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Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions

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NOTES

Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions

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I. INTRODUCTION

As skyrocketing health care costs threaten the survival of federally funded health care programs, government prosecutors and private parties are frequently turning to the Civil False Claims Act¹ as their weapon of choice² in waging the "war" on health care fraud and abuse.³ The False Claims Act is a powerful federal statute that creates liability for the submission of false claims to the federal government. In the health care industry, a typical false claims plaintiff asserts that a health care provider submitted a Medicare or Medicaid claim to the federal government which was "false" because the

1. 31 U.S.C. § 3729(a) (1994).

2. See Lisa M. Rockelli et al., *Congress Returns to Medicare Reform*, DAILY REPORT FOR EXECUTIVES, Jan. 15, 1997, at *Qui Tams/Lawsuits*, available in LEXIS, Exec Library, DREXEC file (calling the False Claims Act the "Government's sanction of choice"). The body of law that deals with these concerns is often called "Medicare and Medicaid fraud and abuse law," although these regulations actually cover a much wider scope of activities. Laws such as the False Claims Act deal with Medicare and Medicaid abuse by punishing those who miscode services, bill for treatment which is not medically necessary, or bill for services not actually performed. 2 BARRY R. FURROW ET AL., *HEALTH LAW* § 15-1, at 245 (1995).

3. See John T. Boese, *Qui Tam, Beyond Government Contracts*, in QUI TAM, BEYOND GOVERNMENT CONTRACTS at 7, 16-17 (PLI Litig. & Admin. Practice Course Handbook Series No. H-456, 1993).

Health care fraud has played a substantial role in the recent escalation of costs for federally subsidized medical care costs. Kim H. Roeder & Sara Kay Sledge, *Concentrated Government Efforts to Prosecute Fraud, and Corporate Sentencing Guidelines, Make Compliance Programs Necessary for Health Care Organizations*, NAT'L L.J., Oct. 14, 1996, at B5.

Health care fraud is the United States Department of Justice's second priority, ranking after violent crime. See *Keeping Fraudulent Providers Out of Medicare and Medicaid: Hearings Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 51 (1995) (statement of Gerald M. Stern, Special Counsel, Health Care Fraud, Department of Justice); see also Gregory T. Jaeger & Jonathan L. Diesenhaus, *Fractious Fraud Fights*, LEGAL TIMES, Oct. 21, 1996, at S32 (noting the Justice Department's "high priority" for combating health fraud). The recently declared "war" on health care fraud and abuse has received much media and political attention. See Michael M. Mustokoff & Michael S. Yecies, *Health Care Fraud and Abuse: The Government's Most Wanted List*, THE LEGAL INTELLIGENCER, Sept. 18, 1996, at 9 (explaining that health care fraud and abuse is of the utmost concern to policymakers and politicians). The perceived threat is so strong that every United States Attorney's office now has a criminal and civil health care fraud coordinator to facilitate prosecution of these cases. See *id.*

provider mischarged or overcharged the government.⁴ In these cases, the provider seeks to defraud the government by submitting false assertions or false data.⁵

Recent revisions of the False Claims Act, however, have encouraged prosecutors and private parties to apply the Act to the health care sector in new and creative ways. One of these innovations is the "tainted claim." The tainted claim theory of False Claims Act liability asserts that a violation of a separate federal statute "taints," or makes false, claims subsequently filed with the government. In the health care arena, well-publicized tainted claims have involved allegations that a violation of the Medicare/Medicaid anti-kickback statute⁶ tainted a subsequently filed claim for Medicare or Medicaid reimbursement.⁷ This Note refers to these claims as "anti-kickback-based tainted claims." Under this new theory of liability, the initial anti-kickback violation renders a subsequent Medicare claim "false" no matter how medically necessary and competently administered the services were, or how bona fide the claim for payment actually is.⁸ Thus, the alleged violation of the anti-kickback statute makes a claim "false" not because the claim is incorrect, falsified, or misleading, but because the provider violated a separate federal law.

The first purpose of this Note is to highlight the existence of anti-kickback-based tainted claims and outline their development. Accordingly, Part II of this Note gives a brief summary of the False Claims Act and its *qui tam* provisions which allow private citizens to bring false claims actions on behalf of the government. Part III provides a similar overview of the Medicare/Medicaid anti-kickback

4. See Boese, *supra* note 3, at 61-62. Common allegations include using false diagnostic codes, *United States v. Metzinger*, No. 94-7520, 1996 U.S. Dist. LEXIS 13666, at *1 (E.D. Pa. Sept. 17, 1996), ordering unnecessary tests, *United States v. Mahar*, 801 F.2d 1477, 1481 (6th Cir. 1986), seeking payment for services that were not rendered, *United States v. Pani*, 717 F. Supp. 1013, 1014 (S.D.N.Y. 1989), and seeking reimbursement for services that were performed but not medically necessary, *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D. Pa. 1991).

5. Some believe the government is wielding this power indiscriminately. As one critic noted, in their efforts to remove fraudulent parties from the health care system, prosecutors and investigators may be "perform[ing] surgery with a butcher knife." Richard A. Feinstein et al., *The Fraud Epidemic*, LEGAL TIMES, Nov. 16, 1992, at 7 (stating that one result of overzealous enforcement is that "good practitioners, fearing civil or criminal claims, may begin to practice a new kind of defensive medicine through underutilization").

6. 42 U.S.C. § 1320a-7b(b) (1994). The anti-kickback provisions are discussed *infra* notes 32-41 and accompanying text.

7. The most publicized of these cases are *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1508 (M.D. Tenn. 1996), and *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

8. See Julie Johnsson, *Supreme Court to Rule on Limits in Whistle-blower Suits*, AM. MED. NEWS, Feb. 17, 1997, at 1.

statute. Part IV outlines the doctrinal and legal evolution of anti-kickback-based tainted claims and summarizes the principal arguments advanced against the viability of anti-kickback-based tainted claims, namely that a violation of the anti-kickback statute cannot render a claim "false" for purposes of the False Claims Act because the violation cannot and does not cause the government injury.

This Note's second purpose is to point out that, in focusing on the False Claims Act's requirement that a claim be "false or fraudulent," the courts, critics, and others have ignored the underlying structure of these new claims, which requires a false claims plaintiff to prove a violation of the anti-kickback statute *as a predicate* for proving a health care provider's claim false. Accordingly, Part V overviews the implications of the anti-kickback-based tainted claim's bifurcated structure and asserts that in recognizing anti-kickback-based tainted claims as valid causes of action, courts have implicitly allowed private citizens, as *qui tam* plaintiffs, to prosecute violations of the anti-kickback statute. After concluding that the anti-kickback statute contains no private cause of action or *qui tam* rights, this Note asserts that a private citizen can bring an anti-kickback-based tainted claim only by using the False Claims Act as a statutory "vehicle."

Concluding that the False Claims Act could not serve as a mechanism for the prosecution of every other statutory violation, this Note advocates analysis of the anti-kickback statute's legislative history to determine whether Congress intended for private citizens to prosecute violations of the anti-kickback statute by using the statutory vehicle of the False Claims Act. Specifically, this Note draws on the standards developed under analogous section 1983 claims as a basis for evaluating whether allowing a private citizen to prove an anti-kickback claim through such a statutory vehicle is consistent with congressional intent. This Note concludes that the anti-kickback statute's comprehensive enforcement scheme demonstrates a firm congressional intent to delegate all anti-kickback enforcement power to the federal government. Accordingly, courts should not allow *qui tam* plaintiffs to pursue anti-kickback claims under the statutory vehicle of the False Claims Act.

II. THE CIVIL FALSE CLAIMS ACT

The False Claims Act (the "Act"),⁹ is a civil statute¹⁰ designed to ensure the integrity of federal programs and the Federal Treasury by deterring submission of false or fraudulent claims to the government, to provide restitution to the government for money fraudulently taken from it, and to punish those who defraud the government.¹¹ A false claims action may be brought by the government or by a private party known as a qui tam plaintiff on behalf of the government.¹²

The focus of False Claims Act civil enforcement actions recently shifted from the defense contracting industry to the health care industry.¹³ In particular, use of the False Claims Act to combat health care fraud and abuse is on the rise¹⁴ due, in part, to recent False Claims Act amendments that lowered the Act's scienter requirement,

9. Congress enacted the False Claims Act in 1863 in response to fraud and price-gouging during the Civil War. *See* Act of March 2, 1863, ch. 67, 12 Stat. 696; *see also* S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273 (fixing the impetus for passage of the Act in "rampant fraud in Civil War defense contracts"). For a comprehensive discussion of the Act's history, *see United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649-52 (D.C. Cir. 1994). The Act was revitalized in 1986 in an effort to combat the public and political perception of increasing fraud against the federal government. In its current form, the Civil False Claims Act reads in pertinent part:

(a) Liability for certain acts.—Any person who—

- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
- (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
- (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . . is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person

31 U.S.C. § 3729 (1994). Exceptions are also listed in the Act, along with circumstances requiring assessment of certain damages and discretionary assessment of attorney's fees. *See id.*

10. Knowing presentation of a false claim to the government can also be a criminal act. For purposes of this Note, however, "false claims" refers to the civil cause of action unless otherwise noted.

11. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Insur. Co.*, 721 F. Supp. 1247, 1253 (S.D. Fla. 1989).

12. *See* 31 U.S.C. § 3730(b). Qui tam actions are discussed further in Part II.C.

13. *See* U.S. DEPT OF JUSTICE, JUSTICE DEPARTMENT RECOVERS OVER \$1 BILLION IN QUI TAM AWARDS AND SETTLEMENTS (Oct. 18, 1995), *available in* 1995 WL 614572. The legislative history accompanying the 1986 Amendments makes it clear that the Act applies to Medicare and Medicaid claims. *See* S. REP. NO. 99-345, at 9 (stating that "[a] false claim for reimbursement under Medicare, Medicaid or similar program is actionable under the act").

14. *See* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1802 tbl. 1 (1996) (documenting rise in qui tam filings from 1987-1995); Catherine Trevison, *Whistleblower Cases on the Rise*, TENNESSEAN, Feb. 2, 1998, at B1 (noting that qui tam lawsuits have doubled in the past two years).

thereby making it easier to obtain substantial monetary rewards for successful False Claims Act actions.¹⁵

A. *Elements of a Successful False Claims Action*

In a typical false claims case, a plaintiff, whether it be the government or a civil litigant, must prove three elements to prevail. First, a plaintiff must prove that the defendant submitted a "claim" to the government or that the defendant caused a third party to submit a claim to the government.¹⁶ Second, the plaintiff must prove that the claim was false or fraudulent.¹⁷ Finally, the plaintiff must prove that the defendant either knowingly submitted a false or fraudulent claim or knowingly caused a third party to submit a false claim.¹⁸

B. *Penalties and Damages*

The large recoveries that occur under the False Claims Act stem from the Act's two-tiered recovery provisions that allow the

15. See 31 U.S.C. § 3729(a)(7)(C) (specifically noting that "actual knowledge" is *not* required under the False Claims Act). In the federal fiscal year of 1995, qui tam plaintiffs recovered approximately \$243 million in statutory "bounty" for their assistance in bringing these claims. See U.S. DEPT OF JUSTICE, *supra* note 13. Thirty-six percent of these cases involved health care fraud. See *id.* Some individuals have collected as much as \$9 million. See Tina Cassidy, *Blowing the Whistle Has Big Rewards*, BOSTON GLOBE, Oct. 10, 1996, at A1. One qui tam plaintiff received \$5.52 million for his efforts in bringing Medicare fraud to the government's attention. See *United States ex rel. Flynn v. Blue Cross/Blue Shield*, No. L93-1794, 1995 WL 71329, at *9 (D. Md. Jan. 10, 1995). Michael T. Kogut, a Massachusetts Assistant Attorney General, stated that "[t]he number of Qui Tam actions being filed . . . has risen enormously in the last few years and many of them are in the health care industry." Tina Cassidy, *Squeal of Fortune*, BOSTON GLOBE, Oct. 22, 1996, at C1. Kogut then referred to qui tam actions as a "revenue raiser." *Id.*

16. See 31 U.S.C. § 3729(a)(1). The definition of "claim" under the Act has been the subject of extensive litigation. See *id.* § 3729(c) (defining "claim" as "any request or demand . . . for money or property). The common understanding of a "claim" is "any demand or request for payment" including invoices, vouchers, and oral or written requests for payment. Boese, *supra* note 3, at 23. The 1986 Amendments added subsection (c) to 31 U.S.C. § 3729, which defines a claim and specifically notes that indirect claims are included. See *id.* at 24. Accordingly, claims submitted to either the federal government under Medicare or to state agencies under Medicaid are subject to civil enforcement under the False Claims Act. See S. REP. NO. 99-345, at 22.

17. See 31 U.S.C. § 3729(a).

18. See *id.* § 3729(b). The 1986 Amendments make clear that specific intent to defraud is not required. Instead, "knowingly" means that the defendant had actual knowledge of the information, acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard of the truth or falsity of the information. See *id.*; see also *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) (stating error alone, especially errors of judgment, will not trigger false claims liability). Mere negligence does not satisfy this threshold. See Boese, *supra* note 3, at 27.

government to assess treble damages¹⁹ and a “per claim” penalty of up to \$10,000.²⁰ Significantly, these penalties are calculated “per claim,” which means “per line item,” not “per bill.”²¹ Because a single bill may contain many line items, multi-million dollar False Claims Act recoveries are becoming commonplace.²²

C. *The Qui Tam Provisions*

Another factor contributing to the False Claims Act's increased popularity is the Act's recently amended qui tam provisions,²³ which

19. See 31 U.S.C. § 3729(a). The provision states that a False Claims Act violator “is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.” *Id.*

20. See *id.* These civil penalties are mandatory: The law requires courts to impose these “fines” on the defendant. See *id.* (providing that courts may assess treble damages and must assess at least double damages, even when defendant has fully cooperated). Civil penalties are independent from damages. See *United States v. Diamond*, 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987).

21. See Michael Pretzer, *Why You Should Have Been at the Health Lawyers' Convention, National Health Lawyers Association's 1996 Conference*, MED. ECON., Aug. 26, 1996, at 160, 166.

22. For example, in October 1996, the Government netted \$119 million in civil and criminal penalties when it settled with Damon Clinical Laboratories. *Medical Lab to Pay \$187 Million in Civil, Criminal Fraud Penalties*, 5 Health L. Rptr. (BNA) 1522, at 1522 (Oct. 17, 1996).

23. See 31 U.S.C. § 3730(b). “Qui tam” is a term derived from the Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*,” which translates as “who sues on behalf of the king as well as for himself.” BLACK'S LAW DICTIONARY 1251 (6th ed. 1990). Qui tam plaintiffs, also known as “bounty hunters,” “whistleblowers,” “relators,” and “informers,” bring false claims actions on behalf of the government.

Congress added the qui tam provisions because of the difficulty in detecting fraud without the assistance of those who are either close observers or are involved in the fraud. See S. REP. NO. 99-345, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269. For a discussion of qui tam actions, see generally Frances E. Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935 (1993); QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT, SECTION OF PUBLIC CONTRACT LAW PROCUREMENT FRAUD COMM., A.B.A. (1994).

In pertinent part, the section reads:

(b) Actions by private persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b).

The Act's current qui tam provisions are the result of congressional efforts to resolve the inherent tension between encouraging private citizens to expose fraud while preventing opportunistic or “parasitic” suits which clog the federal system. See *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8th Cir. 1995) (noting that the False Claims Act attempts to resolve the tension between encouraging private reporting and allowing suits by those who did not discover the fraud); *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) (“The history of the FCA qui tam provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.”). Congress amended the False Claims Act in the 1940s to avoid the

authorize private citizens to bring an action in the name of the government against those persons or entities who submit false claims to the government. To qualify as a qui tam plaintiff, the private citizen must base his or her case on information that has not been publicly disclosed, unless the qui tam plaintiff is the "original source" of that information.²⁴ Further, the qui tam plaintiff must follow the Act's specific filing procedures.²⁵ Successful qui tam plaintiffs can reap up to thirty percent of the government's recovery in successful False Claims Act actions.²⁶ In addition, qui tam plaintiffs may be entitled to attorney's fees and costs.²⁷ In sum, qui tam plaintiffs, and by implication, qui tam plaintiffs' attorneys, can make a healthy profit from a single false claims action.

most visible abuses of qui tam actions—the use of public information to file qui tam actions. Prior to this amendment, "mere busybod[ies]" could "race to the courthouse" to file actions based on information copied from government files and criminal indictments. *False Claims Reform Act: Hearings on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary*, 99th Cong. 42 (1996) (statement of Jay B. Stephens, Deputy Associate Attorney General, U.S. Dep't of Justice).

When public perceptions of increasing fraud on the government grew during the 1980s, however, Congress resurrected and reinforced the False Claims Act. In 1986, Congress lowered the Act's scienter requirement to make false claims prosecution easier. See False Claims Act Amendments Act of 1986, Pub. L. 99-562, § 2(b), 100 Stat. 3153 (codified as amended at 31 U.S.C. § 3729(b)) (expanding "knowing" to include deliberate ignorance or reckless disregard). At the same time, Congress raised both the amount of a potential government award and the percentage of that award a qui tam plaintiff could take home after successful prosecution or settlement, and amended the statute to provide for treble damages and a per claim penalty of \$10,000. See *id.* § 2(a)(7) (codified as amended at 31 U.S.C. § 3729(a)(7)). A qui tam plaintiff can receive up to 30% of this award, whereas previously he had been limited to 15%. See *id.* § 3(d)(2) (codified as amended at 31 U.S.C. § 3730(d)(2)).

24. 31 U.S.C. § 3730(e)(4). See generally Susan G. Fentin, Note, *The False Claims Act—Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. § 3730(e)(4)*, 17 W. NEW ENG. L. REV. 255 (1995). In other words, a qui tam plaintiff cannot simply hear about fraudulent activity on the six o'clock news, then run to the courthouse to file a false claims action.

25. Procedures for qui tam plaintiffs differ from procedures for government prosecutors in these actions. A qui tam plaintiff must first file his complaint under seal and serve the Attorney General with a copy. See 31 U.S.C. § 3730(b)(2). Then, the qui tam plaintiff must make a written disclosure of material evidence and information. See *id.* § 3730(b). Within 60 days, the government must decide whether to intervene and take primary responsibility for the case. See *id.* § 3730(b)(2). After the 60-day period expires the government may intervene upon a showing of good cause. See *id.* § 3730(c)(3). If the government does not intervene within the first 60 days, the qui tam plaintiff may proceed uninhibited. As a matter of practice, the Department of Justice seldom intervenes to dismiss a qui tam plaintiff's case. See Kovacic, *supra* note 14, at 1820-21.

In theory, the current Act allows the government to intervene in those cases it can pursue with its own resources while encouraging meritorious qui tam cases it is not equipped to deal with alone and discouraging groundless or vindictive cases.

26. See 31 U.S.C. § 3730(d)(2). A qui tam plaintiff is rewarded even if the government intervenes and eventually wins or settles the case. Qui tam rewards are limited, however, to 15%-20% of the government proceeds in cases in which the government intervenes. See *id.* U.S.C. § 3730(d)(1).

27. See *id.* § 3730(d)(1).

A qui tam plaintiff needs no government approval to file or pursue a false claims action.²⁸ However, during the sixty days following the filing of the qui tam plaintiff's case, the government may intervene and take control or petition the court to dismiss the case.²⁹ Yet, even in cases in which the government steps in, the qui tam plaintiff has the right to "unrestricted participation" in the litigation unless the case is "dilatatory, harassing, repetitious, irrelevant or unduly expensive."³⁰ After expiration of the sixty-day period, the government may intervene only with court approval upon a finding of good cause.³¹

III. THE ANTI-KICKBACK STATUTE

The second statutory basis for anti-kickback-based tainted claims is, of course, the anti-kickback statute itself. This statute prohibits anyone from knowingly and willfully³² soliciting, receiving, offering to pay, or paying any remuneration to induce or in return for

28. See *id.* § 3730(b)(1). The increasing number of qui tam filings has depleted the Department of Justice's Civil Division resources. In the six months prior to the 1986 Amendments, Civil Division attorneys spent 1,100 hours supervising and evaluating these cases. From January to June 1990, the same group spent 11,000 hours on these claims. See Kovacic, *supra* note 14, at 1840.

29. See 31 U.S.C. § 3730(b)(2). Forcing the Department of Justice to co-litigate with qui tam plaintiffs has caused a number of problems. See Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409, 428-30 (1993). The qui tam plaintiff may have a stake in seeing that the government does not intervene, as sole responsibility for the case assures a higher reward upon success. See *supra* note 26 and accompanying text.

30. 31 U.S.C. § 3730(c)(2)(C)-(D). The Act's provisions allow a qui tam plaintiff to "continue in the action as a full party" even when the government has intervened. *False Claims Reform Act: Hearings on S.1562 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary*, 99th Cong. 41 (1996) (statement of Jay B. Stephens, Deputy Associate Attorney General, U.S. Dep't of Justice).

31. See 31 U.S.C. § 3730(c)(3).

32. 42 U.S.C. § 1320a-7b(b)(1)-(2). At present, the actual standard for the "knowingly" and "willfully" requirement remains unsettled. While actual knowledge of a claim's falsity will confer liability under the statute, it is unclear what level of "constructive knowledge" will result in liability. See Robert Salcido, *Application of the False Claims Act "Knowledge" Standard: What One Must Know to be Held Liable Under the Act*, 8 HEALTH LAW. 1, 3-4 (1996). See generally Tamsen D. Love, Note, *Toward a Fair and Practical Definition of "Willfully" in the Medicare/Medicaid Anti-kickback Statute*, 50 VAND. L. REV. 1029 (1997). At least one court has attempted to clarify the anti-kickback statute's scienter requirement. See *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985). Under *Greber*, a violation of the anti-kickback law occurs when "an intent to induce is a consideration," and prosecutors do not have to prove that the only purpose, or even a dominant, predominant, or significant purpose was the inducement of future referrals. *Id.* at 71. Compare *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399-400 (1995) (stating a defendant must know conduct was prohibited by statute), with *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) (stating that a defendant must "know that his conduct was wrongful"), *cert. denied*, 117 S. Ct. 2452 (1997).

the reference of items or services for which payment may be made under a federal health care program.³³ Violators may be fined up to \$25,000, imprisoned up to five years, or both.³⁴ The remedial purpose of the statute is to enable the Secretary of the Department of Health and Human Services ("HHS") to protect federally funded health care programs, as well as their beneficiaries and recipients, from potentially harmful conduct.³⁵ The Department of Justice, under the Attorney General, enforces this statute under its express statutory authority to enforce the laws of the United States.³⁶ Unlike the False Claims Act, the anti-kickback statute contains neither an explicit private right of action, nor any *qui tam* provisions.

Courts have interpreted the anti-kickback statute broadly, and have held that if any purpose for the referral, even if not a dominant or significant purpose, was to induce future referrals, the conduct falls within the statute's reach.³⁷ If a provider's conduct falls within the reach of the statute, the providers can be prosecuted unless the conduct falls within one of the narrow statutory or regulatory exceptions known as "safe harbors."³⁸ The government has acknowledged the overbreadth of the statute³⁹ and has effected

33. See 42 U.S.C.A. § 1320a-7b(b)(1) (West Supp. 1997).

34. See 42 U.S.C. § 1320a-7b(b)(1)-(2) (1994).

35. The purpose of the anti-kickback statute is "to strengthen the capability of the government to detect, prosecute, and punish fraudulent activities under the medicare and medicaid programs." H.R. REP. NO. 95-393, at 1 (1977), reprinted in 1977 U.S.C.C.A.N. 3039, 3040; see also *Hanlester Network*, 51 F.3d at 1401-02 ("The remedial purpose . . . is to . . . protect federally funded health care programs . . . from future conduct which is or might be harmful.").

36. 28 U.S.C. § 516 (1994) provides that: "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party . . . is reserved to the officers of the Department of Justice, under direction of the Attorney General."

37. In *United States v. Greber*, 760 F.2d at 72, the court held that if one purpose of the remuneration is to induce future referrals, the statute is violated. Other courts have supported this holding. See *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20, 30 (1st Cir. 1989) (stating that the expansive reading of the statute in *Greber* makes irrelevant any discussion of the sole versus primary reason for payments because, under *Greber*, any amount of inducement is illegal); *United States v. Kats*, 871 F.2d 105, 108 & n.1 (9th Cir. 1989) (*per curiam*) (noting that the statute is violated if the remuneration is not "wholly" attributable to the delivery of goods and services); see also James F. Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 AM. J.L. & MED. 205, 211-19 (1996) (discussing *Greber's* implication for the evolving health care industry).

38. See 42 U.S.C. § 1320a-7b(b)(3) (statutory safe harbors); Program Integrity—Medicare and State Health Care Programs, 42 C.F.R. § 1001.952 (1997) (regulatory safe harbors). For a discussion of the safe harbors, see Blumstein, *supra* note 37, at 219-25 (discussing and criticizing the safe harbor provisions).

39. See, e.g., S. REP. NO. 100-109, at 27 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 707-08 (recommending statutory change to identify which commercial arrangements will trigger anti-kickback liability). The House Ways and Means Committee specifically stated that the 1996 amendments were made to ensure that existing law would not chill legitimate business ar-

statutory and regulatory changes in an attempt to provide protection for “innocent conduct that would otherwise be swept up in the fraud and abuse dragnet.”⁴⁰

Specifically, in 1996, Congress amended the anti-kickback statute and narrowed its scope by directing the Office of the Inspector General (“OIG”) to create new safe harbors, making advisory opinions mandatory, and creating a panel to coordinate health care investigations between the various government groups charged with implementing the statute.⁴¹

IV. THE TAINTED CLAIM THEORY OF FALSE CLAIMS ACT LIABILITY

Instead of alleging that a claim is false because it mischarged the government, a plaintiff under the “tainted claim” theory of False Claims Act liability asserts that a violation of a federal statute causes a “taint” that makes all subsequently filed federal claims “false.”⁴²

In the health care arena, the statutes giving rise to such tainted claims include those laws that govern the structure of health care business arrangements and general provider practices, such as the anti-kickback statute, not those that govern the submission of actual claims.⁴³

rangements. See H.R. REP. NO. 104-496, at 84 (1996), reprinted in 1996 U.S.C.C.A.N. 1865, 1884-85.

40. See Blumstein, *supra* note 37, at 211 n.54. See generally Robert Salcido, *Mixing Oil and Water: The Government’s Mistaken Use of the Medicare Anti-Kickback Statute in False Claims Act Prosecutions*, 6 ANNALS HEALTH L. 105, 109-15 (1997) (outlining history of the anti-kickback statute’s amendments).

41. A number of federal and state bodies have concurrent jurisdiction over health care fraud problems. For example, a health care investigation could involve the Federal Bureau of Investigation, the Department of Justice (including the local United States Attorney’s Office), the Inspector General of the Department of Health and Human Services, the Internal Revenue Service, Medicaid Agencies, and Medicaid Fraud Control Units. See *Current Fraud and Abuse Activities*, OHIO HEALTH LAW UPDATE, June 1996, at 6, 7.

42. Plaintiffs have also used statutory or regulatory violations as the basis for a False Claims Act action in other areas of law. For a brief discussion of the use of arguments akin to the tainted claim theory of liability in environmental cases, see generally Paul W. Morenberg, Comment, *Environmental Fraud by Government Contractors: A New Application of the False Claims Act*, 22 B.C. ENVTL. AFF. L. REV., 623, 665-68 (1995).

43. See, e.g., 42 U.S.C. § 1320a-7b(b) (providing separate penalties for receiving kickbacks). Another statute giving rise to tainted claims actions is 42 U.S.C. § 1395nn (limiting physician self-referrals).

A. Development of the Tainted Claim Theory

Critics have labelled the tainted claim theory of False Claims Act liability an "innovation" on the False Claims Act.⁴⁴ Some have called the theory a "leap of logic."⁴⁵ Although the tainted claim may be a new strain of false claims action,⁴⁶ its development was a somewhat predictable by-product of the new incentives Congress provided for use of the False Claims Act.⁴⁷ For years, government prosecutors and qui tam plaintiffs have used the False Claims Act to combat more than the basic "false" claim for substandard goods and services.⁴⁸ False Claims Act cases based on false negotiations, for example, appear to demonstrate that False Claims Act liability attaches not only to claims containing actual false information, but also to claims based on material misrepresentations to qualify for government privileges or services.⁴⁹ False Claims Act liability can also arise in cases involving a contractor's false certification of compliance with federal laws or regulations.⁵⁰ The typical "false certification" claim occurs when a contractor uses false statements to become eligible for government benefits.⁵¹ One common type of "false certification" claim, for example, alleges that a contractor made false statements or assertions to obtain a federal loan guarantee.⁵²

44. Julie Johnsson, *A Gold Mine in False Claims*, 39 AM. MED. NEWS, Oct. 28, 1996, at 1, 28; see also Kovacic, *supra* note 14, at 1805-06 (noting that the increased number of qui tam plaintiffs and the substantial recoveries received by some of them "have provided the means and incentive to explore the application of the far-reaching theories of fraud to a wider range of contractor conduct").

45. *Qui Tam Plaintiffs Often Arguing False Claims Violation, Attorney Says*, Health Care Daily (BNA) (June 12, 1996). The same critics concede, however, that these actions are surviving dismissal motions. See *id.*

46. See Jaeger & Diesenhaus, *supra* note 3, at S32 (explaining that the increase in False Claims Act cases has "spawned new theories of liability, many of which stretch the boundaries of the FCA beyond its logical jurisdictional limits").

47. See *supra* notes 23-27 and accompanying text (describing incentives for using the False Claims Act under the 1986 amendments).

48. See *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) (finding liability under the False Claims Act where the defendant did not use the type of parts specified in a government contract even though the parts that the defendant supplied were just as good as the specified parts).

49. See *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 461 (5th Cir. 1977).

50. See Kovacic, *supra* note 14, at 1811 (discussing use of regulatory compliance certification violations to supply requisite 'falsity' for False Claims Act actions).

51. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-27 to 1-30 (1997).

52. See *United States v. Neifert-White Co.*, 390 U.S. 228 (1968). The Court held the defendant liable under the False Claims Act for a fraudulent federal loan application because he made a false statement "with the purpose and effect of inducing the Government immediately to part with money." *Id.* at 232.

These cases are valid false claims actions even if the source of the fraud is not the substantive information in the claim itself but a false representation of compliance with a statutory or regulatory provision.⁵³ Not all false certifications, however, will give rise to false claims liability. Rather, a government contractor must falsely certify compliance with some regulation or law which is a prerequisite for obtaining a government benefit.⁵⁴

The “false certification” theory of liability led to cases based on contractors’ “implied certification” of compliance with laws or regulations. This development grew out of the 1986 amendments to the False Claims Act, which lowered the Act’s scienter requirement and made recovery for these actions easier.⁵⁵ Under these provisions, “deliberate ignorance” or “reckless disregard” for the truth may establish the requisite intent.⁵⁶ This lower scienter requirement has allowed *qui tam* plaintiffs and government prosecutors to assert that contractors have an implied duty to comply with all applicable federal laws, regulations, rules, and procedures.⁵⁷ Either signing or submitting a claim to the government implies the “certification” of this compliance. Thus, the “implied certification” theory of False Claims Act liability extends the notion of “false certification” to new grounds: No explicit statement from the contractor is required to prove the claim.⁵⁸

Under a false or implied certification claim, the “fraud” comes not from the claim’s substantive information, but from a false representation of regulatory or statutory compliance. In these cases, the causal relationship between the fraud and the harm the False Claims Act was designed to prevent is more attenuated. Accordingly, analysis of the false claims action in these cases will focus on causation; specifically, on whether a relation exists between the subject

53. See Boese, *supra* note 3, at 76-77.

54. See *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (asserting a false certification can only create liability when it is a prerequisite to obtaining a government benefit), *cert. denied*, 117 S. Ct. 958 (1997); *United States ex rel. Fallon v. Accudyne Corp.*, 880 F. Supp. 636, 638 (W.D. Wis. 1995) (finding that false certification of compliance with environmental laws, where compliance is required under a government contract, states a valid cause of action under the False Claims Act where alleged false claims were made to induce payment).

55. See 31 U.S.C. § 3729(b) (1994) (establishing “knowing” as the requisite level of intent to falsify).

56. See *supra* note 23 (discussing amendments to the False Claims Act).

57. See *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8th Cir. 1995) (finding liability for noncompliance with the wage payment provisions of the Davis-Bacon Act).

58. See *United States v. Oakwood Downriver Med. Ctr.*, 687 F. Supp. 302, 304 (E.D. Mich. 1988) (indicating that false Health Care Financing Administration certifications are a proper basis for liability under the False Claims Act).

matter of the false statement and the government's loss.⁵⁹ Anti-kickback-based tainted claims, in contrast, simply assert that an alleged anti-kickback violation somehow renders a defendant's claim false. At present, the reasoning behind this assertion remains unclear. One explanation is that these plaintiffs are asserting nothing more than poorly argued implied certification claims. For an implied certification claim, a plaintiff would argue, first, that Medicare or Medicaid reimbursement submissions impose an affirmative obligation on health care providers to ensure that all claim information is accurate and in accordance with all pertinent statutes and HHS regulations.⁶⁰ According to this reasoning, when a health care provider's signature implies compliance with laws and regulations while, in fact, the provider has breached an HHS regulation, the provider has been "deliberately ignorant" of or has "recklessly disregarded" the truth.⁶¹ Second, the government cannot pay claims that are contrary to the governing federal rules and regulations, and providers have a duty to know the rules governing payment.⁶² Logically, then, because the rules governing payment imply a certification of statutory compliance, the submission of the nonconforming claim is the submission of a "false claim," as it requires the government to reimburse a provider not entitled to payment. Thus, even where a provider's assertion of compliance is

59. See Boese, *supra* note 3, at 76-77 (noting that those who supply false information to be eligible for federal housing assistance and who later default are liable under the False Claims Act).

60. Presumably, this argument stems from statements made in the 1986 Senate Report: "[T]hose doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." S. REP. NO. 99-345, at 7 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272.

The use of the tainted claim theory has not been restricted to the health care arena. For example, *Barth* involved a tainted claim argument for a federally funded construction project, but the court dismissed the case on the grounds that the qui tam plaintiff was not the "original source" of the information. 44 F.3d at 703. Other tainted claims actions have been successful. In *Fallon*, the court found that a violation of a federal environmental statute, the Clean Water Act, could serve as the basis for a false claims act action. See *United States ex rel. Fallon v. Accudyne*, 880 F. Supp. 636, 638 (W.D. Wis. 1995).

61. The viability of the anti-kickback-based tainted claim is directly related to the 1986 Amendments to the False Claims Act's scienter requirement. Notably, in *United States ex rel. Hughes v. Cook*, 498 F. Supp. 784, 787 (S.D. Miss. 1980), a qui tam plaintiff alleged a violation of state medical licensure laws as a basis for proving the falsity of defendant's claims. The court found the licensure violations insufficient to support a false claims action because the False Claims Act required a "knowing" violation at that time. As one critic noted, under the Act's current "deliberate ignorance" or "reckless disregard" standard, this case would probably have been decided differently. See David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, 4 ANN. HEALTH L. 127, 148 (1995).

62. See *supra* note 60.

not explicit, a statutory violation may still trigger false claims liability.

However, under the implied certification theory, the subject matter of falsity must be linked to the submission of a false claim. In other words, if tainted claims plaintiffs are, in fact, arguing under an implied certification theory, one would expect to see plaintiffs arguing the causal relation between the alleged anti-kickback violation and the government's payment of the claim. Courts, however, have not systematically required a plaintiff to show that the "taint" of the statutory violation caused the government to pay the claim.⁶³ Under an expansive view of the tainted claim theory, a plaintiff need not establish a "relation" or "nexus" between the violation and the government's "loss." Under this reasoning, once a provider violates a statute, *all* subsequently filed claims become false or fraudulent.

The implications surrounding acceptance of the tainted claim theory are frightening. If the violation of any federal statute renders subsequently filed claims false for False Claims Act purposes, hospitals and other health care organizations could incur false claims liability for a violation of an entirely distinct civil rights law, employment law, or environmental law. State law could be invoked as the basis for federal liability under the False Claims Act, regardless of whether state legislatures intended this application of the law.

B. Anti-Kickback-Based Tainted Claims

In the health care arena, tainted claims actions based on alleged violations of the anti-kickback statute or physician self-referral laws⁶⁴ have received much publicity.⁶⁵ Tainted claims based on anti-kickback violations have been especially attractive because the anti-kickback statute covers, and potentially makes illegal, many common

63. See *United States ex rel. Sanders v. East Ala. Healthcare Auth.*, 953 F. Supp. 1404, 1411 (M.D. Ala. 1996). In *Sanders*, the plaintiffs claimed that the defendant's Medicare and Medicaid claims were false because the defendant hospital was not in compliance with state licensing requirements prior to submitting claims, despite the requirements of Medicare and Medicaid regulations. See *id.* at 1410.

64. See 42 U.S.C. § 1395nn (1994). The "Stark statute" prohibits physicians from referring their Medicare patients to an entity, or clinical laboratory, for "designated health services," such as hospital in-patient and out-patient services where the referring doctor has a non-exempt "financial relationship" with that entity. *Id.* § 1395nn(a).

65. See, e.g., *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 900-01 (5th Cir. 1997); *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1508 (M.D. Tenn. 1996).

health care relationships and practices.⁶⁶ Early efforts to claim that illegal kickbacks made Medicare and Medicaid claims "false" appeared in the early 1990s.⁶⁷ The Department of Justice has used the anti-kickback-based tainted claim theory on numerous occasions since, but most of these cases ended in settlement or were decided on other grounds.⁶⁸

Qui tam plaintiffs have reached the courtroom with these anti-kickback-based tainted claims more often than the government.⁶⁹ For example, in *United States ex rel. Roy v. Anthony*, a qui tam plaintiff filed suit against a group of medical imaging companies for payment of referral fees that she alleged were anti-kickback violations.⁷⁰ The court, noting that a qui tam plaintiff has no private cause of action under the anti-kickback statute, stated that the relator would have to prove a violation of the False Claims Act to prevail.⁷¹ The court explained, however, "[m]erely pointing to violations of the [anti-kickback] statute will not suffice."⁷² According to the court, the qui tam plaintiff also needed to demonstrate how the anti-kickback violations were also False Claims Act violations or how the anti-

66. The provision is wide in scope and can be read to prohibit what otherwise might be seen as legitimate business practices. For example, seemingly benign practices such as spending funds on physician recruitment, or paying off physicians' student loans have been deemed "kickbacks." See Jaeger & Diesenhaus, *supra* note 3, at S32 (stating that a hospital's agreement with a physician to compensate for referrals may violate the anti-kickback provisions if it includes compensation that exceeds the "fair market value" of the services rendered).

67. See *United States v. Kensington Hosp.*, 760 F. Supp. 1120 (E.D. Pa. 1991). In *Kensington Hospital*, the court denied the defendant's motion to dismiss because the government had "stated a claim upon which relief may be granted, both because receiving payment for services not medically necessary is fraudulent, and because the government need not show injury resulting from the kickbacks in order to recover under the False Claims Act." *Id.* at 1128. Because the court decided this case on multiple grounds, it did not establish the tainted claim as a basis for a valid false claims action.

68. While many of these cases have ended in settlement, the apparent success of these claims out of court is disturbing. Health care providers have lost time, energy, and substantial sums of money in settling these cases. Both the 1994 National Medical Enterprises settlement for \$324 million and the 1995 Caremark settlement for \$161 million involved allegations of anti-kickback-based tainted claims. See Salcido, *supra* note 40, at 107 (discussing recent settlements). For a case involving tainted claims dismissed on other grounds, see *United States ex rel. Buntin v. Lahue*, No. 94-2101-GTV, 1996 WL 439298, at *3 (D. Kan. July 10, 1996) (granting motion to dismiss because plaintiff was not "original source" of information).

69. Perhaps the reason that the qui tam cases have reached the courts more frequently is that defendants may be less intimidated by qui tam plaintiffs than by the Department of Justice. After all, qui tam plaintiffs control a case only if the Government chooses not to intervene. This could imply that the case may be less compelling or less likely to succeed in court. For this reason, a defendant might be less inclined to settle these cases.

70. See 914 F. Supp. 1504, 1506 (S.D. Ohio 1994). Prior to *Roy*, the viability of using "tainted claims" to establish a False Claims Act violation had not been litigated to a judgment. See *Cincinnati Laboratory Faces Qui Tam Action*, OHIO HEALTH L. UPDATE, Nov. 5, 1994, at 5.

71. See *Roy*, 914 F. Supp. at 1506.

72. *Id.*

kickback violations either led to or caused False Claims Act violations.⁷³ Instead, the qui tam plaintiff claimed that the anti-kickback violations occurred during, and in connection with, the defendant's submission of Medicare and Medicaid claims.⁷⁴ The court found that the plaintiff's vague assertion that the kickbacks had tainted the claims created "a tenuous connection" between the anti-kickback statute and the False Claims Act.⁷⁵

This "tenuous connection," however, was sufficient to overcome defendant's motion to dismiss.⁷⁶ In so holding, the court in *Roy* implied, for the first time, that if a plaintiff could produce evidence that the kickbacks somehow "tainted" Medicare and Medicaid claims, the plaintiff might have a valid claim under the False Claims Act. This ruling, however, only suggested that the violations might support a false claims action, and if so, that the claim might also require a causal connection between the violation of the anti-kickback statute and the false claim. Thus, the court in *Roy* recognized the viability of an anti-kickback tainted claim action only skeptically.

In the seminal tainted claim case, *United States ex rel. Pogue v. American Healthcorp, Inc.*, the district court became the first court to hold explicitly that a violation of the anti-kickback statute could support a false claims action.⁷⁷ Reversing its decision that anti-kickback violations could not support a False Claims Act claim because the government suffered no injury, the *Pogue* court allowed the qui tam plaintiff to plead that a violation of the anti-kickback statute could make a claim "false" for False Claims Act purposes.⁷⁸ The qui tam plaintiff could prevail on his false claims action, the court explained, if he could show that the defendants engaged in fraudulent conduct with the purpose of inducing payment from the government.⁷⁹

The *Pogue* decision is a landmark in two ways. First, the case boldly stated what the *Roy* decision had asserted only timidly: A violation of the anti-kickback statute may serve as the basis for a

73. See *id.*

74. See *id.*

75. *Id.*

76. See *id.* at 1506-07.

77. 914 F. Supp. 1507, 1513 (M.D. Tenn. 1996). In *Pogue*, the plaintiff, a former director, was fired from the defendant's corporation. The plaintiff alleged that, in order to boost referrals, defendant American Healthcorp made payments to its medical directors. These payments, plaintiff asserted, ran afoul of the federal anti-kickback and physician self-referral statutes. See *Court Alters on Whether Injury Needed for a Violation of the False Claims Act*, 5 Health L. Rptr. (BNA) 75, 75 (Jan. 18, 1996) (reciting facts of *Pogue*); see also Jaeger & Diesenhaus, *supra* note 3, at S33 (discussing "seminal" nature of *Pogue*).

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

79. See *id.*

false claims action. Second, the court denied defendant's motion for summary judgment, rejecting the argument that the False Claims Act requires "injury to the government." The question of whether actual injury is a necessary element of a False Claims Act claim has become the principal issue in anti-kickback-based tainted claims cases.⁸⁰

The next case addressing the viability of anti-kickback-based tainted claims was *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*⁸¹ In *Thompson*, the qui tam plaintiff claimed that the defendant had created illegal investment arrangements for and provided financial inducements to physicians for patient referrals in violation of the physician self-referral law and the anti-kickback statute.⁸² These violations, the plaintiff claimed, made the claims "false" for False Claims Act purposes. The qui tam plaintiff divided this tainted claim argument into two separate ideas. First, he claimed that the violations of the anti-kickback statute and the Stark statute led to violations of the False Claims Act when the defendant submitted reimbursement claims arising from medical services.⁸³ Second, the plaintiff argued that the defendant submitted claims after falsely certifying their compliance with Medicare laws.⁸⁴ Thus, the false claims plaintiff asserted both a tainted claim and a false certification claim.

The district court disagreed with the plaintiff and dismissed the case. First, the district court judge asserted that the violation of the anti-kickback statute could not support a false claims action under Fifth Circuit precedent.⁸⁵ In the court's view, Fifth Circuit law required that a claim itself be fraudulent or false in order for False Claims Act liability to attach.⁸⁶ Second, the district court judge held that allegedly false certifications of compliance with Medicare laws did not qualify as false claims.⁸⁷

80. See, e.g., *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 900 (5th Cir. 1997); *Pogue*, 914 F. Supp. at 1513.

81. 938 F. Supp. 399 (S.D. Tex. 1996).

82. See *id.* at 401. Plaintiff alleged that the defendant had violated the Stark physician self-referral statute by accepting Medicare referrals from doctors who held financial interests in the defendant's companies. *Id.*

83. See *id.*

84. See *id.*

85. See *id.* at 405 (citing *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1987)).

86. See *id.*; see also *supra* note 18 and accompanying text.

87. See *Thompson*, 938 F. Supp. at 406. Some critics have asserted that the *Thompson* court's holding could also mean simply that if the plaintiff could identify the tainted claims and show how these claims were false under Fifth Circuit law, the claim would be viable. Viewed in this way, *Thompson* simply rejected the plaintiff's claim as pleaded, without rejecting the tainted claim theory of liability as a whole. See Jaeger & Diesenhaus, *supra* note 3, at S33.

On appeal, the Court of Appeals for the Fifth Circuit remanded the case on the plaintiff's false certification claim.⁸⁸ The court found that the plaintiff could prevail on his false claims action if he could show that the government conditioned the payment of defendant's claim on the defendant's certification of compliance with laws "regarding the provision of healthcare services," including the anti-kickback statute.⁸⁹ Yet, the court of appeals appeared to affirm the district court's rejection of the plaintiff's tainted claim theory that, a fortiori, violations of the anti-kickback statute rendered claims subsequently filed with the government false under the False Claims Act, at least to the extent these claims were based upon the anti-kickback statute specifically. Agreeing with the district court that "claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA,"⁹⁰ the appeals court reaffirmed that "[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA,"⁹¹ and that the False Claims Act could not be used as an "enforcement device" for every federal statute.⁹²

In sum, *Thompson* stands for the proposition that anti-kickback violations may support a claim under the False Claims Act, at least under a false certification argument, and the question of whether anti-kickback violations automatically "taint" or make claims filed with the government false remains undecided. Nevertheless, one thing is certain: With the increased media attention given to these claims and the large rewards qui tam plaintiffs stand to gain from them, private citizens will bring more false claims actions based on

88. See *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 904 (5th Cir. 1997).

89. *Id.* at 902.

90. *Id.*

91. *Id.* (citations omitted).

92. *Id.* The appeals court, however, did seem to contemplate that a tainted claim theory might be viable if based on violations of the Stark laws. In remanding the issue, the Fifth Circuit stated:

If the district court determines on remand that claims for services rendered in violation of the Stark laws are, in and of themselves, false or fraudulent claims under the FCA, the the court should also consider whether Thompson has sufficiently alleged that defendants committed separate and independent violations of the FCA.

Id. at 903. The separate treatment of the Stark laws is traceable to the laws' specific language, which prohibits payment of Medicare claims for services rendered in violation of the Stark laws' provisions. See 42 U.S.C. § 1395nn(g)(1) (1994); see also *Thompson*, 125 F.3d at 902 (relying on such language to bar a False Claim Act suit). The anti-kickback statute contains no such prohibition. The court of appeals, however, did not explain why and to what extent the Stark laws' prohibition against payment mandated a different result on the tainted claims issue.

anti-kickback violations,⁹³ that is, unless opponents of anti-kickback-based tainted claims can persuade courts or Congress to rule otherwise.

V. ARGUMENTS AGAINST ANTI-KICKBACK-BASED TAINTED CLAIMS HAVE FOCUSED ON THE FALSE CLAIMS ACT'S REQUIREMENT OF FALSITY OR FRAUDULENCE

Opposition to the validity of anti-kickback-based claims has been animated.⁹⁴ The critics of these claims have, for the most part, focused their arguments on the "falsity" requirement of False Claims Act claims.⁹⁵ Specifically, they argue that an anti-kickback violation cannot render a claim false for false claims purposes because the kickback does not create an injury to the government.

The False Claims Act does not define the terms "false" and "fraudulent."⁹⁶ Courts have stated that a claim is "false or fraudulent" if it should not have been submitted or is not "allowable."⁹⁷ This somewhat circular definition is unhelpful, however, because whether a claim is "permissible" under this interpretation depends on whether the claim is "false or fraudulent." Other courts have explained that "fraud" for False Claims Act purposes is not common law fraud,⁹⁸ nor

93. Qui tam plaintiffs have started using the tainted claims authority in *Pogue* to bring false claims actions based on other violations. See *United States ex rel. Joslin v. Community Home Health, Inc.*, 984 F. Supp. 374, 377 (D. Md. 1997) (alleging, unsuccessfully, false claims liability based on noncompliance with state hospital license laws); *United States ex rel. Sanders v. East Ala. Healthcare Auth.*, 953 F. Supp. 1404, 1411 (M.D. Ala. 1996) (finding that the defendant's alleged violation of state medical licensure requirements could serve as the valid basis for a False Claims Act claim); see also *Ryan*, *supra* note 61, at 148-49 (noting increased trend of using anti-kickback violations of the Stark laws to support False Claims Act suits).

94. See, e.g., *Jaeger & Diesenhaus*, *supra* note 3, at 532 (including anti-kickback-based tainted claims in a discussion of the new FCA theories "which stretch the boundaries of the FCA beyond its logical jurisdictional limits"); *Salcido*, *supra* note 40, at 133-34 (arguing anti-kickback-based tainted claims are invalid).

95. See *Sanders*, 953 F. Supp. at 1411 ("This court finds that the knowing submission of a claim that falsely represented attainment of state licensing requirements is enough to constitute a false claim.").

96. See 31 U.S.C. § 3729 (1994). Accordingly, courts have drawn from any and all sources to flesh out this element. See *Boese*, *supra* note 3, at 24 (stating that "the falsity of a claim is dependent on the confluence of factual, contractual, regulatory and statutory provisions inherent in any [federally funded activity]").

97. See *Boese*, *supra* note 3, at 24.

98. Because the False Claims Act is statutory, elements of a common law fraud action, reliance and actual damages for example, are not elements of a false claims action. The mere submission of a "false claim" is enough to establish liability under the Act. See *id.* at 21-22.

is "falsity" a mere mistake or empirical wrong.⁹⁹ Rather, courts seem to require something akin to a lie.¹⁰⁰ Some courts have gone farther and required a showing of an attempt to deceive the government into payment.¹⁰¹

Critics and opponents of anti-kickback-based tainted claims have looked to the False Claims Act's requirement that a claim be "false or fraudulent" as the basis for arguing that a court must find that the government suffered or could have suffered actual injury for a claim to qualify as "false" for False Claims Act purposes.¹⁰² If successful, this argument sinks virtually all anti-kickback-based tainted claims at the false claims stage because anti-kickback violations, arguably, cause no actual, direct pecuniary harm to the government.¹⁰³ When the government reimburses a qualified health care provider for actually and competently performed medically necessary services, the government reimburses the provider the same amount regardless of whether the physician received or gave illegal remuneration in connection with the provision of services.¹⁰⁴ In other words, the government would receive exactly what it bargained for in its contractual relation with the provider: the provision of necessary and adequate goods or services at the price normally paid for those goods or services. According to this reasoning, the government, that is the public treasury, has suffered no actual "injury."

99. See *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) ("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.")

100. See *id.*

101. See *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266-67 (1st Cir. 1992) (denying liability apparently because the defendant's response to a question in a government contract was a rational interpretation of the question, absent an intent to deceive).

102. See *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1508 (M.D. Tenn. 1996) (rejecting the defendant's argument). In most false claims actions, demonstrating injury to the government is not difficult. Where a defendant submits a false claim or defrauds the government, the defendant usually has intended to harm the government by taking advantage of a contractual relationship in order to extract payment or benefit. See *supra* notes 4-5 and accompanying text. The government's interest in protecting the Federal Treasury is harmed to the extent the government paid for services or goods or quality it did not receive.

103. The same problem arises in other areas of health care litigation. One recent example is the use of the mail fraud statute to enforce the anti-kickback statute. See *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) (reversing mail fraud conviction because undisclosed receipt of referral fees did not produce actual harm), *cert. denied*, 117 S. Ct. 2452 (1997). See generally Gregory D. Jones, Note, *Primum Non Nocere: The Expanding "Honest Services" Mail Fraud Statute and the Physician-Patient Fiduciary Relationship*, 51 VAND. L. REV. 139, 173-76 (discussing *Jain* and the requirement of actual tangible harm).

104. Under the current Medicare payment system, most provider reimbursements are made according to a fee for service, or fixed rate schedule. For further explanation, see Blumstein, *supra* note 37, at 208-10.

Unfortunately, however, courts are split over whether government injury is a prerequisite to a successful false claims action.¹⁰⁵ The courts have divided into two camps: those that require actual injury and those that do not.¹⁰⁶ The Supreme Court declined the opportunity to address this issue in *Hughes Aircraft Co. v. Schumer*, in which a qui tam plaintiff claimed that the defendant's violation of a federal regulation governing accounting procedures rendered a defense contractor's claim false under the False Claims Act.¹⁰⁷ Arguably, the regulation violation did not cause an injury to the public treasury, and defendant's noncompliance may have even saved the government money.¹⁰⁸ The health care field anxiously awaited the Court's holding,¹⁰⁹ recognizing that if the Supreme Court held that injury to the government is an essential element to proving a false claims action, anti-kickback violations could no longer serve as the basis for a tainted false claims action. In a unanimous opinion, however, the Court declined to rule on the issue, and instead based its decision on a finding that the 1986 Amendments to the False Claims Act, upon which plaintiff's claim relied, could not be applied retroactively.¹¹⁰

The Supreme Court's refusal to resolve this issue does not bode well for those relying on the "no injury" argument as a defense to False Claims Act liability, as the Supreme Court's refusal to address

105. *Compare* *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148, 152-53 (1956) (finding liability, despite the lack of specific damages where the defendant falsely used veterans' names to purchase trucks pursuant to the Surplus Property Act), *and* *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-50 (1943) (affirming penalties for instances of fraud that the government discovered before payment) *with* *United States v. McNinch*, 356 U.S. 595, 599 (1958) (stating that the False Claims Act "was not designed to reach every kind of fraud practiced on the Government").

106. The "no injury needed" courts assert that recovery under the False Claims Act is not barred because no actual damages were shown. *See Pogue*, 914 F. Supp. at 1509 (rejecting the use of the *Young-Montenay* test on the grounds that the test required a showing of specific damages in conflict with the *Pogue* court's determination that no specific damages were required for a valid false claim action).

Conversely, other courts require proof of actual injury. *See Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994) (establishing test requiring plaintiff to show that the government suffered damages as a result of the false or fraudulent claim).

107. 117 S. Ct. 1871, 1874-75 (1997).

108. Petitioner's Reply Brief at 18 n.17, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997) (No. 95-1340).

109. Hence, as their part of the "war effort," several health care associations filed an amicus brief arguing against permitting these claims. The Association of American Medical Colleges, the American Hospital Association, and the American Medical Association wrote an amicus brief, as did the Jane Perkins National Health Law Program. *See* Amicus Brief for the Association of American Medical Colleges, the American Hospital Association, and the American Medical Association, *Hughes Aircraft Co.* (No. 95-1340) (supporting *Hughes Aircraft*); Amicus Brief for the National Health Law Program, Inc., *Hughes Aircraft Co.* (No. 95-1340) (supporting *Schumer*).

110. *See Hughes Aircraft Co.*, 117 S. Ct. at 1878-79.

the issue of injury certainly will not discourage proponents of tainted claims and might make the lower courts more hesitant to take a stand against these claims.

At the same time, however, something is inherently suspect about using violations of the anti-kickback statute to support a false claims action.¹¹¹ After all, false claims actions are often brought by private citizens, and the anti-kickback statute provides for criminal sanctions. Opponents and critics of tainted claims actions should focus their efforts on the cause of this uneasiness, the anti-kickback statute itself. To state a claim under the False Claims Act, a plaintiff alleging an anti-kickback-based tainted claim must prove a violation of a federal criminal statute.

VI. ANTI-KICKBACK-BASED TAINTED CLAIMS REQUIRE A PLAINTIFF TO PROVE A VIOLATION OF THE ANTI-KICKBACK STATUTE

As stated above, an anti-kickback-based tainted claim asserts that a government contractor's noncompliance with the anti-kickback statute creates a "taint" that makes subsequently filed claims for government reimbursement false. To prevail on this claim, therefore, a plaintiff must prove that the defendant violated both the False Claims Act and the anti-kickback statute. Thus, an anti-kickback-based tainted claim is bifurcated: A plaintiff must prove first that defendant violated the anti-kickback statute, and then must prove a False Claims Act violation, in this case using the anti-kickback violation to establish the falsity of the defendant's claim.

The reason that a plaintiff must *prove* the anti-kickback violation as part of his False Claims Act claim is simple. If non-compliance with the anti-kickback statute supplies the requisite "falsity" for a plaintiff's false claims action, a plaintiff must prove that the defendant's behavior was not in compliance, that is, that it violated the anti-kickback statute. If a defendant complied with the statute's prescriptions, his claim cannot be "false" on those grounds. Only after establishing a specific anti-kickback violation may the plaintiff use this violation to support his False Claims Act claim.

Courts reviewing these tainted claims have not acknowledged the unique bifurcated structure of these claims. Nor have courts recognized a more important practical reality surrounding anti-kickback-

111. See Jaeger & Diesenhaus, *supra* note 3, at S32 (observing that anti-kickback-based tainted claims seem "headed beyond logical restrictions").

based tainted claims: They are anti-kickback claims in false claims clothing. First, because anti-kickback violations arise from the payment or receipt of remuneration,¹¹² these violations occur when two or more members of the health care industry transact. Second, to qualify as an anti-kickback violation, the remuneration must be paid in connection with an item or service that may warrant payment under a federal health care program.¹¹³ Thus, these transactions fall squarely within the ambit of the False Claims Act.¹¹⁴ Finally, when seeking payment for the services or goods involved in the transaction, the health care provider or supplier will seek payment from the federal health care program, and this demand for payment will almost certainly qualify as a "claim" for payment from the government for False Claims Act purposes.¹¹⁵ Thus, in the vast majority of cases, a transaction giving rise to an anti-kickback violation will involve a claim submission upon demand for payment, a demand which is, itself, an integral part of the transaction at issue in the anti-kickback case.

As a practical matter, the False Claims Act claim can be asserted upon the demand for payment in anti-kickback cases. Upon demand for payment, a "claim" is filed, and the alleged anti-kickback violation, according to the tainted claim theory of liability, would supply the requisite falsity or fraudulence. False claims plaintiffs will undoubtedly argue that satisfaction of the False Claims Act's requirement that the claim be "knowingly submitted" follows automatically from proof that the defendant "knowingly" or "willfully" gave or accepted the remuneration at issue. The anti-kickback statute requires specific intent: Under the *Hanlester Network* standard for anti-kickback liability, a defendant must know his conduct is specifically prohibited by statute,¹¹⁶ and even under the more permissive standard outlined in *United States v. Jain*, a defendant must at least

112. See 42 U.S.C. § 1320a-7b(b)(1)-(2) (1994).

113. See *id.*

114. See 31 U.S.C. § 3729(c) (finding that False Claims Act liability is predicated on a request for money or property being made upon the United States); *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F. Supp. 292, 299 (D.C. Cir. 1996) (finding that annual and interim reports to the SEC do not qualify as "claims" for False Claims Act purposes because reports made "no request or demand upon the United States for money or property").

115. It is well established that claims filed under the Medicare and Medicaid programs qualify as claims against the government within the meaning of the False Claims Act. See, e.g., *Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir. 1975) (Medicare claim qualifies as "claim" for False Claims Act purposes); *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1147 (S.D. Cal. 1976) (Medicaid claim qualifies as "claim" for False Claims Act purposes).

116. See *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399-400 (9th Cir. 1995).

know his conduct "violated a legal duty."¹¹⁷ In contrast, the "knowing" requirement in the False Claims Act is much broader, as it can be satisfied by demonstrating the defendant's "deliberate ignorance of" or "reckless disregard for" a claim's falsity.¹¹⁸ In this way, the False Claims Act creates an affirmative obligation on those who deal with the government to ascertain the truthfulness of their claims.¹¹⁹ If an anti-kickback violation resulted from a defendant's knowing offer or acceptance of remuneration, then he would most probably "know" or should know of the submission of the claim in connection with that transaction. To the extent a court interprets the Act's requirement of a "knowing submission of a false claim" to require that a defendant knew simply of the underlying element that made the claim false (in this case, the anti-kickback violation), the Act's scienter element would be met. And even if a court requires a defendant to know that the claim would qualify as a false claim for False Claims Act purposes, a court could still easily find that the defendant recklessly disregarded that the anti-kickback violation rendered the claim false. In this way, the vast majority of anti-kickback violations will make out, automatically, at least an arguable False Claims Act violation.

A false claims plaintiff does not have to prove the anti-kickback violation beyond a reasonable doubt. In a civil action under the False Claims Act, the plaintiff has the burden of proving its case only by a preponderance of the evidence.¹²⁰ Although courts have not yet addressed the mechanics of these claims, it stands to reason that the anti-kickback violation, because procedurally it is alleged only as an element of the plaintiff's false claims action, need be proven only by a preponderance of the evidence.¹²¹

In sum, the False Claims Act plaintiff's claim is like a house of cards built on the anti-kickback violation: Without the anti-kickback violation, the plaintiff's false claims action falls. Consequently, courts should recognize what these false claims plaintiffs are really doing: using the False Claims Act as a remedial statutory vehicle to pursue

117. 93 F.3d 436, 438-39 (8th Cir. 1996).

118. See *supra* note 32.

119. See *Salcido*, *supra* note 40, at 24.

120. See *United States v. JT Constr.*, 668 F. Supp. 592, 593 (W.D. Tex. 1987).

121. Where a criminal violation is alleged as an element of a civil claim, the criminal violation need only be proven by a preponderance of the evidence. See *Palace Entertainment, Inc. v. Bituminous Cas. Corp.*, 793 F.2d 842, 844 (7th Cir. 1986) (applying Indiana law and stating that "facts constituting a crime need not be proved beyond a reasonable doubt if they are at issue in a civil action, but that it is sufficient to prove the existence of the criminal act by a preponderance of the evidence").

what are, at the core, anti-kickback claims, in order to reap a healthy profit.

VII. DISCREDITING THE RIGHT OF ACTION BASED ON A VIOLATION OF THE ANTI-KICKBACK STATUTE

To recognize that Congress never intended to allow private citizens to use anti-kickback violations to make out False Claims Act claims, one must first understand that private citizens have no right to bring anti-kickback claims independent of the False Claims Act. A *qui tam* plaintiff, as a private citizen, has no independent standing to prosecute an alleged anti-kickback violation. The Department of Justice normally enforces the statute,¹²² which provides for criminal penalties, and a *qui tam* plaintiff does not meet the standard test for standing to bring a claim. Namely, the *qui tam* plaintiff has suffered neither an injury traceable to the kickback, nor an injury capable of judicial redress.¹²³ The arguable "injury" from a kickback stems from the assumption that remuneration to induce future referrals will increase program costs.¹²⁴ Thus, a private citizen is harmed only to the extent that her taxes increase to cover any increased program

122. See *supra* note 41 and accompanying text.

123. There are three constitutional prerequisites to standing: (1) the plaintiff must show that he personally has suffered some actual or threatened injury as a result of defendant's allegedly illegal conduct, see *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); (2) the injury must be fairly traceable to the defendant's conduct, see *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); and (3) the plaintiff must show that his injury is "likely to be redressed by a favorable decision" of the court, *id.* at 38. Of course, the *qui tam* plaintiff usually has no personalized injury that would confer standing under the False Claims Act either. Yet, the *qui tam* provisions of the False Claims Act arguably confer the government's injury, and thereby its standing, to the *qui tam* plaintiff. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 722 F. Supp. 607, 610-11 (N.D. Cal. 1989) (finding that *qui tam* plaintiffs have standing); Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1078 (1991) (explaining and analyzing standing in *qui tam* cases). The Act's *qui tam* provisions themselves have come under fire for unconstitutionally conferring standing on private citizens. See *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, No. H-94-3996, 1997 WL 679105, at *8 (S.D. Tex. Oct. 21, 1997) (holding the Act's *qui tam* provisions unconstitutional for lack of Article III standing). See generally Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO L. REV. 319, 330-45 (1990-91). However, this Note does not take issue with the *qui tam* plaintiff's right to bring the False Claims Act action itself, only with the right to bring the anti-kickback violation before the courts. Thus, this Note will assume that the False Claims Act's *qui tam* provisions are constitutional.

124. Cf. Blumstein, *supra* note 37, at 208-11 (debating the legitimacy of this assumption, particularly where reimbursement under health care plans is capitated, which instead creates an incentive to underutilize medical services).

costs. This is precisely the type of abstract injury for which the Supreme Court has consistently refused standing.¹²⁵

Without explicit standing to pursue an anti-kickback violation, an uninjured private citizen might have the right to bring a claim under the anti-kickback statute in three other ways: (1) through an express or implied cause of action; (2) through express or implied qui tam provisions; or (3) by using the statutory "vehicle" of the False Claims Act to allow pursuit of an anti-kickback violation.¹²⁶

A. The Anti-Kickback Statute Contains No Express or Implied Cause of Action

Courts use the four-factor test outlined in *Cort v. Ash* to determine whether Congress intended to create the private remedy asserted for the violation of statutory rights.¹²⁷ These four factors include the following: (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether the plaintiff can identify an explicit or implicit legislative intent to create or deny such a remedy; (3) whether implication of a remedy for the plaintiff is consistent with the underlying purpose of the legislative scheme; and (4) whether the cause of action at issue is traditionally relegated to state law.¹²⁸ The test reflects a concern, grounded in separation of powers, that Congress rather than the courts should control the availability of remedies for violations of statutes.¹²⁹ Consequently, a strong presumption against the creation of implied rights of action exists.¹³⁰

Neither the anti-kickback statute nor its legislative history suggests that Congress intended to provide qui tam plaintiffs with a

125. See *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217-18 (1974) (finding that taxpayers challenging military reserve status of U.S. Congressmen under the Incompatibility Clause have no standing).

126. See *infra* Part VIII.

127. See 422 U.S. 66, 78 (1975). But see *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23 (1979) (finding private right of action without the *Cort* test).

128. See *Cort*, 422 U.S. at 78; see also *City of Evanston v. Regional Transp. Auth.*, 825 F.2d 1121, 1123 (7th Cir. 1987) (per curiam) (stating that a congressional intent to benefit a class of persons is a threshold test for implying a private right of action).

129. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (arguing that separation of powers principles require that the judiciary not imply private rights of action); *Cannon v. University of Chicago*, 441 U.S. 677, 742-49 (Powell, J., dissenting) (arguing that implying a private right of action impermissibly vests policymaking authority in the judicial branch).

130. See *Community & Econ. Dev. Ass'n v. Suburban Cook County Area Agency on Aging*, 770 F.2d 662, 664 (7th Cir. 1985).

right of action.¹³¹ In fact, when applying *Cort's* four-factor test to the statute, courts have held that the anti-kickback statute does not supply a private right of action even for those private individuals who have suffered actual harm due to anti-kickback violations.¹³² If individuals harmed by violations of the anti-kickback statute have no private right to prosecute these claims, a court could not reasonably find legislative intent conferring such a right on an uninjured, private citizen. Therefore uninjured private citizens have no private cause of action to bring claims independently under the anti-kickback statute.¹³³

B. The Anti-Kickback Statute Contains No Express or Implied Qui Tam Rights of Action

Another basis for conferring the right to bring an anti-kickback claim would be qui tam provisions within the statute itself. If the anti-kickback statute contained its own qui tam provisions, a private citizen who simultaneously qualified as a qui tam plaintiff for the False Claims Act and the anti-kickback statute could feasibly bring an action under the anti-kickback statute and, subsequently, under the False Claims Act. In this way, a private citizen could pursue an anti-kickback violation by virtue of his qui tam status under the anti-kickback statute, and then subsequently use this anti-kickback violation to support the claim under the False Claims Act.

Even if Congress can create legal interests that private citizens may enforce in federal court,¹³⁴ these citizens may not enforce every statute. Qui tam actions do not exist at common law, and they can be maintained only under express or *strongly implied* statutory authority.¹³⁵ Thus, a strong bias exists against finding implied qui

131. See generally H.R. REP. NO. 104-496 (1996), reprinted in 1996 U.S.C.C.A.N. 1865.

132. See, e.g., *West Allis Mem'l Hosp., Inc. v. Bowen*, 852 F.2d 251, 255 (7th Cir. 1988).

133. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 192-93 (1992) (discussing citizen suits).

134. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 348 (1989) (questioning whether the Constitution allows Congress to authorize private citizens to represent the United States in litigation). Professor Caminker argues that "[w]hile Congress cannot itself 'execute' the laws it has enacted, it may structure the operations of the executive branch as it finds 'necessary and proper' to ensure the executive's ability to execute the laws in a manner faithful to congressional will." *Id.* at 357. For a discussion of qui tam enforcement, see *id.* at 350-52.

135. Robert W. Fischer, Jr., Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. REV. 778, 780 (1973) (describing the history and development of qui tam actions in England and in the United States and noting that the "rights of qui tam plaintiffs [in the United States] are always based on a statute").

tam rights in a statute.¹³⁶ Moreover, even where statutory language seems to grant the right to bring a qui tam action, if “other language places enforcement in the hands of governmental authorities,” courts will not find implied qui tam rights.¹³⁷

Neither the text of the anti-kickback statute nor its legislative history suggests that Congress contemplated the possibility that qui tam plaintiffs could pursue these claims on behalf of the government.¹³⁸ Instead, Congress created a federal statute providing for criminal penalties and delegated enforcement duties to the Department of Justice. Because nothing indicates that Congress intended to provide qui tam rights in the anti-kickback statute, and because the statute places enforcement in governmental authorities, no reasonable court could find congressional intent to give private citizens a right to bring qui tam claims under the anti-kickback statute itself.

In sum, a private citizen lacks independent standing to bring an anti-kickback claim and has no right to pursue an anti-kickback violation under an express or implied right of action within the anti-kickback statute. Furthermore, no right to bring an anti-kickback claim under an express or implied qui tam right even exists within

Early federal laws implicitly allowing qui tam actions include: Act of Feb. 28, 1799, ch. 17, § 5, 1 Stat. 622, 623 (failure to pay stamped paper duty); Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532 (failure to pay parchment duty); Act of June 9, 1794, ch. 65, § 12, 1 Stat. 397, 400 (failure to pay auction duty); Act of June 5, 1794, ch. 45, § 5, 1 Stat. 373, 375 (failure to follow transport regulations); Act of June 5, 1794, ch. 51, § 21, 1 Stat. 384, 389 (failure to pay refined sugar duty); Act of June 5, 1794, ch. 48, § 5, 1 Stat. 376, 378 (failure to pay wine duty); *see also* Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 95 (“In deciding which penal statute permitted an informer to sue qui tam, the [early American] courts held that permission either must be expressly granted or clearly implied in the penalty provision.” (citations omitted)). For a more recent attempt to imply qui tam rights into a statute, *see Bass Angler Sportsman Soc’y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (N.D. Ala. 1971) (per curiam) (distinguishing qui tam cases from cases where the plaintiff may share a criminal fine assessed against the defendant).

136. Society, acting through the legislative branch “makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation.” *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting). Thus, “[s]ince the *qui tam* action requires the delegation of some sovereign attributes, it is logical that some clear statutory indication be required before they be delegated.” *Marra v. Burgdorf Realtors, Inc.*, 726 F. Supp. 1000, 1013 (E.D. Pa. 1989). In addition, courts invoke qui tam actions sparingly due to “the potential for collusive litigation that would estop the government from more effective prosecution.” *Id.*

137. *Marra*, 726 F. Supp. at 1013. Even the early cases discussing the implication of qui tam rights recognize the need for a clear indication of congressional intent to that effect: “No man can sue for that in which he has no interest; and a common informer can have no interest in a penalty . . . unless it is expressly, or by some sufficient implication, given to him by statute.” *Bradlaugh v. Clarke*, 8 App. Cas. 354, 358 (1883) (appeal taken from Eng.).

138. *See generally* H.R. REP. NO. 101-247 (1989); S. REP. NO. 100-109 (1987); H.R. REP. NO. 92-231 (1972).

the anti-kickback statute. Yet, private citizens are allowed to pursue anti-kickback violations as part of their false claims actions. A civil litigant's right to bring such a claim, therefore, must arise from the False Claims Act.

VIII. ANALYZING THE FALSE CLAIMS ACT AS A STATUTORY VEHICLE FOR PURSUIT OF ANTI-KICKBACK VIOLATIONS

The courts recognizing anti-kickback-based tainted claims actions must make a critical, yet troublesome assumption: Because a *qui tam* plaintiff must prove an anti-kickback violation in order to establish a claim under the False Claims Act, this private citizen has the right to pursue an anti-kickback violation simply by qualifying as a *qui tam* plaintiff under the False Claims Act. With this assumption, courts have implied *qui tam* provisions into the anti-kickback statute by permitting the plaintiff to use the False Claims Act as a "statutory vehicle" to pursue the violation of a statute which he otherwise would have no right to pursue.

The concept of using one statute as a "vehicle" for pursuing the violation of another is not unique to anti-kickback-based tainted claims. For example, section 1983 of the Civil Rights Act allows certain individuals to bring actions against state actors for violations of other, unrelated federal statutes.¹³⁹ Likewise, the Racketeer Influenced and Corrupt Organization Act ("Civil RICO") contains provisions for a civil cause of action under which litigants may sue for damages based on proof that the defendant engaged in, among other things, racketeering activity.¹⁴⁰ Although section 1983 and Civil RICO allow private citizens to pursue other statutory claims, extending this reasoning to the False Claims Act, and thereby allowing a private citizen to pursue an anti-kickback violation under the Act, is more problematic.

Both section 1983 and Civil RICO act as a statutory "vehicle" by *explicitly* creating a right in civil litigants to pursue claims arising from the violation of certain laws.¹⁴¹ Thus Congress's intent to allow

139. See 42 U.S.C. § 1983 (1994) (providing a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States); see also *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (recognizing that federal statutory violations may be actionable under section 1983).

140. See 18 U.S.C. § 1964(c).

141. See 42 U.S.C. § 1983 (providing a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States); 18 U.S.C.

private litigants to use section 1983 and Civil RICO to pursue other statutory violations is readily discernible within the text of both statutes. The first problem in allowing the False Claims Act to serve as the statutory vehicle for pursuit of anti-kickback violations is that the False Claims Act does not explicitly create such statutory "vehicle" rights, raising the issue of whether Congress intended for the Act to be used in this fashion.

On one hand, it seems likely that Congress intended to enable qui tam plaintiffs to bring claims based on some statutory violations.¹⁴² It is also clear, on the other hand, that the False Claims Act "was not designed to reach every kind of fraud practiced on the government."¹⁴³ Otherwise, the False Claims Act would be impermissibly transformed into a general enforcement statute.¹⁴⁴ The problem courts face, then, is determining when a statutory violation may appropriately support a false claims action, and, concomitantly, when it is appropriate for a court to allow a civil litigant, as a qui tam plaintiff, to bring such a claim. This Note argues that the structure of anti-kickback-based tainted claims impermissibly interferes with the integrity of the anti-kickback statute and that courts, accordingly, should find anti-kickback-based tainted claims to be an improper use of the False Claims Act.

A. Application of Section 1983 Preclusion Analysis to the Tainted Claim Theory of Liability

The argument that anti-kickback-based tainted claims are an impermissible use of the False Claims Act draws on other areas of the law in which statutory vehicles are used. Specifically, when faced with a section 1983 claim, courts face a strikingly similar determination: whether a private citizen may bring a claim for a federal statutory violation via the statutory vehicle of section 1983. The structural similarities between section 1983 and the use of the False Claims Act

§ 1964 (providing a cause of action for "[a]ny person injured in his business or property" by racketeering activity).

142. For example, many false and implied certification claims are based on other statutory or regulatory violations. *See supra* Part IV.A (discussing false and implied certification claims); *see also* Salcido, *supra* note 40, at 130.

143. *United States v. McNinch*, 356 U.S. 595, 599 (1958); *see also* *United States ex rel. Hughes v. Cook*, 498 F. Supp. 784, 787 (S.D. Miss. 1980) (finding no inference of fraud from mere submission of claim for necessary medical services even when plaintiff alleged physician-defendant had submitted claims when no medical license was properly filed with the state).

144. *See* *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977) (stating the False Claims Act is not a general enforcement device for federal statutes such as the Anti-Pinkerton Act).

under the tainted claim theory of liability make it appropriate to apply section 1983 analysis, by analogy, to examination of the propriety of these tainted claims. Application of these standards demonstrates that in permitting private citizens to pursue violations of the anti-kickback statute under the False Claims Act, courts have impermissibly negated congressional delineation of comprehensive remedial and enforcement schemes under the anti-kickback statute itself.¹⁴⁵

As mentioned above, section 1983 provides a cause of action to private parties for the "deprivation of any rights, privileges, or immunities" secured either by the United States Constitution or by federal statutes.¹⁴⁶ Congress created section 1983 to provide a private remedial scheme to individuals who otherwise would have no means of redress.¹⁴⁷ However, just as the Supreme Court has noted that not every fraud will give rise to false claims liability,¹⁴⁸ the Court has recognized exceptions to when a plaintiff may pursue a federal statutory violation under a section 1983 claim.¹⁴⁹ For example, a plaintiff may not pursue a remedy under section 1983 for a federal statutory violation if Congress foreclosed private enforcement in the statute itself.¹⁵⁰

145. The idea to link analysis of anti-kickback-based tainted claims and section 1983 jurisprudence arose from a discussion with Professor James F. Blumstein of the Vanderbilt University School of Law. In addition, a few courts faced with false claims actions based on other statutory violations have mentioned the possibility of such analysis. See, e.g., *Pickens v. Kanawha River Towing*, 916 F. Supp. 702, 705-06 (S.D. Ohio 1996) (rejecting defendant's section 1983 preclusion claim because there was no "positive repugnancy" between the False Claims Act and the underlying statute, the Clean Water Act). However, the analogy between tainted false claims actions and section 1983 should not be confused with the argument of some critics that the anti-kickback statute itself strictly preempts the use of the False Claims Act in these cases. See, e.g., Salcido, *supra* note 40, at 133-34 (arguing, among other things, that Congress intended the anti-kickback statute to be the exclusive remedy for illegal remunerations).

146. See 42 U.S.C. § 1983; see also *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (recognizing that section 1983 provides a cause of action for federal statutes as well as for constitutional violations).

147. See David C. Frederick, Note, *Comprehensive Remedies and Statutory Section 1983 Actions: Context as a Guide to Procedural Fairness*, 67 TEX. L. REV. 627, 644 (1989).

148. See *McNinch*, 356 U.S. at 599 (stating that the False Claims Act was "not designed to reach every kind of fraud practiced on the Government").

149. In *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 508 (1990), the Court stated: "A plaintiff alleging a violation of a federal statute will be permitted to sue under [section] 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.'" (quoting *Wright v. City of Roanoke Redevelop. & Housing Auth.*, 479 U.S. 418, 423 (1987)) (alteration in original).

150. See *id.*; see also *Suter v. Artist M.*, 503 U.S. 347, 365 (1992) (Blackmun, J., dissenting) (quoting *Wilder*). The first exception to the applicability of section 1983 to federal statutory violations, the question of whether a federal statute creates enforceable rights, is largely inapplicable to a qui tam plaintiff's false claims action. The government is the real party to a

Congressional intent to foreclose section 1983 remedies may be found in the express provisions of the statute or where other "specific evidence" within the statute itself demonstrates such intent.¹⁵¹ More precisely, where the statute itself "creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under [section] 1983,'"¹⁵² or where Congress has provided a comprehensive enforcement mechanism for the protection of a federal right, a section 1983 remedy is not available.¹⁵³ In essence, courts use the comprehensive remedies test to determine whether the underlying statute provides adequate procedural protections for the rights it creates, negating the need for a section 1983 right of action.¹⁵⁴

The preclusion of section 1983 enforcement of these federal statutes arises from concerns similar to the concerns lurking behind anti-kickback-based tainted claims. When Congress has affirmatively stated how it would like a statute to be implemented, separation of powers concerns arise when courts recognize different means of enforcement.¹⁵⁵ Separation of powers principles require the branches of government to respect power that the Constitution unambiguously commits to a coordinate branch.¹⁵⁶ The doctrine assigns to Congress the function of enunciating applicable rules of law and to the judiciary the function of interpreting those rules in cases or controversies.¹⁵⁷ Accordingly, courts "may not properly impair the legislature's choice of enforcer in the absence of a constitutional mandate."¹⁵⁸

As a result, courts have looked to the legislative intent behind statutes to determine whether Congress intended to allow a section 1983 or other implied right of action.¹⁵⁹ In enacting the anti-kickback statute, Congress's function was to enunciate the applicable rule of

false claims action, not the qui tam plaintiff. See *supra* note 123. Thus, the federal statute in question creates no enforceable rights in the qui tam plaintiff.

151. *Wilder*, 496 U.S. at 520-21.

152. *Id.* at 521 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)).

153. See *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989).

154. See *Frederick*, *supra* note 147, at 644-45.

155. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981), the Court stated that "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

156. See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933).

157. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

158. *Marra v. Burgdorf Realtors, Inc.*, 726 F. Supp. 1000, 1013-14 (E.D. Pa. 1989).

159. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982); *Sea Clammers*, 453 U.S. at 13.

law for dealing with kickbacks in transactions involving federal health care programs. The judiciary's function is to interpret the anti-kickback statute in cases or controversies, not to create new remedies and enforcement procedures.

To conclude, tainted claims are structurally similar to section 1983 claims based on federal statutory violations: Both would provide a private citizen with the right to pursue a federal statutory claim simply by qualifying as a plaintiff under either of these remedial statutes.¹⁶⁰ Further, the same separation of powers concerns are relevant for evaluating the suitability of a valid right of action for a private plaintiff under section 1983 as under the False Claims Act.¹⁶¹ These claims' structural similarities and the correlative separation of powers concerns make it fitting to use section 1983's analytical tools to evaluate the propriety of anti-kickback-based false claims actions. Applying section 1983 preclusion analysis demonstrates that, in recognizing these claims as valid causes of action, courts alter the anti-kickback statute's congressionally devised statutory remedial scheme. In so doing, courts overstep their constitutionally defined roles by enunciating or modifying policy decisions rightfully reserved to Congress.

B. The Anti-Kickback Statute's Remedial Scheme

First and foremost, the anti-kickback statute provides for felony criminal penalties¹⁶² of up to \$25,000 and five years imprisonment.¹⁶³ Investigations of alleged violations may be made by a number of government entities, including the OIG for the HHS.¹⁶⁴ Because the proceedings involve criminal penalties, the Department of Justice, under the authority of the Attorney General, must bring any actions against health care providers.¹⁶⁵

Second, the Secretary of HHS may apply the administrative remedies available under the Civil Monetary Penalties Law

160. Of course, section 1983 explicitly provides injured private citizens with redress for *personal* injuries, while the False Claims Act, according to the tainted claim theory of liability, provides a *qui tam* plaintiff the right to pursue the *government's* injuries under the anti-kickback statute by clothing the claim in the False Claims Act.

161. See *Marra*, 726 F. Supp. at 1013-14 (arguing separation of powers concerns preclude finding a judicially created *qui tam* provision in the underlying statute).

162. Anti-kickback violations, originally misdemeanors, were upgraded to felonies in 1987. See 42 U.S.C. § 1320a-7b(b) (1994).

163. See *id.* § 1320a-7b(b)(1)-(2).

164. See *id.* § 1320a-7a(j)(2).

165. See *supra* note 41 and accompanying text.

("CMPL")¹⁶⁶ to assess penalties against providers who violate the anti-kickback statute. Specifically, providers who violate the anti-kickback statute are now subject to civil monetary penalties of up to \$50,000 for each anti-kickback violation, as well as treble damages.¹⁶⁷

Furthermore, the CMPL was originally enacted to provide the Secretary with an administrative remedy "akin to the False Claims Act,"¹⁶⁸ indicating that Congress found the False Claims Act insufficient, perhaps even inappropriate, for dealing with claims submitted in connection with an anti-kickback violation. The CMPL also provides a remedy for conduct that may trigger a violation of the False Claims Act itself. Specifically, CMPL penalties may be assessed against any person who presents or causes to be presented to the United States a claim for an item or services the person knows is, inter alia, false or fraudulent.¹⁶⁹ Further, while the civil penalties under the CMPL mirror the False Claims Act's sanctions in that they both contain a set penalty and treble damages, they differ in amount: a \$50,000 penalty under the CMPL, and a \$10,000 penalty under the False Claims Act.¹⁷⁰

The specific administrative procedures governing the imposition of a civil monetary penalty are defined by federal law,¹⁷¹ and provide that the Secretary of HHS can initiate an enforcement proceeding only with the agreement of the Attorney General,¹⁷² and only according to specific procedures that the Attorney General defines.¹⁷³ Thus, the ability of the Secretary to bring these claims, and the procedures the Secretary must follow, are derived from and subject to the power of the Attorney General, which indicates congressional intent to keep these remedies firmly within the Attorney General's control.

Third, the CMPL provides for the exclusion of a provider from federal and state health care programs for violations of the anti-kickback statute.¹⁷⁴ Federal regulations contain elaborate and complex

166. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2105(a), 95 Stat. 357, 789 (codified at 42 U.S.C. § 1320a-7a(a)(7)); see S. REP. NO. 97-139, at 461-62 (1981), *reprinted in* 1981 U.S.C.C.A.N. 727-28 (discussing the operation of civil monetary penalties).

167. See Omnibus Budget Reconciliation Act of 1981 § 2105(a).

168. John J. Meyer et al., *Health Care Fraud and Abuse: Enforcement and Compliance* [1997] Health L. & Bus. Seiries (BNA), at 2600.03.D.1.a.

169. See 42 U.S.C. § 1320a-7a(a)(1)(B).

170. See Meyer et al., *supra* note 168, at 2600.03.D.1.b nn.197-98 (noting the close alignment of CMPL and False Claims Act penalties).

171. See 42 U.S.C. § 1320a-7a(c)(1).

172. See *id.*

173. See *id.*

174. See 42 U.S.C.S. § 1320a-7(a) (1994 & Supp. 1998) (mandatory exclusion); *id.* § 1320a-7(b) (permissive exclusion).

guidelines for determining when exclusion is an appropriate remedy.¹⁷⁵ Federal law provides the framework for appeals from decisions to exclude: a hearing before an administrative law judge.¹⁷⁶

The statute also controls the interaction between and the choice of remedies. The Attorney General empowers the OIG to initiate a CMPL proceeding,¹⁷⁷ to decide whether the government will seek civil monetary penalties, exclusion, or both in a specific case,¹⁷⁸ and to decide whether to settle or to litigate the administrative sanctions.¹⁷⁹ These decisions are often made in light of parallel, yet unrelated, false claims actions at issue in the same case.¹⁸⁰ Procedural safeguards for the imposition of exclusionary sanctions outlined by federal statute include the provider's right to "reasonable notice and opportunity for a hearing" before an administrative law judge,¹⁸¹ and the right to judicial review in district court.¹⁸²

C. Application of Section 1983's "Sufficiently Comprehensive" Standard to the Anti-Kickback Statute's Remedial Scheme

Applying section 1983 standards by analogy, courts should not permit qui tam plaintiffs to pursue anti-kickback claims under the False Claims Act if the anti-kickback statute contains a remedial scheme "sufficiently comprehensive" to protect the government's interest in ridding federally funded health care programs of unlawful kickbacks. Such comprehensiveness would indicate congressional intent to preclude a remedy under the False Claims Act.¹⁸³ Although courts have struggled to define "sufficiently comprehensive" in the section 1983 context,¹⁸⁴ the anti-kickback statute's remedial and enforcement schemes are both sufficiently comprehensive under any analysis to demonstrate congressional intent to preclude the remedy

175. See, e.g., Criteria for Implementing Permissive Exclusion Authority under Section 1128(b)(7) of the Social Security Act, 62 Fed. Reg. 55,410 (1997) (providing specific factors to be used in assessing a permissive exclusion decision).

176. See 42 U.S.C. § 1320a-7(f)(1); Appeal of Exclusions, 42 C.F.R. § 1001.2007 (1997).

177. See 42 U.S.C. § 1320a-7a(j)(2).

178. See Meyer et al., *supra* note 168, at 2600.03.D.1.b.

179. See *id.*

180. See *id.*

181. 42 U.S.C. § 1320a-7(f)(1).

182. See *id.*

183. See *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990) (noting that a statute's remedial scheme may be sufficiently comprehensive to preclude a remedy under section 1983).

184. See *Frederick*, *supra* note 147, at 640-43 (describing courts' wildly varying section 1983 preclusion analyses under the Food Stamp Act).

of a false claims action for conduct consisting of nothing more than a payment of remuneration.¹⁸⁵

First, one of the most important factors in a court's section 1983 analysis is whether the underlying federal statute contains a private right of action.¹⁸⁶ Where a statute provides a private right of action, courts find that the statute contains an effective remedial procedure that nullifies the need for a section 1983 remedy.¹⁸⁷ As the Supreme Court has noted, these private judicial remedies indicate "congressional intent to supplant the [section] 1983 remedy."¹⁸⁸

The anti-kickback statute contains no private right of action, but it does contain a right of action for the party "injured" by anti-kickback violations: the government. In fact, as noted in Part VIII.B, the statute provides the government with multiple avenues to enforce its rights under the statute. The fact that a private citizen has no right of action is immaterial to the analysis of the anti-kickback-based tainted claim. The qui tam plaintiff's only claim to a right of action stems from the government's rights under the False Claims Act.¹⁸⁹ Thus, the qui tam plaintiff's right of action under the Act is only incidental to the government's own right to a remedy. For purposes of the anti-kickback statute, the qui tam plaintiff's incidental rights are simply irrelevant: The real party of interest to the anti-kickback violation already has a right to bring an action under the statute itself. There is no need to provide the government with a statutory vehicle to pursue violations of a statute that it has the right to pursue already.

Second, in determining whether a federal statute provides a comprehensive remedial scheme, courts in section 1983 cases consider whether the statute provides for private judicial remedies and procedures by which plaintiffs can address defendants' federal statutory violations.¹⁹⁰ For example, in *Wright v. City of Roanoke*

185. See Lisa Stamm, Note, *Section 1983 and Title IV-D of the Social Security Act: In Pursuit of Improved Child Support Enforcement*, 60 U. CIN. L. REV. 221, 229-33 (1991), for a discussion of the various factors a court will consider in deciding whether a section 1983 cause of action is precluded.

186. See Frederick, *supra* note 147, at 646-49 (discussing preclusion analysis where underlying statute permits a private right of action).

187. See *id.* at 646.

188. *Wright v. City of Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987) (noting that in the other cases in which the Supreme Court found a section 1983 action precluded, the underlying statute contained a private right of action).

189. See *supra* note 135 and accompanying text.

190. See Ashish Prasad, Note, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U. CHI. L. REV. 197, 217-21 (1993), for a discussion of the development and use of the "comprehensive remedial scheme" test.

Redevelopment & Housing Authority, the Supreme Court carefully analyzed the Brook Amendment's administrative hearing and review procedures to determine whether the underlying statute provided the injured party with adequate redress.¹⁹¹ The anti-kickback statute creates detailed procedures for administrative and judicial review, by which a plaintiff, that is the government, can address violations of the statute.¹⁹² Just as the presence of such details "indicate[s] a precise remedial scheme that 'may not be bypassed by bringing suit directly under [section] 1983,' "¹⁹³ the anti-kickback statute's detailed provisions demonstrate the unpropriety of an anti-kickback-based tainted claim.

Another factor in the section 1983 preclusion mix is the integrity of the underlying statutory scheme and whether a section 1983 claim would undermine this integrity.¹⁹⁴ Courts have held that a section 1983 claim is precluded where section 1983 relief and relief under the statute would be inconsistent.¹⁹⁵

Inconsistencies between statutory remedies and those available through the False Claims Act indicate Congress did not intend to leave False Claims Act remedies available to *qui tam* plaintiffs.¹⁹⁶ Where the violation of the anti-kickback statute might lead to criminal liability under the anti-kickback statute, the same behavior can lead only to civil penalties under the False Claims Act. Even where civil monetary penalties are sought for an anti-kickback violation, the penalty schemes in the CMPL and the False Claims Act look similar but provide for different amounts: a \$50,000 per service or per item penalty under the CMPL and \$10,000 per claim penalty under the False Claims Act.¹⁹⁷ If permitted, anti-kickback-based tainted claims would undermine the integrity of the False Claims Act's scheme by providing different liability potential under the different penalty schemes: If the same conduct can give rise to liability under the CMPL or the False Claims Act, a provider's liability depends not on

191. See 479 U.S. 418, 425-27 (1987).

192. See *supra* Part VIII.B.

193. See *Almond Hill School v. United States Dep't of Agric.*, 768 F.2d 1030, 1035 (9th Cir. 1985) (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)) (determining that a section 1983 claim is precluded by the remedial scheme of the Federal Insecticide, Fungicide and Rodenticide Act).

194. See Stamm, *supra* note 185, at 231.

195. See *Anderson v. Thompson*, 658 F.2d 1205, 1216 (7th Cir. 1981).

196. See *Almond Hill School*, 768 F.2d at 1038 (finding that the delegation of primary enforcement responsibility in a federal act is inconsistent with allowing a private right of action under section 1983).

197. See *supra* note 20 and accompanying text.

his conduct, but on the identity of the plaintiff, that is, the Secretary of HHS or a *qui tan* plaintiff.

Second, the different scienter elements of the anti-kickback statute and the False Claims Act demonstrate additional inconsistencies that argue against tainted claims enforcement. As noted in Part III, the anti-kickback statute requires specific intent; whereas the False Claims Act requires only "reckless disregard" for or "deliberate ignorance" of the falsity of a claim. At least one critic has argued that Congress's intent in defining the anti-kickback scienter requirement demonstrates an intent to punish only that conduct involving the higher level of intent.¹⁹⁸ Allowing plaintiffs to pursue anti-kickback claims in connection with the False Claims Act's lower scienter standard thus undermines both the deliberate enforcement policy Congress intended to create for the anti-kickback statute, and congressional intent to provide a "uniform" scienter standard for False Claims Act prosecution.¹⁹⁹

Third, the anti-kickback statute's complex enforcement scheme is inconsistent with the enforcement scheme that the use of the False Claims Act would create. Section 1320a provides a complex scheme of enforcement whereby it delegates total responsibility for anti-kickback enforcement to the government:²⁰⁰ either to the Department of Justice for criminal sanctions,²⁰¹ or to the Secretary of HHS for civil sanctions.²⁰² The Secretary's powers originate in and are subject to the authority of the Attorney General,²⁰³ indicating a highly comprehensive and integrated remedial scheme where various government entities are ascribed specific and limited roles. The False Claims Act would allow a private citizen to undermine the delicate balance of power brokered by the statute. The statutory scheme governing anti-kickback violations "reflects a 'balance, completeness and structural integrity' that would suggest remedial exclusivity."²⁰⁴

198. See Salcido, *supra* note 40, at 132-33.

199. See *id.*

200. See, e.g., H.R. REP. NO. 103-111, at 213 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 540 (stating that the purpose of the anti-kickback statute's monetary penalties "is to facilitate the timely and effective prosecution of Medicare and Medicaid fraud and abuse cases by the Federal Government" and making references exclusively to the pursuit of anti-kickback violations by the government).

201. United States Attorneys have plenary authority over federal criminal matters. See DEPARTMENT OF JUSTICE MANUAL § 9.2.000 (1994).

202. See *supra* note 166.

203. See 42 U.S.C. § 1320-7a(c)(1) (1994).

204. *Almond Hill School v. United States Dep't of Agric.*, 768 F.2d 1030, 1036 (9th Cir. 1985) (quoting *Brown v. GSA*, 425 U.S. 820, 832 (1976)) (finding such factors indicative of

The administrative and judicial enforcement procedures for anti-kickback violations are detailed comprehensively under one cohesive statutory section: 42 U.S.C. § 1320a.²⁰⁵ The anti-kickback statute's comprehensive remedial scheme indicates Congress's intent to deal directly with the perceived negative consequences of remuneration in health care transactions.²⁰⁶ The statute provides for enforcement only by the various governmental entities mentioned above, and provides no private right of action.²⁰⁷ The statute's remedial exclusivity seems aimed at preserving prosecutorial flexibility in dealing with potential anti-kickback violations. The delicate remedial balance inherent in granting the Attorney General and the Secretary of HHS broad discretion over both the remedies for and pursuit of these claims would be severely compromised, however, if private citizens were allowed to pursue a False Claims remedy for the same conduct.

The range of remedies available to the government under 42 U.S.C. § 1320a itself indicates a comprehensive scheme devised to allow the government flexibility in choosing a remedy appropriate for a given case. The flexibility inherent in such wide prosecutorial discretion is very much a part of how the government currently enforces the anti-kickback statute. This prosecutorial discretion is particularly important because the statute criminalizes otherwise economically beneficial market behavior, much of which is considered business as usual in the health care industry.²⁰⁸ Thus, financial inducements that technically qualify as "kickbacks" are exchanged openly on a daily basis.²⁰⁹ As one scholar has noted, prosecutors realize that this otherwise lawful and efficient behavior could trigger

Congress's intent to foreclose section 1983 remedies for violation of the underlying federal statute).

205. See *supra* Part VIII.B (explaining the remedial scheme).

206. The anti-kickback statute is designed to prevent overutilization of federally funded health care services, constrain the cost of federally funded health care programs, and, arguably, protect a patient's interest in the freedom to choose a health care provider and to avoid over-treatment. See Blumstein, *supra* note 37, at 207-11 (pointing out the inconsistencies between the statute's purported goals and the current incentives for underutilization in systems involving capitated or other risk-sharing arrangements).

207. See *supra* Part VII.

208. See Blumstein, *supra* note 37, at 213 (stating that arrangements permissible in other contexts may be illegal in the health care arena); see also James F. Blumstein, *What Precisely Is "Fraud" in the Health Care Industry?*, WALL STREET J., Dec. 8, 1997, at A25 [hereinafter Blumstein, *Fraud*] (noting that "doing a good job" or even supplying free doughnuts for a physician's lounge could trigger anti-kickback liability); *Even Doughnuts May Count as Kickbacks, IG Warns in Letter*, HEALTHCARE BUS. & LEGAL STRATEGIES, Apr. 10, 1996, at 5 (stating "trinkets such as doughnuts and mugs may be violating the Medicare anti-kickback law, even though the inducement seems trivial").

209. See Blumstein, *Fraud, supra* note 208, at A25 (noting that financial incentives capable of triggering anti-kickback liability have become "part of the fabric of the health care industry").

anti-kickback liability and have assured health care entities that they will prosecute only egregious violations that either hurt health care program beneficiaries or cost the government money.²¹⁰ In essence, prosecutors assure providers they will ignore merely technical violations of the law,²¹¹ thus turning the health care industry into what has been called "a speakeasy, with wholesale illegal conduct taking place but being winked at by prosecutors" who say they will prosecute only "the loud and obnoxious drunks."²¹²

Anti-kickback-based tainted claims frustrate this practical implementation of the anti-kickback statute by undermining the government's commitment to prosecute only harmful violations of the statute. The potential personal recovery available to a qui tam plaintiff would provide an overwhelming incentive to bring anti-kickback claims via the False Claims Act for any potential violation of the statute. The constant threat of qui tam litigation would disrupt the reliance on prosecutorial discretion in the statute's enforcement. In addition, recognizing anti-kickback-based tainted claims could further encourage baseless or harrasing suits by professional litigants who could further hinder the already cumbersome administration of the anti-kickback statute. After all, the qui tam plaintiff's goal is financial gain, not justice.

D. Practical and Policy Considerations Supporting Preclusion

The anti-kickback statute's comprehensive remedies and rigorous procedures reflect Congress's intent to limit the remedies available to the government for anti-kickback violations. However, practical and policy considerations equally demonstrate the inadvisability of anti-kickback-based tainted claims. Specifically, extending a False Claims Act "bounty" to qui tam plaintiffs who pursue anti-kickback claims contradicts the practical use of the statute and would undermine recent government efforts to curb health care fraud and abuse.

On a practical level, Congress has recognized the complexity of the anti-kickback statute.²¹³ In fact, the statute's remedial scheme is

210. *See id.*

211. According to Professor James F. Blumstein of Vanderbilt University School of Law, an estimated 80% of anti-kickback violations go unprosecuted.

212. Blumstoin, *Fraud*, *supra* note 208, at A25.

213. In enacting section 14(a), Congress recognized that the statutory language of 42 U.S.C. § 1395nn(b)(2)(B) (predecessor to current section 1320a-7b(b)) "has created uncertainty among health care providers as to which commercial arrangements are legitimate, and which are proscribed." S. REP. NO. 100-109, at 27 (1987), *reprinted in* 1987 U.S.C.C.A.N. 682, 707-08.

so detailed and complex that the most recent amendments to the statute contained several provisions aimed at clarifying exactly what conduct will subject a provider to penalties²¹⁴ and providing a more organized framework for the various enforcement entities.²¹⁵ Moreover, in the entire history of the statute, in spite of its amendments and changes and all the problems Congress has attempted to address, never once did Congress discuss or even refer to any of the monumental problems that qui tam enforcement of the anti-kickback statute implies. The reason for this enduring omission seems quite clear: Congress never intended for the False Claims Act to serve as the statutory vehicle for qui tam plaintiffs to bring anti-kickback claims.

In other contexts, courts have acknowledged Congress's integral statutory scheme and the dangers inherent in extending remedies to private parties. As one court noted in its inquiry into how the anti-kickback statute should be enforced, "[w]hether this purpose would be better achieved by arming [private parties] with the authority to enforce the provisions of [the anti-kickback statute] is a judgment better left to Congress."²¹⁶ Anti-kickback-based tainted claims should engender the same judicial restraint. In addition, the False Claims Act's qui tam provisions have produced a "chilling effect" on employee and employer communications.²¹⁷ Extending liability under the False Claims Act to anti-kickback violations could chill further good faith efforts to implement compliance plans to detect anti-kickback violations. While it is true that the government maintains some control over a qui tam plaintiff's suit, this supervision itself does not justify the expansion of the anti-kickback statute.

In view of the complexity and comprehensiveness of 42 U.S.C. § 1320a, allowing a qui tam plaintiff to bring a claim via the False Claims Act would be inconsistent with congressional intent to create a

214. See, for example, the Senate Report accompanying the 1987 Amendment which enabled HHS to promulgate "safe harbors," making it clear that the purpose of the legislation was to reign in the anti-kickback statute. *See id.*

215. In fact, to manage jurisdictional and prosecutorial overlap, the 1996 amendments included the creation of a Fraud and Abuse Control Program to coordinate federal, state, and local health care anti-fraud enforcement programs. *See* 42 U.S.C.A. § 1320a-7c(a) (West Supp. 1998).

216. *West Allis Mem'l Hosp., Inc., v. Bowen*, 852 F.2d 251, 255 (7th Cir. 1988).

217. *See Morning Edition: "Qui Tam" Suits Put Government Defrauders on Ice* (NPR radio broadcast, Sept. 24, 1997) (Attorney Robert Salcido explaining that making employees potential bounty hunters on behalf of the government "chills internal discourse between employees and companies" and discourages internal fraud investigations because knowing about fraud can increase the risk of being sued).

“carefully tailored scheme”²¹⁸ for addressing illegal remuneration in federal health care programs. As a result, courts validating these claims have allowed qui tam plaintiffs to intentionally circumvent the anti-kickback statute’s carefully defined remedial scheme and to undermine congressional intent by bringing their anti-kickback claims under the False Claims Act. Using the vehicle of the False Claims Act, then, private parties gain access to the courts, under a less demanding statute and in direct contradiction to the enforcement scheme Congress created.

Not only does analysis under the standards defined in section 1983 cases indicate congressional intent to foreclose a false claims remedy for anti-kickback violations, it should be easier to establish congressional intent to preclude use of the False Claims Act than establish preclusion under section 1983. Under a traditional section 1983 analysis, the defendant bears the burden of affirmatively showing that Congress intended to foreclose private enforcement of the underlying statute.²¹⁹ The reason for placing the burden on the defendant in these cases is that the language of section 1983 clearly indicates that section 1983 provides a remedy for violations of other federal statutes.²²⁰ In other words, because Congress expressly provided that violations of other federal statutes may be pursued properly under section 1983, courts must assume Congress intended to allow an underlying statute to be enforced via a section 1983 claim, unless the defendant can show the court that Congress specifically intended to disallow such enforcement.

In contrast, the False Claims Act does not expressly provide a remedy for violations of other federal statutes. Logically, then, the burden of proof should not fall on a false claims defendant to show that Congress intended to allow the underlying statute, the anti-kickback statute, to be enforced via the False Claims Act. Plus, under the Supreme Court’s recent analysis of section 1983, the *plaintiff* now seems to have the burden of demonstrating the availability of a section 1983 remedy.²²¹ In light of the Supreme Court’s recent trend of

218. *Smith v. Robinson*, 468 U.S. 992, 1012 (1984) (defining rule in context of section 1983 claims).

219. *See Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 520-21 (1990). The defendant in section 1983 cases is, by the nature of the claim, a government entity.

220. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (stating that section 1983’s coverage must be broadly construed).

221. *See Suter v. Artist M.*, 503 U.S. 347, 361 & n.11 (1992) (stating that even if the Adoption Assistance and Child Welfare Act does not expressly provide a comprehensive remedial scheme, the Act still precludes section 1983 enforcement); *see also id.* at 376-77 (Blackmun, J., dissenting) (accusing majority of inverting burden of proof in showing preclusion of section

restricting the scope of section 1983's explicit statutory vehicle, any argument for broadly construing the implicit use of the False Claims Act as such a statutory vehicle seems misplaced.

In sum, applying the comprehensive remedial scheme analysis developed for section 1983 claims demonstrates that allowing a qui tam plaintiff to bring an anti-kickback action by robing it as a false claims action "would be inconsistent with Congress's carefully tailored scheme."²²² In recognizing these claims as valid causes of action, courts distort and expand the remedies available for an anti-kickback violation and short circuit Congress's statutory construct.

IX. CONCLUSION

Leaving to the courts the determination of whether a private party may bring an anti-kickback claim using the False Claims Act is unfair. In this issue courts face competing statutory interests and policy goals. On one hand, the False Claims Act is used expansively to protect the government from paying on fraudulent claims. Further, health care fraud, undeniably, is a tremendous problem, and the government needs effective tools to combat this problem. Thus, the allure of using the False Claims Act in waging the war against health care fraud is understandable. The Act is an effective and efficient means of deterring and punishing this abuse. In addition, allowing qui tam plaintiffs to bring tainted claims actions would make it easier to discover and prosecute the illegal behavior.

However, qui tam false claims actions based on violations of the anti-kickback statute expose health care providers to the risk of substantial penalties and damages for harmless standard practices.²²³ Furthermore, the anti-kickback statute's provisions, remedial schemes, and punitive measures represent the majoritarian branch's delicately negotiated balance of the need to curb health care fraud and the fear of overdeterrence and overenforcement in this heavily regulated industry.

In the short term, if courts do not wish to trump Congress's constitutionally ascribed function, the courts must use the anti-kickback statute only as instructed. These instructions come from the anti-kickback statute itself, not from the False Claims Act. Therefore,

1983 claim); 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.6, at 439-40 (Supp. 1997) (agreeing with dissent's characterization of majority's opinion in *Suter*).

222. *Robinson*, 468 U.S. at 1012.

223. See Jaeger & Diesenhaus, *supra* note 3, at S32.

courts should not allow private citizens to prosecute anti-kickback violations, even under the guise of the False Claims Act. In the long run, however, Congress would be well-advised to define clearly the respective roles of both statutes. If Congress wishes the anti-kickback statute to serve as a vehicle for False Claims Act claims, it should say so in the text of the False Claims Act itself or amend the False Claims Act to provide guidelines for evaluating whether an underlying statute may be used as an enforcement vehicle. Alternatively, Congress could amend the anti-kickback statute to allow private litigant prosecution. Moreover, the HHS could promulgate a regulation to the same effect.

Analysis by analogy to section 1983 claims, however, makes clear the separation of powers and policy problems inherent in allowing private citizens to expand and distort the anti-kickback statute's remedial and enforcement schemes. Accordingly, Congress would be better advised to make clear that the False Claims Act may not serve as a remedial statutory vehicle for anti-kickback violations. Furthermore, only the government should prosecute suspected violations of a federal statute. Congress is free to enlist the help of private citizens, for example, by providing monetary rewards for information leading to anti-kickback convictions. Congress, nevertheless, should clarify this position against anti-kickback-based tainted claims, and, in light of the imminent popularity of these claims, it should do so quickly.

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