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The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud

David J. Ryan*

INTRODUCTION

Once a figure of the Old West, the bounty hunter has appeared on the horizon in the fight against health care fraud. Armed with the False Claims Act (FCA),¹ today's bounty hunter seeks out instances of fraud against Medicare and other federal programs. Although vast differences exist between the frontier bounty hunters and their modern medical counterparts, they share a common bond. Like the bounty hunter, the health care fraud hunter is a private citizen who fights alleged wrongdoing with the promise of a government-sponsored reward if successful. Also, as on the frontier, justice under the FCA is often rough, and constitutional protections are sometimes ignored.

This article will outline the history of the FCA, summarize its major provisions, explore whether certain aspects of the FCA run afoul of constitutional guarantees, and examine recent developments in the expansion of the use of the Act.

Despite the superficial similarity, the origin of today's health care fraud hunter is not found in the 19th century American frontier, but in the England of centuries earlier. There, the "qui tam" doctrine was developed to allow informers to expose fraud against the Crown and to collect a share of the proceeds recovered.² The doctrine was adopted in England's colonies and, after independence, the First Congress of the United States

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1. 31 U.S.C. §§ 3729-3732 (1988 & Supp. 1993).

2. The term is derived from the phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "he who brings the action for the king as well as for himself." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, BOOK III, 160 (1768).

included qui tam provisions in a number of laws concerning import duties and trade.³

The tradition was continued during the Civil War, when the Union Army found itself defrauded by defense contractors.⁴ In response, the False Claims Act was adopted in 1863.⁵ Among other things, this Act contained provisions for civil penalties for fraud against the government, including double damages. The Act also allowed private individuals to prosecute those who submitted false claims to the United States, and successful individuals could receive one-half of the amount recovered. This law, which has been amended several times and recodified since its enactment, is the ancestor of today's FCA.

The reach of the qui tam provisions of the FCA has followed an erratic pattern over the years, expanding, contracting, and then expanding again. This is especially true with regard to the question of who may bring a qui tam action on behalf of the government. Such a person is commonly referred to as a "qui tam plaintiff" or a "relator." The terms are used interchangeably. The position of a qui tam plaintiff can be an enviable one, given the potential rewards. An important issue concerns the degree to which the relator's information is instrumental to the case, earning the relator a share of the recovery.

Initially, the requirements for relators were quite lax. They did not have to bring any new information and, in fact, could rely solely on information already in the hands of the government. Such "parasitic" actions probably reached their zenith in *United States ex rel. Marcus v. Hess*,⁶ in which the United States Supreme Court held that a relator could bring a qui tam action, even if all of the relator's information came from the government's own investigation. In fact, in *Hess*, the plaintiff's complaint was substantially the same as the criminal indictment.

3. See, e.g., *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 n.2 (C.D. Cal. 1989) (citing, e.g., Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (1791); Act of Aug. 4, 1790, ch. 35, §§ 55, 69, 1 Stat. 145, 173, 177 (1790); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (1790); Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (1790); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (1789); Act of July 31, 1789, ch. 5, §§ 29, 38, 1 Stat. 29, 44-45, 48 (1789)).

4. Among the woes described were Colt revolvers being sold to the government for \$25 when they were selling on the open market for \$14.50. *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 n.2 (N.D. Cal. 1989).

5. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863).

6. 317 U.S. 537, 545 (1943).

Congress reacted swiftly to what it viewed as a perversion of the FCA and moved to stop opportunists from taking advantage of the Act when they contributed nothing original. Congress amended the Act to bar all qui tam actions that were based on any information already in the hands of the government.⁷

However, this amendment proved to be overly restrictive, especially when the letter of the law was applied while its spirit was ignored. This was amply demonstrated in a 1984 decision of the Seventh Circuit,⁸ wherein the State of Wisconsin attempted to bring a qui tam action against a psychiatrist who had engaged in Medicaid fraud. However, the court held that the qui tam action was barred because it was based on information already in the hands of the United States. The irony was that the information had been given to the United States by the State of Wisconsin. Therefore, a strict interpretation of the 1943 provision required the dismissal of the State of Wisconsin's qui tam action, even though the state was the originator of the information and the information was essential to the prosecution of the psychiatrist.

This absurd result led to further amendments of the FCA in 1986, as Congress attempted to encourage qui tam actions while avoiding the problem of rewarding opportunists. The amendments reduced the plaintiff's burden of proof, lowered standards for showing intent and knowledge, and significantly raised penalties and damages. The current law, which includes the recent amendments, will be discussed in more detail below.

It seems clear that the amendments have had their intended effect of expanding the use of the FCA and its qui tam provisions. As the recent amendments have made it easier to pursue fraud actions, qui tam suits have increased and received greater publicity, leading to greater awareness of the law and, in turn, to the filing of still more actions.

In fiscal year 1994, the United States recovered \$1.09 billion in all types of civil fraud cases. Over one-third of this amount—\$411 million—was from health care providers. Of the \$1.09 billion recovered in all civil fraud cases, \$378 million was obtained

7. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (originally codified at 31 U.S.C. § 232(c) (1943)).

8. *United States ex rel. Wis. v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

through qui tam actions brought by private citizens—twice the amount recovered in the previous fiscal year.⁹

Such an upsurge may partially be explained by some well-publicized rewards to relators, especially the \$15 million received by the qui tam plaintiff as his share of the government's \$111.4 million recovery against National Health Laboratories.¹⁰

As if that were not enough, the issue of health care fraud has even found its way into popular entertainment. As pointed out by Bruce C. Vladeck, Administrator of the Health Care Financing Administration (HCFA), "[a]t HCFA we attribute increasing symbolic importance to the fact that the bad guys in what's probably the best movie of this past summer, 'The Fugitive,' were really health care providers . . . trying to put one over on the American public."¹¹

This article will review the FCA, identify potential relators, and discuss constitutional challenges to its provisions. It will then explore whether the Act's amendments may be applied retroactively. The article will then focus on the use of qui tam actions in the health care area and conclude with a brief prediction of their prospects in a managed care environment.

I. OVERVIEW OF THE ACT

Under the False Claims Act, a defendant is liable for knowingly presenting to the United States government any false or fraudulent claim for payment. False records or false statements submitted to support a claim are themselves false claims. Conspiracy to make such a false claim is also forbidden, as is causing another person to present a false claim.¹²

The definitions of "knowing" and "knowingly" are quite broad. They include actual knowledge of the information as well as deliberate ignorance of or reckless disregard for the truth or falsity of the information. No specific intent to defraud is required.¹³

9. Josh Chetwynd, *Recoveries by U.S. from Civil Fraud Surged in Fiscal '94*, WALL ST. J., Oct. 12, 1994, at B3.

10. Richard B. Schmitt, *Whistles Blow More Often on Health Care*, WALL ST. J., Sept. 2, 1993, at B1.

11. Bruce C. Vladeck, Administrator of HCFA, Remarks at the National Health Lawyers Association Conference, *Fraud & Abuse*, Sept. 27, 1993 (reported in HEALTH LAW NEWS REP., Oct. 1993, at 5).

12. 31 U.S.C. § 3729(a) (1988).

13. *Id.* § 3729(b) (1988). These broad definitions were made a part of the 1986 amendments to clarify prior law and to avoid decisions such as *United States v.*

A “claim” includes any request for money or property made to the government, as well as any nongovernmental third party, if the United States government provides any portion of the money or property that is requested, or if the government will reimburse the third party.¹⁴

The penalties for submitting a false claim are harsh: a civil penalty of \$5,000 to \$10,000 per false statement, plus three times the amount of actual damages sustained by the government, plus costs. However, a person who submits a false claim but brings it to the government’s attention within 30 days of the person’s discovery of the violation may have the penalty reduced to two times the actual damages plus costs.¹⁵

The section dealing with civil actions under the FCA opens with a paragraph charging the United States Attorney General with responsibility for investigating violations and filing civil actions.¹⁶ However, the rest of the section outlines the procedures to be followed when an action is brought by a private person on behalf of the government.¹⁷

A qui tam plaintiff first prepares a written complaint and serves it on the Attorney General, not on the defendant, along with written documentation of substantially all material evidence. The complaint is filed in camera, remaining under seal for at least 60 days, during which time the government is to review the case.¹⁸ However, the government may move to extend the 60-day period for good cause while continuing to review the matter. Multiple extensions may be given. During this time, the

Ueber, 299 F.2d 310, 314 (6th Cir. 1962), which required actual knowledge. See THE FALSE CLAIMS REFORM ACT OF 1985, S. REP. NO. 345, 99th Cong., 2d Sess. 2, at 7 (1986) [hereinafter REPORT].

14. 31 U.S.C. § 3729(c) (1988).

15. 31 U.S.C. § 3729(a). The 1986 amendments increased these penalties from \$2,000 per false statement, and trebled, rather than doubled, damages. See REPORT, *supra* note 13, at 17.

16. 31 U.S.C. § 3730(a) (1988 & Supp. 1993).

17. *Id.* § 3730(b) (1988 & Supp. 1993).

18. *Id.* § 3730(b)(2). With regard to documentation, courts are inclined to interpret the phrase “substantially all” evidence rather liberally, as long as the government is given sufficient notice of the nature of the fraud and of the evidence. See *United States ex rel. Woodard v. Country View Care Ctr., Inc.*, 797 F.2d 888 (10th Cir. 1986). However, the allegations of fraud contained in the complaint must be pled with particularity, or the complaint may be dismissed without prejudice, *see, e.g.*, *United States ex rel. Mikes v. Straus*, 853 F. Supp. 115 (S.D.N.Y. 1994), or with prejudice if the pleading defects are not corrected. *See, e.g.*, *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Blue Cross & Blue Shield of Ga.*, 755 F. Supp. 1055 (S.D. Ga. 1990).

complaint is still under seal, and the defendant may be completely unaware of the filing of the action.¹⁹

After reviewing the case, the government must decide whether to proceed with the action or to decline to do so. If it proceeds with the action, then the government takes over the handling of the case. If the government declines the case, it so notifies the court, and the *qui tam* plaintiff then has the right to handle the case individually.²⁰ However, once a *qui tam* action has been initiated with the filing of the sealed complaint, no one other than the government or the original relator can intervene or bring any case based on the facts of the original action. In other words, no copy cat suits are allowed, and the first case filed bars all others based on the same facts.²¹

If the government proceeds with the action, it retains the primary responsibility for prosecuting the case. Although the *qui tam* plaintiff has the right to continue as a party, the private plaintiff's role may be limited. Specifically, upon motion of the government, the relator's participation may be restricted,²² and the case may be settled²³ or even dismissed²⁴ over the objections of the relator. The government may also choose to proceed with the action in an alternate forum, such as an administrative proceeding; the relator has the same rights in such an alternate forum as in a regular civil action.²⁵

If the government decides not to handle the case, the relator has the right to conduct the action, although the government may ask to be served with copies of pleadings and deposition transcripts. Also, the government may intervene at a later time,

19. 31 U.S.C. § 3730(b)(3) (1988 & Supp. 1993).

20. *Id.* § 3730(b)(4) (1988 & Supp. 1993).

21. *Id.* § 3730(b)(5) (1988 & Supp. 1993). Where the later-filed case alleges some facts that are contained in the original case and others that are not, the overlapping factual allegations will be stricken from the later-filed complaint, while original allegations will be allowed to stand. *See, e.g., Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989); *Hyatt v. Northrop Corp.*, No. CV 87-6892, 1989 U.S. Dist. LEXIS 18941 (C.D. Cal. Dec. 27, 1989).

22. 31 U.S.C. §§ 3730(c)(2)(C), (D) (1988 & Supp. 1993).

23. *Id.* § 3730(c)(2)(B) (1988 & Supp. 1993). However, a relator may have the right to conduct discovery in order to find out the elements of a settlement where the relator has been excluded from negotiations. *United States ex rel. McCoy v. California Medical Review, Inc.*, 133 F.R.D. 143 (N.D. Cal. 1990). Relators have been successful at challenging inadequate settlements between the government and defendants. *See, e.g., Gravitt v. General Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988).

24. *Id.* § 3730(c)(2)(A) (1988 & Supp. 1993).

25. *Id.* § 3730(c)(5) (1988 & Supp. 1993).

with leave of court, if the rights of the qui tam plaintiff are not thereby limited.²⁶ The government may also delay discovery in the case if it can show that such discovery would interfere with the government's investigation or prosecution of a criminal case arising out of the same facts.²⁷

Aside from the differences in procedures between cases handled by the government and cases that it declines, there are also differences regarding the amount of the relator's award. If the government proceeds with the case, the qui tam plaintiff is entitled to an award in an amount from 15% to 25% of the proceeds of the action or settlement. The court is to determine the percentage based upon the extent of the relator's substantial contribution to the prosecution. However, if the relator's information has not been substantial and the prosecution has been based primarily on sources other than the relator, then the court may award an appropriate percentage to the qui tam plaintiff, but no more than 10% of the proceeds. The relator may also receive reasonable expenses plus costs and attorneys' fees, all of which are awarded against the defendant.²⁸ If the government declines to proceed with the action, the qui tam plaintiff is entitled to a reasonable award of not less than 25% and not more than 30% of the proceeds, in addition to reasonable expenses, costs, and attorneys' fees.²⁹

If the relator participated in the violation of the False Claims Act, then the court may take that fact into consideration in reducing the award to an appropriate percentage. Furthermore, if the qui tam plaintiff is actually convicted of a crime relating to the FCA violation, then no share of the proceeds shall be awarded to that plaintiff. This is true whether or not the government decides to handle the case. If the government does take

26. *Id.* § 3730(c)(3) (1988 & Supp. 1993).

27. *Id.* § 3730(c)(4) (1988 & Supp. 1993).

28. *Id.* § 3730(d)(1) (1988 & Supp. 1993). The 1986 amendments increased the bottom of the range from 10% to 15%. With regard to the second part of this provision, a court has awarded only 5% of the proceeds where it found that "the suit was based primarily on disclosures, albeit not public, of specific information other than information provided by the relators on their own." *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1161 (S.D. Fla. 1990), *aff'd mem.*, 963 F.2d 384 (11th Cir. 1992).

29. 31 U.S.C. § 3730(d)(2) (1988 & Supp. 1993). The 1986 amendments increased the top of the range from 25% to 30% of the proceeds.

the case, it may proceed with the action, although a convicted relator will be dismissed from the case.³⁰

Reasonable attorneys' fees and expenses may be awarded against the qui tam plaintiff if the government does not take on the action *and* if the court determines that the relator brought the action frivolously or vexatiously.³¹

The law avoids the hazard of parasitic suits by prohibiting a qui tam action in a case where the government has already sued in a civil or administrative proceeding,³² or where relevant information has been publicly disclosed.³³

However, where the relator is the "original source" of the information, then a qui tam action may be brought, notwithstanding the public disclosure of the information.³⁴ This latter provision would prevent relators who were original sources of information from falling victim to the trap that snared the State of Wisconsin.³⁵ An original source must have direct and independent knowledge of the information and must voluntarily provide it to the government before filing a qui tam action.³⁶

A False Claims Act suit requires the relator, on behalf of the government, to prove by a preponderance of the evidence all essential elements of the case.³⁷ An action is to be brought within six years of the alleged violation of the FCA, or within three years of the time that the government discovers the viola-

30. *Id.* § 3730(d)(3) (1988 & Supp. 1993). This provision was added through the Major Fraud Act of 1988, Pub. L. No. 100-700, 102 Stat. 4638 (1988), to further refine who may bring a qui tam action; truly culpable parties are not to be unjustly rewarded. An offshoot of this issue, which arises occasionally, is the question of whether a defendant may file an indemnity or contribution counterclaim against an allegedly culpable relator, so as to shift or allocate the liability for the FCA violations. The question was answered in the negative in *Mortgages, Inc. v. United States Dist. Court of Nev.*, 934 F.2d 209 (9th Cir. 1991). It would seem that § 3730(d)(3) provides the only remedy against relators with unclean hands: reduction of their share of the proceeds. However, counterclaims based on issues unrelated to the FCA violations may be permitted. *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993); *United States ex rel. Burch v. Piqua Eng'g*, 145 F.R.D. 452 (S.D. Ohio 1992).

31. *Id.* § 3730(d)(4) (1988 & Supp. 1993).

32. *Id.* § 3730(e)(3) (1988 & Supp. 1993).

33. *Id.* § 3730(e)(4)(A) (1988 & Supp. 1993).

34. *Id.*

35. *United States ex rel. Wis. v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

36. *Id.* § 3730(e)(4)(B) (1988 & Supp. 1993).

37. *Id.* § 3731(c) (1988). This clarifies the standard, which had sometimes been held to be "clear and convincing." See *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962).

tion, whichever occurs later, but in no event more than ten years after the violation was committed.³⁸

II. POTENTIAL RELATORS

Because of the requirement that information not be publicly disclosed or, if it is, that the relator be the original source of the information, it is easy to see why most qui tam plaintiffs have been employed by or associated with the defendants.³⁹ Indeed, one court has referred to the insider as “[t]he paradigmatic ‘original source’”⁴⁰ Of course, even insiders are not always able to come up with information that has not already been publicly disclosed.⁴¹

Another potential source of relators is Medicare beneficiaries. For example, in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*,⁴² a Medicare beneficiary Cooper repeatedly quarreled with Blue Cross and Blue Shield over its handling of certain bills and its role as Medicare secondary payer. In moving to dismiss the relator’s qui tam action, Blue Cross and Blue Shield argued, among other things, that the plaintiff’s allegations were already publicly disclosed in newspaper articles and in a similar action against Blue Cross and Blue Shield in Georgia. The court held that the particular violations that Cooper complained of had been uncovered by him, so the case was allowed to proceed as a qui tam action.

However, a law firm was held not to be an original source of information when it uncovered alleged fraud while handling civil discovery in unrelated litigation. The court held that the law firm’s knowledge actually came from an employee of an insurance company, rendering the firm’s alleged knowledge

38. *Id.* § 3731(b) (1988). Some courts have held that the statute begins to run when demand for payment is made. *See, e.g.,* *United States v. Perez*, 839 F. Supp. 92 (D.P.R. 1993). Other courts have held that actual payment starts the running of the statute. *See, e.g.,* *United States ex rel. Duvall v. Scott Aviation*, 733 F. Supp. 159 (W.D.N.Y. 1990).

39. *See, e.g.,* *United States ex rel. McCoy v. California Medical Review, Inc.*, 133 F.R.D. 143 (N.D. Cal. 1990) (former employees of defendant peer review organization); *United States ex rel. Davis v. Long’s Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976) (former employee of defendant pharmacies).

40. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991).

41. *See, e.g.,* *United States ex rel. Ramseyer v. Century Healthcare Corp.*, No. Civ-92-2192-B, 1994 WL 746694 (W.D. Okla. July 18, 1994), in which a former clinical director of a day-treatment facility was held not to be an original source of information that was already in the hands of the government.

42. 19 F.3d 562 (11th Cir. 1994).

secondhand. For that reason, the law firm could not be an original source.⁴³

A number of courts have addressed the issue of whether current or former government employees are proper qui tam plaintiffs. Most courts have looked at the broad congressional intent and have found such parties to be proper relators.⁴⁴ On the other hand, some decisions have held that, because it is the duty of government employees to uncover and report fraud, the disclosure of such information could not be considered "voluntary." Also, any information that was known to a government employee could be deemed to have been publicly disclosed.⁴⁵

Competitors of the defendant could be another fertile source of qui tam plaintiffs. In fact, the relator who collected the \$15 million share of the National Health Laboratories settlement was a salesman employed by a competing laboratory.⁴⁶

Although public interest organizations have pursued qui tam actions as relators,⁴⁷ great care must be exercised in forming such an organization for the purpose of being a qui tam plaintiff. Such an organization may have difficulty showing that it was the original source of the information and that it had direct and independent knowledge of the allegations.⁴⁸

Also, in *United States ex rel. Federal Recovery Services, Inc. v. Crescent City E.M.S., Inc.*,⁴⁹ an individual who uncovered alleged false claims made by an ambulance service informed the

43. Stinson, 944 F.2d at 1160-61.

44. See *United States ex rel. Fine v. Chevron, U.S.A.*, 39 F.3d 957 (9th Cir. 1994) (former Inspector General auditor); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (Air Force attorney who conducted investigation); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) (government attorney); *United States ex rel. McDowell v. McDonnell Douglas Corp.*, 755 F. Supp. 1038 (M.D. Ga. 1991) (Air Force contract cost analyst); *United States ex rel. Givler v. Smith*, 760 F. Supp. 72 (E.D. Pa. 1991) (former Housing Authority Commissioner); *United States v. CAC-Ramsey, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990), *aff'd mem.*, 963 F.2d 384 (11th Cir. 1992) (retired employee of Department of Health and Human Services who learned of Medicare fraud while performing a government audit); *Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989) (employee of Agency for International Development).

45. See *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (former Defense Department quality assurance representative).

46. Schmitt, *supra* note 10.

47. See, e.g., *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989).

48. See, e.g., *United States v. Rockwell Int'l Corp.*, 730 F. Supp. 1031 (D. Colo. 1990).

49. No. Civ. A. No. 91-4150, 1993 WL 345655 (E.D. La. Aug. 30, 1993).

government and the news media of the allegations. After the information was made public, the individual and his attorney formed a corporation, Federal Recovery Services, to act as the qui tam plaintiff. The court held that Federal Recovery Services was not a proper plaintiff since all of the relevant information was publicly disclosed before it even came into existence. The court further held that the individual who uncovered the information could not be added as a qui tam plaintiff even though he was the original source of the information because the Act prohibits intervention by any person other than the United States government. Although both the individual and Federal Recovery Services were dismissed as relators, the case continued with the United States as the plaintiff. Clearly, despite the qui tam doctrine's liberal application in many cases, technical requirements must still be observed.

III. CONSTITUTIONALITY OF FALSE CLAIMS ACT PROVISIONS

Defendants in several cases⁵⁰ have launched broad attacks on the constitutionality of several provisions of the False Claims Act.

A. Separation of Powers

Some defendants have contended that the qui tam provisions violate the doctrine of separation of powers because they constitute a legislative encroachment on the executive power of prosecution.⁵¹ However, the Second Circuit Court of Appeals rejected this argument in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*,⁵² pointing out that Congress was furthering its legislative functions by employing the qui tam provisions rather than intruding on the powers of the Executive Branch. In *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, a California district court pointed to the long history of qui tam statutes, including the many statutes that were passed with

50. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Burch v. Piqua Eng'g*, 145 F.R.D. 452 (S.D. Ohio 1992); *United States by Dept. of Housing & Urban Dev. ex rel. Givler v. Smith*, 775 F. Supp. 172 (E.D. Pa. 1991); *United States ex rel. Truong v. Northrup Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989).

51. U.S. CONST. art. II, § 3.

52. 985 F.2d 1148, 1155.

such provisions by the First Congress, as “‘contemporaneous and weighty evidence’ that the concept is consistent with the constitutional principle of separation of powers.”⁵³

B. *Appointments Clause*

A related argument concerns the appointments clause,⁵⁴ which gives the President the power to appoint inferior officers of the United States. Defendants often rely on the Supreme Court case of *Buckley v. Valeo*,⁵⁵ wherein the Election Commission appointed by Congress was declared invalid. However, the courts have held that since Congress has no power to control the actions of qui tam plaintiffs and they are not actually appointed by Congress, the *Buckley* reasoning does not apply.⁵⁶

C. *Standing*

The third broad-based constitutional challenge to the qui tam provisions concerns the relator’s lack of standing to bring the case. Defendants argue that qui tam plaintiffs are not bringing an action on their own behalf, so there is no real case or controversy at issue.⁵⁷

Some courts have addressed this issue by looking to the delegation of authority from the United States to the qui tam plaintiff. In those cases,⁵⁸ the courts have held that there is an actual case or controversy between the United States and the defendant, and the qui tam plaintiff is simply bringing the action on behalf of the United States. Other courts have had an alternative view, finding a case or controversy between the relator and the defendant either because the relator has a stake in the recovery of the proceeds⁵⁹ or because the relator frequently risks unemployment or other hardships in bringing the case.⁶⁰

The former appears to be the better-reasoned view. Qui tam cases are brought on behalf of the United States, and there is certainly a case or controversy between the government and the defendant since government money is alleged to have been falsely obtained. The fact that the relator may share in the

53. 714 F. Supp. 1084, 1086 (citation omitted).

54. U.S. CONST. art II, § 2, cl. 2.

55. 424 U.S. 1 (1976).

56. See, e.g., Kelly, 9 F.3d 743, 757-59.

57. U.S. CONST. art. III.

58. See, e.g., Kelly, 9 F.3d at 748; Truong, 728 F. Supp. at 619.

59. Stillwell, 714 F. Supp. 1084, 1098-99.

60. See Burch, 145 F.R.D. 452, 454.

award does not create a controversy between the relator and the defendant because the relator suffered no actual injury. Moreover, aside from employees of the defendant, qui tam plaintiffs do not necessarily risk much by bringing a suit, and, in the case of competitors, they may actually benefit, regardless of the outcome. Finally, one court held that the Eleventh Amendment⁶¹ does not bar a citizen of one state from filing a qui tam action against an agency of another state because the real party in interest is not the relator, but the United States.⁶² This lends support to the argument that it is the government that has standing to bring the suit, while the relator simply represents the government.

In summary, these wide-ranging attacks on the constitutionality of the qui tam provisions have been uniformly unsuccessful in the circuit and district courts. This is not difficult to understand. Although onerous to those defendants who would not otherwise have been prosecuted, qui tam actions brought under the FCA's provisions do not appear to put defendants in any worse position than they would be in had the government decided to prosecute them at the outset. Indeed, in those cases where the government takes over the case, the defendants *are* being prosecuted by the government, and the role of the relator is often quite limited. Where the government declines to handle the case, the defendant may be better off, depending on the quality of the counsel for the qui tam plaintiff. If the charges are found to be baseless and the suit frivolous, sanctions may be awarded against the qui tam plaintiff.⁶³ In short, the qui tam provisions, taken by themselves, do not seem to present glaring problems of unfairness.

However, this is not true of some of the other provisions of the FCA, particularly those dealing with the damages to be assessed against the defendant. Those provisions present serious constitutional issues.

D. Double Jeopardy

One of the most fundamental constitutional guarantees is the right to be free from being put in double jeopardy for the same

61. U.S. CONST. amend. XI.

62. United States *ex rel.* Milam v. University of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46 (4th Cir. 1992).

63. 31 U.S.C. § 3730(d)(4) (1988 & Supp. 1993).

offense.⁶⁴ Parallel criminal proceedings are often brought along with a civil FCA suit, creating double jeopardy problems. This issue was addressed by the Supreme Court in *United States v. Halper*.⁶⁵ In that case, the Supreme Court held that, while the FCA is a remedial statute, it can become a punitive statute if the civil penalties are grossly disproportionate to the harm suffered by the United States. In other words, as long as the civil penalties bear some relationship to the loss, the prosecution of the FCA action will not constitute double jeopardy when there is also a criminal prosecution. However, if the civil penalty bears no rational relationship to the loss, then it can only be interpreted as a punishment, so the double jeopardy prohibition would apply. In *Halper*, the Supreme Court decided that \$130,000 in penalties was so excessive, compared with an actual loss of \$585, that the civil penalties would be considered a second punishment for double jeopardy purposes.⁶⁶ In *Halper*, the defendant had already been imprisoned for the same violations alleged in the civil action.

Although *Halper* seems to hold out hope to defendants, unfortunately no other defendants have been able to convince a court that the *Halper* rule applied to their cases. For example, in *United States v. Pani*,⁶⁷ the double jeopardy argument was unsuccessful in a FCA civil action against a physician. The court held that a civil penalty of \$32,460 was not so disproportionate to the actual damages of \$1,280 as to raise a question of double jeopardy.⁶⁸ This troubling result shows the rather disingenuous position the courts have taken. Can it honestly be said that a civil penalty 25 times the amount of actual damages is intended only as compensation for loss and not as a punishment? Clearly what is involved here is punishment, whether the multiple is 25 times, as in *Pani*, or 222 times, as in *Halper*.

This problem has been made even more acute by the recent amendments, which have increased penalties from \$2,000 per violation to between \$5,000 and \$10,000 per violation, as well as trebling actual damages. The potential for astronomical civil penalties and damages leaves no doubt about the punitive nature of these provisions, and defendants who are subject to crim-

64. U.S. CONST. amend. V.

65. 490 U.S. 435 (1989).

66. *Id.* at 450-52.

67. 717 F. Supp. 1013 (S.D.N.Y. 1989).

68. *Id.* at 1019.

inal prosecution should continue to oppose civil penalties on double jeopardy grounds.

E. Excessive Fines

A related argument concerns the constitutional prohibition on excessive fines.⁶⁹ In *Peterson v. Weinberger*,⁷⁰ the Fifth Circuit Court of Appeals upheld the district court's finding that a civil penalty of \$2,000 for each of 120 false claims would be unreasonable and disproportionate to the loss sustained by the government. This decision was later cited with approval by the Supreme Court in *Halper*.⁷¹ Therefore, in addition to the Fifth Amendment double jeopardy argument, defendants may also have an Eighth Amendment excessive fines argument. This argument is based on the same reasoning: the civil penalties are so excessive they serve not as compensation to the government or as a remedy for the loss but as a quasi-criminal punishment.

Defendants should also be encouraged by dicta from the Supreme Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁷² In that case, the court held that the excessive fines clause did not prevent the award of punitive damages in cases between private parties, but it specifically left open the issue of whether the clause would affect qui tam actions. Given that the real party in interest is the government, it seems that the excessive fines clause should apply to qui tam actions, at least in those cases where the civil penalties are truly excessive.

However, it is likely that the excessive fines argument would be subject to the same scrutiny as the double jeopardy argument, and that only in the most extreme cases would the defendant have any chance of success.

IV. RETROACTIVITY

As discussed in section I above, the recent amendments to the False Claims Act expanded the reach of the Act. Although passed with the admirable purpose of preventing fraud, retroactive application of several of these amendments can cause injustice to defendants. In particular, retroactive expansion of the definition of knowledge of falsity to include "deliberate igno-

69. U.S. CONST. amend. VIII.

70. 508 F.2d 45, 55 (5th Cir.), cert. denied, 423 U.S. 830 (1975).

71. 490 U.S. 435, 450.

72. 492 U.S. 257, 275-76 n.21 (1989).

rance” of truth or falsity,⁷³ and the significant change in civil penalties,⁷⁴ increases the defendant’s liability for acts that occurred before the law was changed. Unfortunately for defendants, it appears that the bulk of the district courts that have addressed this issue have approved of the retroactive application of the amendments.⁷⁵

Some of these cases are based on the 1974 United States Supreme Court decision in *Bradley v. School Board of Richmond*,⁷⁶ which retroactively applied a new provision authorizing an award of attorneys’ fees in a school desegregation case. The Supreme Court stated that courts must “apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.”⁷⁷ In other words, the Court indicated a presumption in favor of retroactivity unless the language of the statute dictates otherwise.

However, 14 years later, in *Bowen v. Georgetown University Hospital*,⁷⁸ the Court appeared to take a very different direction. In that case, the Court indicated that the presumption is *against* retroactivity unless required by the language of the legislation.⁷⁹

Significantly, the only circuit court to have directly ruled on the retroactive application of the FCA amendments rejected such application. In *United States v. Murphy*,⁸⁰ the Sixth Circuit reviewed *Bradley* and *Bowen*, as well as *Bennett v. New Jersey*,⁸¹ a Supreme Court decision that somewhat weakened the principle announced in *Bradley* by stating that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.⁸² The Court decided that *Bennett* and *Bowen* represented the better and latest thinking of the Supreme Court on this issue.

73. 31 U.S.C. § 3729(b) (1988).

74. *Id.* § 3729(a) (1988).

75. *See, e.g.,* *United States v. Rockwell Int’l Corp.*, 730 F. Supp. 1031 (D. Colo. 1990); *United States v. Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989); *United States ex rel. McCoy v. California Medical Review, Inc.*, 723 F. Supp. 1363 (N.D. Cal. 1989); *United States v. Oakwood Downriver Medical Ctr.*, 687 F. Supp. 302 (E.D. Mich. 1988).

76. 416 U.S. 696 (1974).

77. *Id.* at 711.

78. 488 U.S. 204 (1988).

79. *Id.* at 224.

80. 937 F.2d 1032 (6th Cir. 1991).

81. 470 U.S. 632 (1985).

82. *Id.* at 639.

Looking specifically at the Act, the *Murphy* court held that applying the amendment's looser definition of "knowingly" would include conduct that the court would not have previously viewed as criminal.⁸³ Also, the court noted that under the amendments, the liability of an individual would increase by more than a million dollars, thus creating a new liability in connection with a past transaction.⁸⁴ Accordingly, the court refused to apply the amendments retroactively.

Defendants can also point to a recent Supreme Court decision, *Landgraf v. USI Film Products*, which dealt with the compensatory and punitive damages provided for in the 1991 Civil Rights Act.⁸⁵ The Court did not reject *Bradley*, but noted that the decision concerned attorneys' fees, which the Court deemed to be collateral to the main issues. However, the Court held that provisions dealing with both compensatory and punitive damages dealt with substantive rights, and that these could not be applied retroactively.⁸⁶ This case should be a boon to defendants arguing against retroactive application of the FCA amendments.

However, two events would ultimately clear up the controversy over retroactive application of amendments. One would be Congress' passage of yet another amendment explicitly indicating whether the recent amendments are to be applied retroactively or prospectively. The other would be the simple passage of time such that most suits would be brought for activities occurring after the enactment of the amendments, thus rendering the issue moot.

V. FALSE CLAIMS: EXPANDING HORIZONS

In addition to facing simultaneous criminal and civil prosecution, enormous civil penalties and damages, and possible retroactive application of the law, potential False Claims Act defendants in the health care arena must now look forward to qui tam and government-initiated actions based not on specific false claims, but on alleged problems with the structure of their business arrangements. In the past, the typical false claim in-

83. 937 F.2d at 1036.

84. *Id.* at 1038.

85. 114 S. Ct. 1483 (1994).

86. *Id.* at 1505-06.

volved such alleged practices as using false diagnostic codes,⁸⁷ ordering unnecessary tests,⁸⁸ seeking payment for services not rendered,⁸⁹ or falsely characterizing nonreimbursable routine examinations as reimbursable consultations.⁹⁰ In such cases, the presence of a false claim is obvious, since the defendants submit false information in order to receive payment from the United States. However, recent developments have pointed toward a trend in applying the FCA to seek damages and civil penalties for violations of the Medicare and Medicaid anti-kickback statute.⁹¹

A. Kickback Schemes

Among other things, the Medicare and Medicaid anti-kickback law forbids any "remuneration" in return for referrals in connection with any service that may be paid for by Medicare or Medicaid.⁹² Although it has been held that the anti-kickback law itself does not create a private remedy,⁹³ the government and qui tam plaintiffs have sought to bring suits based on violations of the anti-kickback law in the guise of false claims actions.

The seeds of these developments were planted over 50 years ago in *United States ex rel. Marcus v. Hess*,⁹⁴ when the Supreme Court held that claims submitted pursuant to a government contract entered into as a result of collusive bidding or bribery were subject to the FCA. Likewise, the FCA was applied by the Second Circuit over 20 years ago to a case involving a government contract for construction of ship boilers, where it was alleged that the contract negotiations were based on inflated cost estimates submitted by the defendants. The court held that the invoices submitted pursuant to the contract were false claims.⁹⁵

Given these early applications of the FCA to "tainted negotiation" cases, it is surprising that reported decisions using similar theories in the area of health care fraud occurred only within the last few years. For example, *United States ex rel. Woodard v.*

87. *United States ex rel. Wagner v. Allied Clinical Labs.*, No. C-1-94-92 (S.D. Ohio filed Feb. 7, 1994, unsealed July 25, 1994).

88. *United States v. Mahar*, 801 F.2d 1477 (6th Cir. 1986).

89. *United States v. Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989).

90. *United States v. Lorenzo*, 768 F. Supp. 1127 (E.D. Pa. 1991).

91. 42 U.S.C. § 1320a-7b(b) (1988).

92. *Id.*

93. *See West Allis Memorial Hosp., Inc. v. Bowen*, 852 F.2d 251 (7th Cir. 1988).

94. 317 U.S. 537 (1943).

95. *United States v. Foster Wheeler Corp.*, 447 F.2d 100 (2d Cir. 1971).

*Country View Care Center, Inc.*⁹⁶ was a qui tam action filed by the State of Colorado asserting Medicaid fraud. The state alleged that the defendants submitted false claims when they filed cost reports that included amounts of money paid to certain “consultants.” The trial court found that the consultants performed no services and the payments were actually kickbacks.⁹⁷ Since the defendants’ reimbursement was based on the cost reports, submission of these reports constituted false claims. The judgment against the defendants was affirmed on appeal.⁹⁸

By itself, *Woodard* does not appear to be a remarkable result. After all, specific documents containing false statements were submitted to the government. Moreover, because the payments paid to the “consultants” were deemed to be worthless, it was possible to calculate actual damages based on those payments and to assess specific penalties for each submission of an inflated cost report.

In *United States v. Kensington Hospital*,⁹⁹ the trial court allowed the application of the FCA to an alleged kickback situation. In this case, the defendants argued that the Act did not apply because the government could not have suffered any loss due to the kickbacks since the defendants’ reimbursement was already fixed under Medicaid and would not have been affected by the cost of the kickbacks. The court held, citing *Marcus*,¹⁰⁰ that the government did not need to show any actual damages to prove an FCA violation.¹⁰¹ The court also rejected the use of the general Anti-Kickback Act of 1986,¹⁰² holding that Congress intended that act to apply only to contractor-subcontractor situations, not to kickbacks in the Medicare or Medicaid context.¹⁰³

Although the plaintiffs in both *Woodard* and *Kensington Hospital* alleged facts showing the defendants participating in kickbacks, the specific anti-kickback law pertaining to Medicare and Medicaid was not the basis for FCA liability in either case.

However, in the recent decision of *United States ex rel. Roy v. Anthony*,¹⁰⁴ the district court refused to dismiss a qui tam FCA

96. 797 F.2d 888 (10th Cir. 1986).

97. *Id.* at 891.

98. *Id.* at 894.

99. 760 F. Supp. 1120 (E.D. Pa. 1991).

100. 317 U.S. 537 (1943).

101. 760 F. Supp. at 1127.

102. 41 U.S.C. §§ 51-58 (1988).

103. 760 F. Supp. at 1139.

104. No. C-1-93-0559, 1994 WL 376271 (S.D. Ohio July 14, 1994).

suit expressly brought for violations of the Medicare/Medicaid anti-kickback law. Specifically, the plaintiff alleged the defendant received payments for patient referrals. The court noted that the plaintiff was alleging "activity that is clearly illegal, but it is not so clearly a violation of the False Claims Act."¹⁰⁵ Nevertheless, the court felt that it was possible that the plaintiff could establish that the alleged kickbacks "somehow tainted the claims for Medicare."¹⁰⁶ Since this case is still pending, it remains to be seen whether the qui tam plaintiff will be able to muster proof sufficient to support an FCA case. However, the idea of basing FCA suits on violations of the Medicare anti-kickback law seems to be gaining acceptance.¹⁰⁷

The use of the anti-kickback statute in support of FCA suits received another boost recently with the consent judgment entered in *United States v. T² Medical, Inc.*¹⁰⁸ In this case, it was alleged that T², a home infusion company, helped doctors set up infusion centers. When enough doctors were referring a stream of patients to the centers, T² would buy the centers from the doctors, giving them T² stock in exchange for the doctors' shares in the centers. However, the doctors were restricted in selling their T² stock, and they allegedly had an illicit incentive to refer more patients to the centers. In the consent judgment, T² agreed to pay the United States government \$500,000 and to change its business arrangements. The agreement received considerable publicity in the general press¹⁰⁹ while the government touted its "ground-breaking way of using the False Claims Act . . . to provide a remedy for kickbacks in a civil context . . ."¹¹⁰

Thus, the trend is evident: a line of cases has emerged that extends the reach of the FCA to include relatively straightforward situations of false billing, cases of false and inflated cost reports, cases of false (but not inflated) cost reports, and more exotic situations where a "tainted" transaction may be enough to establish a false claim.

105. *Id.* at *2.

106. *Id.*

107. See also, *United States v. Northwestern Inst. of Psychiatry*, No. 93-CV-0132 (E.D. Pa. filed Jan. 11, 1993) (pending case that alleges, among other things, that kickback arrangements were grounds for a False Claims Act suit).

108. Ga. No. 1:94-CV-2549 (N.D. Ga. Sept. 26, 1994).

109. See, e.g., George Anders, *T² Sets Accord in Fraud Case, To Pay Penalty: Home-Infusion Firm's Pact is Likely To Be Viewed as Key U.S. Victory*, WALL ST. J., Sept. 26, 1994, at A2.

110. *Novel Use of False Claims Act Arises in T² Medicare Settlement*, 3 Health L. Rep. (BNA) No. 41, at 1418 (Oct. 20, 1994).

Defendants may find some solace in several cases that seem to not follow this trend. In *United States v. Shaw*,¹¹¹ one of the defendants was employed by land developers to prepare loan applications for submission to the Farmers Home Administration (FmHA). He pled guilty to bribing a FmHA official. In an FCA suit, the government sought to collaterally estop the defendant from denying that each loan application prepared by him was a false claim. However, the court rejected this argument, stating:

While the court would agree with the proposition that the loan approval process was perhaps tainted by payment of the bribes, the court does not accept the government's strained rationalization for its classification of these claims, the loan applications and preapplications, as false or fraudulent. The bare fact that bribes were involved in this case, a fact established conclusively by the prior criminal proceeding, does not necessarily lead to the further conclusion that false or fraudulent claims were made in connection with each of the loan applications or preapplications.¹¹²

For this reason, the court denied the government's motion for summary judgment on the FCA count. However, it seems clear that while the court rejected the notion of a blanket "tainting" of all transactions, the court would have accepted the government's argument as to any loan applications that were shown to have been affected by the bribes.

In a similar vein, the Third Circuit Court of Appeals required false statements in applications to be causally connected to the damages suffered.¹¹³ In that case, a real estate broker falsely certified that certain houses were free of defects in plumbing, electrical, and heating systems. Loans based on those misrepresentations were approved. Later, lead-based paint was forbidden in Philadelphia residences, making the subject houses almost worthless. The district court found against the defendant and awarded damages of approximately \$120,000. However, the court seemed to regret its decision, pointing out that

[t]he result is harsh indeed. For want of a few hundred dollars' worth of work on each property, Hibbs has become, in effect, the guarantor of mortgages amounting to close to \$10,000 each, and is required to pay double the amounts the government has had to expend to make good on defaults which I

111. 725 F. Supp. 896 (S.D. Miss. 1989).

112. *Id.* at 900 (footnote omitted).

113. *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977).

have found to be totally unrelated to the conditions for which the certifications had issued. To make the result all the more severe, at the time of the defaults these houses had virtually no resale value due largely to a lead base paint condition of which neither Hibbs nor FHA was aware at the time the certifications issued.¹¹⁴

The Third Circuit vacated the judgement, holding that the damages should only have been based on the difference in value between the houses as falsely represented and as they actually were.¹¹⁵ In other words, only damages that were actually caused by the misrepresentation should have been awarded.

Although this case deals only with the damage provisions of the FCA, and not with civil penalties, it is nevertheless useful in supporting an argument that the government should be required to show a connection between a kickback or other tainted arrangement and the alleged false claim.

Finally, the case of *United States ex rel. Hughes v. Cook*¹¹⁶ may be of some value to defendants. In this case, the plaintiff brought a qui tam action under the FCA against nine doctors, claiming that all of their Medicaid claims had been false due to various technical problems with the doctors' medical licenses—the doctors' licenses had lapsed. The court held that the doctors were duly licensed. However, the court also stated that the doctors' technical lapses of their licensure would have been insufficient to form the basis for a suit under the FCA. It is important to note that the court based its opinion on the older definition of "knowing" violations of the act. With the newer "deliberate ignorance" or "reckless disregard" standards, the court's reasoning no longer applies. However, the case does represent at least one instance in which a qui tam plaintiff tried and failed to turn an entire series of transactions into false claims based on a defect in the doctors' practices.

B. Stark Violations

Defendants are likely to find themselves fighting a rear-guard action against the expansion of the FCA. In addition to the use of the Act in enforcing the Medicare/Medicaid anti-kickback statute, the trend may spread to FCA suits based on violations

114. 420 F. Supp. 1365, 1373 (E.D. Pa. 1976), *vacated*, 568 F.2d 347 (3d Cir. 1977).

115. 568 F.2d at 352.

116. 498 F. Supp. 784 (S.D. Miss. 1980).

of the Stark self-referral prohibitions.¹¹⁷ This law generally forbids Medicare or the federal portion of Medicaid to pay for treatment that results from a physician's referral of a patient to a provider of certain health services (for example, laboratory services, medical supplies) when the referring physician (or a relative) has a financial interest in the service provider.

Although no reported decisions deal with this issue, at least one case points the way to such an expansion. In *United States v. Oakwood Downriver Medical Center*,¹¹⁸ the district court refused to dismiss an FCA suit brought by the government, holding that the 1986 amendments could be applied retroactively. Although it was not addressed within the motion to dismiss, the government's case was based on the defendant's failure to reveal dealings with related entities on its annual cost report. Thus, although not directly dealing with the Stark prohibitions, this case may open the door to future FCA suits based on violations of the self-referral ban. The analogy is clear: just as a medical center's failure to reveal dealings with related entities has caused its cost report to be a false claim, so too, doctors' referrals to laboratories in which they have an interest could also be deemed to create false claims when the federal government is asked to pay for such services.

VI. MANAGED CARE AND BEYOND

Looking farther ahead, as health care is increasingly provided in managed care settings, the use of capitated payments can be expected to remove the incentive to overutilize services, and, perhaps, reduce the incidence of kickbacks and self-referrals. However, as payment systems shift, so too will the incentives. Providers who are compensated with capitated payments may be tempted to curtail treatment or even fail to perform necessary services since providing those services will yield no additional compensation. If such a provider accepts capitated payments from the federal government without performing required services, a False Claims Act violation would occur. Proving such a case might be difficult for the government or a qui tam plaintiff since the case would involve a question of medical judgment. It would be especially difficult to establish a case where the patient's health was not adversely affected by the failure to perform services. However, in egregious situations or

117. 42 U.S.C. § 1395nn (Supp. 1993).

118. 687 F. Supp. 302 (E.D. Mich. 1988).

where there are clear patterns of abuse, an increasing number of such cases brought under the FCA is expected.

Beyond changes in the delivery of health care, the law affecting health care reimbursement may be changed, which could open new territory to the reach of the FCA. Presently, the Act applies only to claims made against the federal government, but with some adjustments, many of its provisions could be expanded to cover claims presented to private health plans. If prohibitions on kickbacks and self-referrals were also applied to private payer settings, the opportunities to engage in such practices would be narrowed severely.

While the expansion of the False Claims Act into new areas can be expected to further discourage health care fraud, such expansion will also be accompanied by the same constitutional problems discussed earlier. To the extent that civil damage awards exceed any reasonable measure of actual losses, such awards can only be regarded as punishment, and defendants will face an increased risk of excessive fines and double jeopardy.

Certainly, the imaginations of United States attorneys and of qui tam plaintiffs have not been exhausted, and even more creative uses of the False Claims Act can be anticipated. However, the potential for abuse of defendants' rights cannot be ignored. Courts will need to strive to protect constitutional rights and to avoid frontier-style justice.