UNITED STATES EX REL. STATE OF WISCONSIN V. DEAN: A REQUEST FOR AN AMENDMENT TO THE FALSE CLAIMS ACT

INTRODUCTION

In *United States ex rel. State of Wisconsin v. Dean*,[1] the Seventh Circuit Court of Appeals refused to allow the State of Wisconsin to recover under the False Claims Act (FCA)[2] for fraudulent medicare claims which a psychiatrist had submitted to Wisconsin and the Federal Government.[3] The court adopted a restrictive interpretation of the FCA's jurisdictional bar and found that Wisconsin fit within the jurisdictional bar.[4] As a result, the Seventh Circuit frustrated the legislative intent of the FCA, ignored recent Supreme Court decisions, and disregarded Wisconsin's statutory obligation under federal medicare law. The *Dean* court did suggest, however, that Wisconsin petition Congress for an exemption to the jurisdictional bar.[5]

This comment analyzes the *Dean* opinion in light of the legislative intent of both the FCA and its subsequently-enacted jurisdictional bar. It also examines recent case law and the underlying public policy considerations weighed by the courts and the legislature. Finally, this comment considers a Congressional exemption to the jurisdictional bar.

UNITED STATES EX REL. STATE OF WISCONSIN V. DEAN

The appellant in *Dean*, Alice R. Dean, was a Milwaukee psychiatrist.[6] In 1980, a state court found Dean guilty of making fraudulent claims for Medicaid reimbursements.[7] It sentenced her to probation and ordered her to pay $13,285 in restitution to the State of Wisconsin.[8] The State consequently revoked Dean's license to practice medicine in Wisconsin.[9]

On September 9, 1980, the State of Wisconsin's Department of Justice and Department of Health and Social Services filed suit against Alice R. Dean in federal district court.[10] The departments sued under the FCA[11] — a civil statute designed to protect the United States government from fraudulent claims.[12] The FCA provides:

> Any person . . . who shall . . . cause to be presented, for payment or approval . . . any claim upon or against . . . the United States . . . knowing

1. 729 F.2d 1100 (7th Cir. 1984).
2. The False Claims Act, which is codified at 31 U.S.C. §§ 231-233, 235 (1976), allows the United States government and private parties who qualify under the Act to recover for fraudulent claims submitted to the government.
3. 729 F.2d at 1102. The jurisdictional bar (31 U.S.C. § 232(C)) denies jurisdiction where the suit is based upon evidence or information in the possession of the United States government at the time the suit was brought.
4. *Id.* at 1107.
5. *Id.* at 1106.
6. *Id.* at 1102.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. 31 U.S.C. §§ 231-233, 235 (1976).
12. *See, e.g.*, United States v. Neifert-White Co., 390 U.S. 228, 233 (1968). *See also infra* note 14.

> such claim to be false, ficticious, or fraudulent . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of doing or committing such act . . . .[13]

In addition to allowing the federal government to recover, the FCA gives private parties both a cause of action against persons who submit false claims to the federal government[14] and a portion of any recovery.[15] In *Dean*, Wisconsin brought suit as a private party under the FCA.[16]

Dean argued that the FCA's jurisdictional bar clause deprived the federal district court of jurisdiction.[17] The jurisdictional bar clause provides:

> [T]he court shall have no jurisdiction . . . whenever it shall be made to appear that *such suit was based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought.*[18]

Although the district court found that the suit was based on information in the possession of the United States, it held that this case was not within the FCA's jurisdictional bar.[19] The court cited both the FCA's legislative history and subsequent case law to support its holding.[20] The court also sympathized with Wisconsin since federal Medicaid law[21] *required* Wisconsin to turn the information over to the United States.[22] Because of the Medicaid law, the United States acquired the information before Wisconsin brought the suit, thereby appearing to place

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13. 31 U.S.C. § 231 (1976).
14. 31 U.S.C. § 232(B) (1976) provides:
    > Such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.
    >
    > The private plaintiff must also follow the procedures specified in § 232(C):
    >
    > (1) serve the United States Attorney General with a copy of the complaint; (2) include a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of the suit; (3) wait 60 days to allow the United States to decide whether to enter an appearance. If the United States declines to join, the plaintiff may maintain the action unless the suit was based upon information in the possession of the United States at the time such suit was brought.
    >
    > In *Dean*, Wisconsin met these specified procedures and consequently, they were not an issue in the case.
15. When the United States joins in the suit, the private plaintiff may recover fair and reasonable compensation, not to exceed one-tenth of the proceeds or settlement. 31 U.S.C. § 232(E)(1) (1976). When the United States does not join in the suit, the private plaintiff may recover fair and reasonable compensation, not to exceed one-fourth of the proceeds or settlement. 31 U.S.C. § 232(E)(2) (1976).
16. There was no issue contesting whether the State of Wisconsin constitutes a private party under the FCA.
17. 729 F.2d at 1103.
18. 31 U.S.C. § 232(C) (1976) (emphasis added).
19. 729 F.2d at 1103.
20. *Id.* at 1103, 1106.
21. 42 C.F.R. § 455.17 (1984). This provision requires that the state agency report Medicaid fraud and abuse information to the Regional Health Care Financing Administration Administrator as follows:
    > (a) The number of complaints of fraud and abuse made to the agency that warrant preliminary investigation.
    >
    > (b) For each case of suspected fraud and abuse that warrants a full investigation.
    >
    > (1) The provider's name and number;
    >
    > (2) The source of the complaint;
    >
    > (3) The type of provider;
    >
    > (4) The nature of the complaint;
    >
    > (5) The approximate range of dollars involved; and
    >
    > (6) The legal and administrative disposition of the case, including actions taken by law enforcement officials to whom the case has been referred.
    >
    > (c) A summary of the information reported in paragraph (b) of this section.
22. 729 F.2d at 1104.

Wisconsin within the jurisdictional bar. The district court, however, recognized Wisconsin's statutory obligation under Medicaid law, in addition to the FCA's legislative history and subsequent case law, and found jurisdiction over the case.[23]

The Seventh Circuit reversed and denied Wisconsin's cause of action.[24] Applying a strict, literal interpretation of the FCA, the court held that the district court lacked jurisdiction because the suit was based on evidence or information in the possession of the United States.[25] As a result, the Seventh Circuit frustrated the legislative intent behind the FCA, did not consider recent Supreme Court decisions, and disregarded Wisconsin's statutory obligation.

LEGISLATIVE INTENT

Congress enacted the FCA in 1863[26] in response to investigations that exposed the fraudulent use of government funds during the Civil War.[27] In 1943, Congress enacted the jurisdictional bar provision[28] in reaction to *United States ex rel. Marcus v. Hess*.[29] In *Hess*, the Supreme Court held that actions under the FCA are not barred merely because the plaintiff received his information from an indictment rather than from his own investigation.[30] Congress disagreed with the decision and enacted the jurisdictional bar provision to bar parasitical suits where the plaintiff relies on information acquired from public records such as indictments.[31]

Congress adopted the jurisdictional bar provision as a result of a compromise between a House bill and a Senate bill.[32] The House of Representatives passed a bill that would have amended the FCA to abolish *qui tam* suits[33] — suits in which the plaintiff sues for himself and on behalf of the government to recover a portion of the penalty allowed under a statute.[34] The Senate bill, however, permitted *qui tam* suits under the FCA if: (1) the suits were based upon information that was not in the possession of the United States; or (2) the suits were based upon information in the possession of the United States provided that the plaintiff was the source of such information.[35] The compromise bill incorporated only the first part of the Senate proposal.[36] Accordingly, it permitted *qui tam* actions only if the information was not in the possession of the United States at the time the plaintiff brought the suit.[37]

Although the compromise bill did not specifically include the second part of the Senate proposal,[38] the House Conference Report shows that the compromise bill intended to include *qui tam* suits where the plaintiff was the source of the

23. *Id.*
24. *Id.* at 1107.
25. *Id.*
26. Act of Mar. 2, 1863, ch.67, § 4, 12 Stat. 696.
27. *See Neifert-White Co.*, 390 U.S. at 232 (1968).
28. Act of December 23, 1943, ch. 377, § 1, 57 Stat. 608.
29. 317 U.S. 537 (1943).
30. 317 U.S. at 545-48.
31. *See* 89 CONG. REC. 10,846 (1943).
32. H.R. Rep. No 933, 78th Cong., 1st Sess. 4 *reprinted in* 89 CONG. REC. 10, 844-45 (1943).
33. *Id.*
34. 729 F.2d at 1102. In Sierra Club v. Andrus, 610 F. 2d 581, 591 (9th Cir. 1979), the court defined a *qui tam* action as a civil proceeding in which an informer sues for the government, as well as for himself, to recover a penalty under a particular statute; statutory authority for the action must be specifically provided. *See also*, Connecticut Action Now, Inc. v. Roberts Plating Co. 457 F.2d 81, 84 (2d Cir. 1972) and Drew v. Hilliker 56 Vt. 641 (1884).
35. H.R. Rep. No. 933, 78th Cong., 1st Sess. 4 *reprinted in* 89 CONG. REC. 10,845 (1943).
36. *Id.*
37. *Id.*
38. *See supra* text accompanying notes 35-36.

information.[39] The House Conference Report stated: [i]t will not be possible to abate a pending suit if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence or information which was not theretofore in the possession of the Department of Justice.[40] The House Conference Report shows that as part of the compromise, the House accepted the second part of the Senate bill which includes *qui tam* suits if the plaintiff was the source of the essential information and the government did not yet have such information in its possession.

Representative Francis Walter (D-Penn.), a member of the conference committee that drafted the compromise bill, shed additional light on the legislative intent of the provision.[41] In reference to the compromise bill, he stated:

> We feel by enacting this compromise legislation the United States will be amply protected and at the same time there will not be this ever-present invitation to racketeers to examine indictments, to examine reports of the Truman committee, or if you please, for dishonest and unscrupulous investigators to turn over information to their friends or coconspirators for the purpose of bringing suit against our citizens on information that either comes to them by reading an indictment or bill of complaint or through testimony before some committee.[42]

Representative Walter also explained that the committee had "no desire to interfere with suits that are brought honestly and legitimately by informers."[43] Moreover, Representative Estes Kefauver (D-Tenn.) stated: "This bill, then protects the Government and it protects the corporation or the contractor from being defrauded and harassed by shysters or people who might bring suit without any information or with little information . . . ."[44] The statements of Representatives Walter and Kefauver demonstrate that the purpose of the jurisdictional bar was to prevent suits by plaintiffs with little or no information.[45] These statements further illustrate that Congress did not intend for the jurisdictional bar to prevent legitimate suits brought by honest plaintiffs.[46]

In the *Dean* case, the State of Wisconsin can hardly be characterized as a racketeer, shyster, or a dishonest investigator. Nor was Wisconsin a plaintiff with little or no information. It had supplied the federal government with all the information necessary to support a claim under the FCA.[47] Wisconsin's *qui tam* action was a legitimate action in which Wisconsin sought to recover for a real fraud perpetrated on the state and the federal government.[48] Since the Seventh Circuit denied a remedy for this legitimate cause of action,[49] it frustrated the Congressional intent of the FCA.

JUDICIAL CONSTRUCTIONS

In *Dean*, the Seventh Circuit relied on *United States v. Aster*[50] to support its

39. H.R. Rep. No 933, 78th Cong., 1st Sess. 4 *reprinted in* 89 CONG. REC. 10,845 (1943).
40. *Id.*
41. 89 CONG. REC. 10,846 (1943).
42. *Id.*
43. *Id.*
44. *Id.* at 10,849.
45. *See id.* at 10,846, 10,849.
46. *Id.*
47. 729 F.2d at 1104.
48. *Id.* at 1100.
49. *See id.* at 1107.
50. 275 F.2d 281 (3d Cir. 1960).

application of the jurisdictional bar.[51] In *Aster*, the Third Circuit Court of Appeals held that the jurisdictional bar was broad enough to include information obtained by the government from any source.[52] The *Dean* court also relied on the dicta of a 1945 case, *United States v. Pittman*,[53] in which the Fifth Circuit Court of Appeals discussed the absoluteness of the jurisdictional bar when the government possesses the essential information yet declines to join the suit.[54]

The *Dean* court did not consider two more recent Supreme Court cases: *United States v. Neifert-White Co.*[55] and *United States v. Bornstein*.[56] While *Neifert-White* and *Bornstein* do not concern the jurisdictional bar issue, they espouse that the FCA should be liberally construed. In *Neifert-White*, an agricultural dealer who sold grain bins to farmers provided false invoices in support of a loan application to the Commodity Credit Corporation.[57] The Court found the dealer liable under the FCA for submitting fraudulent claims against the government.[58] The Court favored a liberal construction of the FCA and stated: "[I]n the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading . . . ."[59] The Court found support for this liberal construction in the FCA's legislative intent. It noted: "The objective of Congress in enacting the False Claims Act 'was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.' "[60]

In 1976, the Supreme Court again refused to interpret the FCA restrictively. In *United States v. Bornstein*[61], a subcontractor willfully misrepresented the quality of electronic tubes to the prime contractor. The subcontractor was held liable under the FCA for a false claim submitted to the government by the prime contractor.[62] Thus, the FCA was liberally construed to include indirect, fraudulent claims of subcontractors.[63]

In *Dean*, the Seventh Circuit chose not to follow the Supreme Court's liberal construction of the FCA. Instead, the Seventh Circuit ignored the *Neifert-White* and *Bornstein* decisions and adopted a restrictive interpretation based upon earlier Third and Fifth Circuit decisions.[64]

WISCONSIN'S STATUTORY OBLIGATION

While other circuits have recognized that the jurisdictional bar applies when the plaintiff is the source of the information in the government's possession,[65] the facts in *Dean* are unique. Although Wisconsin was the source of the information

51. 729 F.2d at 1105.
52. 275 F.2d at 282, 283.
53. 151 F.2d 851 (5th Cir. 1945).
54. *Id.* at 853. The *Pittman* court, however, declined to apply the jurisdictional bar because the government had joined in the suit.
55. 390 U.S. 228 (1968).
56. 423 U.S. 303 (1976).
57. 390 U.S. at 229.
58. *Id.*
59. *Id.* at 232.
60. *Id.* at 233, quoting Rainwater v. United States, 356 U.S. 590, 592 (1958).
61. 423 U.S. at 303.
62. *Id.* at 303, 304.
63. *Id.*
64. *See Dean*, 729 F.2d at 1105, 1106.
65. The following cases have also held that the jurisdictional bar applies even if the plaintiff is the source of the information: United States ex rel. Weinberger v. Florida 615 F.2d 1370, 1371 (5th Cir. 1980); Pettis ex rel. United States v. Morrison-Knudsen Co. 577 F.2d 668, 669 (9th Cir. 1978); Safir v. Blackwell 579 F.2d 742, 747 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). However, in each of

in the government's possession,[66] Wisconsin did not voluntarily offer the information to the government.[67] Rather, the Medicare reimbursement program required Wisconsin to provide the information to the federal government.[68] Wisconsin had a dilemma. If it gave the information to the United States, the jurisdictional bar as interpreted by the *Dean* court would prevent any recovery under the FCA.[69] On the other hand, if Wisconsin withheld the information to preserve its right to sue under the FCA, it would violate federal law under the Medicare reimbursement program.[70]

Wisconsin chose to comply with federal law and provide the information to the United States.[71] In doing so, Wisconsin hoped the court would recognize its dilemma and allow its suit despite the jurisdictional bar.[72] The district court was sympathetic to Wisconsin's situation;[73] the Seventh Circuit was not.[74]

POLICY CONSIDERATIONS

In *Dean*, the Seventh Circuit followed the Third and Fifth Circuits in adopting a restrictive, literal reading of the FCA's jurisdictional bar provision.[75] Granted, a literal reading promotes predictability by enabling plaintiffs to rely on the plain language of the statute. A literal reading, however, controverts two Supreme Court decisions that broadly construe the FCA to allow recovery for fraud perpetrated on the government.[76] Moreover, reading an absolute jurisdictional bar into the FCA frustrates its legislative intent since the United States government would be less protected from fraudulent claims.[77] A literal reading also frustrates the legislative intent of the jurisdictional bar provision. The jurisdictional bar was enacted not only to bar parasitical suits that arise from public records,[78] but also to allow legitimate suits brought by honest plaintiffs.[79] Furthermore, a literal reading neglects to consider any mitigating or equitable factors, such as Wisconsin's predicament in which federal medicaid law required Wisconsin to provide the information to the United States.[80]

The *Dean* court did, however, recognize the inequity of a literal interpretation.[81] The court suggested that Wisconsin petition Congress to create an exception to the jurisdictional bar.[82] The court stated: "If the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the Federal Government, then it should ask Congress to

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these cases, the plaintiff was not required by law to provide the essential information to the Government, as Wisconsin was required to disclose in *Dean*. *See supra* note 19.

66. 729 F.2d at 1104.
67. *Id.*
68. *Id.*
69. *See* 31 U.S.C. § 232(C) (1976). Since the United States would have possession of the information upon which the suit was based, the jurisdictional bar would prevent either Wisconsin or the United States from recovering under the False Claims Act despite the fraud perpetrated on the state and federal governments. Consequently, Wisconsin would have to pursue a remedy in state court and the United States would have to search for a different act under which to recover — assuming one is available.
70. *See* 42 C.F.R. § 455.17 (1984) *supra* note 21.
71. 729 F.2d at 1104.
72. *See id.* at 1101, 1106.
73. *See id.* at 1103.
74. *See id.* at 1106.
75. *Id.* at 1105, 1106.
76. *See Neifert-White* 390 U.S. at 232 and *Bornstein* 423 U.S. at 303, 304.
77. 390 U.S. at 233.
78. *See supra* text accompanying notes 30-31.
79. *See supra* text accompanying notes 41-46.
80. *See supra* text accompanying notes 21-22 and 65-74.
81. 729 F.2d at 1105, 1106.
82. *Id.* at 1106, 1107.

provide the exemption."[83]

In order to provide an equitable solution to cases like *Dean*, Congress should amend the FCA's jurisdictional bar provision to exempt plaintiffs who are required to report the essential information to the Federal Government. Such an amendment would enable plaintiffs to rely on the plain language of the statute, rather than guessing whether the court will broadly construe the FCA. This amendment would also be consistent with the legislative intent of the jurisdictional bar provision. It would allow honest plaintiffs, like Wisconsin, to recover while still barring parasitical suits brought by racketeers and dishonest plaintiffs.[84] Most importantly, because fewer plaintiffs would fall within the jurisdictional bar, this amendment would further the original purpose of the False Claims Act: to protect the United States Government from fraudulent claims.[85]

PROPOSED AMENDMENT

This comment proposes an amendment to the jurisdictional bar of the FCA:

> The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought, *unless the plaintiff was the source of such evidence or information and was required by federal law to provide such evidence or information to the United States, or any agency, officer, or employee thereof.*

(Italicized portion indicates author's proposed amendment to § 232(C).)

This amendment would enable plaintiffs and courts to rely on the plain language of the statute, thereby promoting predictability. With this amendment, even a literal interpretation would not controvert the legislative intent of the jurisdictional bar. Presently, the jurisdictional bar provision of the FCA is overbroad because it bars suits by plaintiffs, like the State of Wisconsin, who are required to turn information over to the Federal Government. The proposed amendment eliminates the overbreadth problem by allowing recovery for plaintiffs who are required by federal law to provide the information to the United States government. Unless Congress acts to amend the jurisdictional bar of the FCA, plaintiffs, like Wisconsin, will lose an otherwise valid cause of action because they complied with federal law and submitted essential information to the federal government. Furthermore, without this amendment, the United States would not be adequately protected against fraudulent claims since legitimate suits would fall within the overbroad jurisdictional bar.

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83. *Id.*
84. *See supra* text accompanying notes 41-46.
85. 390 U.S. at 233.

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