I. DEVELOPMENTS IN FEDERAL WHISTLEBLOWER LAWS

A. The Federal False Claims Act

1. *Qui Who?*
History of the False Claims Act

Over 130 years ago, Congress, at President Lincoln's urging, passed the federal False Claims Act ("FCA" or "the Act") (currently codified at 31 U.S.C. §3730). Raspanti, Marc S., Laigaie, David M., "Current Practice and Procedure under the Whistleblower Provisions of the Federal False Claims Act," 71 Temp. L. Rev. 23 (Spring, 1998). The purpose of the law was to combat fraud against the Union Army by those selling it defective rifles, lame horses and useless ammunition. *U.S. ex rel. Williams v. NEC Corp.,* 931 F.2d 1493, 1497 (11th Cir. 1991).

The Act contained "*qui tam*" provisions, which allowed private citizens to bring suit in the name of the United States. "*Qui tam*" stems from the Latin phrase meaning, "who sues on behalf of the king, as well as for himself." *Black's Law Dictionary* 1251 (6th ed. 1990). As a reward for the citizen's (called a "relator") efforts, he or she was allowed to retain 50% of the government's recovery.

The Act was substantially limited by amendments passed in 1943. Most significantly, the amendments reduced the relator's share from 50% to a maximum of 25% if the government did not intervene and a maximum of 10% if the government did choose to intervene in the suit. For decades after the enactment of the amendments, few cases were brought by *qui tam* relators. Raspanti, 71 Temp. L. Rev. 23 at 25 - 26.

In 1986, however, Congress passed another series of amendments to the Act, expanding the relator's role and imposing the following liability:

- A penalty of **<u>$5,000 to $10,000</u>** for **<u>each false claim</u>** (Each false claim is a separate offense and generates a separate penalty; most *qui tam* cases involve hundreds of false claims). *Id.*

- **<u>Three times the amount of the government's damages</u>**; and

- Payment of the relator's **<u>attorney's fees</u>** and costs.

Relators are guaranteed a minimum of **15%** and a maximum of **25%** of the recovery where the government (through the Justice Department) intervenes in the suit and between **25 and 30%** of the recovery where the government does not intervene. *Id.* at 26 - 27.

In addition, the FCA creates a separate cause of action for discrimination against an employee who participates in an FCA action. An employee who is retaliated against is entitled to **two times lost wages**, compensation for any special damages, including **litigation costs** and **attorneys' fees** and **reinstatement**. *Id.*

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2. *Better Than The Lottery:* <u>Recent Monetary Recoveries Under the FCA</u>

Statistics indicate that the 1986 amendments to the FCA have created a tremendous revival of the statute. In 1997, for example, 530 qui tam suits were filed as compared to only 33 in 1987. Whistleblower cases in 1997 resulted in a $625 million recovery for the government. In 1988, the recovery amount was a mere $355,000. Consequently, since 1986, *qui tam* relators have recovered over ***$2 billion*** for the United States. Relators have made over ***$244 million*** in those suits. "For Whom the Whistle Blows," Alabama Employment Law Letter, June, 1998.

- A Medicare fraud case resulted in the largest-ever settlement in a False Claims Act case to date: ***$325 million*** by SmithKline Beecham. Of that settlement amount, relators were paid ***$42.3 million***. *Merena v. Smithkline Beecham*, 1998 WL 166256 (E.D. Pa.)

- ***$310 million*** verdict against FMC Corp., which had produced a military vehicle for the government. A former engineer of the company revealed that it had committed fraud against the government by failing to identify serious safety problems with the vehicle (including the fact that the machine was supposed to float, but would sink). *Boisvert v. FMC Corp.*, No. C-86-20613-WA1 (N.D. Cal., Dec. 24, 1998) (unpublished order).

- ***$31 million*** to two auditors who exposed that a school district had overcharged the federal government for insurance programs. *Garibaldi v. Orleans Parish Sch. Bd.,* No. Civ. A. 96-0464 (E.D. La. 1998).

3. *Have the Courts Been Wrong for 130 Years?* District Court Declares FCA Unconstitutional

<u>Good News for the Defense Bar</u>:

In October of 1997, a federal district court in Texas upset 130 years of jurisprudence established by the False Claims Act. Judge Kenneth Hoyt of the Southern District of Texas boldly dismissed an FCA action, holding that the Act's *qui tam* provisions are unconstitutional. *U.S. ex. rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F.Supp. 1261 (S.D. Tex. 1997).

Joyce Riley was employed as a nurse at St. Luke's Hospital in Houston. She filed suit against the hospital under the FCA, alleging that it had filed false claims for Medicare and Medicaid reimbursement. In dismissing the claim, the judge found that *qui tam* relators do <u>not</u> have standing, pursuant to Article III of the Constitution, to sue on behalf of the government.

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Judge Hoyt noted that Constitutional standing consists of these elements:

- The plaintiff must have suffered an "**injury in fact**," which is defined as an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
- There must be a **causal connection** between the injury and the conduct complained of (i.e., the injury must be fairly traceable to the defendant's action and not the result of the independent action of some third party not before the court);
- It must be **likely**, as opposed to merely speculative, that the injury will be redressed by a favorable decision;
- A plaintiff must assert his **own legal rights** and interests and not those of third parties; *and*
- The plaintiff's complaint must fall within the "**zone of interests**" protected by the statute in question.

Id., citing, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 - 61, 112 S.Ct. 2130, 2136 - 37, 119 L.Ed.2d 351 (1992); *Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.,* 454 U.S. 464, 473, 102 S.Ct. 752, 759, 70 L.Ed.2d 700 (1982).

In evaluating these factors, Judge Hoyt found that a ***qui tam* relator has no injury in fact**, nor can a relator establish a **causal connection** between the injury and the defendant's conduct.

But the Bad News Is . . .

The *Riley* decision is at odds with virtually every other court which has addressed the constitutionality issue. The case is currently pending before the Court of Appeals for the Fifth Circuit. Commentators speculate that, should the Fifth Circuit court uphold the decision, the U.S. Supreme Court may grant *certiorari* to address the resultant disagreement among the Circuit Courts.

All other courts addressing the constitutionality of the FCA *qui tam* provisions have found that relators do have standing under Article III of the Constitution. The following is a list of such cases, organized by circuit of origin:

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Courts Upholding the Constitutionality of FCA Qui Tam Provisions

First Circuit

U.S. ex. rel. LaValley v. First Nat'l Bank of Boston, 1990 WL 112285 (D. Mass.)

Second Circuit

U.S. ex. rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993); *U.S. ex. rel. Stevens v. State of Vt. Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998) (in dissent; *U.S. ex. rel. Pentagen Tech. Int'l, Ltd. v. CACI Int'l, Inc., et. al.*, 1997 WL 473549 (S.D.N.Y.).

Fourth Circuit

U.S. ex. rel. Berge v. Bd. of Trustees of the Univ. of Alabama, 104 F.3d 1453 (4th Cir. 1997);*U.S. ex. rel. Mayman v. Martin Marietta Corp.*, 894 F.Supp. 218 (D. Md. 1995).

Fifth Circuit

U.S. ex. rel. Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977); *U.S. ex. rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F.Supp.2d 1017 (S.D. Tex. 1998); *Hopkins v. Actions, Inc. of Brazoria County*, 985 F.Supp. 906 (S.D. Tex. 1997).

Sixth Circuit

U.S. ex. rel. Burch v. Piqua Engineering, Inc., 145 F.R.D. 452 (S.D. Ohio 1992); *U.S. ex. rel. Roby v. Boeing Co.*, 995 F.Supp. 790 (S.D. Ohio 1998); *U.S. ex. rel. Pogue v. American Healthcorp, Inc.*, 914 F.Supp. 1507 (M.D. Tenn. 1996).

Seventh Circuit

Robinson v. Northrop Corp., 824 F.Supp. 830 (N.D. Ill. 1993); *U.S. ex. rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208 (7th Cir. 1995); *U.S. ex. rel. Lamers v. City of Green Bay, Wis.*, 924 F.Supp. 96 (E.D. Wis. 1996); *U.S. ex. rel. Chandler v. Hektoen Institute for Medical Research*, 1998 WL 970134 (N.D. Ill. 1998); *U.S. ex. rel. Fallon v. Accudyne Corp.*, 921 F.Supp. 611 (W.D. Wis. 1995).

Eighth Circuit

U.S. ex. rel. Rodgers v. State of Arkansas, 154 F.3d 865 (8th Cir. 1998) (in dissent).

Ninth Circuit

U.S. ex. rel. Kelly v. Boeing Co., 1993 WL 336011 (9th Cir. 1993); *U.S. ex. rel. Killinsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994); *U.S. ex. rel. Sutton v. Double Day Office Serv. Inc.*, 121 F.3d 531 (9th Cir. 1997); *U.S. ex. rel. Newsham v. Lockheed Missiles & Space Co. Inc.*, 722 F.Supp. 607 (N.D. Cal 1989); *U.S. ex. rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F.Supp. 1084 (C.D. Cal. 1989); *U.S. ex. rel. Truong v. Northrop Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989); *U.S. ex. rel. Yellowtail v. Little Horn State Bank,* 828 F.Supp. 780 (D. Mont. 1992).

Tenth Circuit

U.S. v. Bald Eagle Realty, 1 F.Supp.2d 1311 (D. Utah 1998).

Eleventh Circuit

Public Interest Bounty Hunters v. Bd. of Governors, 548 F.Supp. 157 (N.D. Ga. 1982).

District of Columbia Circuit

U.S. ex. rel. Amin v. George Washington Univ., 26 F.Supp.2d 162 (D.D.C. 1998).

4. *Government Cracks Down on Medicare Fraud:* Health Care Providers Targeted Under FCA

The FCA traditionally has been used against government defense contractors, environmental cases and in the savings and loan industry. Graham, James J., and Fitzgerald, T. Jeffrey, "Curbing False Claims Act Abuse," Business Crimes Bulletin: Compliance and Litigation, October, 1998. ("Fitzgerald, *Curbing Abuse"*). The health care industry, however, has been the latest target of FCA use, following the Department of Justice's declaration that combating health care fraud is its second-highest priority, ranking just after violent crime. "Keeping Fraudulent Providers Out of Medicare and Medicaid: Hearings Before the Subcomm. On Human Resources and Intergovernmental Relations of the House Comm. on Gov't Reform and Oversight, 104th Cong. 51 (1995) (statement of Gerald M. Stern).

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a. Health Care Providers Pay Billions

Consequently, the government has launched a concerted effort against providers, which has resulted in ***billions of dollars*** in awards and settlements. Manier, Jeremy, *Chicago Tribune,* 3/14/99, p. 1. In 1998 alone, for example the settlement amounts are staggering:

1998 Settlements in Healthcare Fraud Cases

$144 million by Blue Cross and Blue Shield of Illinois. *U.S. v. Health Care Serv. Corp. d/b/a Blue Cross Blue Shield of Illinois;* **$38.5 million** by Highmark, Inc., the successor to Pennsylvania Blue Shield. *U.S. ex. rel. Bultena v. Medical Serv. Assn. of Pennsylvania*, No. 96-4430, E.D. Pa; **$17.2 million** by The University of Texas Health Science Center at San Antonio; **$15 million** settlement by Quest Diagnostics. *U.S. v. Dialysis Holdings, Inc., et. al.*, No. 97-10400 GAO, D. Mass). (One of the co-conspirators in the scheme settled a similar criminal case in October of 1996 for **$119 million**, plus **$35.1 million** criminal fines and **$83.3 million** to settle civil claims. *U.S. v. Damon clinical Laboratories, Inc.*, 96-10256, D.Mass.); **$1.5 million** by Medaphis Corporation, *U.S. and State of Calif. ex. rel. Cost Containment and Recovery Serv. and McKinsey v. Medaphis, Inc.;* **$3.1 million** by Spectrum Emergency Care, Inc., Coordinated Health Services, Inc. and Synergon, Inc. *U.S. ex. rel. Personal Representative of the Estate of M. Theresa Semtner v. Emergency Physicians Billing Serv., Inc., et. al.,* No. CIV-94-617(c)(W.D. Ok.); **$7.3 million** by Paracelsus Healthcare Corp., *U.S. ex. rel. Hill and Leavitt v. Paracelsus Healthcare Corp., et. al.*, No. CV 95- 653 TJH (Jrx) (C.D. Cal.); **$9.5 million** by the City of New York. *U.S. v. City of New York*, 96 Civ. 2883; **$3.35 million** by Weiss Memorial Hospital *U.S. ex. rel. Health Outcomes Tech. v. Weiss Memorial Hosp., et. al.*, No. 96-1552 (E.D. Penn.); ***$1.6 million*** by Easton Hospital and Presbyterian Medical Center, *U.S. v. Easton Hosp. Settlement Agreement; U.S. v. Presbyterian Med. Ctr. Agreement.*

Providers of health care complain that the complex structure of the Medicare system is bound to result in billing errors. Teplitzky, Sanford V., and Janet V. DiAntonio, "GAO Report Underscores Unjust Use of False Claims Act," Andrews Government Contract Litigation Reporter, December 2, 1998 ("Tepelitzky, *Unjust Use*"). Likewise, providers argue that the Department of Justice has unfairly focused on the health care industry and has forced settlements with the threat of tremendous liability. *Id.* In 1998, the Government Accounting Office issued a report which acknowledged that FCA use in matters that were previously treated as routine billing errors or disputes has substantially increased in the past several years. *Id.*

b. Congress Rejects Proposed Legislation to Curtail FCA Actions

In 1998, in an effort to curtail FCA action against health care providers, the American Hospital Association proposed broad exemptions for False Claims Act liability to the 105th Congress. (S.5.2007 and H.R. 3523).

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The proposed legislation, called the "Health Care Claims Guidance Act" specified the following:

- In order to be actionable, the defendant must have caused a "material amount" of damages to the government;
- No action can be brought where the defendant relied upon erroneous information from any government agency or employee;
- An action cannot be brought where the defendant had a "model compliance plan" in place; and
- Violations of the FCA by health care programs have to be proven by clear and convincing evidence (the current FCA standard is by a preponderance of the evidence).

The government, through the Department of Justice ("DOJ"), claimed that the proposed amendments provided "preferential treatment" to the health care industry. (June 4, 1998 letter from Acting Assistant Attorney General J. Anthony Sutin to Senator Charles E. Grassley, Senate Committee on the Judiciary.) To diffuse support for the proposed legislation, the DOJ (and the Office of the Inspector General of the U.S. Department of Health and Human Services) offered a compromise: guidelines to its attorneys in enforcing the FCA to ensure that cases are handled in a "fair and evenhanded manner." Fitzgerald, *Curbing Abuse*. As a result, commentators do not expect that the proposed legislation will be passed. Chananie, Steven J., and Martinez, Lourdes, "Guidelines Established for Prosecution under False Claims Act," New York Health Law Update, August, 1998. ("Chananie, *Guidelines Established*").

c. A Compromise?
DOJ Issues Guidelines to Ensure Fairness

The DOJ Guidelines, entitled "Guidance on the Use of the False Claims Act in Civil Health Care Matters" were released on June 3, 1998 in an internal memorandum to all U.S. attorneys, first assistant U.S. attorneys, trial attorneys in the Civil Division's commercial litigation section and civil health care fraud coordinators. *Id.*

The DOJ guidelines stress the following:

- DOJ lawyers should evaluate **two primary elements** of an FCA action before alleging that a violation has occurred. Those elements are: (1) Do false claims exist? and (2) Did the defendant "knowingly" submit the false claims;
- Each of the above elements must be addressed separately and must be satisfied and **supported by evidence**;

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- When determining whether false claims were submitted to the government, the attorneys should **examine the relevant statutes**;
- If a billing rule is "**technical or complex**," attorneys should communicate with "knowledgeable personnel within the program agency";
- Lawyers should **verify** the accuracy of data upon which they rely;
- Attorneys should use "**contact letters**" to notify providers of their potential liability before any monetary demand is made; and
- DOJ attorneys must afford health care providers (1) an **opportunity to discuss** the matter before a demand for settlement is made and (2) an **adequate time to respond**.

DOJ factors in determining whether a false claim was submitted "knowingly"

- ▹ Notice: *Was the provider given notice of the rule or policy upon which a potential case would be based?*
- ▹ Clarity of Rule: *Is it reasonable to conclude that the provider understood the rule or policy?*
- ▹ Magnitude of Claims: *Is the magnitude of the false claims sufficient to support the inference that they resulted from deliberate ignorance or intentional or reckless conduct and not just mistakes?*
- ▹ Compliance Program: *Does the provider have a compliance program, and is it adhering to the program?*
- ▹ Remedial Efforts: *Did the provider identify the wrongful conduct and take steps to remedy it or report it to a governmental agency?*
- ▹ Guidance Sought: *Did the provider seek guidance from the Health Care Financing Administration or its agents?*
- ▹ Past Audits: *Was the provider previously audited regarding similar billing practices?*
- ▹ Other Evidence: *Is there other information relevant to the provider's state of mind when the false claim was submitted?*

Chananie, *Guidelines Established*.

In the same month the DOJ guidelines were issued, the Office of Inspector General ("OIG") of the Department of Health and Human Services circulated internal guidelines in investigating health care fraud. Similar to the DOJ guidelines, the memorandum, entitled "National Project Protocols - Best Practice Guidelines," also addresses how investigations should be conducted. Whether and to what extent the guidelines curb overzealous investigation of alleged medicare fraud remains to be seen. Graham, *Curbing Claims.*

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d. OIG Voluntary Disclosure Protocol Lacks Incentives

Pilot Program Flops: The Office of the Inspector General ("OIG") and the Department of Health and Human Services has issued a "Provider Self-Disclosure Protocol" aimed at encouraging health care providers who may have engaged in fraudulent practices to disclose the information to the OIG. The protocol was first introduced as a pilot program available to several types of providers in five states. The pilot program, entitled "Operation Restore Trust," however, met with little enthusiasm in its two-year run from 1995 - 1997. Avery, A., "OIG Issues New Voluntary Disclosure Protocol," *Health Lawyer*, November, 1998 ("Avery, *OIG Protocol*").

New OIG Program: The OIG insists that the new program will offer providers the opportunity to minimize potential cost and disruption and to negotiate a fair monetary settlement. Under the protocol, the OIG requests that providers voluntarily disclose detailed information and documentation of any "irregularity" in its billing. *Id.* In return for voluntary disclosure, the OIG states that it will "generally agree" for a "reasonable period of time" to forego an investigation of a matter.

Protocol Presents Problems: The OIG however, does not make any commitments as to how an investigation will be resolved and specifically *reserves* the right to refer the matter to the Department of Justice for consideration of civil or criminal sanctions. *Id.*

Other significant pitfalls to providers under the protocol are the following:

- The protocol requires the provider to disclose the names of corporate officials, employees or agents who knew of the practice or "should have known, but failed to detect" the same. The list of names could later be construed as an **admission** when the government seeks to satisfy its burden of proof under the FCA that the provider "knowingly" made false claims.
- Once the provider makes a disclosure, the OIG requests **full access** to all documentation to conduct an investigation. Though the OIG states it will not "normally" request documents protected by the attorney-client privilege, it makes no guarantees.
- If, during the OIG's investigation, it uncovers another irregularity, it may pursue the matter as **outside the protocol** and thus does not have to afford the provider the protections (albeit extremely limited) of the protocol.
- If the OIG finds that the provider owes repayment, it will only allow the provider to make the repayment upon entry of an agreement that the repayment does **not** affect the government's ability to **pursue criminal, civil or administrative remedies**.

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5. "Reverse" False Claims Suits Under the FCA.

Suits under the False Claims Act usually allege that the defendant overcharged the federal government. A provision of the False Claims Act, however, also prohibits companies from defrauding the government by "knowingly mak[ing] . . . a false record or statement to conceal, avoid or decrease an obligation. . ." 31 U.S.C. § 3729(a)(7). Examples include failing to pay royalties due or avoiding import taxes. These types of suits are commonly referred to as "reverse" false claims suits.

The Bad News:

The government has recently decided to intervene in two cases currently pending before the District Court for the Eastern District of Texas. *U.S. v. Texaco, Inc.*, 9:96 CV 507; *U.S. v. Shell Oil Co.*, 9:96 CV 66 (E.D. Tex. 1998). The *Texaco* and *Shell* cases allege that the oil companies conspired to undervalue the oil they had been extracting from federal property and Native American-owned lands. Attorneys for the plaintiffs indicated that the government's intervention in the cases has given them a much-needed boost. Van Duch, Darryl, "Reverse False Claim Suits Gain Ground; Whistleblower Cases Against Oil Companies Present Twist," *The National Law Journal,* Vol. 20, No. 42, 6/15/98. Prior to the government's intervention, the attorneys had been questioning the viability of reverse false claims suits, based on several cases dismissing such actions in recent years. *(See Below).*

The Good News:

a. Postal Scheme OK under FCA:
Reverse FCA Claim Requires Actual Debt to Government.
U.S. v. Q Int'l Courier, Inc., 131 F.3d 770 (8th Cir. 1997).

The Scheme: Q International Courier ("Quick") is a mail courier firm which arranges for the delivery of large volumes of mail. Its purpose is to provide discount mailing services to its clients. In an effort to provide this service, Quick engaged in a practice known as "ABA remail." Under this scheme, Quick would ship bulk mail to Barbados and mail it to addressees in the United States from Barbados. The scheme took advantage of the fact that the U.S. Postal Service ("USPS") charged the Barbadian postal service about a tenth of the $.29 per ounce rate charged for mail sent from within the United States.

U.S.P.S. Catches On: The U.S. government, on behalf of the USPS, sued Quick under the reverse false claims provisions of the FCA. The government alleged that Quick owed to the USPS the full domestic postage for each letter that it sent via the ABA remail system.

The Decision: The Eighth Circuit rejected the claim and affirmed the district court's grant of summary judgment on behalf of Quick. Its decision was based upon the language of the reverse claims provision of the FCA, which prohibits an entity from using a false statement "to conceal, avoid, or decrease an obligation to pay or transmit money or property" that is owed to the government. The Court found that the FCA requires the

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plaintiff to demonstrate that the government was owed a **specific, legal obligation** at the time that the alleged false statement was made:

> The obligation cannot be merely a potential liability: instead, in order to be subject to the penalties of the FCA, a defendant must have had a **present duty to pay money or property that was created by a statute, regulation, contract, judgment or acknowledgment of indebtedness**.

Id. at 772 (emphasis added).

The Court reasoned that Quick's activity, though possibly (even probably) violating other statutes, did not violate the FCA because the FCA does not cover attempts to avoid *potential* fines or sanctions. The government had not demonstrated any present obligation on the part of Quick to pay the domestic rate because no statute, rule or regulation provides for such.

Other Reverse FCA Actions Requiring a "Present" Debt:

U.S. v. Pemco Aeroplex, Inc., 1999 WL 54924 (11th Cir.). Government did not prove a specific, legal obligation or present duty of defendant to pay money to government where it alleged that the defendant had knowingly misidentified aircraft wings on an inventory schedule before purchasing them from the U.S. for scrap.

U.S. ex. rel. American Textile Manuf. Institute, Inc. v. The Limited, Inc., 179 F.R.D. 541 (S.D. Ohio 1997). Potential fines for mislabeling country of origin on imported goods did not constitute debts owed to the government for purposes of FCA.

But see, ***U.S. ex. rel. Dunleavy v. County of Delaware***, 1998 WL 151030 (E.D. Penn.). Not reporting money retained by County, which represented an obligation to pay money to the government under the FCA.

b. *Can They Do This? Uncle Sam Calls "Uncle":* Government Can Dismiss FCA Case Without Relator Consent

U.S. ex. rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998).

Government Opts Out: In 1988, Sequoia Orange Company ("Sequoia") filed 34 reverse FCA *qui tam* actions against a number of citrus growers and packers, alleging that they had violated marketing orders promulgated by the Secretary of Agriculture, pursuant to the Agricultural Marketing Agreement Act of 1937 ("AMAA"). Sequoia claimed that the defendants' violation of the AMAA orders, which restricted the amount of citrus product that can be placed in the market, constituted grounds for reverse false claims cases. At the time the actions were initiated, the government chose not to intervene.

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Government Wants In: In 1993, the Secretary of Agriculture found evidence of widespread violations of the AMAA orders in the industry caused by dissatisfaction with those orders. In June of that year, therefore, the Secretary of Agriculture suspended enforcement of the orders and proposed settlement of all AMAA and FCA cases. The government was thus granted leave to intervene in the *Sequoia* litigation for purposes of negotiating a settlement.

Orders Declared Invalid: In the meantime, the District Court for the Eastern District of California issued a ruling in which the AMAA orders were found unlawfully promulgated and therefore invalid. *U.S. v. Sunny Cove Citrus Ass'n,* 854 F.Supp. 669 (E.D. Cal. 1994). Consequently, the Secretary of Agriculture announced his intent to terminate the AMAA orders and to dismiss all pending litigation against growers. Pursuant to the announcement, the government moved to dismiss the *Sequoia* case in August of 1994.

The Decision: The District Court for the Eastern District of California granted the government's motion to dismiss. *U.S. ex. rel. Sequoia Orange Co., v. Sunland Packing House Co.,* 912 F.Supp. 1325. The relators then appealed, contending that the court could not dismiss a case over their objection unless it found that the cases lacked merit. They contended that their case was meritorious because the AMAA regulations were in force at the time their claims were made and the defendants' action clearly violated those regulations.

In the recently published opinion by the Ninth Circuit in the *Sequoia* case, the Court affirmed the district court's decision. The Court held that, even assuming that Sequoia's case was meritorious, the government has complete "**prosecutorial discretion"** to dismiss it under section 3730(c)(2)(a) of the FCA. That section provides that the government may dismiss a claim, "notwithstanding the objections of the relator" as long as a hearing has been provided on the government's motion. 31 U.S.C. § 3730(c)(2)(a).

The district court proposed the following standards in determining whether section 3730(c)(2)(a) permits dismissal over relator objection:

- First, the government must first satisfy two elements: (1) that it has a valid government purpose in dismissing the action and (2) that a rational relation exists between dismissal and accomplishment of that purpose.

- If the government satisfies its burden, the burden then shifts to the relator to demonstrate that the dismissal is "fraudulent, arbitrary and capricious, or illegal."

The Ninth Circuit adopted the standard and found that, in the Sequoia case, the government had met its burden in showing that its purpose in dismissing the action was to eliminate legal battles in the citrus industry and to avoid litigation costs.

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Other Cases Allowing Government to Dismiss:

U.S. v. Fiske*,* 968 F.Supp. 1347 (E.D. Ark. 1997). Court dismissed claim upon request by the government, finding that the government's proffered reason for dismissal–that the allegations were without merit– is a legitimate governmental reason.

See also, **Hyatt v. Northrop Corp.***,* 91 F.3d 1211 (9th Cir. 1996). Court notes, in *dicta*, that the FCA allows the government to dismiss the suit without the relator's consent.

6. *Whatever Happened to the Eleventh Amendment?* State Immunity against FCA Claims

The Eleventh Amendment prohibits citizen suits against states and, for this reason, states have traditionally been protected against *qui tam* suits under the FCA. Several courts, however, have recently ruled that Eleventh Amendment immunity does not apply in the FCA context because, in a *qui tam* suit, the federal government is the real party in interest (i.e. the "real" plaintiff). (See below.) These decisions create disagreement among the circuits; thus, the issue is seen as headed for the Supreme Court. Pines, Deborah, "Whistleblower Suits May Target States," *New York Law Journal,* vol. 220, no. 11, Dec. 12, 1998.

Defense counsel criticism surrounding the decisions focuses on the fact that the FCA permits treble liability damages and punitive damages against the defendant. Where a state is the defendant, such a suit takes monies from the state treasury better spent on police, education, roads and other public services. *Id.*

State Immunity Under the FCA

States are not Immune*:*

U.S. ex. rel. Stevens v. The State of Vermont*,* 1998 WL 880610 (2d Cir.). Stevens, a former lawyer with the Water Supply Division of the State of Vermont Agency of Natural Resources, claimed that employees of the division submitted time sheets indicating the number of hours which were pre-approved, rather than reflecting actual hours spent. As a result, he claimed that the U.S. government was defrauded of millions of dollars. In holding that the state was not immune from suit, the Court of Appeals for the Second Circuit found that states have no rights or authority to engage in fraudulent conduct against the federal government.

U.S. ex. rel. Zissler v. Regents of the Univ. of Minnesota*,* 154 F.3d 870 (8th Cir. 1998). In 1995, James Zissler brought an FCA action against the University of Minnesota, claiming that the institution had made "false and incomplete" statements in administering $19 million in research grants from the federal government. The district court granted the state's motion to dismiss, finding that the language and history of the FCA did not clearly indicate that it applies to states. In reversing, the Court of Appeals for the Eighth Circuit noted that, in a *qui tam* suit, the federal government is the real party in interest. Further, "nothing in the Eleventh Amendment or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." Following the 8th Circuit ruling, the University agreed to pay **$32 million** to the U.S. government to settle the case.

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***U.S. ex. rel. Chandler v. Hektoen Institute for Medical Research**,* 1998 WL 970134 (N.D. Ill.). In 1989, the National Institute of Drug Abuse issued a request for proposals in studying the treatment of drug-dependent pregnant women. Cook County Hospital submitted a proposal and was granted $5 million to conduct a study. The administration of the grant was later transferred to Hektoen Institute, which hired the relator, Janet Chandler, as its project director in 1993. Chandler alleged that the defendants were not complying with the terms of the grant by, for example, reporting "ghost" research subjects, misrepresenting the progress of the study, providing substandard care and failing to randomize participants. The defendants moved to dismiss, claiming that the FCA does not provide for suits against states or municipalities, citing the District Court for the Southern District of New York in *Graber v. City of New York* (see below). The court, however, rejected the argument, finding that FCA legislative history does not indicate an intent to exempt states and municipalities.

States are Immune:

***U.S. ex. rel. Graber v. City of New York**,* 8 F.Supp.2d 343 (S.D.N.Y. 1998). Plaintiffs claimed that the City of New York, the State of New York, as well as various city and state agencies submitted false claims, statements and records to the federal government in order to receive funding and reimbursement for foster care. The court granted the defendant's motion for summary judgment, finding that the False Claims Act provides for suits against "persons." Based on legislative history and Congressional intent, cities and states are not persons subject to suit.

B. Life Beyond The False Claims Act:

1. Other Federal Whistleblower Laws

The potential to reap millions of dollars under the FCA makes that federal whistleblower statute a hot commodity. The FCA, however, is not the only federal whistleblower statute in existence. Rather, many federal laws contain provisions which protect "whistleblowers"–people who report violations of those statutes.

<u>Federal Laws Providing Protection to "Whistleblowers"</u>

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 stat. 16 (1989)(codified as amended in scattered sections of 5 U.S.C.);
Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (1988);
Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641 (1988);
Asbestos School Hazard Detection Act of 1980, 20 U.S.C. § 3601 (1988);
Clean Air Act (CAA), 42 U.S.C § 7401 (1988);
Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (1988);
Department of Defense Authorization Act of 1984, 10 U.S.C § 1587 (1988);
Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409 (1988);
Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 (1988);
Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5801 (1988);
Equal Employment Opportunity Act (Title VII), 42 U.S.C. § 2000e (1988);

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Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3)(1988);
Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (1988);
Federal Mine Safety and Health Act (FMSHA), 30 U.S.C. § 801 (1988);
Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 (1988);
Hazardous Substances Release Act, 42 U.S.C. § 9601 (1988);
International Safe Containers Act, 46 U.S.C § 1501 (1988);
Jurors' Employment Protection Act, 28 U.S.C. § 1861 (1988);
Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1988);
Migrant Seasonal and Agricultural Worker Protection Act, 29 U.S.C. § 1801 (1988);
Occupation Safety & Health Act, 29 U.S.C. § 651 (1988)
Public Health Service Act, 42 U.S.C. § 201 (1988);
Railroad Safety Authorization Act of 1978, 45 U.S.C. § 421 (1988);
Safe Drinking Water Act, 42 U.S.C § 300f (1988);
Solid Waste Disposal Act, 42 U.S.C § 6901 (1988);
Surface Mining Control & Reclamation Act, 30 U.S.C. § 1201 (1988);
Surface Transportation Assistance Act of 1978, 49 U.S.C. § 2301 (1988);
Toxic Substances Control Act, 15 U.S.C. § 2601 (1988).

2. *Supreme Court Speaks Up:* At-Will Employee May Sue Under §1985

Haddle v. Garrison, 119 S.Ct. 489 (Dec. 14, 1998).

As stated, many federal laws may be considered "whistleblower" statutes because they serve to protect individuals from retaliation for reporting wrongdoing. Section 1985 of 42 U.S.C., for example, prohibits "conspiracies to deter witnesses from testifying in any court of the United States."

The Facts: Michael Haddle was an at-will employee for Healthmaster, Inc. In March of 1995, a federal grand jury indictment charged Healthmaster and company officers Jeanette Garrison and Dennis Kelly with Medicare fraud. Haddle had cooperated with federal agents in the investigation preceding the indictment and was expected to testify before the grand jury.

According to Haddle, Garrison and Kelly conspired with another officer of Healthmaster to bring about his termination in order to intimidate him from participating in the grand jury proceedings and to retaliate against him for his role in the investigation. Haddle therefore brought suit pursuant to 42 U.S.C. § 1985(2), which prohibits conspiracies to deter witnesses from testifying. The statute grants relief to individuals who are "injured in person or property" because of such a conspiracy. 42 U.S.C. § 1985 (3).

Trial Court Dismisses: In an unpublished opinion, the trial court had dismissed Haddle's claim, finding that § 1985(2) requires an injury to constitutionally protected property. Thus, because Haddle's employment was at-will, he had no constitutionally protected right to his job. Again, in an unpublished opinion, the Eleventh Circuit affirmed.

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Supreme Court Reverses: However, the Supreme Court unanimously reversed, **holding that a plaintiff alleging a violation of §1985(2) does not have to suffer an injury to a constitutionally protected property interest**. Thus, interference with an at-will employment relationship will suffice to state a claim under the statute.

The decision settles disagreement among the circuit courts on this issue. For example, the Eleventh Circuit had found that at-will employees may not state claims under § 1985. *Morast v. Lance,* 807 F.2d 926 (11th Cir. 1987). In contrast, the First and Ninth Circuits had allowed such claims to proceed. *Irizarry v. Quiros,* 722 F.2d 869, 871 (1st Cir. 1983); *Portman v. County of Santa Clara,* 995 F.2d 898, 909 - 10 (9th Cir. 1993).

II. DEVELOPMENTS IN STATE WHISTLEBLOWER LAWS

A. Background

California was the first state to enact a whistleblower statute in 1979. Cal. Gov't Code § 10540 (West 1992). The statute opened the floodgates to whistleblower legislation across the country. Currently, the majority of states have whistleblower statutes that protect both public and private employees from retaliation for disclosing employer misconduct. (See below).

State whistleblower statutes are extremely diverse; however, there are a few similarities. Most statutes require that the plaintiff prove the existence of three elements: (1) that he or she was engaged in protected activity; (2) that he or she was discharged as a result of the activity; and (3) a causal connection exists between the protected activity and the termination. *See, e.g., Chandler v. Dowell Schlumberger, Inc.,* 572 N.W.2d 210, 211 (Mich. 1998); *Nelson v. Crimson Enterprises, Inc.,* 777 P.2d 73 (Wyo. 1989); *Melchi v. Burns Intern. Serv., Inc.,* 597 F.Supp. 575 (E.D. Mich. 1984).

State Whistleblower Statutes	
Code of Ala. § 25-8-57 (1998) Alaska Stat. 39.90.100 (1992) Ariz. Rev. Stat. Ann. § 38-531 (West Supp. 1992) Cal. Lab. Code § 1102.5 (West Supp. 1994) Colo. Rev. Stat. Ann. § 24-50.5-101 (West 1990) Conn. Gen. Stat. Ann § 31-51m (West 1987) Del. Code Ann. Tit. 29 § 5115 (1991) Fla. Stat. Ann § 112.3187 (West 1992) O.C.G.A. § 34-9-24 (1998) Haw. Rev. Stat. 378-61 to 69 (Supp. 1992) 5 ILCS 395/0.01 (West 1999) Ind. Code Ann. § 36-1-8-8 (Burns Supp. 1992) Iowa Code Ann. § 79.28 (West 1991) Kan. Stat. Ann. § 75-2973 (Supp. 1998) Ky. Rev. Stat. Ann. § 61.101 (Michie/Bobbs-Merill 1986)	La. Rev. Stat. Ann. § 30-2027; Me. Rev. Stat. Ann. Tit. 26 § 831-840 (West 1988) Miss. Code Ann. § 7-5-307 (1998) Md. Code Ann. Art. 64A, § 12F (Supp. 1992) Mich. Comp. Laws § 15.361-369 (1981)Minn. Stat. § 181.932-935 (1994) Mo. Ann. Stat. § 105.55 (Vernon Supp. 1992) N.C. Gen. Stat. 126-84 (1997) N.H. Rev. Stat. Ann § 275-E:1 to E-9 (Supp. 1993) N.J. Stat. Ann. § 34:19-1 to 8 (West Supp. 1993) N.M. Stat. Ann. § 50-9-25 (1998) N.Y. Lab. Law § 740 (McKinney) Ohio Rev. Code Ann. § 41113.51-53 (Baldwin 1992) 74 Okl. St. Ann. § 840-2.5 (1994) Or. Rev. Stat. § 654.062 (1993)

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43 PA. Cons. Stat. Ann. § 1421 (1991) R.I. Gen Laws § 28-50-1 - 28-50 9 (1995) S.C. Code Ann § 8-27-10 (Law. Co-op Supp. 1992) Tenn. Code Ann. § 50-1-304 (1991) Tx. Govt. § 554.001 - .009 (1993)	Utah Code § 67-21-1 (Supp. 1992) Wash. Rev. Code Ann. § 42.40.010 W. Va. Code § 6c-1-1 Wis. Stat. Ann. § 230.80-89 (West 1987).

B. *The Wave of the Future:* Recent Decisions Under State Whistleblower Statutes

1. *Boys Will Be Boys . . . Or Will They?* Minnesota Court's Broad Definition of "Public Policy"

Hedglin v. City of Willmar, 582 N.W.2d 897 (Minn. 1998).

Minnesota's whistleblower law protects employees who "report a violation or suspected violation of any federal or state law or rule adopted pursuant to law. . . " Minn. Stat. §181.932, subd. 1(a). Prior to the enactment of the whistleblower statute, courts interpreted Minnesota common law to require that the "report" also implicate a clearly mandated public policy, such that the report protects other members of the public, and not just the employee's own personal interests.

The Supreme Court of Minnesota was recently presented with the issue of whether a clearly mandated public policy requirement (that the report protects the public at large) should be read into the statute. The Court, however, did not reach the issue. In *dicta*, however, the Court observed that, even if the statute does require an implication of public policy, the plaintiffs had satisfied their burden.

Firefighters Start Squabble: The three plaintiffs, Hedglin, Grove and Lundquist, were firefighters for the City of Willmar. In 1991, Lundquist ran for the position of fire chief. He was defeated by vote of his fellow firefighters in favor of Douglas Lindblad. Bitter feelings resulted in the emergence of two cliques within the department; the pro-Lindblad group and the pro-Lundquist group. Following the election, each of the three plaintiffs reported alleged misconduct on the part of some of their fellow firefighters (who, incidentally, were also members of the pro-Lindblad faction):

- Grove reported to a city official that the firefighters were unqualified, that some firefighters were reporting to fire calls after they had been drinking and that some had driven fire trucks while intoxicated.
- Both Lundquist and Hedglin reported to various city officials that Schroeder, the first assistant chief, falsified roll call sheets to indicate that he was present when he was not, so that he was paid for fire calls that he did not attend.

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Petty Revenge: Lundquist, Grove and Hedglin claimed that they were made the object of constant harassment as a result of their reports. Consequently, the plaintiffs claimed that they were forced to retire from the department.

Supreme Court Rules by the Book: The Supreme Court of Minnesota analyzed each of the reports separately and, as a preliminary matter, concluded that the reports that firefighters were arriving at fire calls while intoxicated, while "reprehensible," did **not** violate any federal or state law or rule as required by the whistleblower statute. In regard to the other two complaints regarding driving while intoxicated and falsifying roll call records, the Court found that they **did involve the violation of law** and thus were actionable under the whistleblower statute.

Dodging the Bullet: The defendants argued that the whistleblower statute, while not explicitly stating such, should be read to require that reports made by a plaintiff implicate public policy. The Court held that, even if the statute does require that the report involve a public policy issue, plaintiffs had satisfied that burden. Without lengthy explanation, the Court stated that the reports of drunk driving implicated public policy because the firefighters could have caused substantial damage to other drivers, property or pedestrians. The roll call incident implicated public policy because it involved "the government or public funds." Therefore, the Court held that the grant of summary judgment in favor of the defendants was in error.

Other Cases Requiring Violation of Law:

Blackburn v. United Parcel Service, Inc., 3 F.Supp.2d 504 (D.N.J. 1998). Court found that employee's report to his supervisor, questioning the legality of its pricing policy, was not protected because the pricing policy did not violate any law, nor could the plaintiff have reasonably believed that the activity was illegal.

Hinchey v. Nynex Corp., 144 F.3d 134 (1st Cir. 1998)(Mass.) Court found that plaintiff's reports of employees' unethical conduct and negligence to his supervisors implicated only internal policies, not law or public policy.

Bordell v. General Elec. Co., 667 N.E.2d 923 (N.Y. 1996). Employee's report to Dept. of Energy that co-workers may have been illegally exposed to excessive radiation levels was not protected because the employer did not violate any law, rule or regulation affecting human health or safety, which is required by the New York whistleblower statute.

2. *Foreign Trade Association Guidelines as U.S. Public Policy?* New Jersey Court Broadens Whistleblower Protection

Mehlman v. Mobil Oil Corp., 707 A.2d 1000 (N.J. 1998).

New Jersey's whistleblower statute is much broader than most states', protecting those who report violations of any "*clear mandate[s]* of public policy concerning the health, safety or welfare or protection of the environment." N.J.S.A. 34:19-3.

The New Jersey Supreme Court recently broadened the scope of the statute even further, holding that its whistleblower law (the Conscientious Employee Protection Act or "CEPA") prohibits retaliation against employees who report violations of public policy that are not embodied in any constitution, statute, regulation, ordinance or other body of law. In fact, the Court found that "public policy" may be embodied in a foreign country's trade association guidelines.

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Be Careful What You Ask For: The plaintiff, Myron Mehlman, was employed by Mobil Oil Corp. as the manager of its Environmental Health and Science Laboratory, which had responsibility for Mobil's toxicology testing. In 1989, Mehlman traveled to Japan to represent Mobil at an international symposium and was invited to address a group of managers from one of Mobil's Japanese subsidiaries, MSKK. The topic of the presentation, chosen by MSKK managers, was the health hazards of gasoline. During the presentation, Mehlman was informed that the level of benzene (a toxic chemical additive) in Japanese gasoline was extremely high. In response, Mehlman said that it had to be reduced or could not be sold.

Just a Coincidence? On the day of his return to the U.S., Mehlman was contacted by Mobil's vice president of research and development and told that he was being investigated for a possible conflict of interest between Mobil and his activities on behalf of his wife's publishing company. After the investigation, Mehlman was terminated from Mobil.

Show me the Money! Mehlman brought suit under CEPA, claiming that his termination was because of his disclosure regarding the level of benzene in MSKK's gasoline. The jury found in favor of Mehlman, awarding him almost $7 million in compensatory and punitive damages. The trial judge, however, granted Mobil's motion for judgment notwithstanding the verdict. The appellate court reversed and remanded and appeal was taken to the Supreme Court of New Jersey.

What Does it All Mean? In affirming the judgment in favor of Mehlman, the New Jersey Supreme Court noted that the case was one of first impression in New Jersey.

The Supreme Court of New Jersey held:

- Though courts, in interpreting CEPA, generally look to federal and state constitutions, statutes, administrative rules and decisions, judicial decisions and professional codes of ethics in defining "clear mandate[s] of public policy," those sources are not necessarily exclusive. *Id.* at 1013.

- A source of public policy may be an industry's own standards. In this case, the fact that a foreign trade association, the Japanese Petroleum Association, issued guidelines regarding the level of benzene and its members felt obligated to abide by the guidelines was sufficient to establish a public policy. *Id.* at 1015.

- The employer conduct about which the whistleblower complains does not have to violate New Jersey public policy, nor do the harms inflicted by the employer's conduct have to affect New Jersey residents. *Id.*

- An employee does not have to have a specific mandate of public policy in mind when complaining about employer conduct. An employee need only have an "objectively reasonable belief" that the activity is either illegal, fraudulent or harmful to the public and that there is a "substantial likelihood" that the activity

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violates a constitutional, statutory, regulatory or other recognized source of public policy. *Id.*

***A Different Result*?**

In addition to finding that the benzene level of gasoline was restricted by the Japanese Petroleum Association, the Court discussed at length the U.S. regulations and scientific studies demonstrating that benzene is, in fact, harmful to human health. Would the Court have ruled the same way if benzene use had not been restricted in the U.S.? Would the Japanese Petroleum Association guidelines, standing alone, been enough to satisfy the "public policy" standard?

Not All Bad News For the Defense . . .

As noted, the Supreme Court of Minnesota, in *Mehlman,* relied heavily upon the fact that benzene is a widely recognized health hazard. Thus, the Court also recognized, without overruling, that other courts have found that certain reports do not implicate clear mandates of public policy and thus have dismissed whistleblower claims. (See below).

No Clear Mandate of Public Policy Where . . .

- Employee objected to employer's delay in reporting non-serious problems with experimental drug to FDA. ***Chelly v. Knoll Pharmaceuticals,*** 685 A.2d 498 (App.Div. 1996).
- Employer terminated employee to avoid having to pay commissions owed to him. ***Schwartz v. Leasametric, Inc.,*** 539 A.2d 744 (App.Div. 1988).
- Employee refused to conceal wrongful conduct of company president. ***Giudice v. Drew Chem. Corp.,*** 509 A.2d 200 (App.Div.); *cert. den.,* 517 A.2d 449 (1986).
- Employer discharged employee for filing a suit to resolve a salary dispute. ***Alexander v. Kay Finlay Jewelers, Inc.,*** 506 A.2d 379 (App.Div.); *cert. den.,* 517 A.2d 449 (1986).
- Nurse was terminated for refusing to administer kidney dialysis to patient. ***Warthen v. Toms River Community Mem'l Hosp.,*** 488 A.2d 229 (App.Div.); *cert. den.,* 501 A.2d 926 (1985).

3. *Sticks and Stones May Break My Bones, But Names Will Get You Fired:* New Jersey Law Does Not Protect Reports of Co-worker Misconduct.

Higgins v. Pascack Valley Hosp., 704 A.2d 988 (N.J. Super. 1997).

Generally, state whistleblower laws protect employees who report illegal or wrongful activities by either their employers or their co-workers. Two recent appellate court decisions in New Jersey have held, however, that New Jersey's whistleblower law, CEPA, protects only those employees who report violations that can "reasonably" be attributed to the employer. *Higgins v. Pascack Valley Hosp.*, 704 A.2d 988 (N.J. Super. 1997); *Demas v. Nat'l Westminster Bank*, 712 A.2d 693 (N.J. Super. 1998).

Nobody Likes a Tattle-Tale: Higgins was a part-time nurse for the defendant hospital in its Mobile Intensive Care Unit. In the fall of 1991, she reported that two of her co-workers, Bruce Contini and Peter Fromm, had failed to fill out the proper paperwork in response to a call they attended. After investigating the matter, Higgins' supervisor determined that she had been mistaken.

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Several months later, Higgins and Fromm were dispatched to aid someone experiencing chest pain. While examining the patient, Higgins allegedly saw Fromm open the patient's pill bottle and empty the contents into his pocket. Upon returning to the hospital, she told the nursing supervisor what she saw. After an investigation, it was again determined that Higgins' allegations could not be corroborated.

What To Do with an Informant? Following the incidents, Higgins claimed that she was scheduled for fewer shifts, was harassed by co-workers and that she was denied a promotion.

At trial, the jury awarded Higgins nearly $1 million in compensatory and punitive damages, fees, costs and interest.

No Strict Liability for Retaliation: The appellate court reversed the jury's award, finding that CEPA does not protect reports of co-worker misconduct. **In order to violate CEPA, the conduct must be fairly attributable to the employer**. A co-worker omitting paperwork and stealing a patient's pills does not meet this test. Otherwise, the court stated, CEPA would impose a strict liability standard against employers. In this case, Higgins would have to prove that the alleged wrongful conduct (the mismanaged paperwork and pill theft incident) were "condoned and ratified" by hospital management. This could be proven with evidence that the hospital "whitewashed" the investigation of the incidents. (The Supreme Court of New Jersey granted *certiorari* on the Higgins case.)

New Jersey at Odds with Sister States: Other state courts ruling on the issue presented in *Higgins* have come to the opposite conclusion:

Co-worker Misconduct Is Actionable Under Whistleblower Laws:

Flenker v. Willamette Indus., Inc., 967 P.2d 295 (1998). Court noted, in *dicta*, that Kansas common law prohibits termination in retaliation for an employee's report of a co-worker's or the employer's infraction of law.

Riddle v. City of Ottawa, 754 P.2d 465 (Kan. App. 1988) Court found that an employee cannot be terminated for voicing that a co-worker or employer is engaged in violation of rules, regulations or law pertaining to public health, safety and the general welfare.

Dudewicz v. Norris-Schmid, 503 N.W.2d 645 (Mich. 1993). Employee protected under Michigan's Whistleblower Protection Act ("WPA") for filing a criminal complaint against a co-worker for an assault in the workplace.

Dolan v. Continental Airlines, 563 N.W.2d 23 (Mich. 1997). Employee protected under WPA for reporting her suspicion that the employer's customers had violated law.

Thatcher v. Goodwill Indus. of Akron, 690 N.E.2d 1320 (Ohio App. 1997). The Ohio whistleblower law, R.C. 4113.52(A)(1)(a), specifically prohibits retaliation against an employee who reports co-worker misconduct.

Fox v. City of Bowling Green, 668 N.E.2d 898 (Ohio 1996). Police department liable under whistleblower law for retaliating against employee who reported that his co-workers had taken tear gas from the armory and discharged it in a vacant field.

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C. State Common Law as a Basis for Whistleblower Claims

As previously stated, whistleblower statutes vary from state-to-state and provide different protections. Some states, for example, protect only workers who report a violation of a specific statute or regulation; others afford protection only where an employee makes a report to a certain individual or entity. Under California's statute, employees are only protected against retaliation where their reports are made to particular public agencies. In the following case, the employee's reports of alleged wrongdoing were made to supervisors. Thus, he was precluded from bringing suit under the whistleblower statute.

Even where a whistleblower does not have a claim under the state's statute, however, he or she may still be protected under common law. Such "whistleblowers" generally bring wrongful discharge or wrongful termination suits where they are terminated for reporting alleged violations of law or public policy.

Decision "Flies" in the Face of Precedent:
California Court Uses FAA Regulations as Source of Public Policy

Green v. Ralee Engineering Co., 960 P.2d 1046 (Cal. 1998)

Until recently, California courts have held that whistleblowers are protected only when they report employer activities which violate either constitutions or statutes. *See, e.g., Gantt v. Sentry Ins.,* 824 P.2d 680 (Cal. 1992); *Tameny v. Atlantic Richfield Co.,* 610 P.2d 1330 (Cal. 1980); *Petermann v. Int'l Brotherhood of Teamsters,* 344 P.2d 25 (Cal. 1959); In 1998, however, the Supreme Court of California did an abrupt about-face, denying summary judgment to an employer and finding that an employee was protected where he reported violations of Federal Aviation Administration ("FAA") *guidelines* (even though the Court ultimately found that the company had not violated any FAA guidelines). *Id.*

All in a Night's Work: Ralee manufactures various parts for military and civilian aircraft, which it sells to airline assembly companies such as Boeing and Northrop. Richard Green was hired by Ralee as a quality control inspector in 1968. In the early 1990's, Green allegedly noticed that Ralee was shipping parts which had failed his team's inspection process and reported his concerns to members of management.

One Way to Get Rid of a Meddler: In March of 1991, Ralee shut down its night shift because of a reduction in business. It terminated Green and other night shift employees, but retained others, some of whom had less experience than Green. As a result, Green filed a common law wrongful termination suit, alleging that his termination was in retaliation for his complaints to the company. (The California whistleblower statute that applies to employees of private employers requires that the report be made to certain public agencies, which Green did not do. West's Ann.Cal.Labor Code § 1102.5. Thus, his claim was brought under California common law).

Ralee moved for summary judgment, arguing that California precedent requires that a plaintiff allege that the employer's conduct violated a constitution or statute. The trial court granted Ralee's motion for summary judgment on that basis. The appellate court, however, reversed the grant of summary judgment. This time, Ralee appealed.

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Oh Yeah, That's What I Meant: Green relied upon the FAA regulations identified by the appellate court in making his argument before the California Supreme Court. Those FAA regulations apply to *primary manufacturers* of aircraft, such as Boeing, requiring such manufacturers to establish quality control inspection procedures for components they produce and to ensure that their subcontractors (such as Ralee), do the same. The regulations do *not* apply to subcontractors.

Time Will Tell: Under the California Supreme Court's new standard, **an employee is protected from discharge where his or her report concerns the violation of any regulation which implements an "important statutory objective" and promotes a "clearly mandated public policy**." 960 P.2d at 1060 (emphasis added).

California is not alone in recognizing a common law claim for wrongful termination where the discharge violates public policy. However, the Court in *Green* recognized that there are a few states which do not recognize such an exception to the at-will employment doctrine:

States which do not recognize common law wrongful termination claims*:

- New York: ***Murphy v. Am. Home Prods. Corp.***, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 89 (1983).
- Alabama: ***Salter v. Alfa Ins. Co., Inc.***, 561 So.2d 1050, 10511-53 (1990).
- Mississippi: ***Perry v. Sears, Roebuck & Co.***, 508 So.2d 1086, 1089-90 (1987).
- Georgia: ***Evans v. Bibb Co.***, 178 Ga.App. 139, 342 S.E.2d 484, 485-86 (1986).
- Florida: ***Smith v. Peizo Tech. & Prof. Adm'rs.***, 427 So.2d 182, 184 (1983).

*as of 8/31/98

D. *A Different Breed?* Attorneys As Whistleblowers

The issue of attorney whistleblowers is problematic, due, in part, to the fact that an attorney is obligated to keep a client's disclosures confidential. An in-house attorney, therefore, may be faced with a serious dilemma if he or she discovers wrongdoing by the company/client. Under the Model Rules of Professional Conduct, an in-house attorney is obligated to report wrongdoing internally and to confine reports to the authorities of the organization. *Model Rule 1.13(b).* If the internal reporting mechanisms prove futile and the client continues to engage in the illegal activity, the attorney "may resign." *Model Rule 1.13(c)*. The Rules' strict prohibition against disclosure presents a serious ethical dilemma for counsel–to either acquiesce in unlawful conduct or become unemployed.

The attorney as whistleblower is also problematic in the law firm context. While state statutes and common law generally protect employees from retaliation for reporting violations of public policy, the standards may be different for attorneys:

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1. **Firm Can Fire Partner Who Reports Overbilling:**
   Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998).

Butler & Binion ("the firm") had a small, three-attorney office in Washington, D.C. The firm's primary and almost exclusive client was Pennzoil. After working as an associate attorney for the firm for a number of years, Colette Bohatch became a partner in 1990. Shortly thereafter, Bohatch allegedly became concerned that one of the other partners, John McDonald, was overbilling Pennzoil.

The Conspiracy: In July of 1990, Bohatch brought the matter to the attention of the managing partner of the firm, who reviewed the bills and discussed the matter with Pennzoil's in-house counsel (who also happened to have a long-standing relationship with McDonald). Pennzoil's in-house counsel indicated to Paine that Pennzoil was satisfied with the reasonableness of McDonald's bills.

Timing is Everything: Subsequently, Bohatch claims that her work was scrutinized, her partnership share was reduced to zero and she was ultimately discharged because of her accusation.

The Jury's Decision: Bohatch brought suit against the firm, alleging that it had breached its contract with her, as well as its fiduciary duty to her as a partner. The jury found for Bohatch and awarded her $57,000 for past lost wages, $250,000 for past mental anguish and $4 million in punitive damages.

Supreme Court Opinion: On appeal, the Supreme Court of Texas recognized that partnerships are at-will relationships; thus, a firm can terminate a partner for business reasons or to resolve personality conflicts. The question, therefore, was whether an exception to the at-will rule should be applied where a partner acts as a whistleblower. In answering the question in the negative, the Court found that a partnership rests upon personal confidence and trust in one another. **If a firm were forced to retain a partner who had blown the whistle on it, the partners would be placed in an "untenable circumstance-suspicious and angry with each other–to their own detriment and that of their clients whose matters are neglected by lawyers distracted with intra-firm frictions**." *Id.* at *11 (emphasis added).

But see, ***Wieder v. Skala***, 60 N.E.2d 105 (N.Y. 1992). Court found that associate attorney could not be terminated for insisting that his firm report another associate's alleged misconduct to the disciplinary board.

2. **Lawyers' Disclosures Not Covered by Act:**
   Taylor v. Federal Deposit Ins. Corp., 132 F.3d 753 (D.C. Cir. 1997).

The Circuit Court for the District of Columbia found that Resolution Trust Corporation lawyers were not protected by a federal whistleblower act because the allegations that they made and the entities to which they had made them were not covered by the statute.

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The plaintiffs, Bruce Pederson and Jacqueline Taylor, were senior attorneys for the Resolution Trust Corporation ("RTC"), which was subsequently succeeded by the Federal Deposit Insurance Corporation ("FDIC"). In March of 1992, they objected to the pending reorganization of their office, claiming that the reorganization was concocted in an effort to prevent the litigation of suits against failed savings and loans. In other words, the plaintiffs contended that the reorganization was the result of cronyism.

Attorneys Complain to Congress: In an alleged effort to voice their complaints, Pederson and Taylor communicated with the General Accounting Office and testified before the Senate Banking Committee. As a result of their reports, the plaintiffs claimed that they were assigned to a special projects unit, where they were denied meaningful work, support staff, computer links and supplies and that they were ultimately constructively discharged.

The Whistleblower Act: The plaintiffs brought suit against RTC, alleging that their constructive discharges were in violation of the RTC Whistleblower Act, 12 U.S.C. § 1441a(q). The Act prohibits discharge of or discrimination against employees because of their disclosure of information to the RTC, the Thrift Depositor Oversight Board, the Attorney General or any appropriate federal banking agency.

At the time the plaintiffs were allegedly retaliated against, the RTC Whistleblower Act protected only disclosures relating to a possible violation of any law or regulation. Pub. L. No. 102-242, § 251, 105 Stat. 2236 (1991); 12 U.S.C. § 1831j. (In 1993, the Act was broadened to protect disclosures involving "gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety.")

Close, But No Cigar: The Court dismissed the plaintiffs' claims, finding that they **could not prove that the RTC's alleged conduct amounted to a violation of any law or regulation**. Further, the Court found that the plaintiffs' **reports to Congress were not protected by the Act**. Rather, the statute provides specific entities to whom whistleblowers can complain without fear of reprisal. Congress, lacking the capacity to remedy wrongs brought to its attention, is not one of those entities.

III. CONCLUSION

As demonstrated by settlements and verdicts in the hundreds of millions of dollars in 1998, the Federal False Claims Act continues to be a tremendous force. The potential for U.S. Attorneys to reap substantial amounts on behalf of the government, as well as the huge monetary incentives available to employee informers makes it likely that the number of False Claims Act cases will continue to escalate in the new millennium. Though the Department of Justice's guidelines appear to be an effort to temper overzealous use of the Act in the health care industry, it remains to be seen whether those guidelines will, in fact, curb the onslaught of medicare fraud litigation.

State whistleblower protection continues to evolve. Currently, almost every state has some sort of protection for employee informants. In addition, and as demonstrated by the *Green*, *Hedglin* and *Mehlman* decisions, courts continue to expand the protections provided by those statutes. Courts are reaching further in broadening the definition of "public policy" to include many activities that are not prohibited by statute or do not apply to the defendant employer.

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What's A Defendant To Do?

Practice Tips

In light of the growing use of whistleblower laws by employees, defense counsel should be aware of the following practice tips:

- Advise clients to reduce exposure to false claims suits by:
  - Setting up a compliance program, and designate someone to enforce compliance policies and procedures, monitor billing practices and stay abreast of new government regulations that apply to its industry;
  - Conducting in-house training to inform employees of the employer's compliance policies and procedures; and
  - Monitoring and enforcing employee compliance with established policies and procedures and discipline employees who fail or refuse to follow compliance procedures. 1 Ala. Empl. L. Letter 7.
- Treat reports of potential wrongdoing by employees as you would reports of sexual harassment or discrimination. In other words:
  - create a policy which requires supervisors and managers to report any allegations of wrongful activity to a designated person or department;
  - train employees and managers;
  - investigate all reports promptly and thoroughly;
  - take necessary remedial action; and
  - do not permit retaliation against employee informers.
- Once a claim is made, defense strategies include:
  - Attacking the validity of the statute or regulation upon which the alleged wrongful activity is based.
  - Arguing that the underlying statute or regulation does not apply to the particular defendant.
  - Arguing that the practice does not violate public policy and/or is an internal management issue.
  - If the U.S. Supreme Court grants *certiorari* on the issue of the constitutionality of the qui tam provisions, preserving any arguments on that point.

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