

FALSE CLAIMS ACT YEAR IN REVIEW

12th ANNUAL HEALTH LAW INSTITUTE
PENNSYLVANIA BAR INSTITUTE
March 15, 2006

Margaret L. Hutchinson, Esquire
Assistant United States Attorney
Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
Phone: (215) 861-8282
Fax: (215) 861-8609
E-Mail: margaret.hutchinson@usdoj.gov

David M. Laigaie, Esquire
DILWORTH PAXSON LLP
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103
Phone: (215) 575-7000
Fax: (215) 575-7200
E-Mail: Dlaigaie@dilworthlaw.com

Eric W. Sitarchuk, Esquire
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Phone: (215) 864-8220
Fax: (215) 864-9787
E-Mail: sitar@ballardspahr.com

TABLE OF CONTENTS

- I. Important FCA Decisions From 2005

- II. Where Do We Go From Here:
FCA Enforcement in 2006 and Beyond

- III. Updated FCA Statistics

I. IMPORTANT FALSE CLAIMS ACT DECISIONS FROM 2005

1. Relator's Right to Challenge Government's Decision to Settle or Dismiss the Action

- A. United States ex rel. Grober v. Summit Medical Group, Inc., No. 02-177-C (W.D. Ky. Sept. 29, 2005).

The relator is objecting to the government's settlement of this action and the court has permitted the relator to take discovery regarding the settlement. When the relator sought discovery regarding the corporate compliance agreement, the Government moved for a protective order. The ruling grants the protective order, the court explaining: "Information about the Corporate Compliance Program relates to post-settlement enforcement activity, not to the adequacy or fairness of the settlement agreement."

- B. United States ex rel. Nudelman v. International Rehabilitation Assoc., Inc., No. 00-1837 (E.D. Pa. May 12, 2005).

The defendant provides medical utilization reviews for Medicaid programs and other health insurers. The relator alleged that the defendant falsely stated that it was in compliance with certain industry trade group standards which it had to maintain pursuant to its contracts with the health insurers. The federal government and several states reached a settlement with the defendant pursuant to which the defendant would pay about \$1.6 million (about \$400,000 to the federal government) and agree to be subject to a monitoring agreement with the U.S. Attorney's Office. The relator opposed the settlement arguing that the settlement was grossly insufficient and argued that the monitoring was proceeds of the action and should be valued as part of the settlement to which he should receive a share if the settlement was approved. In a one paragraph order, the district court holds that the monitoring agreement is non-cash proceeds of the proposed settlement and has a value of \$1.5 million.

- C. United States ex rel. Ayres v. Bondcote Corp., No. CV403-011 (S.D. Ga. Mar. 18, 2005)

The Government intervened in this qui tam action three days after the case was unsealed and subsequently settled the matter for \$1.7 million. The relator opposed both the Government's intervention and the settlement. The defendant also pled guilty to false statements and paid a fine of \$250,000. This decision addresses the relator's share dispute. First, rejecting the relator's argument that by not intervening while the case was under seal the relator is entitled to 25 - 30%, the court holds that as the government had intervened, the proper range is 15-25%. Rejecting the relator's claim for 25% and the Government's offer of 15%, the court awards 20%, noting that the relator had provided more than nominal assistance

but also had opposed, without grounds, the Government's intervention and settlement. Finally, the court holds that the criminal fine is not part of the proceeds of the qui tam action.

- D. United States ex rel. Ridenour v. Kaiser-Hill Company LLC, 397 F.3d 925 (10th Cir. 2005)

The 10th Circuit held that the FCA did not require the government to intervene before moving to dismiss; the dismissal of the action had a rational relationship with the government's objective of protecting classified information from disclosure; and the relators failed to meet their burden to show that the Government's motion to dismiss was fraudulent, arbitrary and capricious or illegal.

- E. United States ex rel. Schwartz v. Raytheon Co., 2005 WL 2341286 (9th Cir. Sept. 12, 2005)

The 9th Circuit affirmed the dismissal of a qui tam suit where the government claimed that allowing the suit to proceed would interfere with national security.

- F. United States ex rel. Kaplan v. Callahan v. U.S. Oncology, Inc., No. 7:00-CV-00350, 2005 WL 3334296 (W.D. Va. Dec. 7, 2005) (Urbanski, Mag. J.).

The defendant in this intervened case settled two claims with the government and proceeded to trial on three unsettled claims. The relator challenged the fairness of the proposed settlement and the Court scheduled a fairness hearing. The defendant then sought to place the settlement agreement under seal and to hold the fairness hearing in camera, arguing that the publicity would prejudice the jury pool for the upcoming trial. The Magistrate Judge denied the request, holding that the defendant had not shown "good cause" for the hearing to be held in camera (as required by 31 U.S.C. § 3730(c)(2)(B)) or to rebut the presumption in favor of public access to judicial records.

2. Anti-Kickback Violation As An FCA Predicate

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

The allegation in this qui tam action, in which the Government intervened, is that the defendant paid kickbacks to get referrals and then billed Medicare for services performed arising from the referrals. The defendant moved to dismiss for failure to state a claim; the district court denied the motion; the case went to the circuit court on interlocutory appeal. This decision

affirms the denial of the motion to dismiss. After noting that compliance with the Anti-Kickback Statute is a condition of payment by the Medicare program, the Court says: “When a violator of government regulations is ineligible to participate in a government program and that violator persists in presenting claims for payment that the violator knows the government does not owe, the violator is liable, under the Act, for its submission of those false claims....”

3. Public Disclosure

United States ex rel. Gear v. Emergency Medical Assoc. of Ill., Nos. 05-2235 & 05-3203 (7th Cir. Feb. 1, 2006)

The Seventh Circuit affirmed dismissal of a suit brought by a former resident alleging that the defendants, companies that provide physicians to hospital emergency rooms, billed Medicare for services that were provided by residents. The District Court found that these allegations had been unduly disclosed in, inter alia, a 1998 GAO report and dozens of news reports concerning PATH audits and settlements. The Seventh Circuit discounted the relator’s arguments that industry-wide disclosures are insignificant: “The disclosures at issue here were of industry-wide abuses and investigations. Defendants were implicated. Industry-wide public disclosures bar qui tam actions against any defendant who is directly identifiable from the public disclosures.” The Seventh Circuit further held that the relator’s case was “based upon” (which in the Seventh Circuit means “derived from”) the public disclosures, principally because the relator, while serving as a resident, was an editor of the publication that described the PATH settlements and audits in an article published approximately six months before the relator filed his suit. The District Court found the relator’s affidavit that he was unaware of the PATH initiative as being incredible. The Circuit Court agreed: “Gear’s self-serving affidavit is insufficient to sustain a claim that his allegations are not based on public information.” The relator could not show that he was an original source because his attorney filed the action before speaking with the government.

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

A second filed qui tam action was dismissed under the first-to-file bar with the district court holding that even if the first qui tam subsequently was dismissed pursuant to the public disclosure bar, the second filed action still was barred. This decision reverses that ruling stating, “we hold that in a public disclosure case, the first-to-file rule of § 3730(b)(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4).” As there has been no ruling on whether the first filed action is subject to the public disclosure bar, the circuit court remands the action and suggests that the two qui tam actions be consolidated.

4. Government Knowledge

- A. United States ex rel. Stebner v. Steward & Stevenson Services, Inc., 2005 WL 1865309 (5th Cir. Aug. 8, 2005) (per curiam)

The defendants manufactured trucks for the military that did not meet the corrosion-free requirements of the contract. While the contract was being performed and progress payments were being made, this problem became known to both the defendants and the Government. Eventually, the parties resolved the issue by modifying the manufacturing process and the military getting more expansive warranties than the contract initially called for. The relator filed a qui tam alleging that the defendants billed the military for defective trucks. After the Government declined to intervene, the district court granted summary judgment to the defendants suggesting that as the invoices did not certify that the trucks met the corrosion requirements, they were not false claims. 305 F. Supp.2d 694 (S.D. Tex. 2004). This decision, which will not be published, affirms the dismissal on two grounds. First, the court notes that the Fifth Circuit has not adopted an implied theory of certification and says that the invoices did not expressly certify compliance with every provision of the overall contract. Second, the court rejects the argument that the invoices were false as the Government participated in the design of the trucks and the solution of the corrosion problem.

- B. United States ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc., 2005 WL 549150 (6th Cir. Mar. 10, 2005)

The Government intervened in this action alleging that the defendant home health agency and its owner violated the FCA by claiming pension costs on interim rate reports and final cost reports which it had not paid. When the home health agency went into bankruptcy, the case proceeded against the owner of the HHA. The jury trial resulted in a finding of FCA liability and damages in excess of \$600,000 which the court trebled. This decision affirms trial verdict. Among its rulings, the circuit court states that “a party cannot file a knowingly false claim on the assumption that the fiscal intermediary will correctly calculate the value in the review process,” and that the defendant is liable for previously paid false pension costs included in its interim rate reports and cost report even though the fiscal intermediary rejected those costs when reviewing the cost report but did not issue a notice of program reimbursement. (The defendant argued that if he had received a NPR, he would have paid back the money.) The court also said that the FCA has a materiality requirement and that the standard is having a natural tendency to influence the decision of the decision maker.

5. Rule 9(b)

- A. United States ex rel. Bartlett v. Tyrone Hospital, Inc., 2006 WL 221494 (W.D. Pa. Jan. 27, 2006)

This is a declined qui tam against a number of providers, management companies, and individuals for submitting false health care claims arising from violations of the antikickback and Stark laws. In a lengthy decision, the court rules that the complaint fails FRCP 9(b), because, although it identifies conduct that could violate the False Claims Act, it does not identify any specific false claims. The court dismisses the action with leave to amend. The decision also holds:

Entities that knew that false claims were being submitted by others but did not cause the submission of those false claims cannot be held liable under the False Claims Act. Cost reports are false claims even if they only restate claims already paid through individual UB-92 claim forms. One can be liable for a False Claims Act conspiracy even if the Government does not have damages. A parent and a subsidiary corporation cannot conspire together. An agent cannot conspire with its principal. FRCP 9(b) does not apply to pleading a False Claims Act conspiracy.

- B. United States ex rel. Williams v. Bell Helicopter Textron Inc., 2005 WL 1632266 (5th Cir. July 13, 2005)

After the Government declined to intervene in this action, the district court granted the defendant's motion to dismiss for failure to plead fraud with particularity and dismissed the action with prejudice both as to the relator and the United States. 2004 WL 579505 (N.D. Tex. Mar. 18, 2004) The relator appealed the 9(b) dismissal and the Government appealed the dismissal with prejudice as to itself. This decision affirms the dismissal but modifies the judgment to be without prejudice to the United States. On the 9(b) issue, the court says that the relator's complaint contained only conclusory allegations and failed to plead any particular facts showing that the defendant was aware of its employee's conduct or that it had intentionally filed false claims or even that false claims had been submitted to the Government. On dismissing the Government, the court says, "we find that the dismissal with prejudice as to the United States was unwarranted where, as here, the relator's claims were dismissed on a Rule 12(b)(6) motion based on a lack of specificity in the complaint as required by rule 9(b)."

- C. United States ex rel. Tiesinga v. Dianon Systems, Inc., 2005 WL 1566316 (D. Conn. July 1, 2005)

The government intervened in this case alleging that Dianon, a clinical laboratory, submitted more than 10,000 false claims for hematopathology flow cytometry tests. The complaint alleged a general description of the scheme, but did not allege any specific false claims. The Court did not dismiss the case, but allowed the government to amend its complaint to provide “specific examples ... from various time periods and involving various alleged fraudulent practices.”

- D. United States ex rel. Schmidt v. Zimmer, Inc., 2005 WL 1806502 (E.D. Pa. July 29, 2005)

Judge Robreno has dismissed this action twice. Schmidt alleges that Zimmer violated the FCA by causing 1600 unnamed defendant hospitals to submit false claims for Medicare benefits. Specifically, through its Premier Purchasing program, Zimmer paid hospitals based on their use of its medical devices. The hospitals did not report the payments on their cost reports and therefore, according to Schmidt, these hospitals are liable under the FCA. Judge Robreno applied a very stringent interpretation of 9(b) in the FCA context and held that “Schmidt may not merely hypothesize that, based on Zimmer’s allegedly illegal marketing scheme, false claims must have been submitted.”

6. Federal Grant Recipients

- A. United States ex rel. DRC, Inc. v. Custer Battles, LLC, No. 1:04cv199 (E.D. Va. July 8, 2005)

The relators alleged that the defendant overcharged the Coalition Provisional Authority (CPA) for two services contracts in Iraq. The Government declined to intervene but filed briefs addressing whether false claims to the CPA violated the FCA. The court first states that funding for the two contracts came from three sources (1) Iraqi assets that were in U.S. banks when seized by the federal government, (2) currency and other assets seized in Iraq by American forces, and (3) funds of the development Fund for Iraq (DFI) which consisted primarily of United Nations funds, revenues from oil sales, and international donations (although some U.S. funds also were included). The court says that the FCA requires a claim on federal funds, not merely the payment by the federal government of funds belonging to others. The court then holds that as the U.S. based and Iraqi based seized funds became the property of the federal government, false claims on contracts paid with those fund could violate the FCA, but payment made with DFI funds could not. (The court rejected the argument that claims on the DFI could violate the False Claims Act because some federal funds were contributed to the DFI.) Addressing the issue of whether false claims were presented to the federal government - - and whether presentment is

required by the FCA - - the court first holds that § 3729(a)(1) requires presentment of a claim to the federal government. It concludes that it is not necessary to decide whether the CPA is an agency or instrumentality of the United States because the CPA subsequently submitted contract claims to the United States for payment to the defendant, so that there was a presentment of the claim to the United States. Thus, the court concludes that claims on the two CPA contracts that were paid with funds seized by, and became the property of, the United States are subject to the FCA but that any claims paid with DFI funds are not subject to the FCA. The court also dismisses the relator's conspiracy count under the intra-corporate immunity doctrine because all of the alleged conspirators were either the company, its subsidiaries, or its employees.

7. Statute of Limitations on Retaliation Claims

Graham County Soil & Water Conservation District v. United States ex rel. Wilson, 125 S. Ct. 2444 (June 20, 2005)

The Supreme Court held, Justice Thomas writing, that the six-year statute of limitations in the FCA does not govern actions for retaliation. Instead, the limitations period is provided by the most closely analogous state limitations period.

8. Relation Bank Doctrine Does Not Save Government's Late Claims

United States ex rel. Health Outcomes Technologies v. Hallmark Health Systems, No. CIV. A. 01-11375-NMG (D. Mass. Jan. 6, 2006) (Gorton, J.)

This is one of approximately 100 suits filed in 1996, alleging that hospitals upcoded their pneumonia DRG coding. The government settled the majority of these cases. A few defendants, however, fought the allegations, including these defendants. In 2001, the government severed the claims against these defendants and transferred them to Massachusetts. On December 31, 2003, the government filed its Notice of Intervention, and on July 1, 2004, it filed its First Amended Complaint. The defendants argued that the Eastern District of Pennsylvania was not a proper venue for the action, so that the statute of limitations was not tolled until the case was transferred to Massachusetts in August of 2001. The Court agreed, holding that the government's strategy "not to intervene in the action [i.e., the relator's claims against all 100 hospitals] but rather to stand to one side and pick off defendants seriatim" constituted bad faith such that the government could not take advantage of the earlier filing in Pennsylvania to toll the statute of limitations. The court also did not allow claims raised by the government in its Second Amended Complaint to relate back to the relator's Complaint because those claims "were not asserted in the original Complaint."

9. Substandard Care not Actionable Under FCA

United States ex rel. Phillips v. Permian Residential Care Center, 386 F. Supp.2d 879 (W.D. TX 2005)

The relator claimed that the defendant residential care facility did not properly care for a patient who died shortly after being hospitalized for dehydration, malnutrition and bedsores. The court dismissed the substandard care claim, noting that such claims are better brought as malpractice actions. In order to support an FCA claim, the relator must show that the “services were so deficient as to be worthless.”

10. Government’s Obligation to Refund Costs of Defending Qui Tam Suit

Fluor Hanford v. United States, 66 Fed. Ct. 230 (July 1, 2005)

A defendant who successfully defended a non-intervened qui tam action related to its management of the Hanford Nuclear production facility, sought reimbursement (pursuant to indemnification language contained in its contract) from the government of nearly \$3.5 million in attorney fees and costs incurred defending the action. The court denied the request for 100% reimbursement and held that the limitation on reimbursement for cases commenced by the United States contained in the major Fraud Act does not apply where the government declines intervention in the qui tam suit.

11. HIPAA Privacy Regulations Do Not Limit Government’s Use of Discovery Materials

United States ex rel. Kaplan v. Metropolitan Ambulance & First-Aid Corp., 2005 WL 2767112 (E.D. N.Y. Oct. 26, 2005)

In an intervened case against an ambulance company, the Department of Justice issued subpoenas to several non-party health care providers for patient medical records. The defendant, using the HIPAA privacy regulations, attempted to force the government to enter into a confidentiality agreement that limited the government’s use of the records to the qui tam litigation. The court denied the requested protective order and held that the government could use the records for any purpose related to its authorization to perform health oversight activities.

12. Government Auditor as Relator

United States ex rel. Monda v. Sikorsky Aircraft Corp., 2005 WL 1925903
(D. Conn. Aug. 11, 2005)

The relator, a DCAA auditor who uncovered the alleged fraud in the course and scope of his employment, brought this action alleging that the defendant defrauded the government in relation to a contract for the provision of 300 Black Hawk helicopters. The court dismissed, with prejudice, based on Rule 9(b). In dicta, the court gratuitously discussed that a government auditor should not be able “to take evidence recovered while acting in the course of his employment duties to seek a potentially large recovery for himself personally.” The court footnoted several regulations that impose civil and criminal penalties on government employees who misuse government property or engage in conflicts of interest.

13. Attempt to Expand Totten Rejected

United States v. Ari Squire and Accucare, Inc., No. 05C3781, 2005
WL 3470297 (N.D. Ill. Dec. 12, 2005) (Kennelly, J.)

The government alleged that a home health agency and its owner filed false cost reports. The agency defaulted and judgment was entered against it. The owner sought dismissal of the claim arguing, *inter alia*, that false cost reports submitted to Palmetto Government Benefits Administration (its Medicare intermediary) were not “presented to... an officer or employee of the United States Government,” relying on United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004) (false claims on Amtrak do not create FCA liability because not “presented to an officer or employee of the government”). The District Court noted that Judge Garland had dissented in Totten, and held “[w]hether this Court agrees with the Totten majority or Judge Garland’s dissent,” the government had alleged that Squire’s false claim on Palmetto caused Palmetto, in turn, to reimburse itself from the Federal Reserve Bank.” This was sufficient to make a claim for causing the submission of a false claim to the government. *See also* United States ex rel. Tyson v. Amerigroup Ill., Inc., No. 02C6074, 2005 WL 2667207, at *1-3 (N.D. Ill. Oct. 17, 2005) (Medicaid health provider caused false claims to be presented to federal government by submitting them to state agency that ran the Medicaid program); *but see* United States ex rel. Atkins v. McInteer, 345 F. Supp. 2d 1302, 1303-04 (N.D. Ala. 2004) (Medicaid health provider had not presented false claims to federal government by submitting them to state agency that ran Medicaid program, not considering the “cause to be submitted” language).

14. Relator Not Entitled to Common Fund Recovery

United States ex rel. Bogart v. King Pharma., No. Civ. A. 03-1538, 2006 WL 190001 (E.D. Pa. Jan. 23, 2006) (Katz, J.)

The relator brought claims against King Pharmaceuticals under the federal and several state qui tam provisions. The case settled but the relator found himself only entitled to a portion of the federal recovery (totaling \$125 million) and of the states' recoveries for states that had enacted qui tam statutes. The relator argued that he should be entitled to up to 33% of the recoveries for the 38 states that do not have qui tam laws, under a common fund theory. The relator also argued that the New Mexico qui tam provisions (which were enacted after the relator filed suit and after the alleged fraudulent claims period) should be applied retroactively. Judge Katz denied both arguments, holding "to grant such request would subvert the intentions of states which have decided not to codify qui tam statutes, effectively requiring them to offer a higher award in qui tam actions than the federal government or other states who have chosen to pass such statutes." Judge Katz, in a one paragraph order, also rejected Bogart's attorneys' attempts to add the value of the corporate integrity agreement to the settlement.

15. First to File Bar

United States ex rel. Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005)

Where a previously filed qui tam action "encompasses" the allegations of the subsequent qui tam action, the first suit bars the second suit unless the first suit is "infirm under Rule 9(b)." Walburn, a security officer at the Portsmouth Gaseous Diffusion Plant in Piketon, Ohio, alleged that Lockheed (which ran the plant under a contract with the government) changed the readings on individual dosimeters that measure radiation exposure of the workers at the plant. The district court dismissed based on the fact that another relator had filed a qui tam action one month earlier than Walburn that encompassed the same allegations. On appeal, the Sixth Circuit, however, held that the "vague and broad-ranging allegations of fraud contained in the [first filed] Complaint.... rendered it legally infirm from its inception, and therefore it cannot preempt Walburn's action under the first-to-file bar." The Sixth Circuit affirmed dismissal of Walburn's suit, however, pursuant to the public disclosure bar, because it was "based upon" Walburn's prior civil action seeking damages against Lockheed and because Walburn failed to provide the government with information about the alleged fraud before he filed his civil suit.

16. Criminal Forfeiture as Alternate Remedy

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

FDSI is a company retained by the Indiana Attorney General to detect and prosecute fraudulent Medicaid billing practices. In 2000, it filed a qui tam action against a pharmacy for Medicaid fraud. It subsequently added the pharmacy's owner – Peggy Bisig – as a defendant. The Government filed an action in 2001 against the pharmacy and Bisig under the Fraud Injunction Statute, 18 U.S.C. §1845, and indicted them a year later. In 2003, Ms. Bisig pled guilty and agreed to a criminal forfeiture (which has brought in about \$1.2 million). The Government declined to intervene in the qui tam action in 2004. FDSI has asserted that it is entitled to a share of the criminal forfeiture as an alternate remedy. This decision accepts the relator's position and holds that the criminal forfeiture is an alternate remedy. The court says:

because the United States has achieved a monetary recovery from the Defendant in a manner outside of the qui tam action, and that recovery made an actual monetary recovery by the relator in the qui tam action either impossible or futile, the United States, in effect, elected to pursue its claim through an alternate remedy under §3730(c)(5). This interpretation is especially appropriate in this particular situation in which the United States caused the stay of the qui tam action in order to pursue criminal prosecution against the Defendant and recover substantially all the Defendant's assets through forfeiture proceedings.

The court says that the relator can participate in the forfeiture proceeding. The court also states that the Government still can move to dismiss the qui tam action arguing that FDSI is not an original source, that (assuming the qui tam is not dismissed) it will have to decide what percentage between 15 and 25 percent the relator will receive, and that Indiana failed to properly assert a claim for the forfeited property so it must petition the Attorney General to restore a portion of the forfeited property.

17. Defendant Avoids FCA Liability By Timely Repaying Double Billing

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

A hospital – for itself and for a physician practice group – billed Medicare and a federal grant program for the same physician services. The relator, who identified and reported the double billing while working for a consulting firm hired by the hospital, filed this qui tam in which the Government declined to intervene. Before his qui tam was filed, the hospital reported and

repaid the double billings. This decision grants summary judgment to the defendants; the court says that the relator cannot prove that the double billings were submitted knowingly. Although the court rejects the hospital's contention that billing twice for the same service might not result in any false claims, the court accepts that it may not have been clear as to whether the grant or Medicare should have been billed first and the two offices doing the billing did not actually know of the other office's billings. Moreover, the court placed great weight on the fact that the hospital reported the double billings and repaid the money.

18. Disgorgement Not FCA Remedy

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

In this declined qui tam action, the relator has alleged that the defendants created sham entities to obtain small business discounts and other benefits that enabled them to purchase wireless spectrum licenses from the FCC. The relator is seeking as FCA damages bidding credits, favorable financing, and disgorgement of profits arising from the subsequent sales of licenses. The defendants moved for partial summary judgment on the claim for disgorgement of profits. This decision grants partial summary judgment to the defendants, agreeing that disgorgement of profits is a form of unjust enrichment and that the FCA provides only for compensatory damages, not restitution. However, the court observes that "this motion is focused on the remedies available under the Act to [the relator] only. The remedies available generally to the Government present an entirely different question. In circumstances involving unjust enrichment warranting disgorgement of profits, the Government can choose from a panoply of options including pursuing administrative proceedings, 31 U.S.C. §§ 3801-12, and bringing common law unjust enrichment claims."

19. Application of Alternate Remedy Provision

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

The Government and the defendants settled, for \$31 million, allegations that the defendants used eight incorrect diagnostic related group (DRG) codes to inflate health care claims to the federal government. The Government asserted that the relator was not entitled to a share of the settlement proceeds because the relator's complaint did not identify the conduct released by the settlement agreement. This decision holds that the relator is not entitled to a share of the settlement proceeds. Although apparently rejecting the Government's position that the court should look only to the relator's complaint to decide the issue and choosing instead to look at all information provided to the Government by the relator, the Court denies the relator's motion holding that "the evidence presented does not establish that Relator apprised the government of Defendants' DRG violations either before or after filing this qui tam action, nor do

Relator's claims overlap with the settlement agreement entered into by the United States and the Defendants."

II. WHERE DO WE GO FROM HERE? FCA ENFORCEMENT IN 2006 AND BEYOND

1. The Government Has Settled FCA Cases Since October 2005 Totaling More Than \$1 Billion Dollars.

<u>COMPANY</u>	<u>SETTLEMENT</u>	<u>NATURE OF FRAUD</u>
Serono	\$567 million	Improper marketing of Serostim an anti AIDS – wasting drug
King Pharmaceuticals	\$124 million	Violation of Medicaid prescription drug “best price” regulation and underpayment of Medicaid rebates
Tenet (Redding)	\$62 million	Unnecessary heart surgeries
ABN AMRO Mortgage Group	\$42 million	False statements to HUD
Hunt Valve	\$13.2 million	Improper manufacture of parts used in nuclear submarines
Fluor	\$12.5 million	Billing government for unallowed costs.
Amtrak Contractors	\$24.75 million	Overcharging for electrical work done on track between Boston and New Haven
Staples	\$7.4 million	Misrepresenting county of origin on office products sold to GSA
Bearing Point	\$15 million	Management Consultant overbilled for travel

COMPANY	SETTLEMENT	NATURE OF FRAUD
		expenses, did not disclose rebates

2. Continued Reliance on “Big Cases”

A total of 99 cases were settled or litigated to judgment in fiscal year 2005. These 99 cases yielded \$1.5 billion in settlements or verdicts. Sixty percent of that total, however, came from four settlements: Gambro (\$325 million); Healthsouth (\$325 million); CareMark (\$137 million) and Glaxo SmithKline (\$140 million).

3. Continued Reliance on Whistleblowers

A review of the rest of the fiscal year 2005 settlements and judgments show a significant number of smaller cases that would never have been detected, investigated or settled but for a whistleblower.

4. Where the Action Will Be In 2006 - - Big Cases on the Horizon

- Medco Health Solution (PBM Fraud)
- Renal Care Facilities
- Tenet – upcoding
- Pharmaceutical Pricing and Marketing
- Medical Device Marketing

5. Other Likely Suspects

- Medicare Part D
- Operation IRAQI Freedom
- Follow the money

III. FCA Statistics

(Source: Department of Justice as of 9/30/04)

Total FCA recoveries, 1986-2004

Total FCA recoveries where there is an
Associated qui tam case, 1986-2004: \$8.4 billion

Total FCA recoveries by DOJ in cases
that DOJ entered or otherwise pursued: \$8.07 billion

Total FCA recoveries by relators in
cases declined by DOJ, to date: \$374,000,000

Total number of qui tam cases filed to date: 4,704

Qui Tam cases filed (by fiscal year):

1987:	32
1988:	60
1989:	95
1990:	82
1991:	90
1992:	119
1993:	132
1994:	222
1995:	277
1996:	364
1997:	533
1998:	470
1999:	482
2000:	367
2001:	310
2002:	320
2003:	334
2004:	415

Recoveries in qui tam cases declined by DOJ (by fiscal year):

1988:	\$ 35,431
1989:	\$ 0
1990:	\$ 75,000
1991:	\$ 69,500
1992:	\$ 994,456
1993:	\$ 5,978,000
1994:	\$ 1,822,323
1995:	\$ 1,813,200
1996:	\$ 14,033,433
1997:	\$ 7,136,144
1998:	\$ 29,225,385
1999:	\$ 62,509,047
2000:	\$ 1,814,847
2001:	\$125,658,963
2002:	\$ 26,101,582
2003:	\$ 87,140,070
2004:	\$ 9,431,129

Total: \$373,900,000

Total amounts paid or to be paid to relators
As their statutory share, to date:

\$1.42 billion

Relator's awards when DOJ intervened in or
Otherwise pursued the case:

\$1.33 billion

Relator's awards when government declined
to intervene:

\$ 93 million