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THE FEDERAL FALSE CLAIMS ACT: CAN EMPLOYEES REALLY RECOVER?

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ABSTRACT

This article pertains to the federal False Claims Act. The article's primary focus is on an employee's rights when his/her employer exercises retaliatory conduct resulting from the employee's whistleblowing. The article analyzes a successful claim brought by a terminated employee and describes the stringent requirements one federal district court uses to keep FCA trials out of its system. Two issues presented to the Supreme Court during the 1999-2000 session are also discussed.

President Abraham Lincoln and the United States Congress enacted the federal False Claims Act (FCA) in 1863 to fight widespread fraudulent billing perpetrated by government contractors during the Civil War [1]. President Lincoln sought such a tool as a means to stop the profiteering by Union Army suppliers during the Civil War. The FCA authorized U.S. district attorneys and private persons to bring suit in exchange for a percentage share of the overall recovery of penalties, fines, and other damages. During this period, the attorney general's office was in its beginning stages. In fact, it was not until 1870 that the Department of Justice became a government institution.

After the completion of the Civil War, the FCA went into remission until World War II. After World War II, the FCA fell into disuse again until 1986, when the U.S. Congress amended the act to increase the financial incentives for private

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individuals to "blow the whistle" on any person or entity that fraudulently bills the U.S. government. Since then, from the Reagan Administration until the present day, the FCA has been extensively used. In fact, the Clinton Administration has found the FCA to be one of its best weapons in combating Medicare/Medicaid and Federal Construction Contract fraud.

The current version of the FCA authorizes both the U.S. attorney general and private persons to bring civil actions to enforce the FCA's prohibitions on fraud against the U.S. government. The private plaintiff is known as a "qui tam plaintiff," or "relator." Qui tam is short term for the Latin phrase "qui tam pro domino rege quam pro se imposo sequitur." Translated, the phrase means "who brings the action as well for the king as for himself."

Pursuant to the FCA, a realtor brings an action in the name of the U.S. government. The complaint is filed with the U.S. attorney's office in camera and under seal for sixty days. During the sixty-day period the government conducts its own investigation and determines whether to intervene in the action [2]. If the government decides to intervene, it may proceed with the action itself, thereby exercising direct responsibility for the action [2, § 3730(b)(4), (c)(1)]. In such an instance, the realtor may continue as a party to the suit as cochair, although the government is not bound by the relator's acts [2, § 3730(c)(1)]. If, in the alternative, the government declines to intervene, the realtor may pursue the action alone under the full blessing of the U.S. government [2, § 3730(c)(1), (3)]. In such a case, the government does not relinquish complete control of the suit because it has the statutory power to intervene at time [2, § 3730(c)(1), (3)]. Therefore, at a minimum, the government always has indirect control over the FCA claim.

The FCA places certain restrictions on the government's ability to dismiss or settle cases initiated by a relator. The act provides for the court to play an active role in situations pertaining to the government's dismissal and settlement powers. The action may be dismissed only if the court and the attorney general gives written consent to dismissal along with their reasons for consenting [2, § 3730(b)(1)]. If the government pursues such a course, the relator is entitled to a hearing in which s/he may contest the government's decision to dismiss. On the other hand, if the government decides to settle the action, the court holds a hearing to determine whether the proposed settlement is fair, adequate, and reasonable under the circumstances [2, § 3730(c)(2)(B)].

The incentive for relator to pursue a *qui tam* action is substantial. The relator receives a certain percentage of any proceeds recovered. The recovery percentage is contingent on the relator's participation in initiating the suit, his involvement in the suit, and whether the government intervenes in the suit. Where the government intervenes, the relator is entitled to receive between 15 percent and 25 percent of the entire recovery [2, § 3730(d)(1)]. The going rate is 17 percent of the recovery. In the alternative, if the government fails to intervene, whereby the relator pursues the action alone, the relator is entitled to receive between 25 and 30 percent of the overall recovery [2, § 3730(d)(2)]. The court determines the appropriate amount of

the recovery depending on the extent to which the relator substantially contributed to the prosecution of the action [2, § 3730(d)(1), (2)]. Under all circumstances, the U.S. government is entitled to take at least 70 percent of the recovery.

The FCA provides protection for "whistleblowers that states in part:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action brought under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, ***[S]HALL*** be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate district court of the United States for relief provided in this section [2, § 3730(h)].

SUCCESSFUL CLAIM BROUGHT BY FORMER EMPLOYEE

In *Eberhardt v. Integrated Design & Construction,* the U.S. Court of Appeals for the Fourth Circuit ruled on the issue of employer retaliation [3].

Procedural History

In 1996, Eberhardt brought a *qui-tam* action against his former employer, Integrated Design & Construction (IDC), and its majority owner, Albert McCoubrey, for falsely billing the federal government. Eberhardt further claimed that IDC discriminated against him by decreasing his salary, demoting him, and ultimately terminating him, because of the steps he took in furtherance of the *qui-tam* action [3, at 864-869].

On October 2, 1996, the U.S. government intervened and ultimately settled the claim on January 7, 1997. The formalities of the settlement, including the percentage of the recovery awarded to Eberhardt are undisclosed [3, at 864-869].

Eberhardt's employment discrimination claim proceeded to trial. On July 15, 1997, Eberhardt received a jury verdict of $417,700.99 in relation to the employment claim. On July 24, 1997, Eberhardt filed a motion to be reinstated to his original employment position and to receive interest on the back pay. On October 3, 1997, the district court denied IDC's motion for judgment as a mater of law. On November 21, 1997, the district court granted Eberhardt's motion for prejudgment on the back pay award, but denied his reinstatement. IDC and Eberhardt appealed [3, at 864-869].

Factual Summary

IDC was an architectural/engineering/construction firm that managed the design and construction of embassy facilities for the U.S. Department of the State (State Department). IDC's essential role was to act as a conduit between the government and subcontractors. Its duties included invoicing the government for subcontractors and billing for its own administrative costs, known as pass-through contracts. McCoubrey was IDC's president, CEO, and 90 percent shareholder. Eberhardt was hired in 1994 as the director of congressional and government affairs [3, at 864-869].

In July of 1994, Eberhardt was promoted to senior staff vice president. Upon promotion, Eberhardt initiated a method to organize IDC's accounting system and records. In late July 1994, IDC's then-chief financial officer (CFO) and in-house counsel, William Roemer, informed Eberhardt that IDC had invoiced the State Department on uncompleted work to alleviate its dismal cash flow. Eberhardt was further informed that McCoubrey knew of the billings. Eberhardt contacted McCoubrey as to the validity of the information. McCoubrey stated that he would speak with Roemer. Eberhardt discovered more information supporting Roemer's claim and discussed those issues with McCoubrey. In October of 1994, Eberhardt and McCoubrey agreed to have a senior employee, Pittman, review the contracts in question. Pittman reported to Eberhardt that $1.3 million had been billed in advance. Moreover, IDC did not have any records of the funds in its bank accounts. As a result, IDC was facing a severe shortage in cash flow. Roemer became a major focus of IDC's investigation. As a result, Roemer refused to cooperate and was subsequently terminated [3, at 864-869].

In December of 1994, Eberhardt informed McCoubrey that there was an appearance of criminality within the company. He advised McCoubrey that IDC should obtain legal counsel. The next day, McCoubrey ordered Eberhardt to lead an official investigation with the aid of corporate counsel Mark Kellogg. They were instructed to research the issue and submit a written report to the board of directors and the federal government. The report was to be ultimately forwarded to the federal government [3, at 864-869].

The investigation was completed on January 9, 1995. Eberhardt's written report revealed that money from advance billings had been received and spent, thereby creating a significant problem in the corporation's cash flow. During the course of the investigation, Eberhardt discovered that McCoubrey had personally signed the invoices. Eberhardt advised McCoubrey to obtain separate counsel. Eberhardt also sent a set of written questions to McCoubrey pertaining to his involvement in the scheme. Over the course of the investigation, Eberhardt's close relationship with McCoubrey rapidly deteriorated. As a result, McCoubrey excluded Eberhardt from closed-door meetings [3, at 864-869].

On January 16, 1995, McCoubrey directed Eberhardt to return to his normal tasks and to monitor IDC's financial condition. Moreover, McCoubrey issued a

separate order directing that Eberhardt be denied access to IDC's financial information. On January 20, 1995, IDC officials met with the State Department and disclosed the advance billings. Eberhardt was not a party to the meeting with the State Department. On January 30, 1995, Eberhardt reported to the board of directors that IDC had discharged its duty by not reporting to the government. He also stated that he was disbanding the investigation [3, at 864-869].

On February 1, 1995, IDC implemented a plan to alleviate its cash flow problems by cutting the salaries of all senior staff employees by 15 percent. An exception was made for the two lowest-paid employees. On February 7, 1995, IDC implemented a corporate reorganization whereby it laid off two architects, formed an executive committee, and eliminated Eberhardt's senior staff vice president position. Eberhardt was directed to work in the business development field, which was outside his field of expertise. On February 9, 1995, McCoubrey gave Eberhardt the special task of drafting IDC's 1995 comprehensive business plan [3, at 864-869].

Eberhardt responded by memorandum, stating: 1) he was being singled out for leading the investigation; 2) he was pretextually placed in an impossible predicament; and 3) IDC's actions were a violation of the federal Whistleblower Protection Act. On February 13, 1995, McCoubrey denied Eberhardt's claims. Eberhardt responded via memorandum the same day, stating that he was protected by the False Claims Act. Eberhardt also told Kellogg of his intention to bring a *qui-tam* action. On February 16, 1995, Eberhardt met with the board of directors and informed them of his intention to file suit under the FCA. He also informed the board he would not perform his newly assigned duties. Eberhardt was fired after the meeting. Eberhardt then contacted the FBI and advised it of evidence stored at IDC that could be relevant to an investigation of FCA violations [3, at 864-869].

Motions for Judgment as a Matter of Law

IDC claimed the district court should not have denied its motions for judgment as a matter of law because Eberhardt did not present a prima facie case for retaliation. The court reviewed the issue de novo.

Protected Activity: Initiation of a Qui-Tam *Action*

To determine whether the evidence presented a prima facie case of retaliation, the court had to find Eberhardt had engaged in protected activity. Relying on 31 U.S.C. § 3730(h), the court articulated that protected activity includes the initiation of an action filed or to be filed under the FCA. That being the case, the court found Eberhardt had made it clear to IDC prior to his termination that he intended to bring a *qui-tam* action under the FCA and that the act protected him from retaliation [3, at 864-865].

Circuit Judge Herlong noted that Eberhardt had made his intentions known to IDC on several occasions prior to his termination. First, on February 9, 1995,

Eberhardt wrote McCoubrey a memorandum in which he stated he was being singled out for leading the investigation, he was pretextually placed in an impossible predicament, and IDC's actions were a violation of the federal Whistleblower Protection Act. On February 13, 1995, Eberhardt sent a memorandum to Kellogg, IDC's corporate counsel, which explicitly indicated IDC's actions violated several provisions under the FCA. That same day Eberhardt told Kellogg of his intention to bring a *qui-tam* action. On February 16, 1995, Eberhardt met with the board of directors and informed them of his intention to file suit under the FCA. The court found Eberhardt's acts constituted "the initiation of an action to be filed." Therefore, the court concluded it was permissible for the jury to find Eberhardt's termination was a result of the protected activity [3, at 864-869].

Protected Activity: Investigation for a Qui-Tam *Action*

The Fourth Circuit noted that even if Eberhardt had not made explicit claims that he was contemplating bringing a *qui-tam* action against IDC, his investigatory actions alone would have constituted protected activity. Relying on a series of fellow circuit court decisions, the court found Eberhardt was engaged in protected activity based on his internal investigation of fraud [3, at 861, 867-868; 4]. Based on the series of cases, the Fourth Circuit developed its own rule by holding:

> An employee tasked with the internal investigation of fraud against the government cannot bring a 31 U.S.C. § 3730(h) action for retaliation unless the employee puts the employer on notice that a qui-tam suit is a reasonable possibility. Such notice may be accomplished by expressly stating an intention to bring a qui-tam action. Notice may also be accomplished by any other action which the fact finder reasonably could conclude would put the employer on notice that litigation is a reasonable possibility. Such actions would include, but are not limited to characterizing the employer's conduct as illegal or fraudulent or recommending that legal counsel become involved. These types of actions are sufficient because they let the employer know, regardless of whether the employee's duties include investigating potential fraud, that litigation is a reasonable possibility.
>
> It would not be enough to simply report a concern of false charging to the employee's supervisor, nor would it be enough to investigate nothing more than the employer's noncompliance with federal or state regulations [5]. The investigation must concern false or fraudulent claims or it does not fall under the False Claims Act [6]. But once an investigation involves such claims and the employee expresses concern to his employer that there actually is likelihood or fraud or illegality, then the notice requirement is met [3, at 868-869].

The court then applied its rule to Eberhardt's actions. It noted Eberhardt had testified he characterized the billings as illegal during the course of his investigation and had advised McCoubrey to obtain counsel for both IDC and for himself. Therefore, the court concluded it was permissible for the jury to

determine Eberhardt's actions put IDC on notice that a suit under the FCA would be a reasonable possibility. As a result of the protected activity, IDC discriminated against Eberhardt. Thus, the court determined there was reason to believe Eberhardt had presented a prima facie case under the FCA [3, at 864-869].

Reinstatement and Prejudgment Interest

During oral argument Eberhardt withdrew his appeal for reinstatement. Therefore, the only remaining issue was whether Eberhardt should have been granted the motion for prejudgment interest [3, at 864-869].

The court noted that pursuant to section 3730(h), a successful plaintiff is entitled to certain forms of relief including interest on an award of back pay. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees [3, at 864-869].

The jury awarded Eberhardt a lump sum compensation that equaled two times the back pay. However, Eberhardt argued and IDC conceded that the lump sum award did not include prejudgment interest. Therefore, the circuit court held the trial court did not err when it allowed the prejudgment interest to be added to the back pay figure because the jury failed to add into the computation [3, at 864-869].

It should be noted that had Eberhardt followed through on his claim to be reinstated, he more than likely would have been granted such relief.

STRINGENT REQUIREMENTS FOR BRINGING SUIT

Courts require a plaintiff seeking relief under the FCA to prove s/he engaged in protected conduct and that the defendant retaliated against him/her because of that protected conduct [3, 7, 8]. Once an employer has established that his/her conduct is protected, s/he must establish a causal connection between the protected conduct and the adverse actions suffered as a result of the whistleblowing. The battle over whether the employee engaged in protected conduct and whether a causal connection was established is often won and lost during motions for summary judgment.

The most recent case pertaining to protected conduct and causal connection is *Mann v. Olsten Certified Healthcare* [7]. In *Olsten,* the defendant was a home health service provider that received revenues from a number of sources, including Medicare and Medicaid. Mann, the relator began working for the defendant Olsten as a registered nurse in February of 1996. Relator served as the director of clinical management from August of 1996 until her termination on April 8, 1998. In this position, Mann was responsible for supervising and training caregivers in patient care and for ensuring compliance with applicable statutes, regulations, and rules.

Her other responsibilities included investigating complaints relating to instances where nurses did not provide proper services and pointing out billing errors. Mann's supervisor was Debbie Northcutt, who was responsible for hiring, supervising, and discharging employees [7].

Sometime in early March of 1997, one of the relatives of an Olsten patient called and requested that someone come to the patient's home to explain how to use a certain medical device. Mary Grooms, an Olsten employee, claimed she went to the patient's home in late February of the same year. Grooms claimed she had documented the visit and had taught the patient how to use the device. Upon learning of the March phone call, Northcutt asked Grooms whether she had visited the patient's home. Northcutt never made any further inquiries. Mann, who learned of the March complaint approximately one week later, sent another employee to the patient's home for interviewing purposes. The employee was Cindy Pursley. As a result of the interview, Pursley determined Grooms had never made the initial visit to the patient's home. Moreover, Mann learned that the test results documented in Groom's records did not match the reading stored on the medical device. Further, it was determined that the patient's signature did not match the signature Mann had on file. Mann found additional suspicious and missing signatures in Groom's records on other patient visits. Mann brought all findings to the attention of Northcutt, her supervisor [7].

A short time after notifying her supervisor, Mann contacted Olsten's in-house legal department with information pertaining to her findings. The legal department recommended an investigation be conducted on whether more fraudulent claims and/or visits had taken place. Mann relayed the legal department's recommendation to Northcutt. Northcutt responded by removing Mann from further investigative duties [8].

On March 21, 1997, Grooms was terminated, based on the mutual decision of Mann, Northcutt, the legal department, and Olsten Corporation. Thereafter, Northcutt canceled the bill pertaining to the initial complain but did not investigate or cancel any of the bills related to the other suspicious activities. In addition, Northcutt informed the legal department that she did not want to pursue further investigation into the other activities for fear of Olsten Health's reputation [7].

In June of 1997, Olsten began billing Medicare on behalf of a patient named B.C. It was determined that the services provided to B.C. were not Medicare-eligible services. Mann informed Northcutt that she could not bill Medicare for such services. Northcutt disagreed with Mann's determination. To determine whether Mann was mistaken, she contacted Olsten's Central Support Office, which was the corporation's resource on Medicare regulations. Mann spoke to Sandy Wheeler and asked her to contact Northcutt regarding B.C.'s billing. Mann stated she had spoken to Northcutt shortly thereafter and was told Wheeler did not know anything and they should continue billing Medicare for as long as possible. The dispute was never resolved [7].

In April of 1998, Northcutt informed Mann that her position and all other director of clinical management positions within Olsten had been eliminated. It was later determined that all of the positions were not eliminated [7].

The Olsten people contended that Mann was laid off because the home office needed to cut expenses. Northcutt stated that many positions other than Mann's were eliminated between 1994 and 1998 because of increased competition and changes in the Medicare regulations. In 1998, Olsten embarked on a nationwide campaign to reduce operating expenses. As a result, in May of 1998, Northcutt eliminated Mann's position, along with three other administrative positions [7].

It should be noted that Mann never told anyone at Olsten that she was going to file, nor did she file, an FCA claim or report her suspicions to the government while employed. In fact, Mann was unaware of the FCA until after her termination [7].

Protected Conduct

The court first determined whether Mann's conduct was protected by the FCA. The court stated that a plain reading of the statute suggests that to be protected, the employee's conduct must be incidental to an actual lawsuit that has been filed or will be filed pursuant to an FCA claim. In addition, the type of conduct protected is limited to that which stands beneath the examples specified under 31 U.S.C. § 3730(h). Those examples pertain to 1) investigation for such a lawsuit filed or to be filed, 2) initiation of such a lawsuit filed or to be filed, 3) testimony for such a lawsuit filed or to be filed, and 4) assistance in such a lawsuit filed or to be filed [7].

The *Olsten* court correctly noted that such a narrow reading of 31 U.S.C. § 3730(h) had been rejected by many courts. The court articulated that many previous courts had broadly interpreted the statute to provide employee protection in cases where the relator had no idea of the FCA's existence or no knowledge that the conduct was protected. Those courts had held an employee would have protection as long as FCA litigation was a distinct possibility when the employee acted [7, at 1313].

Next, the court faced the multiple-faceted and trafficlightless intersection of "distinct possibility." The court, after presenting an in-depth analysis of the FCA's purpose, settled its "distinct possibility" problem by looking for evidence where the relator communicated to the employer that she believed the employer had engaged in illegal or fraudulent conduct involving the submission of claims for payment to the government. The determining issue would be whether the employer could have, based on a reasonable interpretation of the employee's conduct, feared the employee was contemplating taking legal action under the FCA or reporting the fraud to the government. This view, noted the court, was a view taken by many other courts [9].

In light of the undisputed fact that Mann had had no idea of the FCA while employed at Olsten, the court had to determine whether Mann's conduct nonetheless could have led Olsten to reasonably fear she was contemplating bringing a *qui-tam* action or reporting fraud to the government. The court focused on three contentions: 1) the investigation had reporting of Grooms to the legal department; 2) the billing errors related to patient B.C.; and 3) Mann's regular practice of bringing billing errors to the attention of Olsten's staff [7].

On the first contention, the court concluded that when an employee informs her employer about the discovery of suspected fraud and the employer takes no action to correct it, the employer has reason to fear the employee will file a *qui-tam* action or report the suspected fraud to the government, unless the employee by words or actions affirmatively indicates otherwise. Mann reported the suspected fraud to her supervisor, Northcutt. In return, Northcutt took no action to see that the government was not billed. Hence, Olsten reasonably could have feared Mann was contemplating legal action. Thus, the court held Mann engaged in protected conduct when she investigated and reported Groom's suspected fraudulent activity [7].

On the second contention, the court stated it would be unrealistic to expect an employee to accuse a supervisor of committing fraud when that supervisor has the power to demote, influence, or terminate the employee's future within a company. That aside, the court noted that Mann did contact Sandy Wheeler, the Medicare support person, about patient B.C.'s Medicare billings. Hence, Northcutt and Olsten were put on notice that Mann was serious about correcting any indication of fraudulent billing. Thus, Olsten could have reasonably believed that Mann's conduct indicated she was contemplating a *qui-tam* suit or reporting fraud to the government [7].

On the final contention, the court found Mann's routine efforts to correct mistakes in billing did not put Olsten in fear that she was contemplating legal action or reporting the fraud. The court based its conclusion on the fact that once Mann pointed out the billing errors to the appropriate personnel, she never followed up on the outcomes of the errors. Thus, the court held that Mann's efforts to correct inaccuracies in billing did not constitute protected conduct [10].

The court concluded that Mann engaged in conduct protected by the federal False Claims Act [7].

Causal Connection

Next, the court focused on whether Mann could establish a causal connection between the protected conduct and the adverse actions she suffered. Pursuant to 31 U.S.C. § 3730(h), the FCA provides relief only if the whistleblower can show by a preponderance of the evidence that the employer's retaliatory actions resulted in a protected activity. Further, the employee must show that retaliation was motivated, at least in part, by the employee's engaging in protected activity. Once

that showing has been made, the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in the protected activity [7, at 1316; 1, at 34, reprinted at 5299].

The court began with a direct/indirect analysis. The court stated that a relator may either present direct evidence of retaliatory intent or by an indirect inference of retaliation. Direct evidence, the court explained, is evidence that establishes the existence of retaliatory intent behind the employment decision without any inference or presumption. In the alternative, the court stated, where the relator wishes to prove her case via indirect evidence she must shoulder the initial burden of establishing a prima facie case of retaliation. To prove a prime facie case of retaliation, the plaintiff must prove that 1) the employer is covered by the act at issue, 2) the employee engaged in protected activity, 3) the employee suffered adverse action, and 4) there is an inference of causation between the protected activity and the adverse action. The court declared that the showing necessary to demonstrate the causal link part of the prima facie cause is not overwhelming because the relator has to prove only that the protected activity and the negative employment action are somewhat related. To prove such, the employee must at least establish that the employer was actually aware of the protected expression when the employer took adverse employment action against the employee [7].

The court stated that where the employee establishes employer knowledge of protected expression and its connection with the adverse employment action, a prima facie case arises on a presumption that the employer is liable to the employee. The court, using the McDonnell Douglas approach, stated:

> The burden shifts to the employer to rebut the presumption by producing sufficient evidence to raise a genuine issue of fact as to whether the employer took unlawful actions against the employee. The employer can meet this burden of production by articulating a legitimate, non-retaliatory reason for the employment decision. The employer's reason must be clear, reasonably specific, and worthy of credence. The rebuttal production is one of production only, and the employer does not have to persuade the court that it was actually motivated by the proffered reason. Once the employer satisfies this burden of production, the focus shifts to the employee's ultimate burden of proving by a preponderance of the evidence that the employer's proffered reason for its employment decision is a pretext for retaliation. The employee may meet this burden by persuading the fact finder either directly that a retaliatory reason more than likely motivated the employer or indirectly that the proffered reason for the employment decision is not worthy of belief [7, at 1317, citing 11].

At the outset of the *Olsten* court's causal connection analysis, District Judge Thompson determined that Mann presented no direct evidence of retaliatory intent on the part of Olsten. Therefore, the court focused on whether there was indirect evidence of retaliatory intent. First, the court articulated that Mann presented a prima facie case of retaliation. Second, it was determined that Olsten was subject

to the FCA. Third, Mann had engaged in conduct protected under 31 U.S.C. § 3730(h), of which Olsten was aware. And finally, Mann's employment was terminated by Olsten [7].

Next, the court analyzed the burden by flipping McDonnell Douglas approach. Olsten presented as a nonretaliatory explanation for Mann's termination that she was laid off in an effort to cut costs [12]. Olsten submitted numerous pieces of evidence pertaining to the decline of Olsten's revenue. In addition, Olsten offered evidence that its corporate headquarters ordered Northcutt to cut costs and that Mann was just one of many employees who were terminated. Therefore, the court stated, in order for Mann to withstand the motion for summary judgment she had to present evidence upon which a jury reasonably could conclude that Olsten's proffered justification for termination was a pretext for retaliation [7].

The court erred in its conclusion when it determined that Mann offered no evidence that Olsten's proffered justification for terminating her was not reasonable, sound, and worthy of belief. First, Mann noted that before her termination, Northcutt had reassured her that her position would not be eliminated and that Northcutt's would be eliminated before Mann's. The judge opined that Northcutt's statement did not create a genuine issue of material fact as to whether Mann was terminated because of Olsten's financial difficulties [13]. The court abused its discretion when it dismissed Northcutt's statement because it was not for the judge to decide what the jury would have perceived as the meaning behind the statement. The issue pertaining to the meaning behind the conversation should have been a question for the jury. In fact, the entire conversation between Mann and Northcutt should have been viewed in the light most favorable to the nonmoving party. The nonmoving party in this instance was Mann [7].

Second, Mann offered two documents showing that Mann's director of clinical management position continued to exist after she was dismissed. One document was an organizational chart indicating that Olsten may have continued with a director of clinical management position subsequent to Mann's termination. The other document pertained to a form signed by Cindy Pursley in a space designated for the director of clinical management. The form was signed by Pursley after Mann had been terminated. Pursley had served as a subordinate manager to Mann while Mann was employed with Olsten [7].

The court ruled that neither document was sufficient to establish a genuine issue of material fact as to the truth of Olsten's proffered reason for terminating Mann. In ruling this way, Judge Thompson reasoned that Mann produced no evidence pertaining to when the organizational chart was created. Moreover, he stated the chart proved nothing as to whether Olsten filled the director of clinical management position. Judge Thompson fails to recognize that a summary judgment hearing is not to be used as a forum which determines whether certain pieces of evidence are admissible. Summary judgment hearings are to be conducted under the notion that all documents and statements presented are to be viewed as being true. Moreover, with the interest of justice in mind, the court should have

extended Mann the courtesy of proffering a date as to when the organization chart was created. If, for instance, the chart did pertain to information subsequent to Mann's employment, then the chart would present a material fact upon which a jury could reasonably differ on its interpretation. Again, the court substituted its discretionary powers in place of the jury's role as *first* judge of the facts [7].

On the other hand, the court admitted Pursley's signature suggested that she may have been serving as director of clinical management subsequent to Mann's termination. Yet, the court did not give the document the slightest fraction of weight because there was a lack of other evidence indicating that Pursley served as director of clinical management after Mann's termination. However, the court granted great weight to Olsten's favorable Pursley deposition, which suggested that she had continued to serve as manager of clinical practice subsequent to Mann's termination. The court went on to conclude that in order to create a genuine issue of material fact sufficient to survive summary judgment the relator must present more than a scintilla of evidence supporting the nonmoving party's position. Thus, the court found that a jury could not reasonably discredit Olsten's evidence based on the presence of Pursley's signature on the form [7].

Turning to the signature issue, the court erroneously concluded that one's side's piece of evidence held more weight than the other side's piece of evidence. Once again, the court abused its discretion. Thompson's ruling sidestepped the role of the jury. It is reasonable to conclude that the jury, and not judge, is the body responsible for ascertaining the reason behind Pursley's signature appearing on a business document under the title of director of clinical management when she claimed to only hold the position of manager of clinical practice [7].

In footnote 58 of the court's opinion it is noted that Mann belatedly offered evidence that Olsten settled an FCA claim with the government in March of 1999. The allegations leading to the settlement involved Medicare fraud. However, the court dismissed the evidence because there was a lack of evidence indicating that anyone associated with the Olsten office in which Mann was employed had been aware of the ongoing fraud investigation. It goes without saying that Olsten operated on a national level. Furthermore, it is reasonable to assume that Olsten's in-house legal department was kept abreast of, or at least put on notice that a branch of the corporation was under investigation for fraudulently billing Medicare. Therefore, they would have been wary when Mann contacted them about Groom's faulty billings. Moreover, Mann contacted Olsten's Central Support Office, which was the corporate resource on Medicare regulations. If any branch of the corporation was on the lookout for fraudulent billing, it would have been the Central Support Office [7].

One last point Thompson failed to address is Northcutt's decision to forgo any further investigation into Groom's other faulty billings because it would harm Olsten's reputation. Apparently, the court believes that Groom's termination was a responsible action taken by Olsten. However, Judge Thompson failed to recognize that such a decision is not his choice. As a judge, he is duty bound to give deference

to the laws arising under the U.S. Constitution. Laws arising under the Constitution speak on behalf of the entire nation. The entire nation is tired of Medicare fraud. And, those who engage in Medicare fraud should be dealt with under the constitutionally enacted False Claims Act. Therefore, the court was without authority when it failed to address Northcutt's decision not to allow further investigations into Groom's faulty billings [7]. Nevertheless, I was not there to argue. Therefore, the court dismissed the case on summary judgment [7].

CURRENT ISSUE BEFORE THE SUPREME COURT

As stated earlier, the FCA has been in existence, in one form or another, since at least 1863. However, it was not until very recently that the statute found itself beneath the constitutional microscope. First, the incentive to sue promotes bounty-hunting relators who may not have constitutional standing to sue. Second, it is unclear whether the FCA can be used as a tool for bringing an individual State to justice. The Supreme Court addressed these issues during oral arguments on November 29, 1999. The justices have carved out a bit of work for themselves.

The case, *U.S. ex rel. Jonathan Stevens v. Vermont Agency of Natural Resources,* was granted certiorari in June of 1999 [14]. Originally, the Supreme Court wanted to hear only the narrow issue of whether an individual state could be sued pursuant to an FCA claim. However, the Court uncharacteristically broadened the scope of review just ten days prior to oral argument. The additional issue the justices wanted addressed was whether a private plaintiff ever has standing to sue in the absence of governmental intervention. The Court asked the parties to address this additional issue even though the written briefs were not due until the following day [14].

AUTHOR'S POINT OF VIEW

Standing

As a constant, a relator has standing to sue under the FCA when s/he is specifically injured. For instance, a relator has standing where s/he is a Medicare beneficiary who receives 80 percent coverage. Under this scenario, if a hospital, health care service, or any other entity fraudulently bills the government for a service that was not provided or overcharges for a particular service, the beneficiary/relator is "injured in fact." S/he is injured in fact because s/he has to personally compensate the entity for the uncovered Medicare portion of the balance. Therefore, the relator would have standing to sue even if the federal government failed to intervene.

The second layer, although watered down, involves the bounty-hunting relator. At this level the relator should have standing as well. Here, the relator brings a suit sitting as cochair with the U.S. government. Under such circumstances, the relator

may have designed a program capable of weeding out hospitals that fraudulently bill Medicare. The relator is not a Medicare beneficiary, but instead, an invaluable governmental source possessing a warhead aimed toward fraudulent activity. His/her compensation for the service is a portion of the overall proceeds recovered by the suit s/he initiated.

The problem surrounding the bounty hunter is that s/he is not a traditional "injured in fact" plaintiff. However, "injury in fact" does not become an issue unless the government fails to intervene. Under this set of facts the government does intervene, exercising direct and ultimate control over the suit. Here, the government would have standing because it is bringing a class action suit on behalf of every United States taxpaying citizen who was bilked by the entity's fraudulent billing of Medicare.

Reaching toward the outer limits, there is a third-level plaintiff who should have standing. This plaintiff is the bounty hunter who brings a suit on behalf of the government without governmental intervention. Here, one would argue that without governmental intervention the relator is without injury. And a plaintiff without injury is a person without standing.

This issue deserves a twofold analysis. First, the government does not assume direct control of the pilot's wheelhouse. However, it does assume the ultimate responsibility, albeit indirect, as captain of the ship. In such an instance, the federal government is the captain because: 1) the federal government can intervene at any time during the legal proceeding, 2) the federal government is the only party that may intervene, 3) the federal government has the power to have the suit dismissed if it so chooses, 4) the federal government shall receive at a minimum, 70 percent of the proceeds recovered by the relator, and 5) the government has the power to control discovery. Therefore, even if the government does not directly intervene it is still the captain of the suit.

Second, if the justices are unwilling to accept the direct/indirect analysis, the bounty hunter is "technically" injured. In fact, every taxpaying citizen is injured. As a taxpayer, the bounty hunter has been bilked by the fraudulent billing because it is his/her tax dollars that fund Medicare. Therefore, the bounty hunter has been injured. As a result, the relator has provided an invaluable service because s/he has taken it upon himself/herself to bring a class action suit on behalf of every taxpaying citizen in the United States.

It goes without saying that the "taxpayer" standing argument does not hold much weight with the Supreme Court. It seems etched in stone that a taxpayer alone is not granted standing for the mere fact that s/he is a taxpayer. Well, what if five taxpaying bounty hunters brought suit, or ten top-bracket taxpayers brought suit, or twenty or thirty? Would they have standing?

The simple answer for the bounty hunter is the federal government must intervene even though it may produce more work for the government. More work for the government means more taxpayer money spent on investigations that would have ordinarily been done by the relator. If that is the case, it is the price we

will have to pay for the sake of justice. Another alternative is to encourage the federal government to work alongside the relator in a minimal capacity until it is ready to intervene. The government could even choose to intervene on the day before the complaint is filed.

Eleventh Amendment

Turning now to the underlying issue surrounding *U.S. ex rel. Jonathan Stevens v. Vermont Agency of Natural Resources* [14]. Pursuant to the 11th Amendment's Sovereign Immunity provision, individual citizens are barred from suing individual states. It has been that way since 1798. However, the federal government is not barred from suing an individual state. The federal government's authority to sue a state dates back to at least 1892, and that right was upheld by the Supreme Court as recently as 1987 [14].

As a constant, a personal plaintiff has standing where the bounty-hunting relator brings suit sitting as co-chair with the U.S. government. In this instance, a state agency such as the Vermont Agency of Natural Resources is subject to suit because it is the U.S. government that has direct control of the suit. The government would have standing to sue because it is defending the nation's purse [14].

On the other hand, standing's endpoint is tested when the federal government fails to directly intervene. Here, the relator may have standing to sue the sovereign state because s/he is the pilot who maneuvers the ship. As the pilot, the relator is subordinate to the government because the government is the captain. The reasons are similar to those stated above. The federal government is the only party that may intervene. It is the federal government that has the power to dismiss the suit. It is the federal government that receives the "lion's share" of any proceeds. It is the federal government that has the power to control discovery. Therefore, the relator is allowed to sit in the federal government's wheelhouse. The relator may even have the chance to maneuver the suit all the way into port. But, make no mistake, the federal government is captain of the ship. Therefore, the government could sit on the sidelines until the day before the relator files suit against a state.

The bottom line is that the FCA, in its current form, works. The statute is cost-effective, revenue-enhancing, and an invaluable governmental tool. Greed aside, the plaintiff, relator, bounty hunter, or whatever s/he may be titled, uncovers fraud against the federal government. Such fraud costs taxpayers millions of dollars per year. The FCA provides an incentive for the citizens of the United States to be the eyes and ears of the United States.

CONCLUSION

A large number of FCA cases are waiting at the Supreme Court's door. Some circuits fail to recognize the constitutionality of the entire FCA. The Supreme Court will most likely be forced to hear quite a few cases to get rid of all the bugs.

Or, it may declare the FCA unconstitutional, whereby it would be back to the drawing board for Congress.

The *Eberhardt* case presents a sound legal interpretation of the FCA [3]. On the other hand, the *Olsten* case is a disaster [7]. Concerning employment, the FCA seems to have the employee's best interest in mind. But, as stated many times in employment law, the employer usually has the upper hand. Until society's views shift and the court's with it, employees must skate on a very thin sheet of ice.

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ENDNOTES

1. Unless otherwise indicated, the following overview is derived from Senate Judiciary Committee, False Claims Amendments Act of 1986, S. REP. No. 99-345 (1986), reprinted in 1986 U.S.C.A.N. 5266; *U.S. ex rel. Riley v. St. Luke's Hospital,* 982 F.Supp. 1261 (U.S. District Court, S.D. Texas) (1997); *U.S. ex rel. Riley v. St. Luke's Hospital,* 1999 WestLaw 1034213 (United States Court of Appeals, Fifth Circuit) (Nov. 15, 1999).
2. 31 U.S.C. § 3730(b)(1), (2), 1986.
3. *Eberhardt v. Integrated Design & Construction,* 167 F.3d 86 (4th Circuit), 1999.
4. *U.S. ex rel. Yesudian v. Howard University,* 153 F.3d 731, 740 (D.C. Circuit) (1998); *Neil v. Honeywell,* 33 F.3d 860 864 (7th Circuit) (1994); *Childree v. UAP CHEM,* 92 F.3d 1140, 1146 (11th Circuit) (1996); and *U.S. ex rel. Hopper v. Anton,* 91 F.3d 1261, 1269 (9th Circuit) (1996).
5. I disagree with this part of the court's analysis. Most of the time the corporation (usually a corporation that operates nationwide) is aware, via intercorporate communication, of the consequences resulting from filing false claims to the government. If an employee brings mischarging or noncompliance to the attention of his/her employer, the employer would be given the chance to cover up the mistakes. In such instances, the employer would be able to discretely distance the employee from the potential fraud. Such a narrow interpretation of protected activity defeats the entire purpose behind the government's goal of defeating fraud because it allows the employer to manipulate any further investigative actions of the employee.
6. The problem with holding that the investigation must concern false or fraudulent claims is that the employee, or anyone else for that matter, can present only an allegation of false or fraudulent claims. Most of the time the employer takes the position that it did nothing wrong. It is not until the claims are adjudicated that one can be sure whether the employer fraudulently billed the government.
7. Mann v. Olsten Certified Healthcare, 49 F.Supp. 2d 1307 (U.S. District Court M.D. Alabama) (May 18, 1999).
8. *U.S. ex rel. Yesudian v. Howard University,* 153 F.3d 731, 736 (D.C. Circuit) (1998); *U.S. ex rel. McKenzie v. BellSouth Telecom,* 123 F.3d 935 (6th Circuit) (1997), cert. denied in 1998.

9. This position is confusing. It should not matter whether the employer is on notice that the employee may bring an FCA claim or that the employee may report the fraudulent activity to the government. Those corporations that bill the government for services know or should know that they are held to a higher standard. They are on notice not to commit fraud the moment they sign on to a federal program. Once awarded the right to bill the government for a service, the corporation is bound by the federal government's rules and regulations pertaining to its particular service. Moreover, the FCA is a congressionally enacted statue, whereby everyone is put on notice. The bottom line is, once a law is put into play do not come to the court arguing that you did not know of its existence because ignorance of the law is never an excuse.
10. The court stated that Mann testified that she did not investigate why the bills had not been canceled or try to have them canceled. Nor did she refer to these errors as illegal or fraudulent, report them to the legal department, or call attention to them in any way [7, at 1316].

    The court's determination is a contradiction. Mann did call attention the errant billing when she pointed such errors out to the appropriate personnel. Sometimes the appropriate person was Northcutt. Most of the time it was one of Northcutt's subordinate. Therefore, Mann could not have done more because her hands were tied due the fact that she did not want to lock horns with Northcutt, her supervisor.
11. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (U.S. Supreme Court) (1972). McDonnell Douglas approach is based on the Title-VII burden shifting back and forth method.
12. Olsten proffers that Mann was laid off; Mann proffers that she was terminated; and the court used termination when commenting about the state of Mann's employment status at the time of the hearing.
13. The court then backed up its decision by chiming that "if Northcutt wanted to fire Mann for interfering with her allegedly fraudulent activities, she likely would not have reassured Mann that her position was not threatened. It would have made more sense for Northcutt to give Mann the impression that she was in danger of being laid off for financial reasons, in order to cover her true retaliatory reasons for terminating Mann." *Olsten,* 49 F.Supp 2d at 1318.

    Judge Myron in this instance is without authority. He does not have the judicial power to make arguments on behalf of a party in any suit, let alone a party to a motion for summary judgment. By presenting such an argument in his decision evidences that he claimed title to the role a jury would play in deciding the issues of the case.
14. *U.S. ex rel. Stevens v. Vermont Agency of Natural Resources,* 119 S. Ct. 2391, 144 L.Ed. 2d 792, 99 Cal. Daily Op. Serv. 5058 (U.S. Jun 24, 1999) (No. 98-1828).

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