

# MEDICAL MALPRACTICE AS A BASIS FOR A FALSE CLAIMS ACTION?

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## INTRODUCTION

The purpose of the False Claims Act of 1863 (the "FCA") is to reimburse the federal government (the "Government") for funds that are fraudulently taken from it, and to deter such fraud in the future. Congress recognized, in enacting the FCA, that if persons or entities who defraud the Government were forced to repay any funds obtained fraudulently, then individuals who might otherwise attempt such actions would be deterred. Congress, therefore, envisioned that *knowing* fraud would be avoided.

As health care becomes an ever more important debate in American society and the amount of Government funding of health care programs escalates, it is apparent that the increased likelihood of fraud by health care providers is an important problem. Under the FCA, such fraud will be deterred and the Government will be repaid for money fraudulently taken. However, the quality of health care provided to American citizens is also an important concern. In this regard, the question arises whether the FCA can or should be used to help ensure that individuals who are provided government-funded health care receive quality health care. In particular, can or should the FCA be used as an additional punishment of doctors who commit medical malpractice above and beyond the penalties currently available in a civil malpractice action? The answers are unclear.

## I. BACKGROUND: THE FALSE CLAIMS ACT

The FCA was enacted "during the Civil War . . . to combat fraud and price-gouging in war procurement contracts."<sup>1</sup> It "originated with President Lincoln . . . as a response to fraudulent and abusive practices by defense contractors" and therefore has commonly been referred to as the "Lincoln Law."<sup>2</sup> The FCA allows the Government to sue and recover from any individual "who knowingly presents, or causes to be presented [to the Government] a false or fraudulent claim for payment."<sup>3</sup> The potential recovery by the Government is "a civil penalty of not less than \$5,000 and not more than \$10,000, plus three [3] times

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1. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

2. Neil Getnick & Lesley Skillen, *The Civil False Claims Act, Enlisting Citizens in Fighting Fraud Against the Government*, Report of the Civil Prosecution Committee of the New York State Bar Association Commercial and Federal Litigation Section (May 1996), available in <<http://www.nysba.org/legis/civilprosecut.html>> (visited July 20, 2000).

3. 31 U.S.C. § 3729(a)(1) (1994).

the . . . damages which the Government sustains."<sup>4</sup>

Included in the FCA is what is known as the "*qui tam*" provision.<sup>5</sup> *Qui tam* actions date back to English common law and were "developed to allow informers to expose fraud against the Crown and to collect a share of the proceeds recovered. The doctrine was adopted in England's colonies and, after independence,"<sup>6</sup> the United States Congress "included *qui tam* provisions in a number of laws concerning import duties and trade."<sup>7</sup>

The *qui tam* provision of the FCA allows the *qui tam* plaintiff, known as the "relator," to bring a lawsuit on behalf of the Government against a person in violation of the FCA.<sup>8</sup> In other words, the FCA allows the relator to act as a temporary attorney general to prosecute a claim for the Government if the Government chooses not to, or gives the relator a share of the award if the Government does prosecute the claim.<sup>9</sup> If the Government prosecutes a claim successfully, and a relator provided the information that led to the prosecution, the relator is awarded between fifteen and twenty-five percent of the money returned to the United States Treasury plus attorney's fees.<sup>10</sup> If the Government does not prosecute the claim and the relator brings the lawsuit himself, he receives between twenty-five and thirty percent of any recovery plus attorney's fees.<sup>11</sup>

## II. CHANGES IN THE FALSE CLAIMS ACT

"The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing

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4. *Id.* § 3729(a)(7).

5. *Id.* § 3730. The term *qui tam* is an abbreviation of the Latin phrase *qui tam domino rege quam pro se ipso in hac parte sequitur*, which means he "who brings action for the king as well as himself." Carolyn J. Paschke, Note, *The Qui Tam Provision of the Federal False Claims Act: The Statute in Current Form, its History and its Unique Position to Influence the Health Care Industry*, 9 J.L. & HEALTH 163, 165 (1994) (quoting W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (1768)).

6. David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, 4 ANNALS HEALTH L. 127 (1995).

7. *Id.* at 127-28.

8. *Id.* at 128.

9. *See id.*

10. *See* 31 U.S.C. § 3730(d).

11. *See id.* § 3730(d)(2). The advantages to the *qui tam* provision should be obvious: first, individuals who know of a situation where the Government is being defrauded are motivated to come forward with such information because they know, if successful, they will benefit financially; and second, the Government need not dedicate valuable time and resources to prosecuting claims it feels are not likely to result in a successful judgment or that are not large in scale. Thus, by including the *qui tam* provision, the FCA becomes an efficient means of combating fraud against the Government because the Government receives the majority of any damages awarded in a FCA verdict with little risk.

and discouraging opportunistic behavior."<sup>12</sup> In other words, Congress has tried to give incentive to possible relators to come forward, but it also has tried to avoid allowing the FCA to become a source of income for individuals seeking to earn a buck. With these two goals in mind, Congress has altered the reach of the *qui tam* provision and the provision "has followed an erratic pattern over the years, expanding, contracting, and then expanding again. This is especially true [regarding] the question of who may bring a *qui tam* action on behalf of the [G]overnment."<sup>13</sup>

Since its inception, the majority of changes to the FCA center on the degree to which the relator's information about fraudulent activities is instrumental to the Government's case and, specifically, to the question of whom or what was the source of that information about the fraudulent activities. Initially, the requirements for relators were not strict, which made it easy for them to recover under the FCA.<sup>14</sup> Relators did not need "to bring any new information [to the case] and, in fact, could rely solely on information already in the hands of the [G]overnment."<sup>15</sup> In the 1940s, however, people began simply to copy information from government indictments and to bring suits as *qui tam* relators even though they were not the source of such information.<sup>16</sup> Lawsuits of this type are commonly called "parasitic" lawsuits.<sup>17</sup> As a result, relators often received a percentage of the Government's recovery without helping to break the "conspiracies of silence" surrounding Government fraud.<sup>18</sup> Such parasitic actions reached their high point in *United States ex rel. Marcus v. Hess*,<sup>19</sup> "in which the United States Supreme Court held that a relator could bring a *qui tam* action, even if all of the relator's information came from the [G]overnment's own investigation."<sup>20</sup> This result was obviously too liberal a use of the FCA and expanded, too far, the Government's goal of encouraging possible relators to come forward.

Eleven months after the Supreme Court's ruling in *Marcus*, President Franklin D. Roosevelt signed amendments to the FCA, which were intended to tighten its scope.<sup>21</sup> Congress amended the statute to reflect that the FCA's intent

12. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

13. *Ryan*, *supra* note 6, at 128.

14. *See id.*

15. *Id.*

16. *See Paschke*, *supra* note 5, at 165.

17. *Id.* These lawsuits exploited the *qui tam* provision and in no way assisted the Attorney General's office in its fight against fraud or provided a deterrent to its commission. Rather, they created a "race to the courthouse" between Government attorneys and the private relator to recover the Government's losses. *Id.* at 166.

18. *Id.*

19. 317 U.S. 537 (1943).

20. *Ryan*, *supra* note 6, at 127; *see also Marcus*, 317 U.S. at 545-46.

21. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994).

was to encourage relators to provide the Government with new information regarding false claims, not to encourage parasitic lawsuits where the relator really contributed nothing to the case.<sup>22</sup> In this regard, the 1943 amendments denied jurisdiction for *qui tam* actions that were based on information already possessed by the Government at the time the suit was filed.<sup>23</sup> The courts reacted to these amendments by barring jurisdiction whenever the Government possessed information concerning the fraudulent act on which the claim was based, even when such information was provided to the Government by the *qui tam* plaintiff before the claim was filed, which was an absurd result.<sup>24</sup>

Although the 1943 amendments to the FCA relieved the problem of parasitic lawsuits, the amendments proved to be overly restrictive, "especially when the letter of the law was applied while its spirit was ignored."<sup>25</sup> This excessive restrictiveness was demonstrated in the Seventh Circuit's 1984 decision of *United States ex rel. Wisconsin v. Dean*,<sup>26</sup>

wherein the State of Wisconsin attempted to bring a *qui tam* action against a psychiatrist who had engaged in Medicaid fraud. [T]he court held that the *qui tam* action was barred because it was based on information already in the hands of the United States. The irony was that the information had been given to the United States by the State of Wisconsin. Therefore, a strict interpretation of the 1943 provision required the dismissal of the State of Wisconsin's *qui tam* action, even though the state was the originator of the information and the information was essential to the prosecution of the psychiatrist.<sup>27</sup>

This interpretation of the FCA and its corresponding *qui tam* provision, therefore, unfairly denied the relator money to which he was entitled.<sup>28</sup>

The result in *Wisconsin* created some criticism that set the ball rolling for a less restrictive version of the FCA. The National Association of Attorneys General (the "NAAG") adopted a resolution that strongly urged Congress to rectify the court's restrictive decision, calling it "an unnecessary inhibitor to the detection of fraud on the Government."<sup>29</sup> Congress, feeling the pressure from NAAG, responded with the False Claims Amendment Act of 1986 (the "1986

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22. See Paschke, *supra* note 5, at 166.

23. See *id.*

24. See *id.*

25. Ryan, *supra* note 6, at 129.

26. 729 F.2d 1100 (7th Cir. 1984).

27. Ryan, *supra* note 6, at 129.

28. Further, this interpretation works against the original congressional goal of providing an incentive to possible relators to come forward with information about fraud committed against the Government. If possible relators thought there was a good chance they would not be rewarded for blowing the whistle, they would be deterred from coming forward, especially if the social fallout of coming forward was great.

29. Paschke, *supra* note 5, at 166 (quoting *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1154 (3d Cir. 1991)).

Amendments”) which had the purpose of “enhanc[ing] the Government’s ability to recover losses sustained as a result of fraud against the Government.”<sup>30</sup> Concerned about “sophisticated and widespread fraud” depleting national funds, Congress concluded that “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.”<sup>31</sup> Thus, Congress realized that a “middle of the road” approach was needed between the goals of encouraging possible relators to come forward and of avoiding parasitic lawsuits from such individuals.

“The 1986 [A]mendments . . . reflect the long process of trial and error that engendered them.”<sup>32</sup> The 1986 Amendments “must be analyzed in the context . . . of rejecting suits which the [G]overnment is capable of pursuing itself, while promoting those which the [G]overnment is not equipped to bring on its own.”<sup>33</sup> One commentator has pointed out the benefits of the 1986 Amendments. They “have made it easier to pursue fraud actions, *qui tam* suits have increased and received greater publicity, leading to greater awareness of the law and, in turn, to the filing of still more actions.”<sup>34</sup>

### III. TYPICAL APPLICATIONS OF THE FCA IN THE HEALTH CARE ARENA

“Although the original purpose of the [FCA] statute was to combat defense fraud, the 1986 [A]mendments create incentives and give relators power to bring *qui tam* actions in response to fraud in other areas of Government spending.”<sup>35</sup> For example, the statute has now begun to make its mark in the health care industry where the Government spends a massive amount of money in the funding of Medicare and Medicaid programs.<sup>36</sup> The application of the FCA to the health care industry has taken several forms and has been successful in returning fraudulently taken money to the Government where it belongs.

One typical application of the FCA to the health care industry is in the area of “mischarging” or “false billing” to Medicare or Medicaid. Mischarging or false billing generally occurs when health care providers file false claims for goods or services that were not provided or delivered in order to receive funds fraudulently.<sup>37</sup> A second common mischarging or false billing scheme involves “claims made to the Government for medical services . . . performed by an attending physician when the service was actually performed by a nurse or other

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30. SENATE COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, 99th Cong., 2d Sess., at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

31. S. REP. NO. 99-345, Cong., 2d Sess., at 1-2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67.

32. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

33. *Id.*

34. Ryan, *supra* note 6, at 129.

35. Paschke, *supra* note 5, at 164.

36. *See id.* at 164-65.

37. *See Types of Qui Tam Cases* (visited Oct. 12, 1998) <<http://www.quitam.com/quitam3.html>>.

provider that should have been billed at a lower rate."<sup>38</sup> Although these are the most common forms of mischarging and false billing, such fraud can take many forms.<sup>39</sup>

An example of a mischarging and false billing can be seen in the Fifth Circuit case of *Peterson v. Weinberger*.<sup>40</sup> In that case, the Government brought suit under the FCA against a physician and an owner of a nursing home for billing Medicare for physical therapy services that were never provided in order to receive payment without doing any work.<sup>41</sup> This type of false billing is all too common. Individuals, such as the defendants in *Peterson*, often assume that, due to the large amount of paperwork and reimbursement requests that the Government receives, their false requests will slip through the cracks and the Government will not take the time to investigate such billing. Thus, the risk of being caught is minimal, yet the financial reward to the person can be enormous.

The second typical application of the FCA to the health care industry involves overutilization. Overutilization occurs when physicians order unnecessary tests and services in an attempt to gain extra income, regardless of the patient's needs.<sup>42</sup> Overutilization can take the form of multiple tests being ordered when only one test would have provided the necessary diagnostic information. When more than one test is performed, a profit is made by billing Medicare or Medicaid.<sup>43</sup> Further, overutilization also occurs when a doctor performs surgery on a patient before any other type of treatment or medication has been tried.<sup>44</sup> Such a scheme becomes attractive so long as the surgery can somehow be justified as necessary for the patient's care.<sup>45</sup> Once some justification for the overutilization exists, it becomes a relatively easy step for a health care provider to manipulate the reimbursement system through such suspect activities without being detected.<sup>46</sup>

Even though there are a variety of ways to defraud the Government through the health care industry, most *qui tam* actions brought against health care providers are settled without publicity.<sup>47</sup> This is due primarily to how sensitive

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38. *Id.*

39. Mischarging or false billing can take the form of "charging for more expensive services than were provided [or upcoding;] . . . private insurers charging Medicare [or] Medicaid when the patient was actually covered primarily by the private insurer; charging patients who received outpatient treatment or tests as if they had received inpatient services or tests because Medicare [or] Medicaid pays more for inpatient treatment; and faulty computer systems that either intentionally or accidentally overbill." Paschke, *supra* note 5, at 174.

40. 508 F.2d 45 (5th Cir. 1975)

41. *See id.* at 48-49.

42. *See* Paschke, *supra* note 5, at 174.

43. *See id.*

44. *See id.*

45. *See* Theodore N. McDowell, Comment, *The Medicare-Medicaid Anti-Fraud and Abuse Amendments: Their Impact on the Present Health Care System*, 36 EMORY L. J. 691, 714 (1987).

46. *See id.*

47. *See* Paschke, *supra* note 5, at 174.

the health care industry is to negative public opinion.<sup>48</sup> A lawsuit involving fraudulent claims by a health care provider that were paid by the Government and taxpayers can be highly detrimental to the industry. The general public may lose confidence in the particular provider involved, thereby harming that provider's business.<sup>49</sup> Thus, there is a strong incentive for a health care provider to settle any false claims actions to minimize such damage.<sup>50</sup>

#### IV. ELEMENTS OF A FALSE CLAIMS ACTION

To prevail in a false claims lawsuit, the plaintiff, a realtor, or the Government, must prove three elements.<sup>51</sup> First, a plaintiff must prove that the defendant submitted a "claim" for payment to the Government or that the defendant caused a third party to submit a claim to the Government.<sup>52</sup> If no claim was submitted by the defendant, then the individual or entity cannot be found to have violated the FCA. Second, the plaintiff must also demonstrate that the defendant's or the third party's claim was "false or fraudulent."<sup>53</sup> If the claim was not false or fraudulent in any way, then the purpose of the FCA is not affected and, thus, there is no violation. Third, the plaintiff must prove that the defendant either "knowingly" filed a false or fraudulent claim or "knowingly" caused a third party to file such a false or fraudulent claim.<sup>54</sup> This requirement is perhaps the most difficult of the three elements to prove when using medical malpractice as a basis for an FCA violation. Each of these elements is described in greater detail below.

##### A. Claim

The definition of claim under the FCA has been at the center of much litigation.<sup>55</sup> A claim is commonly interpreted as "any demand or request for payment," which includes invoices, vouchers, and oral or written requests for payment.<sup>56</sup> The 1986 Amendments added a definition of "claim" to the FCA by

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48. *See id.*

49. *See id.* at 174-75.

50. As a result, many such fraudulent schemes are not prosecuted and little publicity is given to them. This in turn leads to less awareness in the medical community of the existence of such schemes, allowing more medical providers to get away with similar behavior.

51. *See* 31 U.S.C. § 3729 (1994).

52. 31 U.S.C. § 3729(a)(1); *see also* Anthony L. DeWitt, *Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act*, 65 U. MO. KAN. CITY L. REV. 30, 34 (1996); Lisa Michelle Phelps, *Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 VAND. L. REV. 1003, 1008 (1998).

53. 31 U.S.C. § 3729(a); *see also* Phelps, *supra* note 52, at 1008.

54. 31 U.S.C. § 3729(b); *see also* Phelps, *supra* note 52, at 1008.

55. *See* Phelps, *supra* note 52, at 1008 n.16.

56. *Id.* (quoting John T. Boese, *Qui Tam, Beyond Government Contracts*, PLI Litig. & Admin. Practice Course Handbook Series No. H-456, at 7, 16-17 (1993)).

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includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.<sup>57</sup>

Accordingly, such claims submitted to either the federal government under the Medicare program or to state agencies under the Medicaid program are subject to civil enforcement under the FCA. The application of the definition in the 1986 Amendments is fairly straightforward and easy to apply.

### *B. False or Fraudulent*

Under the FCA, false or fraudulent means that a reimbursement claim is submitted to the Government that the claimant is not actually entitled to receive. False or fraudulent claims can take many forms, but generally take the form of submitting claims for services not actually performed or billing at a higher rate than is warranted. In addition, false records or false statements offered in support of a claim are also false claims.<sup>58</sup> This element is explained in more detail later when it is applied to medical malpractice.<sup>59</sup>

### *C. Knowingly*

Since 1863, the FCA has required that the defendant in a false claims action knowingly commit the prohibited conduct. However, it was not until the 1986 Amendments the statute defined the term "knowingly."<sup>60</sup> The history of the knowledge requirement is informative in determining what intent is needed when using medical malpractice as a basis for a false claims action.<sup>61</sup>

Prior to the 1986 Amendments, the federal circuit courts were split as to what constituted knowingly filing a false or fraudulent claim under the FCA. The Fifth, Ninth, and Eleventh Circuits have held that the knowledge requirement of the FCA "required proof that a defendant acted with the intent to deceive the [G]overnment."<sup>62</sup> The Eleventh Circuit further elaborated that an intent to

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57. 31 U.S.C. § 3729(c) (1994).

58. See Ryan, *supra* note 6, at 130.

59. See *infra* Part VI. In most situations, it is easy to determine whether a claim for reimbursement of medical treatment expenses is false or fraudulent because the person receiving the money is not entitled to such money because he did not perform the work required for such payment and most likely lied.

60. Pamela H. Bucy, *Civil Prosecution of Health Care Fraud*, 30 WAKE FOREST L. REV. 693, 697 (1995).

61. See *id.*

62. United States v. TDC Mgmt. Corp., 24 F.3d 292, 296-97 (D.C. Cir. 1994); see also

deceive was required because that intent was also a requisite element of common law fraud and “[n]o statute is to be construed as altering the common law, farther than its words import.”<sup>63</sup> Alternatively, “[t]he Ninth Circuit simply could not believe that Congress ‘intended to catch the hapless with the heavy penalties which may be imposed under the False Claims Act.’”<sup>64</sup>

On the other hand, the Seventh, Eighth and Tenth Circuits, along with the Court of Claims, did not agree that an intent to deceive was needed to meet the knowledge requirement.<sup>65</sup> Instead, these circuits held that an “intent to deceive” was not a requisite element of proof under the FCA before 1986.<sup>66</sup> Therefore, the bar was lowered in these jurisdictions to include more individuals and entities that could be prosecuted under the FCA and be found to have “knowingly” violated the law.

Disapproving of the pre-1986 split among jurisdictions, in 1986 Congress took a step forward and defined “knowingly” under the FCA.<sup>67</sup> Knowingly is defined by the 1986 Amendments to mean that, with respect to the false information, a person must: “(1) ha[ve] actual knowledge of the [false] information; (2) act [] in deliberate ignorance of the truth or falsity of the information; or (3) act in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.”<sup>68</sup>

Whether this description of the standard of liability is viewed as a “clarification” or as an outright change in the law, it is clear that the 1986 Amendments affect FCA cases in many jurisdictions.<sup>69</sup> Specifically, the 1986 Amendments affect those jurisdiction “which ha[ve] held that an intent to

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United States v. Davis, 809 F.2d 1509, 1512 (11th Cir. 1987); United States v. Aerodex, Inc., 469 F.2d 1003, 1007 (5th Cir. 1972); United States v. Mead, 426 F.2d 118, 121 (9th Cir. 1970).

63. *TDC Mgmt. Corp.*, 24 F.3d at 297 (quoting *Davis*, 809 F.2d at 1512).

64. *Id.* (quoting *Mead*, 426 F.2d at 121). Working under this premise, the Ninth Circuit raised the culpability bar in order to avoid punishing, under the FCA, those individuals who were not intentionally involved in defrauding the Government.

65. *See id.*

66. *Id.*; *see also* United States v. Hughes, 585 F.2d 284, 287-88 (7th Cir. 1978); Miller v. United States, 550 F.2d 17, 23 (Ct. Cl. 1977); United States v. Cooperative Grain & Supply Co., 476 F.2d 47, 56-58 (8th Cir. 1973); Fleming v. United States, 336 F.2d 475, 479 (10th Cir. 1964).

67. *Bucy*, *supra* note 60, at 697.

68. 31 U.S.C. § 3729(b) (1994). “The drafters of the 1986 [A]mendments gave a two-fold explanation for this definition of [knowingly]: [first,] they wanted to make it easier to prove liability under the FCA;” and second, they sought to standardize the knowledge requirement under the Act. *Bucy*, *supra* note 60, at 697; *see* SENATE COMM. ON JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, Cong., 2d Sess., at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272. The drafters were especially concerned about “corporate officers who insulate themselves from knowledge of false claims submitted by lower-level subordinates” and as such, drafted the new knowledge requirements to make it more difficult for these officers to avoid liability. *Id.*

69. United States v. Hill, 676 F. Supp. 1158, 1165 (N.D. Fla. 1987); *see also* United States v. Davis, 809 F.2d 1509, 1512 (11th Cir. 1987).

deceive or defraud the Government is a discrete element of [FCA] liability."<sup>70</sup>

Knowingly is now defined by the statute, however, its application to various types of situations must be analyzed to determine exactly what constitutes knowledge of the false information involved in a FCA case. In the new definition, "[t]he deletion of the 'specific intent to defraud' requirement now brings less culpable conduct within the ambit of the law."<sup>71</sup> A violator under the FCA did not have to intend to deceive, but rather he must only have made a knowing presentation of a claim that is either fraudulent or simply false.<sup>72</sup> In other words, a violation of the FCA occurs with the knowing presentation of what is known to be false.<sup>73</sup> Additionally, it is not a defense that the relevant government official knows of the falsity of the claim.<sup>74</sup> Thus, a *qui tam* action will survive a summary judgment motion if the relator produces sufficient evidence to support an inference of knowing fraud.<sup>75</sup>

## V. MEDICAL MALPRACTICE

With the above description of the FCA in mind, the central question of my analysis is: Whether medical malpractice can serve as a basis for a cause of action under the FCA? If so, what is the justification for allowing such an application? To determine whether such an application of the FCA is allowable, one must first analyze what constitutes medical malpractice and whether it makes sense to use it as a basis for a false claims action.

Medical malpractice is negligence committed by a professional health care provider, whose performance of duties departs from the standard of practice of those with similar training and experience and results in harm to a patient or patients.<sup>76</sup> A health care provider is negligent when a patient is harmed because the provider failed to meet the generally accepted standards of skill and care.<sup>77</sup> Health care providers, however, cannot guarantee the results of medical treatment.<sup>78</sup> Thus, a patient's malpractice claim is not valid just because his or her treatment was not successful.<sup>79</sup> Rather, the important inquiry is whether the

70. *Hill*, 676 F. Supp. at 1165.

71. *Id.* at 1170 (assuming arguendo that there is a difference between knowingly filing a false or fraudulent statement and filing a statement with the specific intent to defraud).

72. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *see also* 31 U.S.C. § 3729(a)(1) & (2).

73. *See Hagood*, 929 F.2d at 1421.

74. *See id.* (citing *United States v. Ehrlich*, 643 F.2d 634, 638-39 (9th Cir. 1981)).

75. *See United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995); *see also* David C. Hsia, *Symposium on Qui Tam Litigation: Application of Qui Tam to the Quality of Health Care*, 14 J. LEGAL MED. 301, 316 (1993).

76. *See Hsia, supra* note 75, at 310.

77. *See What Is Medical Malpractice?* (visited Oct. 14, 1998) <<http://www.babbitt-johnson.com/mal.html>>; *see also* Hsia, *supra* note 75, at 310.

78. *See What is Medical Malpractice?*, *supra* note 77.

79. *See id.*

health care provider's treatment fell below the general standard of care for the profession.

Although medical malpractice is limited to negligence which occurs in the course of medical treatment, the basic legal issues involved in malpractice are the same as the legal elements in common negligence.<sup>80</sup> The basic elements involved in a successful malpractice claim, as in common negligence, are: (1) the establishment of a standard of care to which the defendant's conduct is to be compared; (2) proving a breach of that standard of care by the defendant; (3) proof of legal causation by the defendant's conduct; and (4) proof of damages to the plaintiff.<sup>81</sup>

Generally, standard of care is defined as the manner in which a "reasonable, careful or prudent person would behave in similar circumstances" to which the defendant was subjected.<sup>82</sup> Breach of the standard of care occurs when the defendant's conduct deviates from the established standard of care.<sup>83</sup> Negligence usually can be proven when the defendant's breach of the standard of care "proximately caused" damages to the plaintiff that were physical or emotional in nature.<sup>84</sup>

## VI. THE FALSE FANTASY

At the center of the inquiry of whether medical malpractice performed by a doctor or other health care provider can be the basis for a false claims cause of action under the FCA is determining whether the doctor's claim in any such circumstance should be considered false. Logically it seems that when a doctor performs some medical service on a patient and then goes through the normal routine of submitting a bill to Medicare or Medicaid for reimbursement and is subsequently reimbursed, there is nothing false about that process. The doctor is merely seeking to be reimbursed for a treatment that he or she actually performed. It is hard to justify finding fault with the doctor above and beyond the damages that will likely be imposed against him in a subsequent civil malpractice suit by the victim of the alleged faulty medical treatment. That is exactly what allowing medical malpractice as a basis for a false claims action

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80. See Anthony E. Palmer, *Medical Malpractice Law in Florida* (visited Oct. 14, 1998) <<http://www.cafelaw.com/medmal.html>>.

81. See *id.* To determine, therefore, whether medical malpractice exists, the questions become: (1) how would a reasonable, careful, and prudent doctor, hospital or other health care provider behave in the same or similar circumstances; (2) did the doctor, hospital, or other health care provider breach that standard of care in this specific situation; (3) was the unreasonable, careless, or inappropriate behavior on the part of the doctor, hospital or other health care provider the proximate cause of the injury to the patient; and (4) what damages follow. See *id.* If these questions are answered in the affirmative by the finder of fact and damages are proven, then the defendant is subject to liability for medical malpractice.

82. *Id.*

83. See *id.*

84. *Id.*

will do. Thus, it is crucial to determine, by analyzing the case law, what exactly has been found by the courts to be a false claim under the FCA. The first case that gives insight into this analysis is *United States ex rel. Pogue v. American Healthcorp, Inc.*<sup>85</sup>

The issue in *Pogue* was whether a claim for payment submitted to Medicare by a provider who is or was in violation of the anti-kickback statute is rendered a false claim under the FCA because of the anti-kickback violation alone.<sup>86</sup> The court in *Pogue* found that allegations that the defendant health care provider submitted requests to the Government for reimbursement, after individual doctors had referred Medicare and Medicaid patients to the provider in violation of federal anti-kickback and self-referral statutes, stated a prima facie case of an FCA violation.<sup>87</sup> The court concluded that the FCA "was intended to govern not only fraudulent acts that create a loss to the [G]overnment but also those fraudulent acts that cause the [G]overnment to pay out sums of money to claimants it did not intend to benefit."<sup>88</sup> Under this rationale, therefore, it would seem that almost any payment that a person or entity receives from the Government could violate the FCA if it were later discovered that the person or entity receiving the payment or reimbursement had violated any law.

The court in *Pogue*, however, also noted that "the Supreme Court cautioned in *McNinch* . . . [that] the False Claims Act was not designed to punish every type of fraud committed upon the government. It was not intended to operate as a stalking horse for enforcement of every statute, rule, or regulation."<sup>89</sup> Even though the legislative history was read to include the court's application of the FCA, the court in *Pogue* realized that the FCA does have an outer boundary and that this application came close to crossing it. The outer boundary the FCA seeks to avoid is a situation where a false claims cause of action is added to any number of lawsuits as an additional enforcer of preexisting laws. Such a result was not the intent of the drafters of the FCA and should be avoided.

Another case adds insight into what constitutes a false claim under the FCA is *United States ex rel. Milam v. Regents of the University of California*.<sup>90</sup> The issue in *Milam* was whether researchers who relied on inaccurate scientific studies and who also "employed practices that irreconcilably deviated from those that are commonly accepted within the scientific community," had submitted

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85. 914 F. Supp. 1507 (M.D. Tenn. 1996).

86. See Kaz Kikkawa, Note, *Medicare Fraud and Abuse and Qui Tam: The Dynamic Duo or the Odd Couple?*, 8 HEALTH MATRIX 83, 103 (1998).

87. See *Pogue*, 914 F. Supp. at 1507.

88. *Id.* at 1513. This is a very broad reading of the FCA. However, the legislative history supports this holding by stating that "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." *Id.* (quoting SENATE COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, Cong., 2d Sess. 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274).

89. *Id.* (citing *United States v. McNinch*, 356 U.S. 595 (1958)).

90. 912 F. Supp. 868 (D. Md. 1995).

false claims for Government research funding in violation of the FCA.<sup>91</sup> The researchers relied on previously published scientific results, which they could not duplicate, to receive research grants from the government for further experimentation.<sup>92</sup>

The court in *Milam* granted summary judgment to the defendants.<sup>93</sup> The court found that “[a]t most, [it was] presented with a legitimate scientific dispute, not a fraud case. Disagreements over scientific methodology do not give rise to False Claims Act liability.”<sup>94</sup> In this regard, the court rationalized that “the legal process is not suited to resolving scientific disputes or identifying scientific misconduct.”<sup>95</sup>

Thus, the court in *Milam* found that the government’s attempted application of the FCA to the facts of that case went beyond the statute’s reach and did not allow the case to go to trial. However, this case is a good example of how the FCA could be expanded if a convincing Government prosecutor or *qui tam* relator found himself in front of a gullible court.

Another informative case in determining what constitutes a false claim under the FCA is *United States ex rel. Marcus v. Hess*.<sup>96</sup> The *Marcus* case established that claims for payment submitted to the Government pursuant to a fraudulently obtained contract violate the FCA, even if the claims themselves do not contain false statements.<sup>97</sup> In *Marcus*, the Supreme Court held that an electrical contractor who obtained a federally subsidized public works contract through collusive bidding violated the FCA even though the contractor’s later claims for payment were submitted to the Government through an intermediary and contained no false statements.<sup>98</sup> Therefore, the court expanded the scope of a fraudulent claim to include those claims that are not fraudulent themselves, but rather, are based on previous fraudulent activity.

The three cases just discussed give outer boundaries to what is considered a false claim under the FCA. On the one hand, it seems that if a Government reimbursement or any other type of Government payment was based on a past or continuing violation of law, then a *prima facie* case of a FCA violation exists.<sup>99</sup> Included in this category are fraudulently obtained contracts, even if a subsequent request for payment by the Government contains no false statements.<sup>100</sup> Further, a violation may exist not only if a law was violated, but also merely if the

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91. *Id.* at 886.

92. *See id.* at 870, 881.

93. *See id.* at 887.

94. *Id.* at 886.

95. *Id.*

96. 317 U.S. 537 (1943).

97. *See id.* at 544.

98. *See id.* at 542-44.

99. *See United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1513 (M. D. Tenn. 1996).

100. *See Marcus*, 317 U.S. at 544.

Government pays out money to claimants who do not deserve it.<sup>101</sup> On the other hand, as the court in *Milam* explained, FCA liability does not extend to disagreements over scientific methodology.<sup>102</sup> In other words, it is not a violation of the FCA to receive money from the Government even though your scientific methods may be faulty or unfounded, as long as there is some basis for the methods used. This is the result even though it can be argued that the Government did not intend to benefit those employing faulty scientific methods.

The question now is whether medical malpractice falls under the category of scientific disagreement or whether it can be characterized as the Government paying out money to individuals that it did not intend to benefit. When a doctor is faced with a situation where he is treating a patient, he is making a professional, scientific judgment with which others may disagree, but which a doctor has the responsibility of making. Although it is true that the Government likely did not intend to benefit those who give meaningless or improper treatment to patients, the Government did intend to benefit those doctors who are put in decision making positions and who treat patients based on their training.<sup>103</sup> Thus, it does not seem logical or effective to label a doctor's request for payment to the Government as false, even if it later turns out that the doctor committed malpractice.

## VII. THE *ELEMENT* FANTASY

In determining whether any action violates a federal or state statute, the central inquiry is whether the action meets all of the elements required by the statute. If any one of the elements is not met, then the action in question does not violate the statute. Following this rationale, for medical malpractice to be the basis for a false claims cause of action, it must meet all of the elements required by the FCA that were previously described.<sup>104</sup> Many cases have addressed specifically how to apply the elements of the FCA to a given set of facts. The first of these is a false claims action filed against the Tucker House II, Inc. ("Tucker House") nursing home and its management company, GMS Management-Tucker, Inc. ("GMS") for inadequate care provided to its residents. Although the case was settled before trial, it gives insight into whether the elements of a medical malpractice cause of action meet the requirements of a false claims cause of action.

On February 21, 1996, the federal government filed a false claims cause of

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101. See *Pogue*, 914 F. Supp. at 1513.

102. See *United States ex rel. Milam v. Regents of the Univ. of Cal.*, 912 F. Supp. 868, 886 (D. Md. 1995).

103. It can hardly be justified to use the FCA to punish a doctor, with the FCA, for making a professional judgment and acting on that judgment, especially when any faulty decisions falling below a doctors' standard of care will be punished with a civil malpractice claim.

104. See *supra* Part IV. Although determining whether the elements are met is analyzed throughout this paper, this section goes into greater detail by analyzing specific cases that have addressed this issue.

action against the Tucker House nursing home and its management company, GMS.<sup>105</sup> Tucker House had earned a reputation in the community as a nursing home that provided quality long-term care to the elderly population in the community who had nowhere else to live.<sup>106</sup>

Tucker House contracted with GMS to run the home and submit bills for reimbursement to the federal government.<sup>107</sup> The quality of care given by the nursing home, however, was considered by the Government to be below the standard of care for similarly situated nursing homes. To remedy this problem, the Government used the FCA to allege that billing the Government "was the equivalent of recklessly submitting a false claim" in violation of the FCA.<sup>108</sup> In its case against the nursing home, the Government framed the central question as: "[D]oes every successful civil malpractice case against a Medicare/Medicaid provider carry with it the seeds of a civil false claims prosecution?"<sup>109</sup> The question at hand, therefore, was whether the negligent care provided by the nursing home and its management staff could serve as a basis for a FCA cause of action.<sup>110</sup>

Since the management company agreed to pay the government a \$575,000 settlement within days after the plaintiffs filed their claim, the merits of the application of the FCA to the quality of the nursing home care were never decided by the court<sup>111</sup> and remain undecided today. This settlement, however, raised a fury of criticism in the health care industry and among legal professionals and scholars that practice in this area. For example, Mustokoff noted that allowing the FCA to be used in this way was not "an ingenious exercise of federal power," but was like "the heavy hand of the 800-pound gorilla."<sup>112</sup> The commentator went further by adding that "[t]he Tucker House II case presents an example of the FCA being stretched beyond recognition to redress the evils of inadequate care. While the goal is laudable, the means provided by the Act are both ill suited and unnecessary to deal with issues of quality of care."<sup>113</sup>

At the center of the negative criticism by the health care industry and legal commentators is their premise that the elements of a common civil malpractice cause of action are not identical to and do not match up well with the elements

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105. See Michael M. Mustokoff et al., *The Government's Use of the Civil False Claims Act to Enforce Standards of Quality of Care: Ingenuity or the Heavy Hand of the 800-Pound Gorilla*, 6 ANNALS HEALTH L. 137 (1997). Tucker House II, Inc. was a community-run organization that took over the ownership of a nursing home called the Tucker House when the previous owners filed bankruptcy and were forced to relinquish control of the nursing home. See *id.* at 139.

106. See *id.* at 139.

107. See *id.*

108. *Id.* at 137.

109. *Id.* at 139.

110. See *id.* at 141.

111. See *id.* at 137-38.

112. *Id.* at 137.

113. *Id.* at 143.

of a common civil FCA cause of action.<sup>114</sup> The crucial inquiry into whether a health care provider has performed malpractice is whether the “provider’s treatment [was] reasonable when viewed against the prevailing standard of medical care” for his or her profession and given his or her circumstances.<sup>115</sup> Failing to meet this prevailing standard of care “is not the equivalent of a reckless evaluation of that care or even deliberate ignorance in submitting a bill for the care provided” as required by the elements of a false claims cause of action under the FCA.<sup>116</sup> Much less, it is simply inconceivable that a doctor’s innocent professional mistake can constitute an intentional presentation of a false claim to the Government for payment.

Even though it is essential that the quality of health care given to Medicare and Medicaid patients be as high as possible, using the “exploding canister of a fraud statute” to accomplish this goal is a stretch of the law.<sup>117</sup> “There is no need to resort to the statutory equivalent of a Saturday night special available to any gunslinger able to spell ‘qui tam.’”<sup>118</sup>

The second specific case used to analyze and determine whether the requisite elements of a medical malpractice cause of action coincide with a false claims cause of action is a defense contract case out of the Ninth Circuit called *Wang ex rel. United States v. FMC Corp.*<sup>119</sup> In that case, Chen-Cheng Wang, a mechanical engineer in the defense contracting industry, was fired from his job at FMC Corporation (“FMC”).<sup>120</sup> Subsequently, he brought a FCA cause of action as a relator under the statute’s *qui tam* provision.<sup>121</sup> Wang alleged that FMC had defrauded the Government on four separate occasions involving defense contracts between the Government and FMC.<sup>122</sup> Specifically, he alleged that FMC’s low level of performance and related mistakes on those contracts led to overpayments by the Government.<sup>123</sup>

Based on Wang’s claim and the resulting discovery phase of the trial, the Ninth Circuit found that Wang failed to produce enough evidence to support an inference that FMC had committed fraud and that all reasonable inference weighed against Wang’s claim.<sup>124</sup> The court, looking at a decision it had made in an earlier case, noted that:

Innocent mistake is a defense to the criminal charge or civil complaint.  
So is mere negligence. The statutory definition of “knowingly” requires

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114. *See id.* at 142.

115. *Id.*

116. *Id.*

117. *Id.* at 145.

118. *Id.*

119. 975 F.2d 1412 (9th Cir. 1992).

120. *See id.* at 1414-15.

121. *See id.* at 1414.

122. *See id.* at 1415.

123. *See id.* at 1415-16.

124. *See id.* at 1420.

at least "deliberate ignorance" or "reckless disregard" . . . What constitutes the offense is not intent to deceive but knowing presentation of a claim that is either "fraudulent" or simply "false." The requisite intent is the knowing presentation of what is known to be false.<sup>125</sup>

The court found that, for each of his claims, "Wang [had] no evidence that FMC committed anything more than 'innocent mistakes' or 'negligence'" and that Wang's evidence consisted of nothing more than his own assessment of FMC's level of performance of the various defense contracts.<sup>126</sup> On this basis, the court additionally found that "[w]ithout more, the common failings of engineers and other scientists are not culpable under the Act" and that neither "lack of engineering insight," "[b]ad math," "innocent mistakes," nor "negligence" constitute the basis of a false claims cause of action.<sup>127</sup> Rather, there must be some additional culpability for the FCA to be violated and for the goals of the statute to be served.<sup>128</sup>

Other courts have adopted the reasoning of the court in *Wang*. One court stated that "[t]he heart of fraud is an intentional misrepresentation . . . . [Negligent misrepresentations] or innocent misstatements, for example, do not subject [G]overnment contractors to liability for fraud."<sup>129</sup>

Although the *Wang* case dealt with a defense contract, the court's holding demonstrates the proper application of the FCA to the health care industry and to whether medical malpractice can serve as a basis for a false claims cause of action. Specifically, a doctor should not be subjected to false claims liability based on a mere mistake, negligence, or lack of insight. Such mistakes, negligence, or lack of insight do not reach the level of immoral wrongdoings that the FCA seeks to punish. Rather, a doctor's mistake is merely a scientific error

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125. *Id.* (quoting *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991)).

126. *Id.*

127. *Id.* at 1420-21.

128. The court summed up Wang's attempt to use the FCA in this situation by focusing on the knowledge requirement in a false claim cause of action. The following summation is a good recitation of how the FCA should be viewed and applied to any given case and how it can be specifically used in determining whether medical malpractice should be the basis for a false claims cause of action. The court stated that:

Wang's case betrays a serious misunderstanding of the Act's purpose. The weakest account of the Act's "requisite intent" is the "knowing presentation of what is known to be false." The phrase "known to be false" in that sentence does not mean "scientifically untrue"; it means "a lie." The Act is concerned with ferreting out "wrongdoing," not scientific errors. What is false as a matter of science is not, by that very fact, wrong as a matter of morals. The Act would not put either Ptolemy or Copernicus on trial.

*Id.* at 1421 (emphasis added) (citations omitted).

129. *X Corp. v. Doe*, 816 F. Supp. 1086, 1093 (E.D. Va. 1993), *aff'd sub nom. Underseal v. Underseal*, 17 F.3d 1435 (4th Cir. Va. 1994); see also *Hagood*, 929 F.2d at 1421.

or a negligent mistake, rather than a false claim.<sup>130</sup>

The court's decision in *Wang*, therefore, justifies the argument that allowing medical malpractice as a basis for a false claims action is an unwarranted stretch of the FCA and, thus, should not be permitted. Not only are the elements of each cause of action dissimilar, but the goals of the FCA will not be advanced by such an application.

### VIII. OTHER CASE LAW

Although few cases have determined or analyzed whether medical malpractice can serve as a basis for a false claims cause of action under the FCA, some cases have focused on specific areas and applications of the FCA that are informative to this inquiry. The first of these cases is *United States v. Krizek*.<sup>131</sup> This case is helpful in ferreting out what type of negligence reaches the level of reckless disregard as to the truth or falsity of information under the FCA.

On January 11, 1993, the United States filed a false claims action against Dr. George and Blanka Krizek.<sup>132</sup> The Government alleged that the Krizeks had submitted false bills for Medicare and Medicaid psychiatric patients whom Dr. Krizek had treated.<sup>133</sup> Dr. Krizek was a psychiatrist who left the billing operations of his practice to his wife.<sup>134</sup>

The Government, in its false claims action against the Krizeks, asserted that Dr. Krizek treated some patients who should have been discharged from the hospital more quickly.<sup>135</sup> Also, the Government asserted that other patients of Dr. Krizek suffered from conditions which could not be helped through psychotherapy sessions.<sup>136</sup> Further, it was suggested that the length of the sessions should have been abbreviated in some cases.<sup>137</sup> Finally, the Government claimed that Mrs. Krizek's sloppy billing practices led to the billing of Medicare and Medicaid for longer sessions than Dr. Krizek actually performed and that Dr. Krizek was therefore not entitled to the amount of payment that he received.<sup>138</sup>

In ruling on the issue of whether Dr. Krizek had unnecessarily treated his Medicare and Medicaid patients, the court did not find it necessary to presume that Dr. Krizek's treatment was medically unnecessary or that he performed such

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130. See *Wang*, 975 F.2d at 1420-21. Further, one of the goals of the FCA is to deter such fraud against the Government in the future. The deterrence factor is lost when you are talking about mistakes or negligence because it is hard to deter an accident. Deterrence usually only works if the person being deterred is aware of what he or she is doing and can avoid the negative result through his or her actions.

131. 859 F. Supp. 5 (D.D.C. 1994).

132. See *id.* at 6.

133. See *id.* at 7.

134. See *id.*

135. See *id.* at 8.

136. See *id.*

137. See *id.*

138. See *id.* at 12.

treatment in an attempt to defraud the Government.<sup>139</sup> Rather, the court gave deference to Dr. Krizek's justifications for the course of treatment, procedures and diagnoses that he followed.<sup>140</sup>

However, the court did find that Mrs. Krizek's sloppy billing errors amounted to knowingly presenting false claims under the FCA.<sup>141</sup> Thus, these sloppy billing errors led to false claims for payment in violation of the statute.<sup>142</sup> In making this determination, the court noted that "[t]hese were not 'mistakes' nor merely negligent conduct . . . Rather[,] the defendants acted with reckless disregard as to the truth or falsity of the submissions."<sup>143</sup> The court found that, "[w]hile the Act was not intended to apply to mere negligence, it is intended to apply to situations . . . where the submitted claims to the government are prepared in such a sloppy or unsupervised fashion that . . . result[] in overcharges to the government."<sup>144</sup>

The court's ruling in *Krizek* is helpful in ferreting out what type of negligence reaches the level of reckless disregard as to the truth or falsity of the information—a false claim under the FCA, and what type of negligence does not reach this level—not a false claim under the FCA. While extreme sloppiness in billing practices can constitute such a reckless disregard, a doctor's billing of the federal government for services that he, in his professional judgment, felt were appropriate, is not a reckless disregard as to the truth or falsity of the information.<sup>145</sup> Rather, the court gives weight to the doctor's judgment, especially when the Government does not present enough evidence to the contrary.<sup>146</sup>

The second case that focuses on a specific application of the FCA is *United States ex rel. Rueter v. Sparks*.<sup>147</sup> This case is also provides insight into resolving to the question whether medical malpractice can serve as a basis for a false claims cause of action under the FCA. The *Rueter* decision is informative because it further analyzes what courts require for proof in a false claims action and particularly what constitutes deliberate ignorance or reckless disregard.

William Rueter brought an action against Sparks & Wiewel Construction Company ("S & W") under the *qui tam* provision of the FCA alleging that S & W's method of billing the Government for a federally funded highway project

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139. *See id.* at 8. The Government's case was based solely on the Government's expert testimony after a "cold review of Dr. Krisek's notes for each patient." *Id.*

140. *See id.*

141. *See id.* at 13.

142. *See id.* at 13-14.

143. *Id.* at 13.

144. *Id.* at 24 (quoting *United States v. Entin*, 750 F. Supp. 512, 518 (S.D. Fla. 1990) (quoting 132 Cong. Rec. H 9389 (daily ed. Oct. 7, 1986) (statement of Rep. Berman))).

145. This is true regardless of whether the medical services were performed perfectly or not.

146. *See Krizek*, 859 F. Supp. at 8.

147. 939 F. Supp. 636 (C.D. Ill. 1996), *aff'd*, 1997 U.S. App. LEXIS 6151 (7th Cir. Mar. 27, 1997).

was false and fraudulent under the Act.<sup>148</sup> The billing errors, although not in compliance with federal law, were not known to or intended by S & W.<sup>149</sup>

The court found that the actions taken by S & W did not rise to the level of deliberate ignorance or reckless disregard and were not false claims under the FCA because S & W thought the billing procedure was consistent with the law.<sup>150</sup> S & W thought it was in conformity with the law because it had been using this billing method for twenty-five years.<sup>151</sup> In its decision, the court stated that “[a]t most, [S & W] was only negligent in this case” and, as discussed earlier, negligence is not a basis for a false claims action.<sup>152</sup>

The *Rueter* decision is informative because it further shows what proof the courts are looking for in a false claims action. The court was not as concerned that the Government was being improperly charged, but rather was concerned with S & W’s intention when billing the Government. Just as the court did not feel that S & W was culpable due to its negligent mistakes, a doctor should not be culpable if his basis for billing the government was due to an honest belief that he provided a proper service, even if the service is later found to be the basis for a malpractice claim. A contrary result would be unfair to the doctor and would not serve the purpose of the FCA.

The third case that focuses on a specific area and application of the FCA and that is informative to the issue whether medical malpractice can serve as a basis for a false claims cause of action under the FCA is the Ninth Circuit case of *United States ex rel. Hopper v. Anton*.<sup>153</sup> The court in *Hopper* took the position that prosecution under the FCA is not the answer to any and all payments by the government for services that are not what they purport to be; the FCA’s focus is more narrow.<sup>154</sup> Thus, *Hopper* gives insight into the general application of the FCA to any specific set of facts that are presented.

Sheila Hopper, a special education teacher, brought a *qui tam* claim under the FCA against the school district in which she worked.<sup>155</sup> She alleged that the school district was not in compliance with various regulations laid out by the California State Department of Education.<sup>156</sup> She further alleged that because the

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148. *See id.* 637.

149. *See id.* at 638. S & W billed the government the prevailing wage of \$18.00 per hour for eight hours a day on some days and seven hours a day for other days. The actual number of hours worked was seven and one-half hours a day, with one half-hour each day dedicated to machine maintenance. For time spent on machine maintenance, the workers were only paid \$8.00 per hour. S & W felt that these maintenance hours need not be included on the payroll record submitted to the government because the General Wage payroll form submitted did not provide a classification for such maintenance. *See id.* at 637-38.

150. *See id.* at 638-39.

151. *See id.* at 638.

152. *Id.*

153. 91 F.3d 1261 (9th Cir. 1996).

154. *See id.* at 1265-67.

155. *See id.* at 1264.

156. *See id.*

school district was not in compliance with these various regulations, its submission of requests for federal funding were false claims under the FCA.<sup>157</sup>

In deciding this case, the court held that the school district did not meet the knowledge requirement of the FCA merely because the school district was in violation of federal regulations.<sup>158</sup> Rather, the court found that violations of federal regulations, unless knowingly committed, are not actionable under the FCA.<sup>159</sup>

The court took the position, therefore, that prosecution under the FCA is not the answer to any and all payments by the government for services that are not exactly what they were supposed to be. This view is consistent with the argument that, simply because a Medicare or Medicaid patient fails to receive the expected level of medical care, does not lead to the conclusion that the doctor's bill constitutes a false claim. Rather, the FCA's focus is narrower and should be applied conservatively. The *Hopper* case, therefore, is yet another argument against allowing medical malpractice to serve as a basis for a false claims action.

#### IX. OPPOSING CASE LAW

Although there are many strong arguments with corresponding case law supporting the position that medical malpractice should not serve as a basis for a false claims cause of action under the FCA, two cases have indicated that such an application may be possible.<sup>160</sup>

In *United States ex rel. Aranda v. Community Psychiatric Centers of Oklahoma, Inc.*, the Government brought a false claims action against a psychiatric hospital alleging that the hospital did not take appropriate precautions to avoid "physical injury to and sexual abuse of patients."<sup>161</sup> This allegation was based on "inadequate conditions" at the hospital, "such as understaffed shifts, lack of monitoring equipment" over the patients, "and inappropriate housing assignments."<sup>162</sup> The district court in Oklahoma declined to hold that "these

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157. *See id.*

158. *See id.* at 1268.

159. *See id.* at 1265. The Ninth Circuit extensively quoted the district court and agreed that "[i]t appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA." *Id.* "[I]t is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA." *Id.* Rather, "[i]t requires a false claim . . . [S]ome request for payment containing falsities . . . must exist." *Id.* Finally, the Ninth Circuit agreed that "[t]his does not mean that other types of violations of regulations, or contracts, or conditions set for the receipt of moneys . . . are not remediable; it merely means that such are not remediable under the FCA." *Id.*

160. Neither of these cases, however, was decided by a high court and, thus, are not binding on any other courts. This issue has not been resolved by the Supreme Court.

161. 945 F. Supp. 1485, 1488 (W.D. Okla. 1996).

162. *Id.*

allegations, if proved, cannot form the basis of an FCA claim."<sup>163</sup>

In *Mikes v. Strauss*,<sup>164</sup> the *qui tam* plaintiff brought a false claims cause of action under the FCA claiming that the defendants had regularly misused and overused spirometry and magnetic resonance imaging tests to overcharge Medicare and Medicaid for patient treatment. The court held that "[t]hese allegations are sufficient to demonstrate the existence of genuine issues of material fact regarding whether defendants made claims for payment to the government, whether these claims were false or fraudulent, and whether defendants conspired in their efforts to defraud the government."<sup>165</sup>

The *Aranda* and *Mikes* decisions are the two leading cases supporting the argument that medical malpractice should be the basis for a false claims cause of action under the FCA. However, these cases were decided in federal district courts and, thus, have no binding authority except in those specific districts. In fact, the argument and cases on the opposite side of the issue show that the courts are split on the issue of whether medical malpractice should be a basis for a false claims action.

#### CONCLUSION

The FCA should not be used to help ensure that individuals who are provided government-funded health care receive quality health care. Particularly, it should not be used as an additional punishment of doctors who commit medical malpractice, above and beyond the penalties assessed by a victim's normal civil malpractice claim. Although it is true that the Government likely did not intend to benefit those who give meaningless or improper treatment to patients, the Government did intend to benefit those doctors who are put in decision making positions and who treat patients based on their training. It does not seem fair or justified to punish a doctor, with the FCA, for making a professional judgment and acting on that judgment. This is especially true when any faulty decision that falls below a doctor's standard of care will be punished with a civil malpractice claim. Thus, it does not seem logical or effective to label a doctor's request for payment to the Government as false, even if it later turns out that he committed malpractice.

The crucial inquiry into whether a health care provider has performed malpractice is whether the provider's treatment was reasonable when viewed against the prevailing standard of medical care for his or her profession and given his or her circumstances. Failing to meet this prevailing standard of care is not the equivalent of a reckless evaluation of the care provided or even deliberate ignorance in submitting a bill for that care as required by the elements of a false claims cause of action under the FCA. Much less, it is simply inconceivable that a doctor's innocent professional mistake can constitute an intentional presentation of a false claim to the Government for payment.

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163. *Id.* at 1489.

164. 889 F. Supp. 746, 749 (S.D.N.Y. 1995).

165. *Id.* at 752.

In addition, a doctor should not be subjected to false claims liability based on a mere mistake, negligence or lack of insight. Such mistakes, negligence or lack of insight do not reach the level of immoral wrongdoings that the FCA sought to punish. Rather, a doctor's mistake is merely a scientific error or a negligent mistake, which is not a false claim. Further, one of the goals of the FCA is to deter fraud against the Government in the future. The deterrence factor is lost when mistakes or simple negligence occur because it is hard to deter an accident. Deterrence usually only works if the person being deterred is aware of what he or she is doing and can avoid the negative result through his or her actions.

For the above reasons, it is inconceivable that medical malpractice could serve as a basis for a false claims cause of action under the FCA. Not only is such an application of the FCA unreasonable and illogical, it is not what Congress intended.

