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**The Civil False Claims Act and Health Care Compliance:  
Recent Developments at the Federal and State Level**

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## INTRODUCTION

The year 2006--marking the twentieth anniversary of the 1986 amendments to the civil False Claims Act--was the year when recoveries and expansion under the Act exploded. More than \$3 billion was recovered by the government under the FCA in fiscal year 2006, the highest amount in any year to date.<sup>1</sup> Over \$2.29 billion of this amount involved the health care industries (traditionally defined as all aspects of health care, including pharmaceutical and medical device companies).<sup>2</sup>

But 2006 is also the year when:

- Congress ignored the concept of federalism and attempted to mandate specific state FCA laws under the guise of deficit reduction;<sup>3</sup>
- The Supreme Court granted certiorari in a case which could clarify conflicting interpretations of the FCA's original source exception to its public disclosure bar;<sup>4</sup>
- The Ninth Circuit issued a decision which, if followed, could vastly expand FCA liability based on false certification and promissory fraud theories;<sup>5</sup> and
- The Second Circuit held that the government's amended complaint was barred under the FCA's statute of limitations and did not allow the government's amendment to relate-back to the original complaint based on the fundamental incompatibility between the secrecy accorded to complaints under the scheme of the FCA and the notice requirement under Rule 15 of the Federal Rules of Civil Procedure.<sup>6</sup>

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<sup>1</sup> See Fraud Statistics, October 1, 1986 – September 30, 2006 (Appendix B) (attached).

<sup>2</sup> See Appendix B (Health & Human Services Fraud Statistics). FCA settlements in the health care industry in 2006 included a \$920 million settlement with the second largest hospital chain in the country, Tenet Healthcare Corporation, and a \$265 million settlement with St. Barnabas Corp. of improper billing for outlier payments charges.

<sup>3</sup> Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031, 120 Stat. 4, 72 (2006) (to be codified at 42 U.S.C. § 1909) ("DRA"). Effective January 2007, a new financial incentive in the DRA encourages states that do not have false claims laws with *qui tam* provisions to adopt them. Under HHS OIG guidelines, state false claims laws are required to strictly conform to the federal FCA in order to "qualify" for this financial incentive.

<sup>4</sup> United States *ex rel.* Stone v. Rockwell Int'l Corp., 92 Fed. Appx. 708 (10th Cir. 2004), *cert. granted*, 127 S. Ct. 35 (U.S. Sept. 26, 2006) (No. 05-1272).

<sup>5</sup> United States *ex rel.* Hendow v. University of Phoenix, 461 F.3d 1166 (9th Cir. 2006), *petition for cert. filed* (U.S. Jan. 22, 2007) (No. 06-1006).

<sup>6</sup> United States v. Baylor Univ. Med. Ctr., 469 F.3d 263 (2d Cir. 2006).

These and other developments are addressed in the pages that follow.

**A. The Deficit Reduction Act's "Encouragement" of State False Claims Laws**

Sixteen states and the District of Columbia have enacted false claims laws with *qui tam* enforcement provisions. The sixteen states are:

California  
Florida  
Illinois  
Nevada  
Hawaii  
Delaware  
Massachusetts  
Tennessee  
Virginia  
Montana  
Indiana  
Louisiana  
Texas  
New Mexico  
New Hampshire  
Michigan

Four of these states—Texas, New Mexico, New Hampshire, and Michigan—limit their false claims laws to actions based on Medicaid fraud. More of both types of laws are in the offing because of a law recently enacted by Congress, the Deficit Reduction Act ("DRA")<sup>7</sup> which offers states with certain false claims laws a ten percent reduction in the Medicaid payment owed to the federal government.

The DRA offers this incentive to states that enact a false claims law that is "at least as effective" as the federal FCA.<sup>8</sup> There are both constitutional and practical problems with the DRA, however. As a practical matter, the DRA's ten percent reduction provision, when measured against the FCA's 15 to 25 percent relator share, may actually result in states losing money by authorizing *qui tam* suits.<sup>9</sup>

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<sup>7</sup> Deficit Reduction Act of 2005, Pub. L. No. 109-171, §§ 6031-6033 (2006) (to be codified at 42 U.S. C. §§ 1396a(a), 1396(i), and 1396h).

<sup>8</sup> See DRA, § 1396h.

<sup>9</sup> See J. Gibeaut, *Seeking the Cure: With Rampant Health Care Fraud, States Are Urged to Pass Their Own False Claims Acts, But Foes Warn of Windfalls for Plaintiff Lawyers*, ABA Journal.com, at 7 (Oct. 9, 2006) (citing

**Footnote continued**

In addition, under guidelines issued by the HHS OIG in August 2006, of the first ten states reviewed, seven failed to qualify for the ten percent incentive.<sup>10</sup> The three states that passed were Illinois, Massachusetts, and Tennessee, while the seven that failed were California, Florida, Indiana, Louisiana, Michigan, Nevada, and Texas. Reasons given for the failures include the following:

- California's penalty of "up to \$10,000" for each false claim does not set a floor as the federal statute does of not less than \$5,500
- Texas does not permit relators to bring *qui tam* actions if the Texas Attorney General declines to intervene
- Louisiana's relator's share provisions allow a lesser percentage to be recovered than under federal law
- Michigan's FCA does not create liability for reverse false claims

Although the reasons for the failure to qualify varied from state to state, the overall conclusion to be drawn from the HHS OIG's review is that the state laws must be virtually identical to the federal FCA in order to receive the ten percent reduction. Ironically, among the failures were those that have been most successful in achieving state FCA recoveries.

Moreover, the requirement in the HHS OIG's review that state false claims laws strictly conform to the federal FCA's provisions in order to be "as effective" as the federal law undermines the idea embodied in federalism that states are free to enact laws which their legislatures deem workable and fair. The Texas FCA's failure to qualify illustrates the problem caused by imposing federal requirements on state laws. As noted above, in Texas, the state legislature has decided to preclude *qui tam* suits if the state Attorney General declines to intervene. Statistics on FCA recoveries show that government participation in FCA suits is an overwhelmingly important element in FCA recoveries. They support the finding that the Texas false claims law requiring government intervention is an effective method—perhaps the most effective and economical method—of recovering Medicaid funds lost to fraud.

Despite these problems, several states have recently introduced legislation patterned after the federal law. These include Colorado, Mississippi, Missouri, New York, North Dakota, Oklahoma, and South Carolina.

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Washington state Medicaid fraud control director David W. Waterbury's mathematical conclusion that a 15 percent relator's share sounds more than the promised 10 percent reduction), available at <http://www.abanet.org/journal/redesign/10fcl.html>.

<sup>10</sup> See J. Boese, *Federalism Takes a Blow as HHS OIG Finds That Seven of Ten State False Claims Laws Do Not Qualify for Financial Incentive under Deficit Reduction Act*, FraudMail Alert No. 06-12-29, available at <http://www.ffhsj.com/wcc/pdf/fm061229.pdf>.

## **B. False Certifications and Promissory Fraud as a Basis for Liability in FCA Cases**

Each year, some of the most significant developments under the False Claims Act arise in the area of express and implied certifications. Many FCA cases are based not on facially false or improper claims, but rather on allegedly false certifications of compliance with statutes or regulations. The more straightforward type of false certification case is based on express certifications. For example, invoices submitted to the government may contain explicit certifications that a product complies with particular contractual standards or regulatory requirements. If that certification is false, it is alleged to be a basis for FCA liability even if the government is billed for the agreed upon amount. Similarly, a service provided to a government beneficiary may be characterized as giving rise to potential FCA liability if the provider falsely represents that it was provided in compliance with certain statutory mandates.

These cases are important in False Claims Act litigation because they often represent something quite different than a direct overbilling or fraud allegation. Rather, the FCA has been used by plaintiffs, with varying degrees of success and with a wide range of motivations, to litigate alleged regulatory and statutory violations, many of which lack a private right of action and do not have anything to do with a claim for payment from the government. Moreover, the FCA's penalty provision is tied to the number of claims or invoices submitted, which means that the amount of a potential penalty can quickly mount to the point where it far exceeds any actual out-of-pocket loss experienced by the government.

More controversial is the false implied certification theory of liability. In the litigation against Columbia/HCA that ultimately yielded more than a billion dollar settlement, the court in *United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*<sup>11</sup> defined the implied certification theory as follows:

The theory of implied certification . . . is that where the government pays funds to a party, and would not have paid those funds had it known of a violation of a law or regulation, the claim submitted for those funds contained an implied certification of compliance with the law or regulation and was fraudulent.

Basing FCA liability on an implied false certification is even more removed from a false claim for payment from the government than an express certification. As a result, in decisions from the Fourth, Fifth, Eighth, and Ninth Circuits, courts have noted the implied certification theory but have either rejected it, questioned its validity, or simply refused to apply it to the facts before the court.<sup>12</sup>

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<sup>11</sup> 238 F. Supp. 2d 258, 264 (D.D.C. 2002).

<sup>12</sup> See, e.g., *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, No. CIVS03949LKKGGH, 2005 WL 3453913, at \*2 (E.D. Cal. Dec. 16, 2005) (finding no compelling reason to certify false implied certification issue for immediate appeal because Ninth Circuit does not recognize the theory); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, No. 03-20460, 111 Fed. Appx. 296, 2004 U.S. App. LEXIS 21799, at \*3 n.2 (5<sup>th</sup> Cir. Oct. 20, 2004) (*per curiam*) (stating that the Fifth Circuit had not specifically addressed the issue of whether FCA liability may be based on the implied certification theory); *United States ex*

**Footnote continued**

The false certification theory—whether express or implied—has been rightly criticized and subjected to significant limitations in a number of jurisdictions because it has the practical effect of imposing FCA liability without proof that the defendant knowingly submitted a false claim to the government. As the definition of the theory in *Pogue* indicates, to the extent that courts recognize a false certification theory of FCA liability, many have limited its application to those few situations in which the government has explicitly conditioned its payment upon compliance with a statute or regulation.<sup>13</sup>

The Fifth, Seventh, and Ninth Circuits have issued conflicting decisions over whether FCA liability, applied under false certification theory to violations of statutory and regulatory requirements that are conditions of payment, should also extend to other conditions, such as conditions of "participation" or "eligibility" in government benefit programs.<sup>14</sup> Of particular concern are decisions by the Seventh and Ninth Circuits that minimize the distinction between the two types of conditions, and could result in using the FCA as a "blunt instrument" and general remedy for knowing regulatory violations rather than limiting its reach to false claims for payment submitted to the government.<sup>15</sup>

In *United States ex rel. Hendow v. University of Phoenix*, relators alleged that the University of Phoenix defrauded the government by concealing its violation of a restriction on enrollment

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*rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 n. 8 (4th Cir. 1999) (noting that implied certification claims are of questionable validity in the Fourth Circuit). *See also* cases cited in John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.03 n. 557 (3d ed. 2006).

<sup>13</sup> *See, e.g.*, *United States ex rel. Mikes v. Straus*, 84 F. Supp. 2d 427, 435 (S.D.N.Y. 1999) (The "implied false certification" theory applies "only in those exceptional circumstances where the claimant's adherence to the relevant statutory or regulatory mandates lies at the core of its agreement with the Government, or . . . where the Government would have refused to pay had it been aware of the claimant's non-compliance"), *aff'd*, 274 F.3d 687 (2d Cir. 2001); *United States ex rel. Bowan v. Education Am., Inc.*, No. 04-20384, 116 Fed. Appx. 531, 2004 WL 2712494 (5th Cir. Nov. 30, 2004) (false certification of compliance with regulations and statutes governing federal student financial aid programs did not violate FCA because relator did not allege defendants certified compliance with particular regulations on which payment was conditioned); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1087, 1089 (D. Kan. 2006) ("plethora of healthcare laws and statutes" establishing standards of care or conditions of participation with which defendant certified compliance were not express conditions of payment, nor was denial of payment the government's only remedy). *See also* cases cited in John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.03 n. 565 (3d ed. 2006).

<sup>14</sup> *See, e.g.*, *United States ex rel. Bowan v. Education Am., Inc.*, No. 04-20384, 116 Fed. Appx. 531, 2004 WL 2712494 (5th Cir. Nov. 30, 2004); *United States ex rel. Gay v. Lincoln Tech. Inst., Inc.*, 111 F. Appx 286 (5th Cir. 2004), *aff'g* 2003 U.S. Dist. LEXIS 25869 (N.D. Tex. Sept. 3, 2003); *United States ex rel. Graves v. ITT Educ. Serv., Inc.*, 284 F.Supp.2d 487 (S.D. Tex. 2003), *aff'd*, No. 03-20460, 2004 U.S. App. LEXIS 21799 (5<sup>th</sup> Cir. Oct. 20, 2004); *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (U.S. 2006); *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), *petition for cert. filed* (U.S. Jan. 22, 2007) (No. 06-1006); *United States v. Chapman Univ.*, No. SACV 04-1256JVSRCX, 2006 WL 1562231 (C.D. Cal. May 23, 2006).

<sup>15</sup> *See Mikes*, 274 F.3d 687, 699.

incentive compensation required under an agreement with the Department of Education and under Title IV of the Higher Education Act ("HEA").<sup>16</sup> Title IV of the HEA has an extensive number of statutory and regulatory requirements to eligibility in its student financial aid program. One of these requires the institution to execute a Program Participation Agreement with the Department, under which it agrees that it "will not provide . . . any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments."<sup>17</sup> The district court dismissed the *qui tam* allegations under false certification and fraud in the inducement theories of liability because the University's alleged false statements requested eligibility in the Department's student financial aid program rather than an immediate payment from the treasury, and because the applications of students for loans were not alleged to be false.

The Ninth Circuit reversed, finding that the allegations were sufficient under both theories. The court held that FCA liability predicated on false certification theory is satisfied by a false statement that violates a statutory or regulatory requirement, even though the court recognized that compliance with the incentive compensation restriction was "a necessary condition of continued eligibility and participation."<sup>18</sup> This decision could dangerously expand FCA liability to "regulatory violations" that are merely "relevant" to the government's decision to confer a benefit.<sup>19</sup> If so, it directly contradicts decisions of other circuits on the legal effect of violations of conditions of participation.<sup>20</sup> It also expands the reach of FCA liability beyond its legal limits. A petition for certiorari has been filed on the *Hendow* decision requesting the Court to strike down its expansive interpretation of FCA liability.<sup>21</sup>

The Ninth Circuit's holding is in direct conflict with that of the Fifth Circuit in *United States ex rel. Graves v. ITT Educational Services, Inc.*, which dismissed similar FCA allegations involving the same restriction on enrollment incentive compensation.<sup>22</sup> In *Graves*, the Fifth Circuit noted that courts have addressed general, after-the-fact certifications of compliance with all applicable laws, regulations and contract terms and found no liability under the FCA unless the certification is a prerequisite to payment.<sup>23</sup> Applying these authorities to the restriction in *Graves*, the Fifth Circuit found that:

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<sup>16</sup> 461 F.3d 1166 (9th Cir. 2006), *petition for cert. filed* (U.S. Jan. 22, 2007) (No. 06-1006).

<sup>17</sup> 20 U.S.C. §1094(a).

<sup>18</sup> *Hendow*, 461 F.3d at 1176.

<sup>19</sup> *Id.* at 1171-72.

<sup>20</sup> *See, e.g.*, cases cited in note 13, *supra*.

<sup>21</sup> The University of Phoenix filed a petition for certiorari in *Hendow* on January 22, 2007.

<sup>22</sup> 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 2004 WL 2376217 (5th Cir. Oct. 20, 2004).

<sup>23</sup> *Id.* at 501 (citing *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001) and *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902-03 (5th Cir. 1997)).

[t]he regulations require that, among the conditions of initial and continued eligibility for the Title IV . . . program, the institution may not make incentive compensation payments to its student recruiters or admissions personnel. However, the regulation does not expressly condition the delivery or disbursement of funds to ITT students on ITT's certification of compliance with this requirement.<sup>24</sup>

Since compliance with the restriction on enrollment incentive compensation was not a condition of payment, the Fifth Circuit held that its violation was not a proper subject of FCA liability. The Fifth Circuit also noted, however, that, under the statutory scheme, a number of administrative and other remedies were available if schools failed to meet compliance requirements, including additional audits, limiting disbursement authority, taking action to terminate participation, or imposing a civil penalty.<sup>25</sup>

The court in *Hendow* found it unimportant that the University's certification was a promise to comply with the ban in the future based on the reasoning that the Education Department and Congress "plainly care" about the enrollment incentive ban, and that that the distinction between a condition of participation and payment in this case was "a distinction without a difference."<sup>26</sup> Under this approach, conditions of eligibility and standards of care that could trigger administrative and other remedies under carefully devised regulatory schemes could also be turned into false claims for payment under the FCA. This moves toward a very dangerous expansion of FCA liability in the Ninth Circuit. Hopefully, that panel was simply using loose language that will not be adopted by other panels in that circuit, particularly in light of its clear conflict with the law in other circuits.

The Ninth Circuit also noted that the Seventh Circuit had founded FCA liability on a version of promissory fraud theory in a similar case in *United States ex rel. Main v. Oakland City University*.<sup>27</sup> Under this theory, liability would attach to each claim submitted under a fraudulently induced contract "when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." As the Seventh Circuit put it in *Main*:

To prevail in this suit [relator] must establish that the University not only knew ... that contingent fees to recruiters are forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. This distinction is commonplace in private law: failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not

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<sup>24</sup> *Id.* at 501.

<sup>25</sup> *Id.* at 502 (citing regulations). The court found no forfeiture remedy among these that would make the funds expended under the program "interim" or "provisional" like the Medicare funds paid out in *Thompson*.

<sup>26</sup> *Hendow*, 461 F.3d at 1176-77.

<sup>27</sup> 426 F. 3d 914 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (U.S. 2006).

to keep is fraud.... [I]f the University knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.<sup>28</sup>

Traditional promissory fraud theory does not take into account unique requirements of the FCA either, however, and courts have emphasized that it is "a 'rare' basis for liability under the False Claims Act."<sup>29</sup> The Seventh Circuit's decision in *Main* swept past the requirements of materiality and potential damage to the treasury when it characterized the Deputy Secretary of Education's memorandum, which stated that noncompliance with the ban usually does not lead to financial loss to the government, as a "back-office memo" with no legal effect.<sup>30</sup>

If followed, both the *Main* and *Hendow* decisions will make dismissals of these suits more difficult, and could expand FCA liability under false certification and promissory fraud theories by minimizing key requirements of the statute. As the Second Circuit pointed out in *Mikes v. Straus*, such expansive liability is not appropriate or desirable:

caution should be exercised not to read this theory expansively and out of context . . . because the False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations--but rather only those regulations that are a precondition to payment--and to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act's reach.<sup>31</sup>

***See also:***

- ***United States ex rel. Crews v. NCS Healthcare of Ill., Inc.***, 460 F.3d 853, 858 (7th Cir. 2006) (conviction for making false statement about compliance with regulations on storage and handling of medications not a false claim because false certification alleged must be a prerequisite to payment).
- ***United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.***, 459 F. Supp. 2d 1081, 1089 (D. Kan. 2006) ("plethora of healthcare laws and statutes" establishing standards of care or

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<sup>28</sup> *Id.* at 917.

<sup>29</sup> *Graves*, 284 F. Supp. 2d at 503 (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)).

<sup>30</sup> 426 F.3d at 917.

<sup>31</sup> 274 F. 3d 687, 699 (2d Cir. 2001).

conditions of participation with which defendant certified compliance were not express conditions of payment, nor was denial of payment the government's only remedy).

- *United States v. Rogan*, 459 F. Supp. 2d 692, 717 (N. D. Ill. 2006) (finding that compliance with AKS was condition of payment under Medicaid).

### **C. New Attention Focused on the Public Disclosure Bar and the Original Source Exception**

The “public disclosure bar” in Section 3730(e)(4)(A) of the FCA prohibits a court from exercising jurisdiction over an action that is based upon public disclosure of allegations in certain circumstances, such as criminal, civil, or administrative hearings, audits, investigations, or media reports. The exceptions to the public disclosure bar under Section 3730(e)(4)(B) are for actions brought by the government or by a person who is an “original source” of the information.

An “original source” is defined in Section 3730(e)(4)(B) 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.” The purpose of the public disclosure/original source bar is to limit *qui tam* enforcement to persons who know the details of the fraud and thus help the government recover losses from fraud that would otherwise go undetected. Applying these provisions has been very difficult, resulting in numerous conflicting interpretations of the statutory terms.

The Supreme Court granted certiorari on the original source issue in a case decided by the Tenth Circuit, *Rockwell International Corp. v. United States ex rel. Stone*.<sup>32</sup> At the time of the Tenth Circuit's decision in *Rockwell*, the circuits were split on the issue of whether the relator's knowledge of the true circumstances underlying the fraud was sufficient, or whether, in addition, the relator's knowledge must extend to the alleged misrepresentations, false statements, or false claims to the government.<sup>33</sup> In *Rockwell*, the Tenth Circuit followed neither of these two views. Instead, it held that knowledge “underlying or supporting” the fraud allegation was sufficient.<sup>34</sup> In specific terms,

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<sup>32</sup> 92 Fed. Appx. 708 (10th Cir. 2004), *cert. granted*, 127 S. Ct. 37 (U.S. Sept. 26, 2006) (No. 05-1272).

<sup>33</sup> See *United States ex rel. Mistick v. Housing Auth. of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) (knowledge of true facts of costs of lead paint abatement at city housing insufficient without first hand knowledge of alleged misrepresentation); *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001) (interpreting knowledge more broadly to allow *either* knowledge of true circumstances *or* of false statements to the government); *United States ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (same); *United States ex rel. Springfield Terminal Rwy. Co. v. Quinn*, 14 F.3d 645, 656-57 (D.C. Cir. 1994) (same).

<sup>34</sup> 92 Fed. Appx. at 723-24 (10th Cir. 2004).

its finding was that the relator's knowledge of a defective pondcrete manufacturing process that was under consideration at Rocky Flats nuclear weapons facility when the relator was employed there was sufficient to support the allegation that Rockwell misrepresented the facility's compliance with environmental, health, and safety laws on a different basis after the relator's employment had ended. Rockwell argued that this set the bar too low, and that it satisfied none of the standards applied by the other circuits.

The Supreme Court heard oral argument in *Rockwell* in December 2006. Issues raised at the argument included the requirements of the original source exception in Section 3730(e)(4)(B) mentioned above. Possible interpretations of Section 3730(e)(4)(A) were also raised at the argument. Justice Scalia asked counsel for Rockwell whether the government's intervention in the action brought by a relator amounted to the same thing as the government bringing the action under subsection (4)(A).<sup>35</sup> This raised several additional questions, such as whether the government's participation in a suit brought by an unqualified original source could be defeated on the basis of that disqualification, or whether it would become a suit brought by the government if the relator dropped out after the government's intervention.<sup>36</sup> Some of these questions will be resolved by the Court in *Rockwell*. Others may require the Court to grant certiorari in another original source case.

The Third Circuit recently interpreted the requirements of the "based upon" element of the original source exception in *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*<sup>37</sup> The government declined to intervene in the case. The suit alleged that the defendant, Penn Shipbuilding Co., engaged in a variety of fraudulent misrepresentations in order to induce the government to enter into contracts for the construction of oiler ships for the Navy. Relator alleged that Penn Ship knowingly understated its bid, misrepresenting its financial solvency and the possibility of default. One of the specific allegations was that Penn Ship and First Fidelity Bank conspired to defeat the Navy's security interests under a trust indenture and mortgage by failing to record those interests.

The Third Circuit affirmed the district court's dismissal of all of the allegations under the original source exception to the public disclosure bar. The appellate court examined each allegation to determine whether Atkinson was an original source of the information on which it was based, and determined that he was not. On the key allegations, the court concluded that:

- Atkinson was not an original source of the non-recording because, although his knowledge of it derived from public records that were not within the meaning of Section 3730(e)(4)(A), the public records he consulted were not obscure, and the information contained in them was his only source of the fact of the non-recording. *Id.* at \*13.

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<sup>35</sup> See *Rockwell* Transcript at 5, available at [http://www.friedfrank.com/pdf/rockwell\\_transcript.pdf](http://www.friedfrank.com/pdf/rockwell_transcript.pdf).

<sup>36</sup> *Id.* at 7-8.

<sup>37</sup> No. 04-3374, 2007 WL 79483 (3d Cir. Jan. 12, 2007). The reader should note that the author entered an appearance for the Penn Ship defendants in this case.

- Since the allegations that Penn Ship knew it would be unable to complete the oiler contract were publicly disclosed in sources within the meaning of Section 3730(e)(4)(A), and Atkinson's knowledge was derived from those sources, the court concluded that he could not be an original source of the information supporting the allegations. *Id.* at \*14.
- Government disclosures in response to FOIA requests were public disclosures under subsection (e)(4)(A), and therefore Atkinson could not be an original source of that information. *Id.* at\*15 ( citing *United States ex rel. Mistick v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 382 (3d Cir. 1999)).

*See also:*

- *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006) (finding that a state audit report was within the meaning of public disclosure under Section 3730(e)(4)(A)).
- *United States ex rel. Zaretsky v. Johnson Controls, Inc.*, 457 F.3d 1009 (9<sup>th</sup> Cir. 2006) (finding no requirement for relators to inform government before public disclosure in antitrust suit).
- *In re Natural Gas Royalties Qui Tam Litigation*, No. 99-MD-1293-D, 2006 WL 358909, at \*21 (D. Wyo. Oct. 20, 2006) (Grynberg's "odious tactics" of choosing to employ "sweeping allegations of fraud against nearly the entire industry, based in large part on rank speculation . . . [became] the instrument of his own undoing").
- *United States ex rel. Rost v. Pfizer Inc.*, 446 F. Supp. 2d 6 (D. Mass. 2006) (adopting minority view that "based upon" means "derived from" rather than "supported by," and applying original source approach that required relator to have direct and independent knowledge of facts alleged and to disclose that information to the government before filing the action).
- *United States ex rel. Maxwell v. Kerr-McGee Chemical Worldwide, LLC*, No. 04-CV-01224-PSF-CBS, 2006 WL 1660538 (D. Colo. June 9, 2006) (government employee not barred from acting as relator), *amended by order allowing interlocutory appeal*, 2006 WL 2869515, at \*6-7 (slip op.) (D. Colo. Oct. 16, 2006).

**D. The FCA's Statute of Limitations, Government Knowledge, and Relation- Back**

Under the FCA's statute of limitations provisions in Section 3731(b), an action may not be brought:

- (1) more than 6 years after the date on which the violation of section 3729 is committed, or

- (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

One of the factors considered in determining when the statute of limitations begins to run under this provision is when the material facts are known or reasonably should have been known by an appropriate government official. Circumstances in which courts have ruled that the necessary facts should have been known and the statute began to run include when DOJ failed to obtain a widely circulated audit of another government agency that detailed the fraud,<sup>38</sup> and when due diligence would have uncovered the material facts in the case.<sup>39</sup> A relator's "nonspecific assertions of fraudulent concealment [were] insufficient to toll the statute of limitations," however.<sup>40</sup>

Recently, in *United States v. Baylor University Medical Center*,<sup>41</sup> the Second Circuit decided an FCA statute of limitations issue related to the series of court cases, administrative agency action, and Senate subcommittee hearings that arose in connection with a 1994 *qui tam* suit against 132 hospitals. The *qui tam* allegations were that the hospitals submitted false claims to Medicare for services to patients who received cardiac devices that were not approved by the FCA.<sup>42</sup> In 1999, without formally intervening, the government began filing *ex parte* motions to transfer the actions of particular hospitals to other venues and negotiated settlements with several of them. The government did not file its complaints-in-intervention against the hospitals that remained until 2002 and 2003.

The Second Circuit found that the dates on which the government's complaints-in-intervention were filed--2002 and 2003--were the commencement of the government's suits for statute of limitations purposes. Since the alleged FCA violations occurred from 1986 to 1995, the government's allegations based on these violations were time-barred under the six-year statute of limitations in Section 3731(b)(1), the court held. The three-year tolling provision in Section 3731(b)(2) did not rescue the government's claims, the court found, because the relator's *qui tam* complaint gave the government knowledge of the alleged violations. The statutory period therefore commenced to run when it was filed in 1994.

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<sup>38</sup> See *United States v. Incorporated Village of Island Park*, 791 F. Supp. 354 (E.D. N.Y. 1992).

<sup>39</sup> See *United States v. Intrados/Int'l Mgmt. Group*, 265 F. Supp. 2d 1, 11 (D.D.C. 2002).

<sup>40</sup> See *Croskey v. United States*, No. 93-5202, 1994 U.S. App. LEXIS 509 (Fed. Cir. Jan. 10, 1994).

<sup>41</sup> 469 F.3d 263 (2d Cir. 2006).

<sup>42</sup> See *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318 (D. Conn. 2004).

A very important related issue addressed by the Second Circuit in *Baylor* was whether the government's claims could relate-back to the relator's complaint under Rule 15. Rule 15(c)(2) provides:

An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

The district court in *In re Cardiac Devices Qui Tam Litigation* found that this rule may apply to the government's complaint-in-intervention although it was not technically an amended complaint by the original party. The Second Circuit disagreed, however, based on the incompatibility of the scheme created under the False Claims Act and Rule 15(c)(2). The court noted that Section 3730(b) of the FCA, authorizing relators to bring suit on behalf of the government, is "distinctive for the secrecy that it affords the relator's qui tam complaint," depriving defendants of the notice usually given by a complaint.<sup>43</sup> The court found that the secrecy of this scheme was not compatible with notice to defendants, which is the touchstone of Rule 15(c)(2)'s relation-back mechanism:

Under [Rule] 15(c), the central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading.<sup>44</sup>

The seal in *qui tam* cases deprives defendants of that notice, and thus the core requirement for relation-back of subsequent amendments to the original complaint is not met, the court found. Under these circumstances, the statute of limitations continues to run.

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<sup>43</sup> *Baylor*, 469 F.3d at 269.

<sup>44</sup> *Id.* at 270 (quoting *Rosenberg v. Martin*, 478 F.2d 520, 526 (2d Cir. 1973)).

**FALSE CLAIMS ACT\***  
**31 U.S.C.**

**§3729. False claims**

(a) LIABILITY FOR CERTAIN ACTS.- - Any person who - -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) 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;

(5) 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;

(6) 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; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to be Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that - -

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the

person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **KNOWING AND KNOWINGLY DEFINED.** For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **CLAIM DEFINED.** - - 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.

(d) **EXEMPTION FROM DISCLOSURE.** - - Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **EXCLUSION.** - - This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

### **§3730. Civil actions for false claims**

(a) **RESPONSIBILITIES OF THE ATTORNEY GENERAL.** The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **ACTIONS BY PRIVATE PERSONS.**

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60 day period or any extensions obtained under paragraph (3) the Government shall - -

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as - -

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF. - -

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to 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, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceedings, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

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

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the

action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.** The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **FEES AND EXPENSES TO PREVAILING DEFENDANT.** In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

### **§3731. False claims procedure**

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

### **§3732. False claims jurisdiction**

(a) Actions under section 3730.--Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local Government if the action arises from the same transaction or occurrence as an action brought under section 3730.

\*31 U.S.C. § 3733, containing the False Claims Act's Civil Investigative Demand provisions, is intentionally omitted because of its length.

### FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2006  
Civil Division, U.S. Department of Justice

FY	NEW MATTERS <sup>1</sup>		SETTLEMENTS AND JUDGMENTS <sup>2</sup>				RELATOR SHARE AWARDS <sup>3</sup>			
	NON QUI TAM	QUI TAM	NON QUI TAM <sup>2</sup>	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	361	69	86,479,949	0	0	0	86,479,949	0	0	0
1988	246	60	172,843,696	355,000	35,431	390,431	173,234,127	88,750	8,638	97,388
1989	236	95	197,202,180	15,111,719	0	15,111,719	212,313,899	1,446,770	0	1,446,770
1990	256	82	193,239,367	40,483,367	75,000	40,558,367	233,797,734	6,590,936	20,670	6,611,606
1991	243	90	270,945,467	69,705,771	69,500	69,775,271	340,720,738	10,667,537	18,750	10,686,287
1992	357	119	136,862,236	134,099,447	994,456	135,093,903	271,956,139	24,196,648	259,784	24,456,432
1993	329	132	187,234,076	171,798,383	5,978,000	177,776,383	365,010,459	25,675,134	1,756,902	27,432,036
1994	291	222	706,187,897	379,646,074	1,822,323	381,468,397	1,087,656,294	70,051,930	538,897	70,590,827
1995	236	277	279,522,866	245,463,627	1,813,200	247,276,827	526,799,693	46,475,379	517,238	46,992,617
1996	187	363	247,357,271	124,565,203	14,033,433	138,598,636	385,955,907	22,193,539	3,896,058	26,089,597
1997	185	533	468,549,359	623,031,381	7,376,144	630,407,525	1,098,956,884	66,067,671	1,996,346	68,064,017
1998	119	470	151,585,794	435,248,410	29,274,385	464,522,795	616,108,589	69,660,944	8,541,960	78,202,904
1999	141	481	196,613,009	454,283,097	40,609,191	494,892,288	691,505,297	52,274,854	12,118,498	64,393,352
2000	96	367	367,887,197	1,202,841,907	1,825,847	1,204,667,754	1,572,554,951	183,663,087	395,033	184,058,120

FY	NEW MATTERS <sup>1</sup>		SETTLEMENTS AND JUDGMENTS <sup>2</sup>				RELATOR SHARE AWARDS <sup>3</sup>			
	NON QUI TAM	QUI TAM	NON QUI TAM <sup>2</sup>	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2001	88	309	494,496,974	1,175,104,715	125,726,963	1,300,831,678	1,795,328,652	187,475,850	30,294,843	217,770,693
2002	63	320	113,692,470	1,070,943,672	29,866,186	1,100,809,858	1,214,502,328	159,395,905	5,593,086	164,988,991
2003	93	334	703,003,368	1,430,379,125	87,140,070	1,517,519,195	2,220,522,563	307,961,126	19,322,900	327,284,026
2004	113	415	115,656,023	557,573,854	9,474,879	567,048,733	682,704,756	110,136,352	2,433,638	112,569,990
2005	107	394	276,914,983	1,133,354,057	24,896,229	1,158,250,286	1,435,165,269	162,832,340	6,900,933	169,733,273
2006	65	382	1,754,393,122	1,401,254,330	16,596,926	1,417,851,256	3,172,244,378	193,552,112	4,423,810	197,975,922
<b>TOTAL</b>	<b>3,812</b>	<b>5,514</b>	<b>7,120,667,304</b>	<b>10,665,243,139</b>	<b>397,608,163</b>	<b>11,062,851,302</b>	<b>18,183,518,606</b>	<b>1,700,406,864</b>	<b>99,037,984</b>	<b>1,799,444,848</b>

**NOTES:**

1. "New Matters" refers to newly received referrals and investigations, and newly filed *qui tam* actions.
2. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

### FRAUD STATISTICS - HEALTH & HUMAN SERVICES<sup>1</sup>

October 1, 1986 - September 30, 2006  
Civil Division, U.S. Department of Justice

FY	NEW MATTERS <sup>2</sup>		SETTLEMENTS AND JUDGMENTS <sup>3</sup>			
	NON QUI TAM	QUI TAM	NON QUI TAM <sup>4</sup>	QUI TAM		TOTAL QUI TAM AND NON QUI TAM
			TOTAL	TOTAL	RELATOR SHARE <sup>4</sup>	
1987	14	4	11,361,826	0	0	11,361,826
1988	9	9	1,382,675	355,000	88,750	1,737,675
1989	20	15	350,460	5,099,661	50,000	5,450,121
1990	28	12	12,202,500	903,158	119,474	13,105,658
1991	23	13	8,670,735	4,741,340	861,401	13,412,075
1992	30	17	9,821,640	2,192,478	446,648	12,014,118
1993	22	39	12,523,165	142,800,000	21,576,000	155,323,165
1994	43	80	381,635,015	16,564,684	2,692,177	398,199,699
1995	27	94	96,290,779	86,498,324	15,237,303	182,789,103
1996	20	204	63,059,873	52,876,698	9,624,568	115,936,571
1997	49	298	354,371,325	565,978,803	56,744,071	920,350,128
1998	36	287	40,107,920	257,320,610	47,807,528	297,428,530
1999	29	310	38,000,792	404,488,079	45,415,582	442,488,871
2000	37	223	208,899,015	708,090,743	113,594,529	916,989,758
2001	36	180	435,849,179	855,576,637	144,208,957	1,291,425,816
2002	24	197	74,117,427	938,122,925	149,533,552	1,012,240,352
2003	26	217	536,834,879	1,299,636,860	279,722,852	1,836,471,739
2004	28	276	34,816,447	476,076,860	97,514,920	510,893,307
2005	34	268	204,821,548	915,787,965	123,452,837	1,120,609,513
2006	16	110	1,087,314,755	1,208,428,854	149,215,240	2,295,743,609
TOTAL	551	2,853	3,612,431,955	7,941,539,679	1,257,906,389	11,553,971,634

**NOTES:**

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary agency.
2. "New Matters" refers to newly received referrals and investigations, and newly filed *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

**FRAUD STATISTICS - DEPARTMENT OF DEFENSE<sup>1</sup>**  
 October 1, 1986 - September 30, 2006  
 Civil Division, U.S. Department of Justice

FY	NEW MATTERS <sup>2</sup>		SETTLEMENTS AND JUDGMENTS <sup>3</sup>			TOTAL QUITAM AND NON QUITAM
	NON QUITAM	QUITAM	NON QUITAM <sup>4</sup>	QUITAM		
			TOTAL	TOTAL	RELATOR SHARE <sup>4</sup>	
1987	245	18	27,897,128	0	0	27,897,128
1988	138	36	149,136,213	33,750	8,437	149,169,963
1989	128	40	154,588,297	10,002,058	1,394,770	164,590,355
1990	77	45	118,915,978	21,699,713	3,795,720	140,615,691
1991	79	50	227,813,245	57,242,000	8,636,300	285,055,245
1992	78	64	62,603,695	129,294,456	23,874,784	191,898,151
1993	94	55	83,968,840	32,072,641	5,330,923	116,041,481
1994	62	96	222,799,421	361,385,206	67,285,578	584,184,627
1995	54	103	110,498,386	149,504,237	29,617,461	260,002,623
1996	44	135	78,085,099	63,347,938	12,991,758	141,433,037
1997	45	146	30,734,273	52,610,622	9,187,922	83,344,895
1998	29	78	71,063,139	147,761,685	20,055,789	218,824,824
1999	33	109	27,211,319	18,591,946	3,394,779	45,803,265
2000	10	77	53,007,693	124,996,475	20,959,416	178,004,168
2001	11	74	17,472,751	165,641,285	28,279,241	183,114,036
2002	16	72	9,561,543	42,665,096	8,235,954	52,226,639
2003	11	78	107,337,000	193,018,638	42,686,070	300,355,638
2004	16	99	10,098,491	17,941,119	3,104,889	28,039,610
2005	16	97	19,049,935	93,711,552	19,904,255	112,761,487
2006	11	52	586,430,385	35,063,952	6,693,210	621,494,337
TOTAL	1,197	1,524	2,168,272,831	1,716,584,369	315,437,256	3,884,857,200

**NOTES:**

1. The information reported in this table covers matters in which the Department of Defense is the primary agency.
2. "New Matters" refers to newly received referrals and investigations, and newly filed *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

**FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD)<sup>1</sup>**

October 1, 1986 - September 30, 2006  
Civil Division, U.S. Department of Justice

FY	NEW MATTERS <sup>2</sup>		SETTLEMENTS AND JUDGMENTS <sup>3</sup>			TOTAL QUI TAM AND NON QUI TAM
	NON QUI TAM	QUI TAM	NON QUI TAM <sup>4</sup>	QUI TAM		
			TOTAL	TOTAL	RELATOR SHARE <sup>4</sup>	
1987	102	12	47,220,995	0	0	47,220,995
1988	99	20	22,324,808	1,681	200	22,326,489
1989	88	46	42,263,423	10,000	2,000	42,273,423
1990	151	33	62,120,889	17,955,496	2,696,412	80,076,385
1991	141	38	34,461,487	7,791,931	1,188,586	42,253,418
1992	249	57	64,436,901	3,606,969	135,000	68,043,870
1993	213	66	90,742,071	2,803,742	525,113	93,545,813
1994	186	105	101,753,461	3,518,507	613,071	105,271,968
1995	155	134	72,733,701	11,274,266	2,137,853	84,007,967
1996	123	163	106,212,299	22,374,000	3,473,272	128,586,299
1997	91	366	83,443,761	11,818,100	2,132,025	95,261,861
1998	54	168	40,414,735	59,440,500	10,339,588	99,855,235
1999	79	153	131,400,898	71,812,263	15,582,991	203,213,161
2000	49	165	105,980,489	371,580,535	49,504,175	477,561,024
2001	41	134	41,175,045	279,613,755	45,282,495	320,788,800
2002	23	122	30,013,500	120,021,838	7,219,485	150,035,338
2003	56	136	58,831,489	24,863,697	4,875,103	83,695,186
2004	69	180	70,741,084	73,030,755	11,950,182	143,771,839
2005	57	185	53,043,500	148,750,769	26,376,181	201,794,269
2006	38	74	80,647,982	174,358,450	42,067,470	255,006,432
<b>TOTAL</b>	<b>2,064</b>	<b>2,357</b>	<b>1,339,962,518</b>	<b>1,404,627,254</b>	<b>226,101,202</b>	<b>2,744,589,772</b>

**NOTES:**

1. The information reported in this table covers matters in which an agency other than the Department of Health and Human Services or the Department of Defense is the primary agency.
2. "New Matters" refers to newly received referrals and investigations, and newly filed *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims which may not be the entire settlement or judgment amount. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

**FRAUD STATISTICS**  
**QUI TAM INTERVENTION DECISIONS & CASE STATUS**  
 As of September 30, 2006

Civil Division, U.S. Department of Justice

	ACTIVE	SETTLEMENT OR JUDGMENT	DISMISSED	INACTIVE	UNCLEAR	TOTAL
U.S. Intervened	63	905	50	3	7	1,028
U.S. Declined	355	191	3,018	2	5	3,571
Under Investigation						915
						5,514

