fraud. In 1987, one year after the 1986 amendments that revitalized the FCA, only 12% of *qui tam* cases involved the Department of Health and Human Services ("DHHS") as the client agency.[10] By 1998, 61% of pending *qui tam* cases involved the DHHS as the client agency.[11] There are a number of reasons for the surge of health care fraud FCA cases. There is greater public awareness of the large amount of fraud, waste and abuse in the health care system. This helps bring forth citizens as *qui tam* relators. Also, the penalty structure of the FCA (penalties per claim) is especially lucrative for plaintiffs bringing health care fraud

---

5. BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

6. 31 U.S.C. § 3729(a) (1994).

7. Taxpayers Against Fraud, Qui Tam *Statistics*, TAF (visited June 3, 1999) <http://www.taf.org/taf/docs/qtstats98.html> (citing *qui tam* total recovery statistics released by the United States Department of Justice).

8. 18 U.S.C. §§ 1961-68 (1994 & Supp. III 1997). Like civil RICO, the FCA provides that *either* the government *or* private individuals may bring an FCA action under 31 U.S.C. § 3730(a)-(b). The private plaintiff provisions of the FCA differ from those in RICO in two major ways, however. First, whereas RICO requires that a private party demonstrate that he or she has been harmed "in his business or property" by the defendant's conduct, the FCA permits "[a] person" to bring an FCA suit. *See* 18 U.S.C. § 1964(c) (1994 & Supp. III 1997); 31 U.S.C. § 3730(b)(1) (1994). Second, whereas RICO allows a private party plaintiff to litigate the action without any interference from the government, the FCA permits the federal government to intervene in a FCA lawsuit initiated by a private party and if the government chooses, to take over the action with minimal involvement by the private party plaintiff. *See* 18 U.S.C. § 1964(c) (1994 & Supp. III 1997); 31 U.S.C. § 3730(b)-(c) (1994).

9. Money Laundering Control Act, 18 U.S.C. § 981 (1994). *See, e.g.*, Comprehensive Forfeiture Act, 21 U.S.C. § 853 (1994 & Supp. III 1997).

10. Money Laundering Control Act, 18 U.S.C. § 981 (1994). *See, e.g.*, Comprehensive Forfeiture Act, 21 U.S.C. § 853 (1994 & Supp. III 1997).

11. Qui Tam *Statistics*, *supra* note 7.

cases because most health care providers submit thousands of claims as a matter of routine.[12] Thus, even if the amount of fraud per claim is small, the FCA rakes in high penalties. In addition, the federal government, which was hostile to FCA cases brought by private citizens a decade ago, has become solicitous of such cases.[13] Prosecutors realize that detection and investigation of complex frauds, such as health care fraud, require "insiders" who can provide detailed information about the facts and participants. The FCA encourages insiders to come forward by sharing proceeds recovered with the insider whose information leads to a successful *qui tam* action. Also, given the difficulty of proving intentional commission of health care fraud, it makes sense for prosecutors to use the civil FCA instead of criminal prosecution. Not only is the burden of proof less (preponderance, rather than beyond a reasonable doubt), but the mens rea requirement in the FCA (knowing, reckless disregard for the truth or deliberate disregard of the truth) is less than "willfulness," which must be proven for many criminal causes of action.[14] Lastly, most health care providers, unlike many criminal defendants, have a fair amount of assets, making pursuit of a civil action viable.

The FCA is not a panacea for prosecuting health care fraud, however. Health care fraud is unusually difficult to prove, whether criminally or civilly. Part of this difficulty is due to the chaos that characterizes the American health care system. The number of providers and claims submitted each year and the variety of reimbursement mechanisms, insurers and billing codes in use make it difficult to determine what happened, and it is even more difficult to prove that fraud, and not honest mistakes, occurred.[15] Compounding this is the fact that many questions of fraud quickly turn into questions of whether malpractice was committed—an ambiguous inquiry at best. This imprecision makes it difficult to prove that fraud, not just faulty judgment,

12. PAMELA H. BUCY, HEALTH CARE FRAUD: CRIMINAL, CIVIL AND ADMINISTRATIVE LAW § 4.01 (1996 & Supp. 1999) [hereinafter BUCY, HEALTH CARE FRAUD].

13. U.S. DEP'T OF JUSTICE, HEALTH CARE FRAUD REP., FISCAL YEARS 1995 & 1996, at 14 (1996) (stating that "[t]he influence of *qui tam* cases in the health care area cannot be overstated").

14. 31 U.S.C. § 3731(c) (1994).

15. BUCY, HEALTH CARE FRAUD, *supra* note 12, § 1.04.

was present. In addition, to prove fraud (or to escalate the penalties under the FCA by identifying lots of false claims) it is necessary to prove that a pattern of misbehavior occurred. This becomes logistically challenging; the sheer number of documents, witnesses, financial transactions and patients can be overwhelming. Aside from the difficulty of proving health care fraud, whether under the FCA or otherwise, aggressive use of the FCA raises policy questions such as whether threatened suit under the FCA "extorts" settlements,[16] and whether parallel investigations of potential criminal and civil liability stifle constructive dialogue between regulators and the health care industry.[17] Used properly, however, the FCA is a potent and appropriate weapon to use against fraudulent health care providers and should be employed whenever its elements are met.

II. ELEMENTS OF THE FALSE CLAIMS ACT

A. *Mens rea*

Since 1863, the FCA has required that the defendant commit the prohibited conduct "knowingly," but until the FCA was amended in 1986, the statute did not define "knowingly." Prior to 1986, a number of courts interpreted "knowingly" as "specific intent to defraud."[18] Specific intent to defraud is difficult to prove because it requires evidence that a defendant violated a known legal duty.[19] Disavowing of this interpretation, Congress defined "knowingly" in the 1986 amendments as follows:

16. Pamela H. Bucy, *The PATH from Regulator to Hunter: Lessons from the Investigation of Physicians at Teaching Hospitals*, ST. LOUIS U. L.J. (forthcoming 1999).

17. *Id.*

18. United States v. Davis, 809 F.2d 1509, 1512 (11th Cir. 1987); United States v. Aerodex, Inc., 469 F.2d 1003, 1007 (5th Cir. 1972); United States v. Mead, 426 F.2d 118, 122 (9th Cir. 1970). Other courts interpreted knowingly as stringently but in different terms: "guilty knowledge of a purpose on the part of [the defendant] to cheat the Government." *E.g.*, United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959).

19. Ratzlaff v. United States, 510 U.S. 135, 142 (1994) (citations omitted).

(1) actual knowledge of the information;
(2) act[ing] in deliberate ignorance of the truth or falsity of the information; or
(3) act[ing] in reckless disregard of the truth or falsity of the information.[20]

The drafters of the 1986 amendments gave a two-fold explanation for this change: they wanted to make it easier to prove liability under the FCA, and they wanted to standardize the mens rea requirement in the statute.[21] The drafters were especially concerned about "corporate officers who insulate themselves from knowledge of false claims submitted by lower-level subordinates."[22] Thus, the 1986 clarification of knowingly makes it more difficult for these officers to avoid liability.[23] Furthermore, Congress left intact the higher, specific intent requirement in at least two of the seven sections of the FCA. Section 3729(a)(4), which prohibits delivering less property to the Government than is shown on a certificate or receipt, requires proof of "inten[t] to defraud the Government or willfully to conceal . . . property."[24] Section 3729(a)(5), which prohibits certifying receipt of property by the Government "without completely knowing that the information on the receipt is true," also requires proof of "inten[t] to defraud the Government."[25] In addition, § 3729(a)(3), prohibiting conspiracies to submit false claims, arguably requires proof of specific intent, not just a knowing violation.[26] Section 3729(a)(3) does not include the language "knowingly" and, while not specifically including the language "intent to defraud," refers to "conspir[ing] to defraud the Government."[27]

Even with the dilution of the "knowing" requirement in portions of the FCA, innocent mistake and mere negligence

20. 31 U.S.C. § 3729(b).

21. "The Committee's interest is not only to adopt a more uniform standard, but a more appropriate standard for remedial actions." S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.

22. *Id.*

23. *Id.*

24. 31 U.S.C. § 3729(a)(4).

25. *Id.* § 3729(a)(4)-(5).

26. *See supra* notes 18-23 and accompanying text.

27. 31 U.S.C. § 3729(a)(3) (emphasis added). John T. Boese makes this argument in CIVIL FALSE CLAIMS, *supra* note 2, § 2-27.

remain defenses to FCA actions. The FCA plaintiff must prove "the knowing presentation of what is known to be false."[28] *United States ex rel. Hochman v. Nackman*[29] provides an apt example of the scienter requirement. The relators, physicians at the Los Angeles Veterans Administration Outpatient Medical Clinic, filed a *qui tam* action against administrators and physicians at the clinic, alleging that the defendants submitted false claims to the federal government by charging for time the physicians were not at the clinic.[30] The Ninth Circuit affirmed summary judgment in favor of the defendants on the ground that the plaintiffs had not proven scienter.[31] Whether the payments to physicians at issue were erroneous depended upon the proper interpretation of guidelines promulgated by the Veterans Health Administration ("VHA").[32] The Ninth Circuit found that even if the payments were made in violation of the VHA Guidelines,

> [T]he record does not support a reasonable inference that the defendants had the requisite knowledge of the alleged falsity. . . . Absent evidence that the defendants knew that the VHA Guidelines on which they relied did not apply, or that the defendants were deliberately indifferent to or recklessly disregardful of the alleged inapplicability of those provisions, no False Claims Act liability can be found.[33]

The court stressed that innocent mistake or mere negligence cannot form the basis of FCA liability.[34]

B. Claim

The FCA does not define "claim," but the courts have defined it for purposes of the FCA as "a demand for money or for some transfer of public property."[35] One type of claim that has

---

28. United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).
29. 145 F.3d 1069 (9th Cir. 1998).
30. *Hochman*, 145 F.3d at 1069.
31. *Id.* at 1069, 1074.
32. *Id.* at 1073-74.
33. *Id.* at 1074.
34. *Id.*; *see also* Wang v. FMC Corp., 975 F.2d 1412, 1420-21 (9th Cir. 1992).
35. United States v. McNinch, 356 U.S. 595, 599 (1958) (quoting United States v. Tieger, 234 F.2d 589, 591 (3d Cir. 1956)).

caused some controversy in FCA cases is the "reverse false claim." In this situation, the claimant makes a material misrepresentation to avoid paying money owed to the government. For example, if an individual who is obliged to pay the government a percentage of profits falsely understates income and/or overstates expenses in calculating the government's share of profits, that individual has submitted a reverse false claim to the government.[36] Prior to the 1986 amendments, courts routinely held that "reverse false claims" did not fall within the FCA.[37] In the 1986 amendments, however, Congress amended the FCA to make clear that the FCA covers reverse claims.[38]

C. The Prohibited Conduct

The FCA prohibits seven types of conduct, all concerning submissions of false claims to the government.

1. Section 3729(a)(1).—The conduct prohibited in § 3729(a)(1) is "present[ing] or caus[ing] 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."[39] The elements of a § 3729(a) action are: (1) that the defendant "knowingly presents or causes to be presented, to an officer or employee of the gov-

---

36. "For instance, the manager of HUD-owned property may falsely understate income and/or overstate expenses in order to reduce the rental receipts which must be paid to HUD at the end of each month." 132 CONG. REC. 22,337 (1986) (remarks of Rep. Fish).

37. *See* United States v. Howell, 318 F.2d 162 (9th Cir. 1963). In *Howell*, the Ninth Circuit held that the defendants' act of understating total receipts to the government pursuant to an agreement that the defendants and the government would split receipts was not a false claim. *Howell*, 318 F.2d at 164. The court noted the government's argument that there is no difference, in terms of the effect on the government, between a situation where a claimant "is fraudulently demanding money and one where he is fraudulently seeking a reduction in the amount of money to be paid by him." *Id.* at 165. Acknowledging that such "reasoning would be valid . . . with a general fraud statute," the court held that the FCA specifically required presentation of a claims. *Id.* at 166; *see also* Smith v. United States, 287 F.2d 299, 304 (5th Cir. 1961); United States *ex rel.* Kessler v. Mercur Corp. 83 F.2d 178, 179, 181-82 (2d Cir. 1936), *cert. denied*, 299 U.S. 576 (1936).

38. 31 U.S.C. § 3729(a)(7). *See, e.g.*, United States v. American Heart Research Found., Inc., 996 F.2d 7, 9 (1st Cir. 1993).

39. 31 U.S.C. § 3729(a)(1).

ernment . . . a false or fraudulent claim for payment or approval";[40] (2) [t]hat the claim was false or fraudulent;[41] (3) that the defendant knew the claim was false or fraudulent;[42] and (4) that the United States Government suffered damages as a result of the false or fraudulent claim.[43]

A common type of conduct prohibited by the FCA, seeking reimbursement for goods or services never provided, is covered by § 3729(a)(1).[44] *United States ex rel. Hochman v. Nackman*[45] demonstrates this use of § 3729 (a)(1). Physicians employed at a Veterans Administration Outpatient Medical Clinic brought suit as *qui tam* relators, alleging that the various defendants (the Clinic Director, the Clinic Chief of Staff and the Clinic Chiefs of Anesthesiology and Surgery, among others) submitted or approved inaccurate attendance records for clinic physicians, thereby charging the government for physician services never provided.[46]

In addition, § 3729(a)(1) covers misrepresentations as to what type of service or product was provided. *United States ex rel. Foulds v. Texas Tech University*[47] demonstrates this use of § 3729(a)(1). Foulds, a dermatology resident, filed a *qui tam* action alleging that Texas Tech Health Sciences Center ("TTHSC") (the teaching hospital associated with Texas Tech Medical School) submitted claims for reimbursement for services allegedly provided by staff physicians which were actually provided by resident physicians (physicians in training) without supervision by the staff physicians.[48]

---

40. *Id.*
41. *Id.* § 3729(a)(2).
42. *Id.*
43. *See id.* § 3729(a).
44. *See* S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272; United States v. McNinch, 356 U.S. 595 (1958); United States v. Collyer Insulated Wire Co., 94 F. Supp. 493, 495 (D.R.I. 1950); *see also* United States v. Bornstein, 423 U.S. 303 (1976); Murray & Sorenson, Inc. v. United States, 207 F.2d 119, 123 (1st Cir. 1953); United States *ex rel.* Luther v. Consolidated Indus., Inc., 720 F. Supp. 919, 922 (N.D. Ala. 1989).
45. 145 F.3d 1069, 1073 (9th Cir. 1998).
46. This *qui tam* action was dismissed on the grounds that no reasonable factfinder could conclude that the defendants knowingly presented false claims. *Hochman*, 145 F.3d at 1069.
47. 171 F.3d 279 (5th Cir. 1999).
48. *Foulds*, 171 F.3d at 281. Ultimately, this case was dismissed on the ground

Section 3729(a)(1) also covers "caus[ing a false claim] to be presented,"[49] which may occur when a subcontractor submits false claims to a contractor who unknowingly incorporates the falsity into the claim it submits to the government. *Murray & Sorenson, Inc. v. United States*[50] exemplifies this. Contractors hired by the government to build a naval base employed a purchasing agent who inflated the cost of parts.[51] Unaware of the falsification, the contractors submitted the inflated cost to the government and were reimbursed at the inflated amount.[52] The court held that the purchasing agent was liable under the FCA for causing the submission of false claims.[53]

2. Section 3729(a)(2).—Section 3729(a)(2) prohibits making, using or causing to be made or used "a false record or statement to get a false or fraudulent claim paid or approved by the Government."[54] This section is aimed at those persons who supply false documentation in support of a false claim.[55] Such documentation may include invoices, a schedule for completion of projects, results of inspections, safety or performance tests, evidence of eligibility to contract, etc.[56]

---

that the defendant ("TTHSC") was immune from suits by private citizens under the Eleventh Amendment. Because the United States had not joined as a plaintiff, the only plaintiff in this action was the *qui tam* relator, and the court's ruling on sovereign immunity required that the suit be dismissed. *Id.* at 294.

49. 31 U.S.C. § 3729(a)(2).

50. 207 F.2d 119 (1st Cir. 1953).

51. *Murray*, 207 F.2d at 121.

52. *Id.* at 121-22, 123.

53. *Id.* at 124.

54. 31 U.S.C. § 3729(a)(2).

55. The leading FCA expert, John T. Boese, has suggested that although "the explicit language of [§ 3729(a)(2)] appears to require actual payment or approval by the Government," the language of this section does not require actual payment or approval—it prohibits knowingly making, using or causing to be made or used a false statement *to get* a false or fraudulent claim paid or approved by the government. BOESE, *supra* note 2, § 2-16 n.14. The key to liability would seem to be the defendant's intent: did the defendant make or use the false record with the goal of getting a false or fraudulent claim filed? A focus on intent would seem to be more consistent with both the FCA's goals and Congress' admonition to construe the FCA's provisions broadly. Surely Congress would not have intended that a person who submitted false invoices to get a false claim paid escape liability simply because his or her fraud was detected prior to payment or approval of the claim by the government.

56. *See, e.g.*, United States *ex rel.* Butler v. Hughes Helicopter Co., No. CV 89-

United States ex rel. Thompson v. Columbia/HCA Healthcare Corporation[57] demonstrates use of § 3729(a)(2) in a health care context. Thompson, a physician in Corpus Christi, Texas, brought suit as a *qui tam* relator alleging that the defendants, various health care providers, submitted false claims to Medicare when they certified, in annual cost reports, that the services they had provided were in compliance with Medicare laws and regulations.[58] Thompson argued that because the defendants were in violation of anti-kickback and Stark laws, which govern financial transactions among health care providers,[59] all of the claims they submitted to Medicare after their certification were false.[60] In addition, Thompson argued that the cost reports containing the certification were "statements [made] to get a false claim paid," in violation of § 3729(a)(2).[61]

Both § 3729(a)(1) and § 3729(a)(2) may apply to a given situation, but the number of claims may vary, depending on which section is charged.[62] For example, assume that a subcontractor submits fifty false invoices to a contractor who, unaware of the falsity, includes the invoices when submitting a claim to the government for reimbursement. Assuming that other elements of the FCA are met, the subcontractor could be charged with fifty counts of violating § 3729(a)(2) for causing submission of fifty false statements to get a claim paid, or with one count of violating § 3729(a)(1) for causing the submission of a false claim. As John T. Boese, foremost expert on the FCA, has pointed out, § 3729(a)(2) liability could be enormous if numerous false records are submitted to support a single false claim.[63]

5760 SVN, 1993 WL 841192, at *5 (C.D. Cal. Aug. 25, 1993).

57. 125 F.3d 899 (5th Cir. 1997).

58. *Thompson*, 125 F.3d at 900.

59. *Id.* at 901.

60. *Id.* at 902.

61. *Id.* at 901.

62. *See* United States v. Bornstein, 423 U.S. 303 (1976). The Supreme Court held that a subcontractor caused a false claim to be submitted to the government when the subcontractor caused the prime contractor to submit a false claim. *Bornstein*, 423 U.S. at 312-13. The subcontractor, United National Labs ("United") supplied electron tubes to the prime contractor, Model Engineering & Manufacturing Corp., Inc. ("Model"), which included the tubes in radio kits that Model supplied to the government. *Id.* at 303. United provided Model with electron tubes of inferior quality and falsely marked invoices to conceal the defects. *Id.*

63. John T. Boese, *An Overview of Liability Under The Civil False Claims Act,*

3. Section 3729(a)(3).—Section 3729(a)(3) prohibits conspiring to defraud the government to get a false or fraudulent claim allowed or paid.[64] The elements of this offense are (1) the defendant conspired with one or more persons to get a false or fraudulent claims allowed or paid by the United States, and (2) one or more conspirators performed an act to effectuate the object of the conspiracy.[65] It is not necessary to show that a false claim was actually presented to or paid by the government as a result of the conspiracy.[66] Each co-conspirator is jointly and severally liable for the damages and penalties resulting from this violation.[67] *United States ex rel. Mikes v. Strauss*[68] demonstrates the use of § 3729(a)(3) in a health care context. Patricia S. Mikes filed suit, claiming that her former employers, all diagnostic clinics, conspired to defraud the government by submitting claims to Medicare for improper diagnostic tests (spirometry, which measures air flow in the lungs) and magnetic resonance imaging (which uses radiation absorption for non-intrusive viewing of internal organs).[69]

United States ex rel. Haskins v. Omega Institute, Inc.[70] provides another example of a § 3729(a)(3) action. The relators, former and current paralegal students at Omega Institute, a post-secondary school for adults, brought suit alleging that Omega made misrepresentations to the United States Department of Education to obtain financial aid funds for its students.[71] Specifically, the relators alleged that various teachers and administrators conspired to provide fewer hours of instruction than Omega represented in its government filings.[72] Noting that some of the defendants spoke among themselves about the num-

---

in NAT'L INST. ON THE CIVIL FALSE CLAIMS ACT AND QUI TAM ENFORCEMENT B3 (1998).

64. 31 U.S.C. § 3729(a)(3).

65. United States v. Bouchey, 860 F. Supp. 890, 893 (D.D.C. 1994); *see also* Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 828 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1007 (2d Cir. 1987).

66. United States *ex rel.* Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258-59 (S.D. Fla. 1989); *Blusal Meats*, 638 F. Supp. at 828.

67. United States v. Board of Educ., 697 F. Supp. 167, 176 (D.N.J. 1988).

68. 889 F. Supp. 746 (S.D.N.Y. 1995).

69. *Mikes*, 889 F. Supp. at 749.

70. 11 F. Supp. 2d 555 (D.N.J. 1998).

71. *Haskins*, 11 F. Supp. 2d at 558.

72. *Id.* at 565.

ber of hours taught and, even though not involved in teaching the reduced load, distributed catalogs containing allegedly false information about course load, the court found that a genuine issue of fact existed as to whether all defendants participated in the conspiracy, and it denied defendants' motion for summary judgment.[73]

4. Section 3729(a)(4).—Section 3729(a)(4) essentially prohibits embezzlement of government property by delivery contractors. It provides liability for any person who "has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt."[74] It is significant to note that § 3729(a)(4) and § 3729(a)(5) require proof of a higher mens rea than is required in other sections of § 3729. Before any person violates § 3729(a)(4), it must be shown that he or she acted "*intending* to defraud the Government or *willfully* to conceal the property."[75]

The elements of § 3729(a)(4) are:

(1) the defendant had possession, custody, or control of money or property used or to be used by the government;
(2) the defendant delivered or caused to be delivered less property than the amount for which he received a certificate or receipt;
(3) with intent to defraud or to willfully concealed [sic] the property; and
(4) the United States suffered damages as a result.[76]

United States ex rel. Stinson v. Provident Life & Accident Insurance Co.[77] demonstrates a § 3729(a)(4) case. In its complaint, Stinson, a law firm, alleged that Provident Life paid as secondary insurer on health care claims when it should have paid as

73. *Id.* at 566.
74. 31 U.S.C. § 3729(a)(4).
75. *Id.* (emphasis added).
76. *Stinson*, 721 F. Supp. at 1259.
77. *Id.* at 1257.

primary insurer. The result was fraud upon Medicare which, because of Provident's concealment, paid as primary insurer instead of as secondary.[78]

5. *Section 3729(a)(5).*—Section 3729(a)(5) encourages those who receive or make deliveries to the government to verify that the delivery is complete. It provides liability for any person who is "authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true."[79] As noted, § 3729(a)(5), like § 3729(a)(4), requires proof of a higher mens rea than is required in other sections of § 3729, namely, that one "intend[ed] to defraud the Government"[80] rather than that one "knowingly" defrauded the government.[81]

6. *Section 3729(a)(6).*—Section 3729(a)(6) reaches those who buy property on the "black market" from government officers or employees or from members of the Armed Forces. It provides liability for any person who "knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property."[82] Like all but § 3729(a)(4) and § 3729(a)(5), this section requires only proof that the defendant acted "knowingly."[83] Section 3729(a)(6) would be violated, for example, if Veterans Administration ("VA") hospital employees sold medical supplies, equipment or drugs purchased by the VA for in-patient use to non-authorized individuals.

7. *Section 3729(a)(7).*—Section 3729(a)(7), added in 1986, prohibits knowingly making, using or causing to be made or used, "a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Gov-

78. *Id.* at 1248-49, 1257.
79. 31 U.S.C. § 3729(a)(5).
80. *Id.*
81. *Id.* § 3729(a)(1)-(2), (6)-(7).
82. *Id.* § 3729(a)(6).
83. *Id.*

ernment."[84] This section was added to make clear that "reverse false claims" are covered by the FCA. In these cases, a claimant makes a material misrepresentation to avoid paying money otherwise due the government. There has been considerable litigation involving § 3729(a)(7), especially concerning whether it covers potential obligations due the government, such as when a party makes false statements to avoid fines, penalties or forfeitures which *may* be imposed.[85]

Reverse false claims have arisen under § 3729(a)(7) in the health care context when health care providers failed to reveal fully their relationship to businesses they deal with. Medicare and Medicaid restrict the reimbursement due certain providers when those providers obtain goods or services from a "related organization." A "related organization" is an organization that is "to a significant extent . . . associated with or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies."[86] *United States v. Oakwood Downriver Medical Center*[87] demonstrates this use of § 3729(a)(7). Two hospitals and various individuals associated with the hospitals[88] were sued under § 3729(a)(1)-(3) and

---

84. 31 U.S.C. § 3729(a)(7).

85. *See, e.g.*, United States *ex rel.* S. Prawer & Co. v. Verrill & Dana, 946 F. Supp. 87 (D. Me. 1996) (holding that potential liability cannot form the basis of a § 3729(a)(7) suit; judgment or acknowledged indebtedness is required). *Prawer* is cited with approval in United States v. International Courier, 131 F.3d 770, 773 (8th Cir. 1997) (holding that § 3729(a)(7) does not only cover "potential" liability, but in addition to judgments, it also covers obligations to pay arising from "statute, regulation, contract, judgment, or acknowledgment of indebtedness"). *But see* United States *ex rel.* Stevens v. McGinnis, Inc., No. C-1-93-442, 1994 WL 799421, at *8 (S.D. Ohio Oct. 26, 1994) (holding that failure to report pollution spills as required under the Clear Water Act was a potential obligation because spills subjected the polluter to fines, a potential obligation covered by § 3729(a)(7)); United States *ex rel.* Sequoia Orange Co. v. Oxnard Lemon Co., No. CV-F-91-194 OWW, 1992 WL 795477, at *4 (E.D. Cal. May 4, 1992) (holding that false statements to avoid paying fines for shipping lemons in excess of quotas are potential obligations covered by § 3729(a)(7)); *accord* Pickens v. Kanawha River Towing, 916 F. Supp. 702, 708 (S.D. Ohio 1996).

86. 42 C.F.R. § 413.17(b)(1) (1998).

87. 687 F. Supp. 302 (E.D. Mich. 1988).

88. The individuals sued included the Chief Executive Officer ("CEO") and partner at one of the hospitals, a member of the Board of Trustees and part-owner of one of the hospitals, and a CPA who worked on the hospitals' accounts and the CPA's firm. *Oakwood*, 687 F. Supp. at 303.

§ 3729(a)(7) for failing to reveal their related party status.[89] The government alleged that annual cost reports submitted by Oakwood to Medicare "falsely declared that none of [the] Medicare reimbursement costs sought by Oakwood involved related parties."[90] By revealing that it was related to one of its suppliers of health care services, Oakwood would have subjected itself to less reimbursement from Medicare.[91]

D. *"Submitted to the Government"*

The FCA does not apply unless false claims are submitted "to an officer or employee of the United States Government or a member of the Armed Forces of the United States."[92] Because the federal government often contracts with private parties to perform various functions on behalf of the government, questions have arisen as to whether claims submitted to these "contractors" are within the FCA. For example, in *Peterson v. Weinberger*,[93] the government brought suit under the FCA against a physician and an owner of a nursing home for billing Medicare for physical therapy never provided.[94] Although the claims were actually submitted to a private insurer, the court found the federal government to be the real party in interest.[95] The court noted that the insurers were "Medicare fiscal interme-

89. *Id.* at 304.

90. In fact, according to the government, West Outer Drive Medical Center ("WODMC"), which provided various medical services to Oakwood, was a related party. *Id.* at 303. One defendant served as Oakwood's CEO and was a partner in WODMC. *Id.* Another defendant was on Oakwood's Board of Trustees and was a part-owner of WODMC. *Id.* at 304. A third defendant was the CPA for both Oakwood and WODMC. *Oakwood*, 687 F. Supp. at 303.

91. When a provider purchases goods or services from a non-related party, it is reimbursed by Medicare for its "reasonable" costs; when a provider purchases goods or services from a related party, it may be reimbursed only for the cost for which "comparable items" could have been purchased elsewhere. 1 Medicare & Medicaid Guide (CCH) P5679 (1988); BUCY, HEALTH CARE FRAUD, *supra* note 12, § 2.04.

92. 31 U.S.C. § 3729(a)(1) (1994).

93. 508 F.2d 45 (5th Cir. 1975).

94. *Peterson*, 508 F.2d at 47-48.

95. *Id.* at 51-52 n.7 (citing 20 CFR § 405.670 (1973), which states that "[i]n the performance of their contractual undertakings, the carriers act on behalf of the Secretary, carrying on for him the administrative responsibilities imposed by the law. . . . The Secretary, however, is the real party in interest in the administration of the program").

diaries who act as agents at the sole discretion of the Secretary of Health, Education and Welfare [currently Health and Human Services]."[96]

A variation of this issue occurs where a program is jointly funded with federal and state resources, such as Medicaid. In these cases, the key to FCA coverage appears to be in the amount of control retained by the federal government. *United States ex rel. Davis v. Long's Drugs Inc.*[97] demonstrates this. Davis, a pharmacist working at Long's Drugs, filed an FCA lawsuit alleging that his employer submitted numerous false claims to the California Medicaid program.[98] The defendants argued that "the mere fact that federal funds are advanced for a state program is insufficient to warrant a characterization of fraudulent claims under that program as claims against the United States government within the meaning of the [FCA]."[99] The court rejected this argument, finding that there were "substantial contacts"[100] between the state Medicaid programs and the federal government, including required compliance with a "myriad of federal regulations"[101] and joint funding.[102]

The 1986 amendments resolved any doubt about this issue with § 3729(c), which states:

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[103]

Thus, although it is not necessary for a claim to be made, presented, or submitted directly to the government, it is necessary

---

96. *Id.* at 51.
97. 411 F. Supp. 1144 (S.D. Cal. 1976).
98. *Davis*, 411 F. Supp at 1144.
99. *Id.* at 1146.
100. *Id.*
101. *Id.* at 1146-47.
102. United States v. Azzarelli Constr. Co., 647 F.2d 757, 759 (7th Cir. 1981); United States *ex rel.* Fahner v. Alaska, 591 F. Supp. 794, 798 (N.D. Ill. 1984).
103. 31 U.S.C. § 3729(c).

to demonstrate that the ultimate financial victim is the federal treasury.[104] An interesting variation on this issue occurs when a claim is submitted to a grantee of federal funds. As the Court of Appeals for the District of Columbia pointed out, in such a situation "there must be a sufficiently close nexus between the [grantee and the federal government] such that a loss to the [grantee] is effectively a loss to the [federal government]."[105] Submitting an application to a grantee is not deemed to be a submission to the federal government "where the grantee's federal funds are an insubstantial percentage of its total budget, where there is little likelihood that any of a defendant's money actually came from the federal grant, or where there is little continuing contact between the grantee and the government once the grant is made."[106] The case before the D.C. court of appeals involved allegations by a *qui tam* relator that the purchasing department at Howard University ("Howard") falsified time and attendance records, engaged in bid-rigging with vendors, authorized payments to vendors who provided no services to Howard, and appropriated Howard's property for personal use.[107] Although there was no evidence that the alleged falsehoods would lead to direct payout to Howard by the federal government, the court found that there was adequate evidence of a nexus between the federal government and Howard: over 80% of Howard's funds came from the federal government during the relevant time period; Congress annually authorized funds for Howard; Howard was permitted to make purchases through the General Services Administration; Howard was subject to inspection "at all times" by the Secretary of Education ("Secretary") and was required to submit a financial accounting to the Secretary annually.[108] The court reasoned that, "[w]hether or not the United States Government would be out *additional* money beyond that already appropriated for Howard,

104. United States *ex rel.* Simmons v. Smith, 629 F. Supp. 124, 127 (S.D. Ala. 1985).

105. United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 738 (D.C. Cir. 1998).

106. *Yesudian*, 153 F.3d at 738.

107. *Id.* at 734.

108. *Id.* at 739.

it would suffer a loss if the money appropriated for legitimate purposes were instead wasted on a false claim."[109]

E. Jurisdiction . . . When Suing a Sovereign

When a sovereign, such as a state, is sued as a defendant under the FCA, jurisdictional questions arise under the Eleventh Amendment to the United States Constitution and under the terms of the FCA. It is not unusual to see states as defendants in health care fraud cases. State agencies administer state Medicaid programs, and state universities, especially medical schools, have myriad contracts with the federal government to conduct research[110] and render patient care.[111] Fraud in any of these activities could subject the state to suit under the FCA, assuming no jurisdictional prohibitions.

The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[112] The Eleventh Amendment has been interpreted as permitting the United States to sue a state but preventing citizens from suing any state, whether it be their own or another.[113] Thus, the question that arises in FCA cases is whether the *qui tam* relator or the United States is the "real party in interest." A collateral question is whether failure by the United States to intervene is significant in determining the "real party in interest." There is a split in the circuits on these issues, with the Supreme Court set to resolve it.[114]

Four circuits have held that the Eleventh Amendment does not prevent FCA *qui tam* actions against the states because the

---

109. *Id.*

110. *See* United States *ex rel.* Berge v. University of Ala., 104 F.3d 1453 (4th Cir. 1997).

111. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, MEETING THE NEEDS OF COMMUNITIES 2 (1998).

112. U.S. CONST. amend. XI.

113. Hans v. Louisiana, 34 U.S. 1, 10-11 (1890).

114. United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (June 24, 1999), *docketed for oral argument* Nov. 29, 1999.

United States is the real party in interest, even if the United States does not intervene.[115] These courts point to the federal government's "significant control over the course of the litigation and its dominant share of the proceeds thereof," whether or not it intervenes.[116] They note, for example, that even if the federal government does not intervene, it is the aggrieved party which receives copies of all pleadings,[117] can intervene at any time upon "good cause,"[118] and can seek limits on the relator's role.[119] Moreover, these courts reason, allowing FCA suits to go forward against the states will not disrupt "the usual balance of power between the United States and the State[s]."[120] As the Eighth Circuit reasoned, "[t]here is no coercion in subjecting States to the same conditions for federal funding as other grantees. . . . if they take the King's shilling, they take it *cum onere*."[121]

The Fifth Circuit has ruled otherwise, holding that the Eleventh Amendment bars FCA actions against the States, at least in those cases where the government chooses not to intervene.[122] Acknowledging that the federal government "may be a relevant 'party'" in a *qui tam* case where it has not intervened, the Fifth Circuit found it significant that the federal government "is not the acting party-of-record."[123] As such, according to the court, it occupies a "passive role."[124] The Fifth Circuit focused on the role played by the relator when the government does not intervene; the relator finances the litigation and "controls all

115. *See* United States *ex rel.* Rodgers v. Arkansas, 154 F.3d 865, 868 (8th Cir. 1998); *Stevens*, 162 F.3d at 201-03, *cert. granted*, 119 S. Ct. 2391; United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 39 F.3d 957, 959, 963 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995); United States *ex rel.* Milam v. University of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46 (4th Cir. 1992).

116. United States *ex rel.* Zissler v. Regents of The Univ. of Minn., 154 F.3d 870, 872 (8th Cir. 1998); *see also Stevens*, 162 F.3d at 200.

117. 31 U.S.C. § 3730(c)(3).

118. *Id.* § 3730(b)(5), (c)(3).

119. *Id.* § 3730(c)(2)(C) (limiting the role upon a showing that the relator's action in the case would "unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment").

120. *Zissler*, 154 F.3d at 873.

121. *Id.* at 873.

122. United States *ex rel.* Foulds v. Texas Tech Univ., 171 F.3d 279, 294 (5th Cir. 1999).

123. *Foulds*, 171 F.3d at 291.

124. *Id.* at 282.

strategic litigation decisions in the case, such as how, when and in what manner to make demands on a state, whether to sue a state, how far to push the state toward a jury trial in extended litigation, whether to settle with a state and on what terms."[125] In short, the Fifth Circuit sees serious federalism concerns in allowing a private individual to sue a state.[126]

Even in those circuits holding that the Eleventh Amendment does not preclude FCA actions against States, a second question exists, namely whether the terms of the FCA permit such suits. The FCA permits suits against "any person"[127] but provides scant guidance as to whether "person" includes states. The only courts addressing this question have answered it affirmatively, holding that "person" includes the states.[128] These courts look to the purpose of the FCA, noting its breadth: "the Act was intended to reach all types of fraud, without qualification, that might result in a financial loss to the Government."[129] They also look to the FCA's legislative history, which directly addresses the term "person" and states that "the False Claims Act reaches all parties who may submit false claims."[130] Thus, the Eighth Circuit, at least, clearly concludes that the term "person" is used in its broadest sense to include "partnerships, associations, and corporations . . . as well as States and political subdivisions thereof."[131] The Eighth Circuit notes that when used in other portions of the FCA relating to discovery[132] and eligibility to serve as a relator,[133] the term "person" has

125. *Id.* at 293.

126. *Id.*

127. 31 U.S.C. § 3729(a).

128. The Fifth Circuit has not reached this question since it resolved the *Foulds* case, holding that the Eleventh Amendment precluded Foulds' *qui tam* action. *Foulds*, 171 F.3d at 288 (stating that "[t]he facts of this case necessarily limit our inquiry to the situation in which a private citizen brings the *qui tam* action and the United States government has not intervened").

129. *Zissler*, 154 F.3d at 874 (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).

130. *Id.*

131. *Id.* at 874 (citing S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272).

132. 31 U.S.C. § 3733(a)(1) (1994) (authorizing civil investigative demands against "any person").

133. *Id.* § 3730(b) (stating that "a person" may bring a *qui tam* action under the FCA). States have long served as relators under the FCA. *See, e.g.*, United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984).

been interpreted to include the states. As the Eighth Circuit noted, "the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning."[134]

F. "False or Fraudulent"

For FCA liability to attach, the claim must be "false or fraudulent."[135] While the typical FCA case involves overcharging the government under a government contract,[136] FCA cases have also been found to exist on the theory that substandard products or services were supplied.[137] One of the more actively litigated questions involving the FCA has been whether the FCA covers claims which accurately list services rendered, but which are submitted by a person (or entity) which has failed to comply with all applicable governmental laws and regulations for health care providers. For example, are claims "false" within the FCA if submitted by a nursing home for services actually rendered to Medicare patients but where the nursing home has failed to comply with state licensing requirements? Are claims "false" within the FCA if submitted by a diagnostic clinic that paid physicians who referred patients to the clinic in violation of the anti-kickback statute?

---

134. *Zissler*, 154 F.3d at 875 (quoting Commissioner v. Lundy, 516 U.S. 235, 250 (1996)).

135. 31 U.S.C. § 3729(a)(1). Given the complexity and ambiguity of billing regulations, this may not be straightforward to determine in health care fraud cases. *See, e.g.*, United States *ex rel.* Glass v. Medtronic, Inc., 957 F.2d 605 (8th Cir. 1992). Glass, a patient who received a second pacemaker after experiencing complications with his first pacemaker, brought an FCA action against the pacemaker manufacturer. *Glass*, 957 F.2d at 607. Glass alleged that the manufacturer violated the FCA by improperly directing him to seek reimbursement from Medicare when the manufacturer should have paid the health care costs associated with the replacement surgery. *Id.* at 606. According to Glass, the manufacturer "caused a false claim to be filed when it told him to submit his claim to Medicare for reimbursement, when [the manufacturer] knew it was responsible for any costs." *Id.* at 608. The court dismissed Glass' complaint, finding that there was no falsity. *Id.* Citing regulations from the HCFA, the court found that the manufacturer properly instructed Glass to seek reimbursement from Medicare. *Id.*

136. United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996).

137. United States v. Aerodex, 469 F.2d 1003, 1012 (5th Cir. 1972).

The cases presenting this question are as varied as the rules and regulations governing government contractors, and they raise difficult policy issues. On the one hand, a provider may be billing at a proper rate for eligible and necessary services which were in fact provided. Thus, there is no measurable monetary damage, and as courts have consistently pointed out, "the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations. The FCA is a fraud prevention statute."[138] On the other hand, a provider which has arguably not complied with licensing requirements or which has been paying illegal kickbacks should not be rendering services or submitting insurance claims in the first place.

Although too early to describe definitively the approach courts have adopted in resolving this issue, two general points seem clear.[139] First, whenever payment of a claim is premised expressly and directly upon compliance with certain laws or standards, failure to comply is a false claim within the FCA.[140] When a provider certifies, for example, that all services rendered were medically necessary and provided in accordance with medically accepted standards, the provider has submitted a false claim if the provider knowingly provided substandard or unnecessary services.[141] Second, even if a claim is not directly premised upon compliance with specific standards, it may be implicitly premised. In this situation, claims have been held to fall within the FCA only if the *payment* of the claim, not *participation* in the program, is conditioned upon compliance with specific regulatory and contractual standards.[142] In addition, of course, the elements of "knowingly" and "false or fraudulent" must be satisfied, which may be more difficult because of the implicit nature of the certification of compliance.[143] Courts began addressing the question of whether claims are false within the

138. United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1020 (7th Cir. 1999).

139. The Supreme Court avoided a recent opportunity to weigh-in on this issue when it opted not to rule on the question of whether there must be fiscal harm to the United States (i.e., measurable monetary damage) to constitute an FCA violation. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 945 (1997).

140. *See infra* pp. 24-25.

141. *See infra* p. 25.

142. *See infra* pp. 28-29.

143. *See infra* pp. 24-25.

FCA for failure to comply with applicable regulatory and licensing rules when faced with alleged violations of anti-kickback statutes. Now they face this issue in the context of state licensing laws, certificates of need and adequate quality of care.

1. Kickbacks and Self-Referrals.—Over the past twenty years, lawmakers have focused considerable attention on the referral practices of some health care providers. This focus has been directed at payments by providers to other providers for referrals and at self-referrals, whereby a provider refers patients to clinics with which the referring physician has a financial relationship.[144] Because such payments are believed to encourage unnecessary medical procedures, to subsidize marginal providers who otherwise would not be able to remain in practice, and to discourage competition from entering the system,[145] they have been prohibited in all but a few specifically defined instances. Beginning in 1972 and continuing almost annually, Congress has passed legislation, or federal agencies have promulgated applicable regulations[146] regarding referrals among health care providers. These legislative and regulatory efforts potentially affect every business arrangement in which health care providers participate.

In 1989, Congress passed the Ethics in Patient Referrals Act.[147] This statute, known as the Stark Amendment, took effect on January 1, 1992 and prohibits physicians from referring Medicare patients to clinical laboratories in which they hold a financial interest.[148] It also prohibits clinical laboratories from

144. *See generally* BUCY, HEALTH CARE FRAUD, *supra* note 12, § 2.13 (describing recent trends in kickbacks and self-referrals).

145. *Issues Related to Physician "Self Referrals": Hearings on H.R. 939 Before the Subcomm. on Health and the Subcomm. on Oversight of the House Comm. on Ways and Means*, 101st Cong. 27-28 (1989) [hereinafter *Hearing Issues Related to Physician Self-Referrals*] (statement of Rep. Fortney Pete Stark, Chairman, Subcomm. on Health).

146. 42 U.S.C.A. § 1320a-7(b) (West 1991 & West Supp. 1999); 42 C.F.R. § 1001.952(a)-(m) (1998).

147. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6204, 103 Stat. 2137, 2236 (codified at 42 U.S.C. § 1395nn (1994)). Minor amendments were added in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

148. 42 U.S.C.A. § 1395nn(a)(1)(B) (West 1994 & West Supp. 1999).

billing any person for "designated health services"[149] performed as a result of a prohibited referral. In 1992, the DHHS promulgated proposed regulations to implement this statute.[150] Final regulations took effect on August 14, 1995.[151]

In 1993, Congress expanded the Stark Amendment by passing "Stark II." Stark II extends the prohibited referrals to Medicaid as well as Medicare patients, and prohibits referrals to ten categories of providers in addition to clinical laboratories.[152] The 1993 amendments took effect on January 1, 1995. On January 9, 1998, HHS promulgated proposed Stark II regulations.[153]

In FCA cases, relators have alleged that claims submitted by entities which have violated the anti-kickback statute or Stark laws are false within the FCA because the claims implicitly represent that the provider has complied with all applicable laws and regulations. The only two courts to rule on this issue have held that such claims may be "false" within the FCA if payment of the claims were conditioned upon a certification that the provider had complied with all applicable laws.[154] In *United States ex rel. Thompson v. Columbia/HCA Healthcare Corporation*,[155] the Fifth Circuit remanded the case for further findings but held that if the Medicare payment to the provider were conditioned upon the provider's certification of compliance with Medicare laws and regulations, including the anti-kickback and Stark laws, any claims based upon such certification were false within the FCA.[156] A district court in Tennessee ruled similarly

149. *Id.*

150. Medicare Program: Physician Ownership of, and Referrals to Health Care Entities that Furnish Clinical Laboratory Services, 57 Fed. Reg. 48, 8588 (1992).

151. Exclusions from Medicare and Limitations on Medicare Payment, 60 Fed. Reg. 156, 41,978 (1995); 42 C.F.R. § 411.350 (1998).

152. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (codified in principal part at 47 U.S.C. § 309(j) (1994 & Supp. III 1997)).

153. Medicare and Medicaid Programs: Physicians' Referrals to Health Care Entities with Which They Have Financial Relationships, 63 Fed. Reg. 6, 1659 (1998).

154. United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902-03 (5th Cir. 1997); United States *ex rel.* Pogue v. American HealthCorp, Inc., 914 F. Supp. 1507, 1509-13 (M.D. Tenn. 1996).

155. 125 F.3d 899 (5th Cir. 1997).

156. *Thompson*, 125 F.3d at 902. On remand, the district court concluded that the Medicare payment was conditioned upon the provider's certification of compliance. United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 20 F.

in *United States ex rel. Pogue v. American Healthcorp, Inc.*[157] The position taken by these courts is consistent with prior courts' emphasis on materiality, i.e., the allegedly false statement must be material before a violation of the FCA exists.[158] *United States ex rel. Berge v. University of Alabama*[159] demonstrates this emphasis on materiality. Pamela Berge, a doctoral candidate in nutritional service who worked with scientists at the University of Alabama at Birmingham ("UAB"), brought a *qui tam* action under the FCA alleging that the UAB scientists made false statements to the National Institute of Health ("NIH") in annual progress reports required under a NIH grant awarded to the scientists.[160] In particular, alleged Berge, the UAB scientists misled the NIH about the amount of data which had been computerized and misrepresented who did what work.[161] The Fourth Circuit reversed the jury verdict for Berge on the ground that the alleged false statements were not material to NIH funding decisions.[162]

2. Claims for Medically Unnecessary Services.—When health care providers perform unnecessary medical services and seek reimbursement by certifying that such services were necessary, they have committed fraud.[163] Recent FCA cases brought under this theory include *United States ex rel. Mikes v. Straus*,[164] where the relator alleged that bills submitted to Medicare for magnetic resonance imaging ("MRI") tests were false because the tests were unnecessary;[165] *United States ex rel. Public Integrity*

Supp. 2d 1017, 1046 (S.D. Tex. 1998). Thus, the court denied the defendants' motion for summary judgment. *Thompson*, 20 F. Supp. 2d at 1049.

157. *Pogue*, 914 F. Supp. at 1513.

158. United States *ex rel.* Berge v. University of Ala., 104 F.3d 1453, 1459 (4th Cir. 1997), *cert. denied*, 522 U.S. 916 (1997).

159. *Berge*, 104 F. 3d at 1453.

160. *Id.* at 1456.

161. *Id.*

162. *Id.* at 1460. The court also found that the statements at issue were not false. *Id.* at 1460-61; *see also* United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999) (citing with approval, without having to decide the issue itself, the Fourth Circuit's opinion in *Berge*).

163. *See* BUCY, HEALTH CARE FRAUD, *supra* note 12, § 2.06.

164. 931 F. Supp. 248 (S.D.N.Y. 1996).

165. *Mikes*, 931 F. Supp. at 251.

v. Therapeutic Technology Inc.,[166] where the relator alleged that Medicare claims for Lymphedema pumps were false because the equipment was unnecessary;[167] and *United States v. Geri-Care, Inc.*,[168] where the government, as the sole plaintiff, alleged that Medicare claims for audiological tests were false because the tests were unnecessary.[169]

3. Quality of Care.—Providing substandard quality of care can become fraud if the provider misrepresents that care provided complies with required quality standards or minimums established by the insurer. The certification on the claim form will be crucial in determining whether a sufficient misrepresentation has been made to prove fraud.[170] *United States ex rel. Aranda v. Community Psychiatric Centers of Oklahoma Inc.* demonstrates an FCA case where this theory of certification was used.[171] The complaint alleged that the provider, a mental health institution, submitted false claims when it sought reimbursement for services.[172] According to the complaint, the claim implicitly certified that the facility "was abiding by applicable statutes, rules and regulations"[173] when in fact it was not because it was not providing its patients with a reasonably safe environment.[174] Specifically, the complaint alleged that the facility failed to take adequate precautions to protect suicidal patients, patients who had "elopement" tendencies, and patients, in general, who were exposed to other patients who were physically aggressive.[175]

Wagner v. Allied Clinical Laboratories,[176] demonstrates another example of this theory as used in an FCA case. Among other things, the *Wagner* complaint alleged that when the defen-

166. 895 F. Supp. 294 (S.D. Ala. 1995).
167. *Public Integrity*, 895 F. Supp. at 295.
168. No. Civ. A. 89-5720, 1990 WL 39301 (E.D. Pa. Mar. 30, 1990).
169. *Geri-Care, Inc.*, 1990 WL 39301, at *1.
170. United States *ex rel.* Aranda v. Community Psychiatric Ctrs. of Okla., 945 F. Supp. 1485, 1487 (W.D. Okla. 1996).
171. *Aranda*, 945 F. Supp. at 1487.
172. *Id.*
173. *Id.* (quoting Second Amended Complaint ¶¶ 101-02, at 20-21).
174. *Id.*
175. *Id.* at 1488.
176. No. C-1-94-092, 1995 WL 254405 (S.D. Ohio Mar. 20, 1995).

dant, a clinical laboratory, accepted Medicare assignment, it certified that it would operate in accordance with requirements established by the DDHS.[177] The complaint alleged that the laboratory failed to operate within the parameters of acceptable competency because it falsified diagnoses and failed to obtain a diagnosis on specimens referred to the laboratory.[178] Similarly, in *Cedars-Sinai Medical Center v. Shalala*,[179] a *qui tam* relator brought suit alleging that the defendants, all hospitals, sought reimbursement for devices that were not FDA-approved and thus did not comply with Medicare's requirements for reimbursement.[180]

United States Attorneys in Pennsylvania and Maryland have been especially active in using this quality of care theory. On September 14, 1998, the U.S. Attorney's office in Maryland filed an FCA suit against Greenbelt Nursing and Rehabilitation Center alleging that the nursing home engaged in "a systemic denial of care."[181] As Lynn R. Battaglia (U.S. Attorney for Maryland) warned: "[t]he nursing home industry should be aware that, in appropriate instances, the U.S. Attorney's Office will act to investigate and pursue systemic substandard care issues, notwithstanding a provider's representation of compliance with administrative requirements."[182] Interestingly, in the *Northern Health Facilities* case, the parties filed a consent injunction at the time of the filing of the FCA suit. The injunction, which had to be approved by the court, required immediate, specific protections for the nursing home residents.[183]

The U.S. Attorney in Philadelphia also settled a similar quality of care FCA suit with a Philadelphia nursing home. The settlement required the nursing home to pay $50,000 and to improve conditions for its residents. Again, the settlement was

---

177. *Wagner*, 1995 WL 254405, at *1.

178. *Id.* at *3, *12 (setting forth the settlement agreement).

179. 125 F.3d 765 (9th Cir. 1997).

180. *Shalala*, 125 F.3d at 764; *see also* United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1517 (10th Cir. 1996) (alleging mental health facility's deviation from required Medicaid components).

181. United States v. Northern Health Facilities Inc., 25 F. Supp. 2d 690 (D. Md. 1998).

182. 7 Health Care Rep. (BNA) 1443 (1998).

183. *Nursing Home Faces FCA Action, Agrees to Monitoring Pending Resolution*, 2 Health Care Fraud Rep. (BNA) 706 (1998).

filed simultaneously with the complaint.[184] This case represents the first time that the Civil Rights Division has worked with a U.S. Attorney's Office and the DHHS to investigate health care fraud.[185]

Luckey v. Baxter Healthcare Corporation[186] provides a helpful survey of quality of care cases and an analysis of how to approach them as fraud cases. Luckey was a laboratory employee at Baxter Healthcare Corp. ("Baxter"), which produced plasma derivatives for sale to federally subsidized hospitals, among others.[187] Luckey filed a *qui tam* action under the FCA alleging that Baxter falsely represented to the United States that its testing of plasma was "adequate and effective" and that it was in compliance with federal regulations. The United States declined to intervene, and on April 20, 1998, the court granted summary judgment for Baxter on all counts.[188]

There was no question that Baxter certified compliance with certain regulatory and contractual standards, but with one exception: the court found that the certifications in question were required for Baxter to *participate* in the plasma program but not to receive *payment*.[189] As such, the court held that Baxter's certifications did not activate the FCA.[190] As the court noted: "[a] finding of a false implied certification under the FCA for every request for payment accompanied by a failure to comply with all applicable regulations, without more, improperly broadens the intended reach of the FCA."[191]

It was significant to the court that the standards cited by Luckey were not "specific directions requiring compliance"[192] and that Baxter was contractually provided with the opportunity to make improvements, should the government determine that Baxter's facilities or procedures were inadequate.[193] According

184. *Id.* at 713.
185. *Id.*
186. 2 F. Supp. 2d 1034 (N.D. Ill. 1998).
187. *Luckey*, 2 F. Supp. 2d at 1037.
188. *Id.*
189. *Id.* at 1045.
190. *Id.* at 1046.
191. *Id.* at 1045.
192. *Luckey*, 2 F. Supp. 2d at 1046 (discussing Ab-Tech Constr. v. United States, 31 Fed. Cl. 429, 434 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995)).
193. *Id.*

to the court, "[t]his provision contradicts any attempt by Luckey to demonstrate that regulatory compliance was a prerequisite to receiving payment from the government."[194]

Also enlightening is the way the court handled the one instance where it found Baxter's certification of compliance to be a claim within the FCA. Baxter conceded that its payment for plasma was conditioned upon its certification of compliance with the federal Food, Drug and Cosmetic Act ("FDA").[195] However, the court found that there was insufficient evidence that Baxter's certification was "false" (instead, there existed a disagreement over scientific methodology)[196] or that Baxter "knowingly" misrepresented its FDA compliance (instead, there were differences in professional judgment, "ambiguous" FDA regulations, and a reasonable interpretation by Baxter).[197]

4. Certificate of Need.—Hospitals, home health agencies and other institutional providers may be required to obtain a Certificate of Need ("CON") from state authorities prior to building or expanding their facilities. All facilities which submit claims to Medicare and Medicaid claims are supposed to comply with state licensing regulations.[198] Therefore, argue some FCA plaintiffs, claims submitted by providers which fail to obtain the required CON or by providers which have obtained a defective CON, are false. *United States ex rel. Joslin v. Community Home Health of Maryland, Inc.*,[199] presents an example, albeit unsuccessful, of this attempted use of the FCA.[200] The court granted summary judgment for the defendant after it found, alternatively, that the defendant was in compliance with Maryland's CON requirement for home health agencies (grand-fathered in under prior Maryland law on CONs) or that if it was not, the defendant's lapse was not a "knowing" lapse as required for violations of the FCA.[201] In dicta, the court held that even if the defendant was

194. *Id.*
195. *Id.*
196. *Id.* at 1047.
197. *Luckey*, 2 F. Supp. 2d at 1049.
198. 42 C.F.R. § 482.11(b)(2) (1998).
199. 984 F. Supp. 374 (D. Md. 1997).
200. *Joslin*, 984 F. Supp. at 377; *see also* United States *ex. rel.* Sanders v. East Ala. Healthcare Auth., 953 F. Supp. 1404 (M.D. Ala. 1996).
201. *Joslin*, 984 F. Supp. at 379, 383.

required to obtain a CON and knowingly failed to do so, there was no FCA violation.[202] Although dicta, it is significant that the court also employed the "condition for payment and not condition for participation in program" test to determine whether false certification of compliance may constitute a false claim within the FCA.[203] According to the court, "[t]he relevant statute and regulation simply state that such compliance is a condition of participation in the Medicare program, but no evidence has been presented suggesting that certification of such compliance is a condition to *payment*, the *sine qua non* of FCA liability."[204]

Another area of alleged fraud regarding CONs is in connection with durable medical equipment. For durable medical equipment to qualify for reimbursement, a physician must certify that it is medically necessary.[205] *United States ex rel. Piacentile v. Wolk*[206] demonstrates an example of this. Employees of the defendant, a corporation engaged in selling medical equipment, were alleged to have "altered the CONs (certificate[s] of medical necessity) either by whiting-out or cutting out the original information supplied by the physician and substituting false information, or by adding information without the authorization or knowledge of the physician."[207] It was also alleged that some physicians had signed the CONs in blank and that employees of the defendant had destroyed corporate records to hide the various schemes.[208]

III. *QUI TAM* PROVISIONS

A. *Background*

The FCA provides that the federal government or any "person" may bring an action under the Act.[209] In this way, the

202. *See id.* at 385.
203. *See id.*
204. *Id.*
205. *See* Jackson v. United States, No. CV-97-0381, 1998 WL 661460, at *1 (E.D.N.Y. Aug. 12, 1998) (describing Medicare reimbursement process).
206. No. 93-5773, 1995 WL 20833, at *1 (E.D. Pa. Jan. 17, 1995).
207. *Piacentile*, 1995 WL 20833, at *1.
208. *Id.*
209. 31 U.S.C. § 3730(a)-(b) (1994). "[F]ormer or present member[s] of the armed

FCA empowers "private attorneys general" to supplement the government's efforts against fraud upon the government. One legislator summed up the rationale for this dual prosecuting authority during the 1986 revision of the FCA: "[i]n the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."[210]

Qui tam FCA actions have become renown in recent years for the large recoveries they bring to relators. One million dollars is the *average* relator's award,[211] but some of the recent recoveries are astounding: $42 million to relators on a $333,976 million settlement,[212] $2.34 million to relators on a $12.65 million recovery, and $2.4 million relators on a $10 million recovery.[213]

Elaborate procedures exist to protect the federal government's role in *qui tam* FCA suits. Upon filing a *qui tam* action, the relator must provide the government with a copy of the complaint and "substantially all material evidence and information the person possesses."[214] The complaint is sealed for at least sixty days to allow the government time to determine whether it will join as a plaintiff in the suit.[215] Even if the government chooses not to join at the time the complaint is filed, it

forces" are disqualified from serving as "persons" for purposes of the FCA. *Id.* § 3730(e)(1). In recent litigation, a corporation urged that its former in-house counsel was ineligible to serve as a *qui tam* relator. United States *ex rel.* Doe v. X Corp., 862 F. Supp. 1502, 1507 (E.D. Va. 1994). Although it acknowledged that ethical and policy problems potentially existed where counsel sues client in an FCA action, the court found that Congress had not precluded attorneys who sue their clients from serving as relators in FCA actions. *Doe*, 862 F. Supp. at 1507. However, in the case before it, Doe could not serve as relator because in making written disclosure to the government as required in § 3730(b)(2), Doe would violate an injunction prohibiting him from revealing confidences of his client. *Id.* at 1510. The court noted, however, that in other circumstances, it may be possible for an attorney to sue his client under the FCA without breaching ethical requirements. *Id.* at 1510 n.20.

210. S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.

211. Qui Tam *Statistics*, *supra* note 7.

212. United States *ex rel.* Merena v. Smithkline Beecham Corp., 52 F. Supp. 2d 420, 421 (E.D. Pa. 1998).

213. THE FALSE CLAIMS ACT LEGAL CENTER, 12 FALSE CLAIMS ACT AND *QUI TAM* Q. REV. 40 (1998).

214. 31 U.S.C. § 3730(b)(2).

215. *Id.*

may join later for "good cause" shown,[216] and it is entitled to copies of pleadings filed throughout the case even if it does not join the relator as a plaintiff.[217]

B. Jurisdictional Bar

The part of the FCA that has generated the most litigation is the "jurisdictional bar" provision which applies when a *qui tam* relator brings suit.[218] This provision jurisdictionally bars a court from considering:

> an action . . . 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.[219]

The relator bears the burden of proving that a court has jurisdiction over the case.[220] A decision by a district court as to whether or not a case is jurisdictionally barred is subject to a de novo review on appeal.[221]

There are three questions to resolve in applying the jurisdictional bar provision: (1) whether the allegations in the FCA action have been previously disclosed publicly, (2) whether the lawsuit is "based upon" the publicly disclosed information, and (3) whether the *qui tam* relator is an "original source" of the information.[222] Even if the allegations in the lawsuit have been publicly disclosed and the allegations in the *qui tam* action are based upon the publicly disclosed information, the relator is not

---

216. *Id.* § 3730(b)(3).

217. *Id.* § 3730(c)(3).

218. *Id.* § 3730(e)(4)(A).

219. 31 U.S.C. § 3730(e)(4)(A).

220. United States *ex rel.* Herbert v. National Academy of Sciences, No. Civ. A. 90-2568, 1992 WL 247587, at *4 (D.D.C. Sept. 15, 1992); United States *ex rel.* Kalish v. Desnick, No. 91-C-2288, 1992 WL 32185, at *2 (N.D. Ill. Feb. 18, 1992).

221. United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 859 (7th Cir. 1999); United States *ex rel.* Precision Co. v. Koch Indus. Inc., 971 F.2d 548, 551 (10th Cir. 1992).

222. *Mathews*, 166 F.3d at 859; *see also Precision*, 971 F.2d at 552.

jurisdictionally barred from bringing the law suit if the relator is an "original source" of the information.[223] If the relator does not qualify as an original source of the publicly disclosed allegations, the FCA lawsuit may continue but not as a *qui tam* action; it continues only if the Attorney General brings the action.[224]

1. Background.—In 1863, the FCA did not contain a "jurisdictional bar" provision. It was added in 1943 and was substantially revised in 1986. The impetus for adding this provision was the Supreme Court's decision in *United States ex rel. Marcus v. Hess*.[225] Prior to the filing of the *qui tam* action in *Marcus*, the defendants, all electrical engineers, had been convicted of defrauding the government by conspiring to rig the bidding on federal public works projects in the Pittsburgh area.[226] Apparently, the *qui tam* relator simply took information publicly available from the indictment and using it to file a *qui tam* action.[227] The Supreme Court held that the FCA allowed such parasitic suits.[228] The Court noted that whatever "strong arguments of policy [militate] against the statutory plan," such arguments should be addressed to Congress because the statute, as passed by Congress, allowed *qui tam* relators to use public information to file a *qui tam* suit.[229]

After the *Marcus* decision, the House of Representatives moved to repeal the FCA at the Attorney General's urging.[230] The Senate sought to save the statute but agreed to reduce the powers of the *qui tam* relator. The Senate prevailed, and the FCA was amended in 1943 to include a "jurisdictional bar" pro-

223. 31 U.S.C. § 3730(c)(4)(A).

224. *Id.* § 3730(a); S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.

225. 317 U.S. 537 (1943).

226. *Marcus*, 317 U.S. at 539 n.1.

227. *Id.* at 545.

228. *Id.* at 546.

229. *Id.* The damages sustained by the government because of the defendant's collusive bidding were $101,500. *Id.* at 540. This amount was doubled, according to the FCA. *Marcus*, 317 U.S. at 540. Added to the doubled damages was $112,000: $2000 for each of the 56 false claims submitted. *Id.* The FCA, in effect, allocated one half of the total award to the *qui tam* plaintiff.

230. S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.

vision barring parasitical FCA *qui tam* suits. This provision declared that no court had jurisdiction over a *qui tam* lawsuit if the government had *any* knowledge of the fraud at the time the lawsuit was filed.[231] The 1943 amendments also restricted the rights of the relator to participate in the lawsuit. Prior to the amendments, the relator directed the lawsuit, even if the government intervened. After the 1943 amendments, the Department of Justice ("DOJ") directs the case, and the *qui tam* relator has no role in the lawsuit.[232] In addition, the 1943 amendments reduced the amount of recovery available to the relator. Instead of a guaranteed one half of the recovery, the relator is eligible to receive no more than either 10% of the recovered amount if the government enters the case or no more than 25% if the government does not enter the case.[233] Either way, the court has discretion to award any amount below these percentages or none at all.[234]

A 1984 Seventh Circuit opinion highlighted a major inequity in the 1943 jurisdictional bar provision and prompted its revision in 1986. The case, *United States ex rel. Wisconsin v. Dean*,[235] was brought by the State of Wisconsin. Wisconsin successfully prosecuted Alice R. Dean, M.D., under state criminal statutes for submitting fraudulent Medicaid claims.[236] Dean was fined and sentenced to probation.[237] As required by the Medicaid program, Wisconsin reported Dean's state conviction to the federal government.[238] Thereafter, Wisconsin, as a *qui tam* relator under the FCA, sued Dean for damages resulting from many of the false claims at issue in the criminal case.[239] The Seventh Circuit ordered the complaint dismissed since, as all parties agreed, the FCA suit was "'based upon evidence or information in the possession of the United States . . . at the time' the complaint was filed."[240] Although acknowledging the ineq-

231. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. §§ 3729-3731 (1994)).

232. *Id.*

233. *Id.*

234. *Id.*

235. 729 F.2d 1100 (7th Cir. 1984).

236. *Wisconsin*, 729 F.2d at 1102.

237. *Id.*

238. *Id.* at 1103.

239. *Id.* at 1102.

240. *Id.* at 1103 (quoting 31 U.S.C. § 232(c) (1994)). This provision was designed

uity of dismissing Wisconsin's complaint, since it was the party that originally provided the federal government with information about the case, the court nevertheless held that it was bound by the statute to dismiss the action.[241] The court noted that only Congress could address the inequity.[242] In 1986, Congress responded by enacting the jurisdictional bar provision:

> No court shall have jurisdiction over an action . . . 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.[243]

Although remedying the inequity highlighted in *Dean*, this jurisdictional bar provision, which remains in effect today, has created interpretative difficulties for courts and litigants.

2. *Public Disclosure*.—If the information in the FCA suit has been publicly disclosed and the *qui tam* relator is not the original source of the information, then the suit is barred.[244] The FCA lists a number of sources that constitute public disclosure: criminal, civil or administrative hearings; congressional, administrative or Government Accounting Office reports, hearings, audits or investigations; and news media.[245] One of the more heavily litigated questions concerning public disclosure is whether disclosure during discovery in a case other than the FCA action constitutes "public disclosure" within the FCA even if the discovery is not actually made public. The Third Circuit,[246] followed without much discussion by the Second Cir-

---

to prevent "parasitical suits," whereby private litigants took public information or information otherwise known to the government and simply filed a *qui tam* FCA suit based upon such information. *Wisconsin*, 729 F.2d at 1104.

241. *Id.* at 1106-07.

242. "If the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption." *Id.* at 1106.

243. 31 U.S.C. § 3730(e)(4).

244. *See id.*

245. *See id.*

246. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1160-61 (3d Cir. 1991).

cuit,[247] has held that such "potential" public disclosure suffices under the FCA, and discovery is "public disclosure" under the FCA.[248] The Third Circuit reasoned: "[w]e do not think that it is significant, for purposes of interpreting the 'public disclosure' provision of the FCA, whether the discovery has in fact been filed [and thus made public]."[249] Rather "we look . . . [to] whether there is a recognition that [the discovery] can be filed and hence available for public access."[250] Under the Third Circuit's view, however, a protective order restricting access to the discovery would foreclose such discovery from qualifying as "public disclosure" under the FCA.[251] The Seventh and D.C. Circuits reject this approach as unsound and contrary to the statutory language.[252] As the Seventh Circuit explained,

> To say that something *is* publicly disclosed even if it is not in fact open to general observation or actually opened up to view, but is only potentially so, and that it is not publicly disclosed only if a court has forbidden its disclosure, is to distort the ordinary meaning of the words and in fact to read into the statute provisions that Congress did not enact.[253]

In *United States ex rel. Ramseyer v. Century Healthcare Corp.*,[254] the Tenth Circuit confronted a similar situation when the alleged public disclosure occurred with the filing of a report prepared by state officials.[255] This report was filed with a state agency and, by state law, was available to the public if specifically requested and approved. [256]Ramseyer was a consultant and then a clinical director of a mental health facility operated

247. United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1158 (2d Cir. 1992).

248. *Stinson*, 944 F.2d at 1161.

249. *Id.* at 1158.

250. *Id.* at 1159; *see also* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653 (D.C. Cir. 1994); *cf.* United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347-50 (4th Cir. 1994).

251. *See Stinson*, 944 F.2d at 1157-58.

252. United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 860 (7th Cir. 1999); *Springfield*, 14 F.3d at 652.

253. *Mathews*, 166 F.3d at 860.

254. 90 F.3d 1514 (10th Cir. 1996).

255. *Ramseyer*, 90 F.3d at 1517.

256. *Id.*

by Century Healthcare Corporation ("Century").[257] During her eight months of employment with Century, Ramseyer observed widespread noncompliance with Medicaid requirements.[258] Although Ramseyer communicated this noncompliance to the defendants, the defendants did nothing to correct the problems and continued to send noncomplying claims to Medicaid.[259] The defendants terminated Ramseyer's employment after eight months of service.[260] During this time, and independent of Ramseyer's efforts to alert the defendants of the problems, a routine audit and inspection by the Oklahoma Department of Human Services ("DHS") uncovered the same problems.[261] A DHS Program Supervisor prepared a report summarizing these findings. Three copies of the report were made. One copy was given to the defendants; one remained in DHS files; and one was given to a DHS Administrator.[262] The only way a member of the public could obtain a copy of the report was to specifically request it in writing and obtain approval for its release from DHS legal counsel; this was not done.[263]

The Tenth Circuit viewed the issue as "whether theoretical or potential accessibility—as opposed to actual disclosure—of allegations or transactions is sufficient to bar a *qui tam* suit that is based upon such information."[264] Following the approach adopted by the Ninth[265] and the D.C. Circuits,[266] and rejecting the view of the Third Circuit,[267] the court held that actual disclosure to the public was necessary to find that "public disclosure" had occurred under the FCA.[268] The court reasoned that common usage and understanding of the term "public disclosure"

---

257. *Id.*
258. *Id.*
259. *Id.*
260. *Ramseyer*, 90 F.3d at 1517.
261. *Id.*
262. *Id.*
263. *Id.* at 1517-18.
264. *Id.* at 1519.
265. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519-20 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 939 (1997).
266. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 652-53 (D.C. Cir. 1994).
267. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir. 1991).
268. *Ramseyer*, 90 F.3d at 1519.

imply actual disclosure. It pointed out that finding public disclosure to exist merely upon the possibility that the public could gain access to information would frustrate the FCA's goal of "encourag[ing] private citizens with first-hand knowledge to expose fraud."[269] Applying its analysis to the facts before it, the court found that "DHS did not affirmatively 'disclose' either the existence or the contents of the Hughes Report; instead, DHS simply placed the report in its investigative file and restricted access to those persons clairvoyant enough to specifically ask for it."[270] As such, the allegations and transactions in Ramseyer's FCA *qui tam* suit had not been publicly disclosed, and the Tenth Circuit reversed the district court's dismissal of Ramseyer's suit.[271]

Disclosure to government officials also raises questions of whether public disclosure has occurred. In *United States ex rel. Mathews v. Bank of Farmington*,[272] for example, prior to the filing of the FCA action by *qui tam* relators, the Farmington bank president revealed facts underlying the alleged fraud to the Farmers Home Administration ("FmHA") government official responsible for monitoring the bank's activity.[273] Acknowledging that not every disclosure to a government official constitutes a "public disclosure" within the FCA, the Seventh Circuit focused on whether the disclosure was to a government official "with direct responsibility for the claim in question."[274] If so, reasoned the court, it would constitute "public disclosure" within the FCA.[275] On the other hand, if the information was disclosed to a public official whose duties did not "extend to the claim in question in some significant way," such disclosure would not be "public" within the FCA.[276] Turning to the facts before it, the court held that the disclosure by the bank president to the FmHA official constituted "public disclosure" within

269. *Id.*
270. *Id.* at 1521.
271. *Id.* at 1521-22.
272. 166 F.3d 853 (7th Cir. 1999).
273. *Mathews*, 166 F.3d at 857.
274. *Id.* at 861.
275. *Id.*
276. *Id.*

the FCA since, given his duties, he was "authorized to act for or to represent the community."[277]

At the other extreme is *United States ex rel. Fine v. Advanced Sciences, Inc.*,[278] where, prior to filing his *qui tam* action, the relator disclosed information concerning the fraud to a government official unconnected with the alleged fraud.[279] Rejecting the argument that disclosure must be more meaningful, the Tenth Circuit took a literal approach: "[r]egardless of the number of people [Fine's] disclosure may have reached, he disclosed the allegations to a member of the general public: one who was previously unconnected with the alleged fraud."[280]

3. "Based Upon" Public Disclosure.—The issue of whether a *qui tam* action is *based upon* the public disclosure arises when the information contained in the *qui tam* action has been publicly disclosed, but the relator has not relied upon it in bringing a *qui tam* action.

The majority of the circuits have adopted the approach taken by the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Industries*.[281] In *Precision*, the relator was a corporation that filed a *qui tam* action under the FCA alleging that various companies falsely represented to the U.S. Government the

277. *Id.* at 862.

278. 99 F.3d 1000 (10th Cir. 1996).

279. *Fine*, 99 F.3d at 1005.

280. *Id.* at 1006. The Seventh Circuit rejected this view, finding that such isolated disclosure "fails to serve the purpose of the [FCA] under the 1986 amendments, namely to encourage the exposure and punishment of fraud." *Mathews*, 166 F.3d at 861-62.

281. 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), *approved by* United States *ex rel.* Biddle v. Board of Trustees of Stanford Univ., 147 F.3d 821, 826 (9th Cir. 1998); *see also* United States *ex rel.* McKenzie v. Bellsouth Telecomm., 123 F.3d 935, 940 (5th Cir. 1998); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 682-84 (D.C. Cir. 1997); United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 567 (11th Cir. 1994); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993); Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992) (noting that a *qui tam* action is "based upon" public disclosure if the complaint "repeats what the public already knows").

Although the Fifth Circuit has not directly addressed this issue, it has addressed it tangentially in Federal Recovery Servs., Inc. v. United States, 72 F.3d 447, 451 (5th Cir. 1995), seemingly following the majority view. See Wercinski v. IBM, Inc., 982 F. Supp. 449, 457-60 (S.D. Tex. 1997), for a helpful analysis of the Fifth Circuit's analysis.

amounts of crude oil and natural gas produced from federal lands.[282] The Tenth Circuit affirmed the dismissal of the *qui tam* action on the grounds that the information about the misrepresentations had been publicly disclosed prior to the filing of the action; the *qui tam* action was "based upon" the public disclosure; and, the relator could not qualify as an "original source" of the information.[283] Of significance was the court's discussion of whether the *qui tam* action was "based upon" the publicly disclosed information. Relying upon the statutory language and the purposes of the statute (to encourage persons with first hand knowledge of fraud to come forward, yet to avoid "opportunistic" lawsuits whereby individuals file *qui tam* actions about publicly known fraud without contributing to its detection), the Tenth Circuit held that a *qui tam* action is "based upon" public disclosure if the action is "supported by"[284] or is "substantially identical" to the publicly disclosed information.[285]

The Fourth Circuit was the first circuit to articulate a different view.[286] In *United States ex rel. Siller v. Becton Dickinson & Co.*, the Fourth Circuit held that a *qui tam* action is "based upon" publicly disclosed information only if the relator "actually derived from [the public] disclosure the knowledge of the facts underlying his action."[287] David Siller was employed by Scientific Supply Inc. ("SSI"), a distributor for health care products distributed by Becton Dickinson & Company ("Becton").[288] SSI and Becton settled a lawsuit brought by SSI alleging wrongful termination of SSI's distributorship by Becton.[289] Included in this lawsuit were allegations that Becton overcharged the federal government for health care products.[290] The parties to the settlement, including Siller's brother as President of SSI, agreed to keep the terms of settlement confi-

282. 971 F.2d 548, 550 (10th Cir. 1992).

283. *Precision*, 971 F.2d at 554.

284. *Id.* at 552-53.

285. United States *ex rel.* Fine v. Advanced Sciences Inc., 99 F.3d 1000, 1006 (10th Cir. 1996).

286. *See* United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1349 (4th Cir. 1994).

287. *Siller*, 21 F.3d at 1347.

288. *Id.* at 1340-41.

289. *Id.* at 1341.

290. *Id.*

dential.[291] Arguing that he was not bound by the settlement, Siller filed a *qui tam* action which, he admitted, included the same allegations contained in the SSI wrongful termination lawsuit and settlement.[292] Finding that the allegations of overcharging contained in Siller's *qui tam* action were publicly disclosed when SSI filed its prior suit against Becton, the Fourth Circuit went on to hold that Siller's *qui tam* suit was not "based upon" that public disclosure.[293] The court agreed with Siller that "his complaint, even if substantially similar to that in the SSI litigation, was not 'based upon' the disclosures in the SSI complaint because he actually learned of Becton's overcharging practices independently of the SSI complaint."[294] The court held that this approach was "the only fair construction of the statutory phrase."[295] The court reasoned: "[r]ather plainly, therefore, a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based."[296] The Fourth Circuit found its approach consistent with the FCA's goal of preventing parasitic suits since a relator must still prove that he did not base the FCA lawsuit on the publicly disclosed information.[297] Finding this reasoning persuasive, the Seventh Circuit recently adopted the Fourth Circuit's position.[298]

291. *Id.* at 1340-41.
292. *Siller*, 21 F.3d at 1341.
293. *Id.* at 1349.
294. *Id.* at 1347.
295. *Id.* at 1348.
296. *Id.*
297. *Siller*, 21 F.3d at 1348.
298. United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 863 (7th Cir. 1999). The courts rejecting the Fourth's Circuit's position find it inconsistent with the FCA's policy of encouraging insiders to come forward with information of fraud of which the government is unaware. As the Ninth Circuit reasoned, when the allegations of fraud are already publicly known, "the relator confers no additional benefit upon the government by subsequently repeating the fraud allegations in his complaint." United States *ex rel.* Biddle v. Board of Trustees of Stanford Univ., 147 F.3d 821, 828 (9th Cir. 1998). These courts also make a statutory construction argument: interpreting "based upon" so narrowly "renders the 'original source' requirement largely superfluous." *Biddle*, 147 F.3d at 827. As the Ninth Circuit explained, "to say that a relator's complaint is not derived from public disclosures is to say that the relator had direct and independent knowledge of the fraud. Thus, under the *Siller* view, the 'based upon' language . . . duplicates the 'direct and independent

4. "Original Source."—Even if the first prong of the jurisdictional bar provision is met (i.e., the *qui tam* lawsuit is found to be "based upon" publicly disclosed allegations or transactions), the relator may go forward if the relator is "an original source" of the publicly disclosed information.[299] The FCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."[300] The major controversies concerning the "original source" language are: how to interpret the "direct and independent" requirement; whether the *qui tam* relator had to disclose information to anyone prior to filing the FCA lawsuit; and how to determine whether the relator "voluntarily" provided the government with information concerning the fraud before filing the FCA action.

a. "Direct and Independent"

The specificity and uniqueness of the information, the manner and timing in which the *qui tam* relator obtained the information, and when the relator obtained the information appear to be the key factors in determining whether the *qui tam* relator is found to have obtained the information "directly and independently." In *United States ex rel. Precision Co. v. Koch Industries*,[301] for example, the Tenth Circuit found that the relator's information was not obtained directly and independently but was "weak, informal and strikingly redundant" of allegations previously disclosed in civil lawsuits, a Congressional hearing and news releases.[302] Thus, the court ruled, the relator did not qualify as an original source.[303]

---

knowledge' language in [the original source requirement.]" *Id.*

299. 31 U.S.C. § 3730(e)(4)(A) (1994).

300. *Id.* § 3730(e)(4)(B).

301. 971 F.2d 548 (10th Cir. 1992).

302. *Precision*, 971 F.2d at 554; *see also* United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991); United States *ex rel.* Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 505 (7th Cir. 1989).

303. *Precision*, 971 F.2d at 554.

In contrast is *United States ex rel. Cooper v. Blue Cross & Blue Shield of Florida, Inc.*[304] As in *Precision*, substantial publicity of the allegations contained in the relator's FCA action preceded the filing of the FCA complaint.[305] The Eleventh Circuit, however, held that the relator was an "original source."[306] The court noted that the relator had conducted a thorough investigation on his own prior to the publicity, and his information was "potentially specific" and was "more than background information which enables him to understand the significance of a more general public disclosure."[307]

In short, it appears that a relator's knowledge will be deemed to be "direct" and "independent" if his knowledge was gained by his own efforts rather than from the labors of others.[308] As the Ninth Circuit explained, relators must "see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else."[309]

b. Disclosure

There is a disagreement among the courts as to what is needed to find adequate disclosure by an "original source." In *United States ex rel. Dick v. Long Island Lighting Co.*,[310] the Second Circuit held that the relator "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based."[311] In *Dick*, the relators were mid-level managers at a nuclear power plant.[312] They filed a *qui tam* action alleging that the power plant misrepresented to the state Public Service Commission the status of its

---

304. 19 F.3d 562 (11th Cir. 1994).
305. *Cooper*, 19 F.3d at 566.
306. *Id.* at 568.
307. *Id.* at 568 n.12; *see also* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 39 F.3d 957, 961-62 (9th Cir. 1994).
308. United States *ex rel.* Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1006-07 (10th Cir. 1996); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 656 (D.C. Cir. 1994).
309. United States *ex rel.* Devlin v. Cal., 84 F.3d 358, 361 (9th Cir. 1996).
310. 912 F.2d 13 (2d Cir. 1990).
311. *Dick*, 912 F.2d at 16.
312. *Id.* at 14.

construction so as to obtain higher rates.[313] Because the federal government was a ratepayer, allegedly it was defrauded by these misrepresentations.[314] Substantial publicity regarding the filing of a civil RICO class action by ratepayers preceded the filing of the relators' *qui tam* action.[315] The RICO complaint and the publicity surrounding it contained substantially the same allegations included in the relators' *qui tam* action.[316] The Second Circuit focused on the FCA's language and purpose,[317] reasoning as follows: "[o]ur interpretation . . . is most likely to bring 'wrongdoing to light' since, by barring those who come forward only *after* public disclosure of possible False Claims Act violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time."[318]

The Ninth Circuit reached a similar result but with different reasoning. In *Wang v. FMC Corp.*,[319] the Ninth Circuit found the statutory language to be ambiguous, so focused on the legislative history: "*qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based."[320] The Ninth Circuit also considered policy arguments, reasoning that the "conscientious or enterprising person" brave enough to bring the fraud to the public's attention should be rewarded with the bounty provided in the FCA rather than the person who "sat quietly in the shadows and breathed not a word" of the fraud.[321]

The Second and Ninth Circuits' approach is problematic. Holding that a relator qualifies as an original source only if the relator has disclosed the information concerning the alleged fraud to the entity that publicly disclosed the allegations would seem to turn on fortuities that have nothing to do with, or are

313. *Id.*
314. *Id.*
315. *Id.*
316. *Dick*, 912 F.2d at 14.
317. *Id.* at 16-18.
318. *Id.* at 18 (emphasis in original).
319. 975 F.2d 1412 (9th Cir. 1992).
320. *Wang*, 975 F.2d at 1418.
321. *Id.* at 1419-20.

irrelevant to, a relator's eligibility to bring a lawsuit. Such a holding would also seem to discourage individuals from fully investigating the facts surrounding false claims prior to disclosing the suspected fraud to others for fear that they may lose the "race to publicize." According to the Fourth Circuit, the Second Circuit's approach is "wholly indefensible" and constitutes a "misreading of the legislative history . . . to create an ambiguity in the statute where none exists."[322]

Recently, the Sixth, Seventh and D.C. Circuits adopted another approach, holding that a relator qualifies as an "original source" if the relator voluntarily provided information to the government prior to the public disclosure.[323] The Sixth Circuit simply found it difficult to understand how one can be a "true whistleblower" unless he or she is responsible alerted the government to the alleged fraud before information about it was in the public domain.[324] The Seventh Circuit found support for this approach in the statutory language: "To be an 'original source,' a *qui tam* plaintiff must be a *source* as well as being an *original source*."[325] Whereas being an *original* source requires proof that the plaintiff has "direct and independent knowledge of the information on which the allegations are based,"[326] being a *source* requires that one "voluntarily provide. . . . the information to the government before filing" suit.[327]

322. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1352-54 (4th Cir. 1994); *see also* United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 567-68 n.13 (11th Cir. 1994).

323. United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 865-66 (7th Cir. 1999); United States *ex rel.* McKenzie v. BellSouth Telecomm., 124 F.3d 935, 943 (6th Cir. 1997); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690 (D.C. Cir. 1997).

324. United States v. Horizon Healthcare Corp., 160 F.3d 326, 334 (6th Cir. 1998); *McKenzie*, 123 F.3d at 942.

325. *Mathews*, 166 F.3d at 865.

326. *Id.* (quoting 31 U.S.C. § 3730(e)(4)(B) (1994)).

327. *Id.* The Seventh Circuit also elaborated on what action would meet this disclosure requirement: a relator should notify a "suitable law enforcement office of the information which is the basis for the action, or . . . [should] inform [] the agency or official responsible for the particular claim in question." *Id.* at 866.

c. "Voluntarily" Providing Information to the Government

Aside from the controversy as to whether, when, and to what extent the relator must provide the federal government with information to qualify as a "source," the FCA explicitly requires that the relator "*voluntarily* provide [ ] the information to the Government before filing."[328] A "voluntary" disclosure is "uncompensated," "unsolicited,"[329] and "of [the relator's] own free will without valuable consideration . . . [or] without any present legal obligation . . . or any such obligation that can accrue from the existing state of affairs."[330] *United States ex rel. Stone v. AmWest Savings Association*[331] provides a helpful analysis of the voluntariness requirement. Stone, as former President and CEO of AmWest Savings Association ("AmWest"), filed a *qui tam* suit under the FCA alleging that AmWest "presented false claims, obtained false payments, and fraudulently avoided payment obligations."[332] All of the alleged acts of fraud arose from an agreement between AmWest and the Federal Savings and Loan Insurance Corporation ("FSLIC"), whereby the FSLIC would guarantee payment because of AmWest stemming from AmWest's acquisition of the assets and liabilities of eleven failed savings and loan institutions.[333] The government did not intervene in Stone's FCA action.[334]

The court dismissed Stone's lawsuit, finding that Stone could not qualify as an original source because he did not voluntarily provide the government with information concerning the fraud prior to filing his *qui tam* action.[335] At no point during his employment with AmWest did Stone make a disclosure to the government, even though he was aware, during his employ-

---

328. 31 U.S.C. § 3730(e)(4)(B) (1994) (emphasis added).

329. United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 743 (9th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1233 (1996).

330. *Fine*, 72 F.3d at 744.

331. 999 F. Supp. 852 (N.D. Tex. 1997).

332. *Stone*, 999 F. Supp. at 854.

333. *Id.* at 853.

334. *Id.* at 854.

335. The court previously determined that Stone's FCA case was based upon publicly disclosed information. *Id.* at 857-58.

ment, of AmWest's "questionable business activities."[336] Instead, Stone made his disclosures only once a criminal investigation was under way and he received immunity from prosecution.[337]

IV. CONCLUSION

The False Claims Act has had and will continue to have a tremendous impact on how the government deals with white collar criminals. It offers important advantages, primarily, flexibility in dealing with misconduct in complex regulatory areas where intent is difficult to determine and incentives are needed for those most knowledgeable about fraud to come forward. The FCA presents challenges, however. Its hybrid criminal/civil nature and public/private plaintiff structure present unique nuances for litigants and courts. As this Article has discussed, there are significant splits in the courts on basic and important issues of FCA jurisprudence. While scatter-shot development of the law is to be expected when new legislation is enacted, the uncertainty surrounding the FCA is exorbitant, causing unfairness for parties and inefficiencies in the courts. Since the FCA's effectiveness as a law enforcement and consumer tool will not be realized until the FCA case law has matured, its brightest days almost certainly lie ahead. For that reason, lawyers of tomorrow cannot afford not to have a working knowledge of the FCA. Given the federal government's avid role as a purchaser, consumer and guarantor of private enterprise's bounty, especially in the health care arena, few health care providers will practice beyond the FCA's reach.

---

336. *Id.* at 857.
337. *Stone*, 999 F. Supp. at 858.