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# VERMONT AGENCY OF NATURAL RESOURCES: *HAS THE HIGH COURT SOUNDED THE DEATH KNELL FOR QUI TAM LITIGATION?*

Catherine L. Razzano\*

## INTRODUCTION

Due to staggering healthcare costs and the industry's susceptibility to fraud, the Department of Justice ("DOJ"), under the Clinton Administration, made prosecuting healthcare fraud a top priority, second only to violent crime.<sup>1</sup> The "primary litigative tool" in prosecuting healthcare fraud is the federal False Claims Act ("FCA").<sup>2</sup> According to DOJ statistics and reports, the FCA has earned the United States Treasury close to \$4 billion, with individual citizens receiving about \$629 million since 1986.<sup>3</sup>

In most FCA and *qui tam*<sup>4</sup> cases, including healthcare, liability requires

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1. See Shari G. Kleiner, et al., *Health Care Fraud*, 36 AM. CRIM. L. REV. 773, 774-75 (1999).

2. See Senate Judiciary Committee, False Claims Amendments of 1986, S. Rep. No.99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 [hereinafter "Senate Report"].

3. See Fried, Frank, Harris, Shriver & Jacobson, *Fried Frank Qui Tam Page—FCA Statistics*, at <http://www.ffhsj.com/quitam/fcastats.htm> (last modified Jan. 13, 1999). Under the FCA, both the government and the individual who instigated the complaint receive a portion of the damages awarded.

4. The term "*qui tam*" is derived from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "he who brings an action for the King as well as for himself." See Note, *The History and Development of Qui Tam*, 1972 WASH. U. L. Q. 81, 83 (*citing* 3 W. BLACKSTONE, COMMENTARIES ON THE

proof of at least three elements: (1) the person must present, or cause another person to present, a “claim” for payment to the United States; (2) the claim must be “false or fraudulent”; and (3) either submission of documents and information or identification of such documents and information must be made available to the government.<sup>5</sup>

The basic scenario of fraudulent behavior in the healthcare setting involves a provider who claims a reimbursement from a federal healthcare program, such as Medicare, for a more expensive treatment than was actually provided to the beneficiary.<sup>6</sup> Common types of *qui tam* relators<sup>7</sup> are current and former employees.<sup>8</sup> The suit is filed on behalf of the Government, yet the relator still retains a monetary interest in the share of damages that the Government recovers as a result of the litigation, regardless of whether the Government actually intervenes.<sup>9</sup> If the Government intervenes, the odds of a significant settlement or judgment in a *qui tam* case increases dramatically.<sup>10</sup>

Recently, there have been a number of high-profile FCA cases brought by *qui tam* relators against state institutions, which have resulted in million dollar settlements in favor of the federal Government.<sup>11</sup> However, the United States Supreme Court of the United States recently held that a private person cannot bring a *qui tam* claim under the FCA against a state or state entity in the name of the United States Government.<sup>12</sup> *Vermont*

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LAWS OF ENGLAND 160 (1768)). Essentially, the *qui tam* provision allows a private plaintiff to step into the shoes of the government and file a civil action on its behalf against another party for violation of the FCA.

5. See John T. Boese, *Key Corporate Issues in Healthcare Fraud: False Claims Act Liability, Due Diligence, and Corporate Compliance Programs*, 1997 A.B.A. SEC. BUS. L. REP. 43, 45.

6. See *id.*

7. See 31 U.S.C. § 3730(b) (1994) (“A person may bring a civil action for a violation of § 3729 for the person and for the United States Government. The action shall be in the name of the Government.”).

8. See Boese, *supra* note 5, at 49.

9. See A.B.A., Sec. Pub. Contract L., Procurement Fraud Committee, *Qui Tam Litigation Under the False Claims Act*, at 1 (2 ed. 1999).

10. See Boese, *supra* note 5, at 51.

11. For example, the University of Pittsburgh Medical School settled with the federal Government in February 1998 for \$17 million in a case involving billing errors to Medicare. See Jack J. Chielli, *Teaching Hospital Audits Hit Region*, at <http://physiciansnews.com/cover/598wp.html> (last visited Jan. 28, 2002).

12. See *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529

*Agency of Natural Resources v. U.S.* involved a *qui tam* action filed by Jonathon Stevens, a former employee, who claimed that the state agency had submitted false claims in connection with federal grant programs.<sup>13</sup> As a result of the Court's ruling in *Vermont Agency*, the opportunity for whistleblowers to sue state sovereigns on behalf of the federal Government has effectively been eliminated.

Additionally, there are two competing effects of the ruling. First, the ruling will act as a shield against those who are motivated purely by financial interests in claiming that federal programs have been defrauded. Second, it opens the door to prolonged fraudulent behavior, which may go virtually unchecked without the ability to initiate *qui tam* litigation. The question left untouched by the Court is how these two adverse effects will counterbalance one another.

This Note focuses on the status of *qui tam* litigation under the FCA and its effects on the healthcare community. Part I examines the FCA and the *qui tam* provision's "facelift" in response to widespread fraud against the federal Government. Next, it examines the nature of legal protection given to the States and state entities, beginning with the legal analysis engendered in the split between the Federal Circuit Courts of Appeal. The Note then analyzes the Supreme Court's holding in *Vermont Agency* and its possible ramifications in combating healthcare fraud. This Note then parses the facts of *Vermont Agency* in which the Supreme Court granted certiorari to determine sovereign immunity under the FCA.

Part II analyzes how the Court's ruling will affect the Government's nationwide review of compliance with billing procedures at teaching hospitals, formally known as Physicians at Teaching Hospitals ("PATH") audits. The first section briefly describes the PATH initiative. The second section discusses the lawsuit brought in the Ninth Circuit Court of Appeals by the Association of American Medical Colleges, responding to the Government's aggressive enforcement of the PATH initiative.

Part III explores the current backlash by healthcare providers against the government's efforts to combat fraud and abuse. The issue raised by provider backlash is whether such fraud and abuse enforcement has gone too far. Finally, the Note suggests that the Court's ruling is not destructive to the fight against healthcare fraud; rather, it will be beneficial to the Government and healthcare providers alike. The Court

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U.S. 765 (2000).

13. See *id.* at 770.

correctly erected a necessary boundary on the use of the *qui tam* provision of the FCA. Private litigants will have to think twice before using the *qui tam* provision as an instrument to combat fraud. Moreover, the Court's ruling encourages both state-funded and private hospitals to implement compliance programs from the very beginning, rather than waiting until they are slapped with a high-priced lawsuit.

## I. CAN CITIZENS ACTING ON BEHALF OF THE UNITED STATES GOVERNMENT SUE THE STATES UNDER THE FALSE CLAIMS ACT?

### A. *The Qui Tam Provision of the False Claims Act*

Originally enacted in 1863,<sup>14</sup> the FCA's statutory intent was to discourage corruption and fraudulent claims among defense contractors during the Civil War.<sup>15</sup> The FCA authorized private informers, known as "*qui tam* relators," to file civil actions against persons who knowingly perpetrated fraudulent claims upon the federal Government. As an incentive to prosecuting these actions without Government interference, the FCA provided the relator with fifty percent of all damages recovered,<sup>16</sup> including a \$2,000 penalty for each false claim by a Government contractor.<sup>17</sup>

The period after the Civil War marked a time when the judiciary increasingly imposed its discretion on how much of the fifty percent of damages the relator would be awarded, thereby sparking a gradual decrease in the FCA's use.<sup>18</sup> Subsequently, Congress significantly revised the FCA in 1943.<sup>19</sup> The FCA amendments constricted both the capability of a *qui tam* relator to bring a false claims suit, as well as the ability to

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14. The statute was originally codified as the Act of March 2, 1863, at ch. 67, 12 Stat. 696-98 (1863). It was later reenacted by Rev. Stat. §§ 3490-94 and 5438 (1878).

15. See *United States v. Bank of Farmington*, 166 F.3d 853, 857 (7th Cir. 1999).

16. See John C. Ruhnka, et al., *Qui Tam Claims: Threat to Voluntary Compliance Programs in Health Care Organizations*, 25 J. HEALTH POL. POL'Y & L. 283, 285 (2000).

17. See Act of March 2, 1863, ch. 67, 12 Stat. 696, 698 (1863).

18. See Ruhnka, et al., *supra* note 16, at 286.

19. See *id.*

recover any potential “bounty.”<sup>20</sup> As a result of these changes, private person use of the FCA to fight fraudulent behavior almost became obsolete.

### 1. The 1986 Legislative Amendments

After a series of defense contractor fraud scandals in the 1980's, Senators Charles Grassley, Dennis DeConini and Carl Levin led a movement in the Senate to reform the FCA.<sup>21</sup> In 1986, Congressional hearings demonstrated that the incentives for *qui tam* relators to bring suit had diminished and extensive amendments were necessary.<sup>22</sup> The goal of the 1986 amendments was to promote the “relator’s ability to assist the [G]overnment in investigating, detecting, and litigating FCA suits.”<sup>23</sup> Essentially, the newly renovated *qui tam* provisions created greater incentives for private citizens to “blow the whistle” on fraud.<sup>24</sup>

To encourage private citizens to volunteer information regarding behavior which defrauds the federal Government, the amended legislation raises the stakes considerably by increasing recoverable damages.<sup>25</sup> For example, if the *qui tam* relator prosecutes the case absent Government intervention, the amount receivable rises from twenty-five percent to a maximum of thirty percent of the recovered damages.<sup>26</sup> In cases of Government intervention, “the bounty was increased from a minimum of ten percent to the range of fifteen to twenty-five percent.”<sup>27</sup>

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20. See A.B.A., *supra* note 9; see generally United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1106-07 (7th Cir. 1984) (the State of Wisconsin could not bring a *qui tam* action because the information on which the action was based was in the Government’s possession at the time the lawsuit was filed).

21. See A.B.A., *supra* note 9, at 1-2.

22. See S. Rep. No. 99-345, at 33 (“The Committee favorably reported S. 1562 [the False Claims Reform Act], as amended, by unanimous consent on December 12, 1985.”).

23. A.B.A., *supra* note 9, at 6. See also Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified as amended at 31 U.S.C. §§ 3729-3733).

24. See Martie Ross & Jenny Brannon, *False Claims Act and Qui Tam Litigation: The Government Giveth and the Government Taketh Away (And Then Some)*, 68 J. KAN. BAR ASSOC. 20, 21 (1999).

25. See Jonathon M. Kaye & John Patrick Sullivan, *False Claims*, 30 AM. CRIM. L. REV. 643, 650 (1993).

26. See A.B.A., *supra* note 9, at 8; 31 U.S.C. § 3730(d)(2) (1994).

27. *Id.* See also 31 U.S.C. § 3730(d)(1) (1994).

Moreover, the 1986 amendments eased the burden of proof for both the Government and relators, providing that allegations of false claims need only be proven by a “preponderance of the evidence,” rather than the “clear and convincing evidence” standard previously required under the FCA.<sup>28</sup>

Similarly, the 1986 amendments also lightened the procedural requirements of the FCA. Most notably, the amendments extended the applicable statute of limitations. Originally, the FCA statute of limitations was six years from the time when the false claim was submitted.<sup>29</sup> This period was modified to allow an action to be brought within three years, “after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances.”<sup>30</sup> The legislative history reveals Congress’ concern that “because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure the Government’s rights are not lost through a wrongdoer’s successful deception.”<sup>31</sup>

Since the 1986 amendments to the FCA, *qui tam* litigation has exploded.<sup>32</sup> In particular, the Government’s recent commitment to attack healthcare fraud has fostered a significant increase in FCA actions filed against healthcare providers.<sup>33</sup> However, recent court rulings render the

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28. See A.B.A., *supra* note 9, at 10. See also Ross & Brannon, *supra* note 24.

29. See S. Rep. No. 99-345, at 15.

30. 31 U.S.C. § 3731(b)(2) (1994).

31. S. Rep. No. 99-345, at 15.

32. Since the amendments were passed, over 2,000 *qui tam* cases have been filed. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, at 1-4 (Aspen Law & Business, Supp. 1999). See also Mary Thompson & Michael D. Siemer, *Qui Tam Litigation: Pursuing Claims for Private Gain Under the Federal False Claims Act*, 37 HOUS. LAW. 18, 20 (2000) (reporting that the number of *qui tam* cases has risen from 33 cases in 1987 to 417 cases in 1998); Ross & Brannon, *supra* note 24, at 23 (“More than \$2 billion has been recovered in those actions in which the [G]overnment has assumed prosecution of the suit.”); Taxpayers Against Fraud, *Qui Tam Statistics*, at <http://www.taf.org/statistics> (DOJ has intervened in or pursued 267 of the 2,000 cases and declined to intervene in 1,009) (last visited Jan. 23, 2002)..

33. See Ross & Brannon, *supra* note 24, at 21 (“[C]ases involving allegations of healthcare fraud accounted for more than 60 percent of the new *qui tam* cases filed in 1998.”); see also Taxpayers Against Fraud, at <http://www.taf.org/taf/> (last visited Oct. 26, 2000).

future of *qui tam* healthcare litigation uncertain.<sup>34</sup>

*B. States Are Immune from Qui Tam Claims, But On What Legal Basis?*

*1. A Split Among the United States Circuit Courts of Appeal*

State defendants in past *qui tam* cases have argued that, because states are not “persons” within the meaning of the FCA, sovereign immunity pursuant to the Eleventh Amendment bars *qui tam* suits against state entities.<sup>35</sup> This argument typically has been rejected.<sup>36</sup> However, in 1999, the Fifth Circuit and the D.C. Circuit both issued similar decisions within days of each other. Both courts held that whistleblowers may not bring suits under the FCA against States or state entities,<sup>37</sup> although on somewhat different grounds.

The Fifth Circuit heard the case of Carol Foulds, a medical resident at Texas Tech Health Sciences Center (“Texas defendants”), who discovered that her employer was submitting allegedly false claims to Medicare and Medicaid.<sup>38</sup> Foulds filed a *qui tam* action in the district court in August 1995. When the United States Government failed to intervene in a timely manner,<sup>39</sup> the Texas defendants moved to dismiss the action, arguing primarily that the FCA suit failed to meet the requirements set forth by the Supreme Court in *Seminole Tribe of Florida v. Florida*.<sup>40</sup> The district court denied the Texas defendants’ motion to

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34. See Thompson & Siemer, *supra* note 32, at 21.

35. See John T. Boese & Beth C. McClain, *High Court Will Hear Case on FCA Suits Against State Entities*, 2 No. 6 HEALTH CARE FRAUD & ABUSE NEWSL. (Leader Publications, division of American Lawyer Media), July 1999, at 8.

36. See U.S. *ex rel.* Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 875 (8th Cir. 1998); U.S. *ex rel.* Milam v. Univ. of Texas M.D. Anderson Cancer Ctr., 961 F.2d 46, 50 (4th Cir. 1992).

37. See U.S. *ex rel.* Foulds v. Texas Tech Univ., 171 F.3d 279, 294 (5th Cir. 1999); U.S. *ex rel.* Long v. SCS Bus. & Tech. Inst., 173 F.3d 870, 884 n.16 (D.C. Cir. 1999).

38. See *Foulds*, 171 F.3d at 282. Foulds alleged that, during a ten-year period, approximately 500,000 false claims were submitted to the Government. *Id.*

39. See *id.* at 283.

40. 517 U.S. 44 (1996) (Congress may not abrogate the immunity of the States unless its intent to do so is clearly stated and is consistent with § 5 of the Fourteenth Amendment); see *Foulds*, 171 F.3d at 283-84.



dismiss and noted that *Seminole Tribe* applies only to situations where Congress attempts to subject the states to private suits, not to suits by the United States.<sup>41</sup>

Having filed an interlocutory appeal, a panel of the Fifth Circuit Court of Appeals reversed and remanded the district court's decision.<sup>42</sup> Writing for the panel, Judge Jolly elected to "begin and end with [a] jurisdictional [analysis] *vis á vis* the Eleventh Amendment."<sup>43</sup> The court focused on the plain language of the Eleventh Amendment to decide whether the case was "commenced or prosecuted"<sup>44</sup> by a citizen or by the United States itself.<sup>45</sup> Judge Jolly declared, "[I]t is as plain as the sun that this suit was not commenced by the United States and that the United States has not intervened to prosecute this case."<sup>46</sup> The court found that the federal Government is a "passive party"<sup>47</sup> when they decline to assume control of the litigation. Further, the court noted that *qui tam* relators were "deputized" under the FCA as "responsible federal officers" with the right to represent the sovereign.<sup>48</sup>

In addition to finding that a private citizen had commenced and prosecuted the suit "within the meaning of the Eleventh Amendment," the court applied the two-prong test articulated in *Seminole Tribe* to "determine whether Congress ha[d] abrogated the States' sovereign immunity."<sup>49</sup> Because there was no clear intent by Congress to abrogate

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41. See U.S. *ex rel.* Foulds v. Texas Tech Univ., 980 F. Supp. 864, 870 (N.D. Tex. 1997)(The district court relied on *Milam*, 961 F.2d at 46, noting that *qui tam* actions in which the DOJ does not intervene are still essentially lawsuits by the United States, and therefore the Eleventh Amendment is not an obstacle to bringing suit under the FCA.

42. See *Foulds*, 171 F.3d at 295.

43. See *id.* at 285-86 ("It is the Eleventh Amendment's restraint on 'Judicial power' that requires us to confront the Eleventh Amendment before employing our power to interpret statutory text.").

44. See U.S. CONST. amend. XI.

45. See *Foulds*, 171 F.3d at 289. See also Margaret A. Cassisa, *Silencing the Whistleblower's Whistle: The Eleventh Amendment and Sovereign Immunity in Qui Tam Actions Filed Against the States Without Government Intervention*, 45 LOY. L. REV. 565, 578 (1999).

46. See *Foulds*, 171 F.3d at 289.

47. *Id.* at 291.

48. *Id.* at 293.

49. *Id.* at 294.

immunity, the court ended its judicial inquiry,<sup>50</sup> finding it unnecessary to analyze the second prong of the test. Incidentally, the second prong of the test determines “whether Congress has acted ‘pursuant to a valid exercise of power.’”<sup>51</sup>

Three days after the *Foulds* decision, the United States Court of Appeals for the District of Columbia ruled on the very same fundamental issue, however taking a different approach.<sup>52</sup> Ronald Long had been employed as the Coordinator of Investigations and Audit for a branch of the New York State Department of Education.<sup>53</sup> After an investigation of SCS Business and Technical Institute (“SCS”) in 1989, Long discovered that New York state officials allegedly conspired to conceal fraudulent claims made to the federal Government in return for federal funding of tuition assistance programs at SCS.<sup>54</sup> Additionally, Long claimed that from the time he reported the incident to the authorities, his supervisor and other state officials limited his ability to investigate the matter further.<sup>55</sup> Eventually, Long was taken off the case. Subsequently, he was fired in 1992, shortly after SCS settled with the Government.<sup>56</sup>

Thereafter, Long filed a *qui tam* claim against SCS and its officials.<sup>57</sup> The United States Government intervened in the case against SCS, but not against the state officials.<sup>58</sup> As a result, the state officials moved to dismiss the complaint on grounds that states are not “persons” as defined by § 3729 of the FCA and, in the alternative, that the Eleventh Amendment bars recovery.<sup>59</sup> Following the denial of the State’s motion,<sup>60</sup> the defendants filed an appeal challenging the district court’s finding that the suit could proceed.<sup>61</sup>

Contrary to the Fifth Circuit’s assertion, the D.C. Circuit did not base

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50. *See id.*

51. *Id.*

52. *See Boese & McClain, supra* note 35, at 9.

53. *See Long*, 173 F.3d at 872.

54. *Id. See also Boese & McClain, supra* note 35, at 9.

55. *See Long*, 173 F.3d at 872.

56. *Id.*

57. *Id.* at 873.

58. *Id.*

59. *See id.*

60. *See U.S. v. ex rel. Long v. SCS Bus. & Tech. Inst.*, 999 F. Supp. 78, 91-93 (D.D.C. 1998).

61. *See Long*, 173 F.3d at 873.

its ruling on the Eleventh Amendment, but on two previous Supreme Court decisions: *Will v. Michigan Department of State Police*<sup>62</sup> and *Wilson v. Omaha Indian Tribe*.<sup>63</sup> Both decisions held that, when Congress fails to define the term “person,” the Supreme Court presumes that “the term ‘person’ does not include the sovereign, [and] statutes employing the [term] are ordinarily construed to exclude it.”<sup>64</sup> Reviewing legislative history, the circuit court found no legislative intent in the 1986 legislative amendments to include states within the confines of the term “person.”<sup>65</sup> The court concluded that Congress must make its intent “unmistakably clear” if states are subject to liability under the FCA.<sup>66</sup>

Both decisions are of monumental importance for state entities that receive federal funding.<sup>67</sup> While the *Foulds* holding is limited to those cases in which the federal Government does not intervene,<sup>68</sup> the holding in *Long* has a much broader reach.<sup>69</sup> Nonetheless, both cases raise questions regarding the federal Government’s enforcement efforts under the FCA aimed “at state-run teaching hospitals under the Physicians at Teaching Hospitals (“PATH”) initiative.”<sup>70</sup> The U.S. Supreme Court granted certiorari in *Vermont Agency* in order to resolve the propriety of FCA

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62. 491 U.S. 58 (1989).

63. 442 U.S. 653 (1979).

64. *Long*, 173 F.3d at 874 (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989) (and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979)).

65. *Long*, 173 F.3d at 876. *But see* S. Rep. No. 99-345, at 9 (“The False Claims Act is intended to reach *all* fraudulent attempts to cause the Government to pay sums of money or to deliver property or services.”)(emphasis added).

66. *See Long*, 173 F.3d at 887.

67. Boese & McClain, *supra* note 35, at 10.

68. *See Foulds*, 171 F.3d at 283.

69. *See Long*, 173 F.3d at 884 (providing that not only is the *qui tam* relator a “real party in interest,” but the United States is also a “real party in interest”).

70. Boese & McClain, *supra* note 35, at 10. *See also* Shelley R. Slade & Thomas A. Colthurst, *Health Care Fraud and the False Claims Act: The Supreme Court Supports a Federal Weapon*, 10 BUS. L. TODAY 1, 24-27 (2000). The Department of Health and Human Services (“HHS”) Office of Inspector General (“OIG”) initiated the PATH project in order to determine whether, and to what extent, compliance with Intermediary Letter 372, the Medicare rule affecting physician services provided by residents, has been affected. The PATH initiative and its relation to the FCA is further discussed in Part III of this Note. *See Ass’n Am. Med. C., Background Paper: PATH Initiative*, at <http://www.aamc.org/hlthcare/path/bckgrnd.htm> (last modified Dec. 7, 1999).

suits against state sovereigns.<sup>71</sup>

## 2. High Court Settles the Split

In *Vermont Agency*, the U.S. Supreme Court, for the first time, addressed whether the FCA's whistleblower provision applies to sovereign states or their agencies.<sup>72</sup> The controversy involved a *qui tam* action filed by Jonathon Stevens against his former employer, the Vermont Agency of Natural Resources ("VANR"), a state agency. The complaint alleged that the agency had defrauded the Environmental Protection Agency ("EPA") by submitting false claims "in connection with various federal grant programs administered by the EPA."<sup>73</sup> In particular, the relator, Mr. Stevens, claimed that the state agency had overstated the time its employees had spent working on federally funded projects, "thereby inducing the Government to disburse more grant money than [the agency] was entitled to receive."<sup>74</sup> After the United States Government declined to intervene, VANR moved to dismiss, arguing that neither a State nor a state agency is "a 'person' subject to liability under the FCA,"<sup>75</sup> and further, that the action is barred by the Eleventh Amendment.<sup>76</sup>

When the United States District Court for the District of Vermont denied the motion, VANR filed an interlocutory appeal.<sup>77</sup> Subsequently, the United States Government intervened in the suit.<sup>78</sup> A divided panel of the Second Circuit Court of Appeals affirmed the district court's decision.<sup>79</sup> Thereafter, the Supreme Court granted certiorari to resolve the split among the circuits.<sup>80</sup>

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71. Boese & McClain, *supra* note 35, at 8.

72. See *Vermont Agency*, 529 U.S. at 768.

73. *Id.* at 770.

74. *Id.*

75. *Id.*

76. *Id.*

77. A denied "motion to dismiss based upon a claim of Eleventh Amendment immunity is immediately appealable." *Id.* at 770 (citing *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993)).

78. *Vermont Agency*, 529 U.S. at 770.

79. *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 198 (2 Cir. 1998).

80. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 527 U.S. 1034 (1999).

First, the Court approached the jurisdictional issue of whether private individuals have standing to maintain a FCA suit under Article III of the Constitution.<sup>81</sup> The Court, per Justice Scalia, concluded that a *qui tam* relator does have standing to sue under Article III of the Constitution.<sup>82</sup> Of the three requirements constituting the “irreducible constitutional minimum” of standing, Justice Scalia focused on the “injury in fact” requirement.<sup>83</sup> Considering the injury in fact requirement of Article III standing, Justice Scalia looked to the text of the statute and rejected the notion that *qui tam* relators are “statutorily designated agent[s]”<sup>84</sup> of the Government, who receive their award “out of the United States’ recovery for filing and/or prosecuting a successful action on behalf of the Government.”<sup>85</sup> The Court found that the agency analysis was precluded by the statute because it provides the relator with “an interest in the lawsuit.”<sup>86</sup>

In rejecting the agency argument, the Court emphasized that the “interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right.”<sup>87</sup> The Court then concluded that there was a “fairly trace[able]” connection between the alleged injury in fact and the alleged conduct of the state agency.<sup>88</sup> Strengthening its conclusion, the Court noted the expansive and developed history of *qui tam* actions both in England and the United States.<sup>89</sup> The Court went on to declare that this long tradition, coupled with the application of the doctrine of assignment,<sup>90</sup> “leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.”<sup>91</sup>

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81. See *Vermont Agency*, 529 U.S. at 771. The issue of whether relators had Article III standing to bring *qui tam* actions was addressed by the Court *sua sponte*; see also Slade & Colthurst, *supra* note 70, at 28.

82. See *Vermont Agency*, 529 U.S. at 774.

83. *Id.* at 771.

84. *Id.* at 772.

85. *Id.*

86. *Id.* (emphasis omitted).

87. *Id.* at 772-73.

88. *Id.* at 771.

89. See *id.* at 774-75.

90. See *id.* at 773-74 (“[A]dequate basis for the relator’s suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.”).

91. See *id.* at 778.

Concluding that a relator has standing, the Court moved on to examine the central issue of whether a *qui tam* plaintiff could sue the States and state entities under the FCA.<sup>92</sup> Before approaching the question of whether the Eleventh Amendment bars a *qui tam* action against the states, the Court began and ended with the statutory inquiry of § 3729(a) of the FCA.<sup>93</sup> The Court utilized its “longstanding interpretive presumption that ‘person’ does not include the sovereign,”<sup>94</sup> a rule that will only be disregarded by the Court upon some showing of Congressional “intent to the contrary.”<sup>95</sup>

The Court logically turned to the legislative history of the Act.<sup>96</sup> Taking a formalist approach, Justice Scalia found that the equivalent of § 3729(a) in the original language of the FCA “bore no indication that States were subject to its penalties.”<sup>97</sup> Noting that the FCA had undergone changes in 1982 and 1986, the Court found nothing in either amendment which reflected a Congressional intent to expand the term “person” to encompass the states.<sup>98</sup> Additionally, the Court remarked that the current version of the FCA provides for punitive damages, which is in direct contradiction to the presumption that punitive damages ought not be imposed on governmental bodies.<sup>99</sup> The Court reversed the Second Circuit holding that while a private individual has standing to bring a *qui tam* claim under the FCA, neither a state nor a state agency is subject to liability.<sup>100</sup>

Though Justice Scalia “seemingly took pains to limit the majority’s ruling,”<sup>101</sup> the decision leaves the door open to other challenges against the

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92. See *id.*; see also Slade & Colthurst, *supra* note 70, at 28.

93. See *Vermont Agency*, 529 U.S. at 779 (“When these two questions are at issue, not only is the statutory question ‘logically antecedent to the existence of’ the Eleventh Amendment question, but also there is no realistic possibility that addressing the statutory question will expand the Court’s power beyond the limits that the jurisdictional restriction has imposed.”).

94. *Id.* at 780.

95. *Id.* at 781.

96. See *id.* at 781-82; see also A.B.A., *supra* note 9, at 1.

97. *Id.* at 782.

98. *Id.*

99. *Id.* at 784-85.

100. *Id.* at 787-88.

101. Slade & Colthurst, *supra* note 70, at 29.

FCA. First, in response to Justice Stevens' dissenting opinion,<sup>102</sup> the majority explicitly left open the question of whether a state can be deemed a "person" for purposes of a *qui tam* action under the statute.<sup>103</sup> Second, in a concurring opinion, Justice Ginsberg agreed with the application of the "clear statement" rule, finding that the FCA lacked "any clear statement subjecting the States to *qui tam* suits brought by private parties."<sup>104</sup> However, her opinion also left open the issue of whether the Court's ruling would apply if the relator was the United States Government itself, rather than a private individual.<sup>105</sup>

Notwithstanding the foregoing, the Court's dual ruling in *Vermont Agency* will have a great impact. With regard to the issue that was addressed first, the Court maintained that private litigants can indeed sue under the FCA. This is positive news for the Federal Government, which has been using the FCA as an effective means to combat healthcare fraud.<sup>106</sup> In contrast, by limiting the FCA's scope of potential defendants, the Court has also restrained the Federal Government's ability to recover damages from the States and state entities engaged in fraudulent behavior.<sup>107</sup> Some critics warn that the latter ruling will have "chilling effects."<sup>108</sup> However, query whether the effect of state immunity will be as

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102. Justice Stevens, joined by Justice Souter, dissented on grounds of statutory interpretation. He found that the legislative history of the 1986 amendments disclosed that both federal and state officials understood that States were "persons" within the meaning of the FCA. See *Vermont Agency*, 529 U.S. at 793. In Stevens' view, "the committee unequivocally stated that the Act reaches all parties who may submit false claims and that the term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." *Id.*; see Senate Judiciary Committee, *supra* note 2, at 8.

103. See *Vermont Agency*, 529 U.S. at 787; see also Ruhnka, *supra* note 16, at 286. The issue left open by 31 U.S.C. § 3730(b) is whether the outcome would have been the same if the Government had not intervened in the lawsuit.

104. *Id.* at 788-89.

105. *Id.* at 789.

106. See Slade & Colthurst, *supra* note 70, at 29.

107. *Id.*; see also Kenneth J. Nolan & Michael Flynn, *Standing to Sue Under the False Claims Act*, 74 FLA.B.J. 7, 58-60 (2000).

108. See Slade & Colthurst, *supra* note 70, at 29 ("[T]he government will be less likely to learn of the frauds involving states since the whistle-blowers have lost the financial incentive to report such matters."); see also Nolan & Flynn, *supra* note 107 ("[T]he only winners will be dishonest government contractors, and the

“chilling” to the healthcare community as predicted.

## II. THE HEALTH CARE PROVIDER’S RESPONSE TO USE OF *QUI TAM* ACTIONS AS A TOOL TO DETER FRAUD

### *A. The Relation of the Physicians at Teaching Hospitals (“PATH”) Audits to Qui Tam Litigation*

#### *1. What is PATH?*

Because of the manner in which Medicare reimburses academic medical centers<sup>109</sup> and teaching hospitals, there has been an ongoing concern that Medicare would be charged twice for the same service.<sup>110</sup> Through the DOJ and the HHS, healthcare fraud was a main priority during the Clinton Administration, particularly Medicare fraud.<sup>111</sup> The Office of Inspector General (“OIG”) announced “a series of nationwide reviews of compliance with rules governing physicians at teaching hospitals [PATH] and other Medicare payment rules [in 1996].”<sup>112</sup> The PATH initiative was undertaken by the Health Care Financing Administration (“HCFA”), which administers Medicare, to determine whether teaching hospitals were improperly billing Medicare by “upcoding.”<sup>113</sup>

Following a 1995 settlement between the DOJ and the University of Pennsylvania, wherein the University agreed to pay \$30 million to the DOJ, the OIG and HHS launched a nationwide PATH initiative.<sup>114</sup> The

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losers will be their competitors, . . . [and] the taxpayers.”).

109. An “academic medical center” is defined as “university-based health centers that include at a minimum a hospital and associated clinics, a medical school, or one of the other health professions schools.” University of Washington Academic Medical Center, *UW AMC Fact Sheet*, at <http://www.washington.edu/medical/about/#what> (last modified Jan. 14, 2002).

110. See Pamela H. Bucy, *The Path From Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U.L.J. 3, 4 (2000).

111. See Chielli, *supra* note 11.

112. Ass’n Am. Med. C., *supra* note 70.

113. “Upcoding” is “billing for a more complex level of care than was actually provided.” Harry R. Silver, *PATH Audits May Be Challenged*, at <http://www.ober.com/pubs/health/oosu20.htm> (last visited Jan. 25, 2002).

114. See Bucy, *supra* note 110, at 6. The investigation by the DOJ of the



position of the HCFA is that teaching physicians can bill Medicare properly for services rendered if the physician personally treats the patient or, alternatively, if the teaching physician is present at the time services are administered by the resident.<sup>115</sup>

The OIG initially commenced its PATH initiative by selecting one hundred and twenty-five (125) teaching hospitals associated with each of the nation's medical schools.<sup>116</sup> The PATH initiative focuses on three issues:

- (i) whether the teaching physician on whose behalf a claim of reimbursement under Medicare Part B was submitted was physically present during all medical services performed; (ii) whether the involvement of the treating physician with the Medicare patient was adequately documented to justify payment under Medicare Part B; and (iii) whether the level of service billed to Medicare for the involvement of the teaching physician was sufficiently documented.<sup>117</sup>

By focusing on these issues, the OIG aimed to discover any fraudulent behavior; however, the PATH initiative has been met with overwhelming criticism by the targeted teaching hospitals who argue that the parameters utilized to conduct the PATH audits need to be clarified.<sup>118</sup> The requests for clarification suggest that the standards for paying physicians under § 1395k(a)(2)(B)<sup>119</sup> of Medicare have been confusing since their inception.<sup>120</sup>

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University of Pennsylvania focused on billings by physicians and possible inflation of services rendered.

115. *Id.*

116. *Id.* at 12.

117. Paul R. DeMuro & John D. Whipple, *Health Care Fraud & Abuse: How to Navigate the Compliance Process*, 1999 PRAC. L. INST. 9, 11-12.

118. See Ass'n Am. Med. C., *supra* note 70.

119. Part B covers medical services provided directly to individuals on a fee-for-service basis such as physician's services, medical supplies and diagnostic/laboratory tests. Thus, Medicare Part B pays physicians, including teaching physicians, for services provided directly to Medicare patients. See 42 U.S.C. §§ 1395k (1994).

120. See Ass'n Am. Med. C., *supra* note 70; see also Letter from Otis Bowen, M.D. & Louis Sullivan, M.D., former HHS Secretaries, to Congressman John Porter (R-Il.), United States House of Representatives (Feb. 24, 1997) (on file with the Association of American Medical Colleges). Drs. Bowen and Sullivan stated that,

Really since the inception of the Medicare program the [HHS] has had a

## 2. *The Association of American Medical Colleges Challenge the PATH Audits*

As have many organizations before them, the Association of American Medical Colleges (“AAMC”) chose litigation as a means of correcting what its members contend are serious flaws in the PATH project.<sup>121</sup> The AAMC and the American Medical Association (“AMA”), along with a host of other medical associations and numerous teaching hospitals, filed suit against the Government, seeking to “end the way the PATH audits are currently being conducted.”<sup>122</sup>

Specifically, the plaintiffs alleged the following: that guidance to teaching hospitals about reimbursement was vague and contradictory;<sup>123</sup> that PATH auditors inappropriately increased the authority of insurance carrier policies;<sup>124</sup> that the regulations issued in 1996 were being applied retroactively to services rendered prior to their issuance;<sup>125</sup> and most importantly, that threats of FCA actions were being used as a coercive force to settle pending lawsuits in violation of the Due Process Clause.<sup>126</sup> The district court dismissed the complaint on procedural grounds,<sup>127</sup> ruling that the allegations regarding the conduct of the PATH audits were speculative.<sup>128</sup>

Thereafter, the plaintiffs filed an appeal with the Ninth Circuit Court of Appeals on July 11, 2000. Though the circuit court affirmed the holding that there is no case or controversy under Article III of the Constitution, they left “open [the] question[s] [of] whether the PATH audits will actually result in findings of abuse or fraud”<sup>129</sup> and if the “OIG could still modify its rather draconian view of the Act’s requirements for Part B

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difficult time in setting forth a bright line standard that could be used to separate the services provided by an attending physician that are strictly teaching in nature and those that involve care to a specific patient. *Id.*

121. See Silver, *supra* note 113.

122. See Chielli, *supra* note 11.

123. See Silver, *supra* note 113.

124. See *id.*

125. See *id.*

126. See *id.*

127. See *Ass’n of Am. Med. Colleges v. U.S.*, 34 F. Supp. 2d 1187, 1195 (C.D. Cal. 1998) (Procedurally, the court dismissed the case for lack of subject matter jurisdiction and lack of ripeness for adjudication).

128. See *id.* at 1193-95.

129. See *Ass’n of Am. Med. Colleges v. U.S.*, 217 F.3d 770, 781 (9th Cir. 2000).

billing.”<sup>130</sup> Additionally, the court found too speculative whether PATH audits would result in threatened prosecution under the FCA; however, the court will gladly take up this issue as long as the claim is ripe for adjudication.<sup>131</sup>

### III. ANALYSIS: STATE ENTITIES ARE NO LONGER LIABLE UNDER THE FCA-NOW WHAT?

#### A. Coercive Settlements Becoming A Thing of the Past

Teaching hospitals contend that there is an aura of compulsion surrounding the PATH audits, and consequently believe that there is no other choice but to settle with the Government or risk future litigation under the FCA.<sup>132</sup> Yet, as the Government has become more aggressive in its enforcement of the FCA, healthcare providers have begun to fight back.<sup>133</sup>

The complaint by healthcare providers of vulnerability to coercive settlements is certainly understandable. Whether or not a case is initiated based upon a PATH audit or *qui tam* filing, defendants generally move the case toward settlement due to fear that the litigation could take years and become extremely expensive.<sup>134</sup> Even though providers may well believe they have a defensible position,<sup>135</sup> settlement is often pursued because the Government need only prove knowledge, recklessness or deliberate ignorance of billing error by a preponderance of the evidence

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130. *Id.*

131. *See id.* at 782 (For a claim to be ripe for adjudication, it must not rest upon “contingent future events that may not occur as anticipated, or indeed may not occur at all.”).

132. *See Bucy, supra* note 110, at 14.

133. *See* Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 258 (1999).

134. *See id.* at 306. There are no publicly available statistics on the proportion of fraud and abuse cases that are settled and those that go to judgment. For one indication of the prevalence of settlements, see THE U.S. DEP’T OF H.H.S. & U.S. DEP’T OF JUSTICE, HEALTH CARE FRAUD REP. FISCAL YEAR 1997, at <http://www.usdoj.gov/dag/pubdoc/HEALTH97.htm> (last visited Jan. 27, 2002) (describing a sampling of cases brought or settled under criminal or civil false claims authorities during fiscal year 1997).

135. *See* Jost & Davies, *supra* note 133, at 307.

under the FCA.<sup>136</sup> To providers facing the risk of penalties running into the millions of dollars, the finality of settlement looks very attractive compared to the risk of an even larger judgment.<sup>137</sup>

As a result of *Vermont Agency*, the issue of vulnerability for state agencies and state-funded hospitals has been resolved. By decreasing the number of potential defendants against which a *qui tam* claim can be filed,<sup>138</sup> healthcare providers now have a larger shield to protect against frivolous lawsuits.<sup>139</sup> In this respect, the ruling is beneficial to both state-funded healthcare providers and the public by restraining overzealous FCA enforcement, thereby allowing caregivers to use the resources they have on the patients.<sup>140</sup>

Since *Vermont Agency*, the same issue has not arisen as to whether a county or municipal entity can be held liable under the FCA. Until recently the issue had not been addressed by any circuit court.<sup>141</sup> The District Court for the Eastern District of Pennsylvania found that, pursuant to *Vermont Agency*, the County of Delaware could not be sued under the FCA.<sup>142</sup> The court held that the action could not continue against the county due to the punitive nature of the damages mandated by the FCA.<sup>143</sup> Additionally, the court determined that the presumption against imposing punitive damages on governmental entities was not overcome because there was no showing of statutory intent to the contrary.<sup>144</sup> This finding has further narrowed the scope of defendants upon which a *qui tam* relator can cast its spell.

### *B. Compliance Programs: The Path Less Traveled Looks More*

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136. See 31 U.S.C. § 3729(b)(1994).

137. See Jost & Davies, *supra* note 133, at 307.

138. See *High Court Limits False Claims Suits*, 3 HEALTH CARE FRAUD & ABUSE NEWSL. 5 (Leader Publications, division of American Lawyer Media), June 2000, at 1.

139. See John T. Boese, *Can Substandard Medical Care Become Fraud? Understanding An Unfortunate Expansion of Liability Under the Civil False Claims Act*, 2000 A.B.A. SEC. BUS.L.REP. 30, 37.

140. *Id.*

141. See A.B.A., *supra* note 9, at 62.

142. See *U.S. ex rel. Dunleavy v. County of Delaware, et. al.*, No. 94-7000, 2000 U.S. Dist. LEXIS 14980, at \*1 (E.D. Pa. Oct. 12, 2000).

143. See *id.* at \*16.

144. See *id.* at \*18-19.

### *Attractive*

Increasingly, healthcare providers have been asking what they can do to avoid being swept up in the frenzy of the aggressive nature of the Government's current healthcare fraud enforcement environment.<sup>145</sup> Compliance programs, although not perfect, are the best tool to deter misconduct.<sup>146</sup> An effective compliance program can act as a means for providing a measure of insurance for healthcare companies in order to prevent fraudulent activities.

A descendant of the Federal Sentencing Guidelines,<sup>147</sup> compliance programs are usually imposed by the Government in Corporate Integrity Agreements,<sup>148</sup> as part of settling healthcare fraud charges.<sup>149</sup> Instead of acquiescing to a government-imposed compliance program, it behooves hospitals and other healthcare providers to voluntarily adopt their own compliance program and tailor it to their needs.<sup>150</sup>

#### *1. The OIG Compliance Program Guidance for Hospitals*

Faced with today's complicated healthcare regulatory environment, the OIG deemed it necessary to formulate a model plan. This plan assists hospitals in the development of effective internal controls that promote

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145. Thomas E. Bartrum & L. Edward Bryant, Jr., *The Brave New World of Health Care Compliance Programs*, 6 ANNALS HEALTH L. 51, 55 (1997); see Corrine Parver & Justin D. Simon, *The Ugly Spector of Health Care Fraud: Do you Know If Your Home Care Company is Adequately Protected? Guidance on Developing and Implementing an Effective Compliance Program*, 1 (Oct. 2000) (unpublished manuscript, on file with Dickstein, Shapiro, Morin, & Oshinsky, L.L.P.).

146. See Bartrum & Bryant, *supra* note 145.

147. See Parver & Simon, *supra* note 145 ("As reflected in the federal Sentencing Guidelines... , an effective corporate compliance program must contain elements which are designed to prevent, detect, investigate and remediate compliance problems.").

148. See *id.* at 1-2 ("For example, when companies enter into settlement agreements, the government usually insists on the companies performing compliance audits of their federal contract programs for a number of years into the future to make sure they are complying with the promises being made.").

149. See Bartrum & Bryant, *supra* note 145.

150. See Lewis Morris & Gary W. Thompson, *Reflections on the Government's Stick and Carrot Approach to Fighting Health Care Fraud*, 51 ALA.L.REV. 319, 348 (1999).

adherence to federal and state law.<sup>151</sup> The OIG notes that this model plan “is by no means meant to be an exhaustive list” and, therefore, suggests that providers implement their own compliance plans that address their specific needs.<sup>152</sup>

There are seven essential elements necessary for the establishment of a comprehensive compliance program.<sup>153</sup> These include the following: (1) development and distribution of written standards of conduct, as well as written policies and procedures that promote the hospitals’ commitment to compliance; (2) designation of a chief compliance officer and other appropriate bodies; (3) development and implementation of effective education and training programs for all affected employees; (4) maintenance of a process to receive complaints, and adoption of procedures to protect the anonymity of whistleblowers; (5) development of a system to respond to allegations of improper/illegal activities and the enforcement of appropriate disciplinary action against employees who have violated internal compliance policies; (6) use of audits and/or other evaluation techniques to monitor compliance; and (7) investigation and remediation of identified systemic problems and the development of policies addressing the non-employment or retention of sanctioned individuals.<sup>154</sup>

The OIG provides a model that attempts to establish a foundation for the process of creating and implementing a cost-effective and efficient hospital compliance program.<sup>155</sup> The OIG does not expect that every hospital’s compliance program will be identical to the model provided, but suggests that each entity make a good faith commitment to ensure that their compliance program is successful.<sup>156</sup> Furthermore, the OIG recognizes that each program should be tailored to fit the needs of individual hospitals.<sup>157</sup>

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151. See Ruthann Russo & Joseph J. Russo, *Healthcare Compliance Plans: Good Business Practice for the New Millenium*, J. AHIMA, (last visited Oct. 24, 2000), at <http://www.ahima.org/journal>.

152. *Id.*

153. See Carole L. Basri, *The Office of Inspector General’s Compliance Program Guidance for Hospitals*, 1998 PRAC. L. INST. 857, 865.

154. See *id.* at 865-66.

155. *Id.* at 902.

156. *Id.* at 902-03.

157. See Russo & Russo, *supra* note 151.

## 2. Benefits of a Compliance Program

The OIG's primary goal is to ensure that the law is not violated,<sup>158</sup> but compliance programs provide numerous additional benefits. A compliance program provides early detection of wrongful conduct which decreases the potential for liability and prevents *qui tam* suits.<sup>159</sup>

Additionally, compliance programs present a number of economic advantages. Such programs reduce legal costs by encouraging employees to report potential problems to the employer before filing a *qui tam* suit.<sup>160</sup> They also improve the speed and quality of responses to lawsuits once they arise.<sup>161</sup> Moreover, the costs of implementing a voluntary compliance program are tax deductible and the legal costs are reimbursable on a Medicare cost report, so long as they are reasonably related to patient care.<sup>162</sup>

Lastly, compliance programs may improve employee morale,<sup>163</sup> thereby acting as a deterrent against the filing of a *qui tam* claim by an employee who discovers conduct that may not be proper. There is no time like the present for hospitals and healthcare providers to guard against liability on their own terms.

## CONCLUSION

Although the decision in *Vermont Agency* is believed by some to be the death knell for *qui tam* litigation, the case stands for the proposition that "enough is enough" when it comes to filing *qui tam* suits which may or may not have merit. While the Court implicitly agrees that the FCA is a powerful tool in the fight against healthcare fraud, it also realizes that the

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158. Katheryn Ehler-Lejcher, *The Expansion of Corporate Compliance: Guidance for Health Care Entities*, 25 WM. MITCHELL L. REV. 1339, 1378 (1999).

159. *See id.* at 1379.

160. *Id.* at 1380.

161. *See id.* ("An effective compliance program would include the development of ongoing monitoring and review procedures to ensure compliance procedures *are* effective and to ensure compliance with new developments in the law."). Parver & Simon, *supra* note 145, at 3 (emphasis added).

162. *Id.* at 1381 & n.287 ("However, costs from the implementation of a corporate compliance program imposed by the government as a result of a civil . . . judgment or settlement are not reimbursable."). *See also* Bartrum & Bryant, *supra* note 145, at 55-56.

163. *See* Ehler-Lejcher, *supra* note 158, at 1382.

FCA has significant potential for abuse.

In the past, *qui tam* claims have undermined the effectiveness of federal and state regulatory efforts to adopt compliance programs;<sup>164</sup> however, *Vermont Agency* provides positive incentives for administrators to employ these kinds of enforcement mechanisms to protect against fraud. Because FCA liability “is triggered whenever any statement made to secure reimbursement is inaccurate,”<sup>165</sup> compliance programs benefit healthcare providers by halting any potential fraud from the outset, thereby restricting *qui tam* liability. Alternatively, it has been suggested that the FCA be amended once again to accentuate the positive of the *qui tam* provision, and filter out its destructive effects on the healthcare community.<sup>166</sup>

*Vermont Agency* sends the message to both the Government and the healthcare community that the *qui tam* provision of the FCA can no longer be used as a crutch for enforcing fraud and abuse. Rather, the Court has set boundaries<sup>167</sup> on its use for the implicit purpose of creating a more efficient instrument to combat fraud. The Court has opened the door to reform the Government’s fraud and abuse enforcement mechanisms and it is now time to heed the advice of the highest court in the land.

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164. See Ruhnka, et al., *supra* note 16, at 304.

165. See *id.*

166. See *id.* at 305 (“[*Q*]ui tam probably should be retained, but in modified form. We suggest that it is time for Congress to revisit the FCA to eliminate some of its more destructive effects on regulatory agency efforts to achieve more cost-effective compliance through voluntary compliance and self-reporting programs.”).

167. See *Vermont Agency*, 529 U.S. 765, 787 (2000) (The Court erected a wall around a private individual’s ability to bring suit in federal court under the FCA by disallowing a state (or state agency) to be subject to liability in such actions).



