DISCHARGING FALSE CLAIMS LIABILITY IN BANKRUPTCY, SECTION 1141(D)(6)(A) OF THE BANKRUPTCY CODE: AN INCENTIVE TO SETTLE FCA CASES?

Roger S. Goldman, Esq.
Abid R. Qureshi, Esq.
Anne W. Robinson, Esq.
Latham & Watkins LLP
Washington, DC
Katherine A. Lauer, Esq.
Latham & Watkins LLP
San Diego, CA

For a corporation in financial distress, reorganization under Chapter 11 of the Bankruptcy Code provides critical protections, allowing it to discharge certain debts while retaining control over its business. Indeed, until recently, a corporation filing for bankruptcy under Chapter 11 was permitted to discharge all debts, no matter how incurred, upon reorganization. Confirmation of a reorganization plan promised the corporation a clean slate, requiring it to pay only a fraction of what it owed. But in 2005, on the heels of Enron’s bankruptcy filing and attendant criminal prosecution, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), eliminating the corporation a comprehensive discharge of all pre-confirmation debts. This new provision excludes from automatic discharge any corporate debts incurred as a result of fraud:

[T]he confirmation of a plan does not discharge a debtor that is a corporation from any debt (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute.2

Thus, section 1141(d)(6)(A) exempts two kinds of debts from bankruptcy discharge: debts to a domestic governmental unit arising out of fraud (as defined in 11 U.S.C. § 523(a)(2)(A) and (B)), and debts owed to a person bringing suit under the federal FCA or similar state statute. The non-dischargeability of these debts is a significant departure from the Bankruptcy Code’s underlying principle of complete corporate debt forgiveness.3 Prior to its amendment in 2005, section 1141(d) provided that a confirmed reorganization plan discharged a corporation from its existing debts. In fact, when amending the Bankruptcy Code in 1978, Congress eliminated the exceptions to corporate discharge enacted in the 19th century, and legislated that all debts—no matter how incurred—were discharged upon confirmation of a reorganization plan. This principle of complete discharge was animated by the belief that exceptions to discharge prevented rehabilitation: “corporate discharge exceptions in chapter [11]—particularly the discharge exception for fraud debts—posed a substantial impediment to the ability of certain debtors to reorganize under that chapter.”

Section 1141(d)(6) was first introduced in 1997 in the limited context of tax fraud debts. The Tax Advisory Committee of the National Bankruptcy Review Commission4 sought to amend the Chapter 11 discharge provision “to except from discharge taxes unpaid by business entities, which nonpayment arose from fraud.”5 This narrow tax fraud proposal subsequently expanded into wide-reaching legislative proposals that aimed to make bankruptcy less forgiving for corporations whose executives had engaged in illegal activity.6 Various legislative proposals considered after 1997 called for different types of exceptions to the complete discharge of corporate debts. At one point, draft legislation proposed that all nineteen of the debts excepted from discharge for individual debtors (enumerated in 11 U.S.C. § 523) apply to corporate debtors as well.7 And at another time, proposed legislation excepted from discharge

The Origins of Section 1141(d)(6)(A)

BAPCPA added sub-section (6) (A) to section 11 U.S.C. § 1141(d), the section that previously afforded a corporate debtor a comprehensive discharge of all pre-confirmation debts. This new provision excludes from automatic discharge any corporate debts incurred as a result of fraud:

The non-dischargeability of these debts is a significant departure from the Bankruptcy Code’s underlying principle of complete corporate debt forgiveness. Prior to its amendment in 2005, section 1141(d) provided that a confirmed reorganization plan discharged a corporation from its existing debts. In fact, when amending the Bankruptcy Code in 1978, Congress eliminated the exceptions to corporate discharge enacted in the 19th century, and legislated that all debts—no matter how incurred—were discharged upon confirmation of a reorganization plan. This principle of complete discharge was animated by the belief that exceptions to discharge prevented rehabilitation: "corporate discharge exceptions in chapter [11]—particularly the discharge exception for fraud debts—posed a substantial impediment to the ability of certain debtors to reorganize under that chapter."

Section 1141(d)(6) was first introduced in 1997 in the limited context of tax fraud debts. The Tax Advisory Committee of the National Bankruptcy Review Commission sought to amend the Chapter 11 discharge provision “to except from discharge taxes unpaid by business entities, which nonpayment arose from fraud.” This narrow tax fraud proposal subsequently expanded into wide-reaching legislative proposals that aimed to make bankruptcy less forgiving for corporations whose executives had engaged in illegal activity. Various legislative proposals considered after 1997 called for different types of exceptions to the complete discharge of corporate debts. At one point, draft legislation proposed that all nineteen of the debts excepted from discharge for individual debtors (enumerated in 11 U.S.C. § 523) apply to corporate debtors as well. And at another time, proposed legislation excepted from discharge

The Origins of Section 1141(d)(6)(A)

BAPCPA added sub-section (6) (A) to section 11 U.S.C. § 1141(d), the section that previously afforded a corporate debtor a comprehensive discharge of all pre-confirmation debts. This new provision excludes from automatic discharge any corporate debts incurred as a result of fraud:

Therefore, section 1141(d)(6)(A) exempts two kinds of debts from bankruptcy discharge: debts to a domestic governmental unit arising out of fraud (as defined in 11 U.S.C. § 523(a)(2)(A) and (B)), and debts owed to a person bringing suit under the federal FCA or similar state statute. The non-dischargeability of these debts is a significant departure from the Bankruptcy Code’s underlying principle of complete corporate debt forgiveness. Prior to its amendment in 2005, section 1141(d) provided that a confirmed reorganization plan discharged a corporation from its existing debts. In fact, when amending the Bankruptcy Code in 1978, Congress eliminated the exceptions to corporate discharge enacted in the 19th century, and legislated that all debts—no matter how incurred—were discharged upon confirmation of a reorganization plan. This principle of complete discharge was animated by the belief that exceptions to discharge prevented rehabilitation: “corporate discharge exceptions in chapter [11]—particularly the discharge exception for fraud debts—posed a substantial impediment to the ability of certain debtors to reorganize under that chapter."

Section 1141(d)(6) was first introduced in 1997 in the limited context of tax fraud debts. The Tax Advisory Committee of the National Bankruptcy Review Commission sought to amend the Chapter 11 discharge provision “to except from discharge taxes unpaid by business entities, which nonpayment arose from fraud.” This narrow tax fraud proposal subsequently expanded into wide-reaching legislative proposals that aimed to make bankruptcy less forgiving for corporations whose executives had engaged in illegal activity. Various legislative proposals considered after 1997 called for different types of exceptions to the complete discharge of corporate debts. At one point, draft legislation proposed that all nineteen of the debts excepted from discharge for individual debtors (enumerated in 11 U.S.C. § 523) apply to corporate debtors as well. And at another time, proposed legislation excepted from discharge

The Origins of Section 1141(d)(6)(A)

BAPCPA added sub-section (6) (A) to section 11 U.S.C. § 1141(d), the section that previously afforded a corporate debtor a comprehensive discharge of all pre-confirmation debts. This new provision excludes from automatic discharge any corporate debts incurred as a result of fraud:

Therefore, section 1141(d)(6)(A) exempts two kinds of debts from bankruptcy discharge: debts to a domestic governmental unit arising out of fraud (as defined in 11 U.S.C. § 523(a)(2)(A) and (B)), and debts owed to a person bringing suit under the federal FCA or similar state statute. The non-dischargeability of these debts is a significant departure from the Bankruptcy Code’s underlying principle of complete corporate debt forgiveness. Prior to its amendment in 2005, section 1141(d) provided that a confirmed reorganization plan discharged a corporation from its existing debts. In fact, when amending the Bankruptcy Code in 1978, Congress eliminated the exceptions to corporate discharge enacted in the 19th century, and legislated that all debts—no matter how incurred—were discharged upon confirmation of a reorganization plan. This principle of complete discharge was animated by the belief that exceptions to discharge prevented rehabilitation: “corporate discharge exceptions in chapter [11]—particularly the discharge exception for fraud debts—posed a substantial impediment to the ability of certain debtors to reorganize under that chapter."

Section 1141(d)(6) was first introduced in 1997 in the limited context of tax fraud debts. The Tax Advisory Committee of the National Bankruptcy Review Commission sought to amend the Chapter 11 discharge provision “to except from discharge taxes unpaid by business entities, which nonpayment arose from fraud.” This narrow tax fraud proposal subsequently expanded into wide-reaching legislative proposals that aimed to make bankruptcy less forgiving for corporations whose executives had engaged in illegal activity. Various legislative proposals considered after 1997 called for different types of exceptions to the complete discharge of corporate debts. At one point, draft legislation proposed that all nineteen of the debts excepted from discharge for individual debtors (enumerated in 11 U.S.C. § 523) apply to corporate debtors as well. And at another time, proposed legislation excepted from discharge

The Origins of Section 1141(d)(6)(A)

BAPCPA added sub-section (6) (A) to section 11 U.S.C. § 1141(d), the section that previously afforded a corporate debtor a comprehensive discharge of all pre-confirmation debts. This new provision excludes from automatic discharge any corporate debts incurred as a result of fraud:

Therefore, section 1141(d)(6)(A) exempts two kinds of debts from bankruptcy discharge: debts to a domestic governmental unit arising out of fraud (as defined in 11 U.S.C. § 523(a)(2)(A) and (B)), and debts owed to a person bringing suit under the federal FCA or similar state statute. The non-dischargeability of these debts is a significant departure from the Bankruptcy Code’s underlying principle of complete corporate debt forgiveness. Prior to its amendment in 2005, section 1141(d) provided that a confirmed reorganization plan discharged a corporation from its existing debts. In fact, when amending the Bankruptcy Code in 1978, Congress eliminated the exceptions to corporate discharge enacted in the 19th century, and legislated that all debts—no matter how incurred—were discharged upon confirmation of a reorganization plan. This principle of complete discharge was animated by the belief that exceptions to discharge prevented rehabilitation: “corporate discharge exceptions in chapter [11]—particularly the discharge exception for fraud debts—posed a substantial impediment to the ability of certain debtors to reorganize under that chapter."

Section 1141(d)(6) was first introduced in 1997 in the limited context of tax fraud debts. The Tax Advisory Committee of the National Bankruptcy Review Commission sought to amend the Chapter 11 discharge provision “to except from discharge taxes unpaid by business entities, which nonpayment arose from fraud.” This narrow tax fraud proposal subsequently expanded into wide-reaching legislative proposals that aimed to make bankruptcy less forgiving for corporations whose executives had engaged in illegal activity. Various legislative proposals considered after 1997 called for different types of exceptions to the complete discharge of corporate debts. At one point, draft legislation proposed that all nineteen of the debts excepted from discharge for individual debtors (enumerated in 11 U.S.C. § 523) apply to corporate debtors as well. And at another time, proposed legislation excepted from discharge
any debt incurred as a result of fraud committed by the corporate debtor.9

All of these non-dischargeability proposals were met with strenuous objections from leading bankruptcy scholars and groups, including the National Bankruptcy Conference.10 During the 2001 legislative session, for example, Harvard Law School Professor (and current Chair of the Congressional Oversight Panel11) Elizabeth Warren testified:

The appropriate remedy when management has misbehaved is to fire the management and to sue them personally, not to saddle the surviving company with litigation that will sink it and repayments that will come out of the pockets of the innocent creditors.12

As a result of such concerns, legislators scaled back the discharge provision in the bill that then-President Bush signed into law in 2005.

The legislative history of BaPCPA does not provide any insight into how legislators came to narrow the non-dischargeability provision contained in section 1141(d)(6)(A).13 The reference to “subchapter III of chapter 37 of title 31” – the FCA – suggests that Congress intended to exclude from discharge any debt owed to the government arising from a corporation’s violation of the FCA. But the plain language used in section 1141(d)(6)(A) exempts only FCA debts “owed to a person,” and not those owed to a “domestic governmental unit.” Pursuant to 31 U.S.C. § 3730(d)(1), the only “person” that is entitled to any funds as a result of an FCA action is a qui tam relator who is statutorily authorized to recover from the defendant reasonable expenses, attorneys’ fees, and costs, and from the United States between 15 to 25 percent of the proceeds of a damages award or settlement.14 Although section 1141(d)(6)(A) indicates that corporate FCA liability to the government may be excepted from discharge if it qualifies under sections 523(a)(2)(A) or (2)(B) of the Bankruptcy Code, Congress could certainly have made the exception more explicit by providing that “any debt owed either to a domestic governmental unit or a person as a result” of an FCA action was excepted from discharge.

Discharging FCA Liability

As previously discussed, section 1141(d)(6)(A) excepts from discharge certain fraud-related debt (as enumerated in sections 523(a)(2)(A) or (2)(B)) owed to a domestic governmental unit, or a debt owed to an individual who brought suit under the FCA or similar state statute.15 The scope and significance of each of these clauses is discussed below.

Nondischargeability of Section 523(a)(2)(A) and (B) Debts Owed To Federal and State Governments and Agencies

In its first clause, section 1141(d)(6)(A) makes nondischargeable any “debt” specified in sections 523(a)(2)(A) and (B) “owed to a domestic governmental unit.” The term “debt,” as used in section 1141(d)(6)(A) and other provisions of the Bankruptcy Code, encompasses “all liability for fraud, whether in the form of punitive or compensatory damages.”16 Moreover, in addition to liability for a final judgment for damages, it includes liability for settlement payments and pending claims for payment.17 A “governmental unit,” as defined in the Bankruptcy Code, includes federal, state and city governments and agencies.18

Sections 523(a)(2)(A) and (B) of the Bankruptcy Code contain exceptions for fraud-related debts incurred by individual debtors:

(1) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title [11 U.S.C. § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt –

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent [it was] obtained by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition;

(B) use of a statement in writing –

(i) that is materially false;

(ii) respecting the debtor’s or an insider’s financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive….

Notably, in providing that a debt is non-dischargeable if it was incurred as a result of “false pretenses, a false representation, or actual fraud,” subsection 523(a)(2)(A) does not enumerate the specific elements of these causes of action. Courts interpret this subsection as excepting from discharge debts arising from common-law fraud, and apply the applicable jurisdiction’s common-law elements of actual fraud to determine whether a debt arises from “false pretenses, a false representation, or actual fraud” in evaluating dischargeability.19 Generally, creditors must show – by a preponderance of the evidence – the existence of facts satisfying the following five elements:

(1) that the debtor made a representation;

(2) that the representation was false and the debtor knew the representation to be false at the time it was made;

(3) that the representation was made with the intention and purpose of deceiving the creditor;
Discharging False Claims Liability in Bankruptcy

(4) that the creditor actually and justifiably relied upon the representation; and

(5) that the creditor sustained a loss or was damaged as a proximate result of the representation.20

This test is applied regardless of whether the creditor alleges false pretenses, false representation, or actual fraud.21

Section 523(a)(2)(B) provides for the nondischargeability of a debt arising out of:

(1) the use of a written statement;

(2) that is materially false;

(3) respecting the debtor’s or an insider’s financial condition;

(4) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(5) that the debtor caused to be made or published with intent to deceive.

Thus, the scope of section 523(a)(2)(B) non-dischargeability is slightly narrower than that of subsection 523(a)(2)(A), as it requires a written statement concerning the debtor’s financial condition.

While these provisions are not often evaluated in the false claims context, courts that have considered whether a debt arising from FCA violations is exempted from discharge under §§ 523(a)(2)(A)-(B) have reached differing conclusions. For example, in Winters v. United States, a bankruptcy court declined to declare non-dischargeable a $1.8 million FCA judgment against a debtor, concluding that several elements of § 523(a)(2)(A) were not satisfied by the district court record in the FCA litigation.22 The individual debtor in Winters was previously a defendant in a civil FCA action predicated on his submission of falsified cost reports to the government. The federal government obtained a $1.8 million civil judgment and $10,000 in civil penalties against him in the United States District Court for the Middle District of Tennessee.23 The district court made the following conclusions regarding the defendant’s scienter:

“[A] jury could have reasonably inferred that Winters acted in deliberate ignorance or in reckless disregard of the truth or falsity of the information he possessed related to the actual number of employees submitted in the pension accrual cost reports.

Because Winters acted in deliberate ignorance, or in reckless disregard, in failing to ascertain the actual number of employees submitted in the pension accrual cost report that formed the basis for…claim for reimbursement, the Court concludes that a jury could reasonably infer that Winters violated his ‘continuing duty to comply with the regulations on which payment is conditioned.’”24

The bankruptcy court found that these factual conclusions by the district court were insufficient to deem the FCA debt non-dischargeable under 11 U.S.C. § 523(a)(2)(A):

While not necessary to its decision, the court notes that the findings of the district court are not sufficient as a matter of law to determine that the debt to the United States is nondischargeable pursuant to section 523(a)(2)(A).25 Exceptions to discharge are to be strictly construed in favor of the debtor. The record reflects a finding that the claims submitted to Medicare, while false, resulted from deliberate ignorance or reckless disregard of their truth or falsity on the part of the Debtor. It is not clear, without more, that this finding rises to the level of scienter required for purposes of rendering a debt nondischargeable pursuant to section 523(a)(2)(A). Further, there is no analysis of the reliance placed upon the statements by the United States. In order for a debt to be excepted from discharge under section 523(a)(2)(A), the creditor must demonstrate not mere reliance in fact, but justifiable reliance upon the false statements.25

In contrast, the court in United States v. Spicer determined that the settlement of an action involving FCA and common-law fraud claims was non-dischargeable under section 523(a)(2)(A).26 The individual debtor in that case submitted false statements to obtain government mortgage insurance and was subsequently prosecuted criminally and civilly. The debtor pled guilty to the interstate transportation of money obtained by fraud, and admitted to making false statements in order to obtain mortgage insurance from the government. Later, the debtor reached a civil settlement agreement which contained no admission of liability but required him to pay $339,000 to the government over a ten-year period.27 When the debtor filed for bankruptcy under Chapter 7 of the Bankruptcy Code, he sought to have the $339,000 debt discharged. The government resisted, filing a complaint for non-dischargeability under section 523(a)(2)(A).28

The court held the debt non-dischargeable. After concluding that the entire $339,000 settlement amount related only to fraud claims (FCA and common-law), the court explained that the conduct underlying the settlement agreement satisfied the elements of fraud governing non-dischargeability under section 523(a)(2)(A):
The elements for actual fraud are met here as indicated by the following undisputed facts. The debtor has admitted he knowingly submitted false statements to the government or the purpose of inducing the government to insure mortgages. The false information submitted formed the basis for the government agreeing to insure the mortgages, and the government acted reasonably in relying on the false representations contained in the insurance applications: the certification was necessary before an application could be granted and there is no evidence the government was on warning that the certification was false. The debtor benefited from the government insuring the mortgages as such insurance facilitated the sale of the real properties, which, in turn, resulted in the debtor obtaining money through sales proceeds or commissions. Finally, because the government agreed to insure the mortgages, it was required to settle numerous claims to its detriment when the various mortgagors defaulted.

In addition, the Spicer court found dispositive the debtor’s admission—in a written factual proffer and oral statement made at both the entry of the criminal plea agreement and the associated sentencing hearing—that he knowingly submitted false statements to the government for the purpose of obtaining government insurance of mortgages.

Thus, while an FCA claim is not “ipso facto excepted from discharge under section 523(a)(2)” and is instead evaluated on a case-by-case basis, corporate defendants should know that false statements which form the basis of FCA liability are often viewed as “fall[ing] squarely within those not dischargeable in bankruptcy under [the predecessor to section 523(a)(2)(A)].”

Non-Dischargeability of Debts Owed to a “Person” Under The False Claims Act or Similar State Statute

In its second clause, section 1141(d)(6)(A) makes non-dischargeable any debt “owed to a person as the result of an action filed under [the FCA] or any similar State statute.” The use of the term “person” in the clause of section 1141(d)(6)(A) pertaining expressly to the FCA suggests that only debts “owed” to a qui tam plaintiff are non-dischargeable under this provision of BAPCPA. In fact, “person” is defined in the Bankruptcy Code to specifically exclude any governmental unit. But debts resulting from the underlying FCA liability are never “owed” to a qui tam plaintiff. Even if a qui tam relator hires and prosecutes an FCA suit and resulting damages are awarded to the government, which then gives a portion of the award to the qui tam plaintiff pursuant to 31 U.S.C. § 3730(d)(1).

The legislative history of BAPCPA provides no insight as to why section 1141(d)(6)(A) discharges only those FCA debts owed to a “person,” but Congress may have included the phrase “owed to a person” in order to give qui tam relators some incentive to pursue the non-dischargeability of FCA debts. If the government declines to intervene in an FCA litigation, it is unlikely to assert an action for nondischargeability. And even in the context of a non-intervened qui tam action, the action is brought in the name of the United States and the judgment rendered would be in favor of the United States, which would in turn pay the relator. But by protecting the relator’s claims for attorney fees, Congress did provide some additional incentive for relators to continue to pursue qui tam actions after a bankruptcy filing. As discussed in the next section, regardless of the intent or reasoning behind the language of section 1141(d)(6)(A), the resulting uncertainty will have the effect of motivating parties to settle FCA actions.

Practical Implications of The Language in Section 1141(d)(6)

Section 1141(d)(6) of the Bankruptcy Code excepts from discharge only FCA liability “owed” to relators (and their counsel). If Congress sought to establish clarity regarding the non-dischargeability of all FCA debts, why did BAPCPA fail to do so? The answer to this question may lie in the practical consequences of having the dischargeability of a corporate FCA debt to the government clouded in uncertainty— incentivizing parties to come to the negotiating table rather than roll the dice on litigation.

FCA defendant corporations in desperate financial circumstances and contemplating reorganization under Chapter 11 have no guarantee that any FCA debt they might incur will be discharged in bankruptcy. But the government fares no better: If the government seeks to establish non-dischargeability of an FCA debt, it cannot rest on any per se rule; instead, it must continue to rely on the case-by-case analysis of 11 U.S.C. § 523(a)(2)(A).

Thus, whether intended or not, a clear effect of section 1141(d)(6) is to create uncertainty with respect to dischargeability, and as a result to promote settlement between the government and corporate debtors.

This state of uncertainty may not last for long in light of Congress’s recent focus on legislative reform in both the fraud and bankruptcy arenas. In the past year, the FCA has been dramatically retooled to expand the scope of liability and otherwise benefit the government and qui tam plaintiffs. And Congress may reconsider certain provisions of BAPCPA in coming sessions to address the difficulties faced by financially complex
Discharging False Claims Liability in Bankruptcy

corporations trying to restructure during the current economic downturn. But until Congress amends section 1141(d) (6), parties and the courts are left to struggle with the statute's puzzlingly unclear language and the dischargeability of all FCA debts in a Chapter 11 reorganization.

***

Latham & Watkins LLP summer associate Michael Barnett also contributed to the authorship of this article.

Roger S. Goldman is a partner in the Washington, D.C. office and has practiced law with the firm since 1981. His practice centers around government contracts and healthcare with an emphasis on False Claims Act litigation, government contracts fraud defense and bid protest litigation. He has handled numerous *qui tam* proceedings, congressional investigations and grand jury investigations, representing a host of major healthcare corporations, government contractors and telecommunications firms. He has also handled bid protest litigation for major defense contractors, telecommunications companies, and healthcare companies in federal court and before the Government Accountability Office, the General Services Board of Contract Appeals and various federal agencies.

Mr. Goldman has played a principal role in the defense of a number of high profile health care fraud investigations on behalf of clients; he has also represented major government contractors in False Claims Act cases. He served as Chairman on the *Qui Tam* Monograph project for the ABA Public Contracts section, Procurement Fraud Committee in 1994. Mr. Goldman is the Co-Founder and President of Buildable Hours, Inc., a national organization that assembles groups of law firms to build homes with Habitat for Humanity International. In November 2006, he was named Corporate Partner of the Year by New York City Habitat for Humanity at its 7th Annual Builder Awards Gala. As a member of the firm’s Pro Bono Committee, Mr. Goldman actively participates in administration of the firm’s extensive pro bono program. Mr. Goldman may be reached at 202-637-2253 or roger.goldman@lw.com.

Katherine A. Lauer is a partner in the firm’s San Diego office, and is a Global Co-chair of the firm’s Healthcare and Life Sciences Practice Group. Ms. Lauer focuses her practice on healthcare litigation, with emphasis on healthcare fraud defense. She has defended some of the country’s largest and most high profile civil and criminal government healthcare fraud investigations and *qui tam* cases. Ms. Lauer has repeatedly been recognized by *Nightingale’s Healthcare News* as one of the country’s top healthcare attorneys – in 2004 as an “Outstanding Fraud and Compliance Lawyer” and in 2006 as an “Outstanding Healthcare Litigator.”

Ms. Lauer has extensive expertise in the federal Anti-kickback Statute, the Stark Laws and the federal False Claims Act, as well as cost reporting and other reimbursement issues. She advises a wide array of healthcare industry clients on issues related to pharmaceutical and medical device marketing, the structure and formation of joint ventures and other corporate transactions, including mergers and acquisitions. She also has particular expertise in the design and implementation compliance programs, and has structured and conducted many internal investigations and compliance audits.

Ms. Lauer is the immediate past Co-Chair of the Health Law Litigation Committee of the American Bar Association Section of Litigation. She is a member of the American Health Lawyers Association, the Healthcare and Government Contracts section of the Federal Bar Association, and the California Society for Healthcare Attorneys, where she serves on the Publications Committee. Ms. Lauer is a Barrister in the William Enright Chapter of the American Inns of Court and a member of the Association of Business Trial Lawyers. She is a frequent speaker at premier national conferences as a prolific author. Ms. Lauer may be reached at 619-238-2841 or katherine.lauer@lw.com.

Abid Qureshi is a partner and the local co-chair of Latham & Watkins’ Litigation Department in the Washington, D.C. office. Mr. Qureshi has represented a variety of clients in the health care/life sciences industry. In addition, he has represented managed care companies, manufacturers of medical and diagnostic devices, and health care information system providers.

He has a particular expertise in representing healthcare clients in government investigations involving alleged violations of the False Claims Act, the Physician Self-Referral Law, and the Anti-Kickback Statute. In addition, Mr. Qureshi’s health care experience includes resolving reimbursement disputes with managed care companies; evaluating uninsured patient and charity care policies; reviewing state and federal billing requirements for healthcare providers and medical device manufacturers; and assisting managed care companies achieve accreditation. He also has experience in conducting internal investigations and representing companies in complex commercial litigation matters. Mr. Qureshi may be reached at 1.202.637.2240 or abid.qureshi@lw.com.

Anne Robinson is an associate in the Litigation Department in the Washington, D.C. office of Latham & Watkins. Her practice focuses primarily on government contracts litigation and white collar and government investigations.
Ms. Robinson has represented clients in a variety of commercial matters in state and federal courts and before the General Accounting Office and federal regulatory agencies. She has particular expertise in allegations involving the False Claims Act and other allegations of fraudulent conduct.

Ms. Robinson has authored or contributed to numerous U.S. Court of Appeals and Supreme Court briefs.

Ms. Robinson’s pro bono work includes a successful challenge in the United States Court of Appeals for the Second Circuit to a denial of benefits by the Social Security Administration and the representation of an asylum applicant before the United States Court of Appeals for the Fourth Circuit. Prior to joining Latham & Watkins, Ms. Robinson served as a law clerk to the Honorable Edith Brown Clement of the United States Court of Appeals for the Fifth Circuit. Ms. Robinson may be reached at 202-637-2161 or anne.robinson@lw.com.

Endnotes

3. This is particularly true after the enactment of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21 (S. 386) in May 2009. As part of this broad antifraud initiative, Congress dramatically expanded the scope of FCA liability and enacted procedural revisions that benefit the government and qui tam relators. As a result, corporations will face an increased number of qui tam suits. See, e.g., Roger S. Goldman, Katherine A. Lauer, Abid R. Qureshi and Anne W. Robinson, Significant False Claims Act Amendments Enacted as Part of the Fraud Enforcement and Recovery Act of 2009 16-19, The Lawyer’s Brief, Vol. 39, No. 14 (July 29, 2009).
5. The Tax Advisory Committee was formed as part of the National Bankruptcy Review Commission in February 1997. Its members, who are appointed by the Commission, are charged broadly with discussing and making proposals regarding issues that involve tax collection, compliance, and reporting relating to bankruptcy, the bankruptcy process, and the administration of the bankruptcy estate.
7. See 146 Cong. Rec. S11715 (daily ed. Dec. 7, 2000) (“Congress believes the Bankruptcy Code should not encourage fraud by allowing the discharge of debts incurred through fraud or false representation simply because those debts were incurred in a corporate setting.”) (statement of Sen. Grassley on a failed predecessor to BAPCPA).
8. See H.R. 833, 106th Cong. § 321(d) (as passed by Senate, Feb. 2, 2000). These 19 debts include those to a spouse, former spouse or child of the debtor incurred in the course of a divorce (§ 523(a)(15)) and debts for death or personal injury caused by the debtor’s unlawful operation of a motor vehicle, vessel or aircraft due to intoxication (§ 523(a)(9)).
10. The National Bankruptcy Commission was formed in the 1940s and has been involved in advising Congress on every significant piece of bankruptcy legislation since then. Its 60 members are leading bankruptcy scholars and experts, current and former judges, former members of congressional staff, and practitioners from leading law firms. See National Bankruptcy Conference Website, available at http://www.nationalbankruptcyconference.org/images/NBC%20Fall06%20Fact%20sheet%20Nov7b.pdf.
11. Congress created the Congressional Oversight Panel in conjunction with the $700 billion provided to the U.S. Treasury to distribute through the Troubled Asset Relief Program. In addition to overseeing Treasury’s actions, the Panel is charged with “review[ing] the current state of financial markets and the regulatory system” and analyzing “its effectivenss at overseeing the participants in the financial system and protecting customers.” See Congressional Oversight Panel, About the Congressional Oversight Panel, available at http://cop senate.gov/about/.
14. Id. at *5 (emphases omitted) (quoting the district court’s opinion).
15. Id. at *12.*13 (internal citations omitted) (emphasis in original). The Bankruptcy Court ultimately denied the government’s request to determine Winters’ $1.8 million debt non-dischargeable on procedural grounds (the government had failed to file a timely complaint as required under the Bankruptcy Rules).
18. See 11 U.S.C. § 101(27) (“The term ‘governmental unit’ means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territo r y, municipality, or a foreign state; or other foreign or domestic government.”).
20. Id. at 322-33 (collecting cases).
22. Winters v. United States, No. 03-40517-L, 2006 Bankr. LEXIS 3678, at *12-*13 (Bankr. W.D. Tenn. Dec. 27, 2006) (noting that “[e]xceptions to discharge are to be strictly construed in favor of the debtor.”) (citing Rembert v. AT&T Universal Card Servs., 141 F.3d 277, 281 (6th Cir. 1998)).” The opinion in Winters was subsequently vacated by the Bankruptcy Court because the debtor died prior to the entry of the discharge order. See Winters v. United States, Case No. 03-40517-L, 2006 Bankr. LEXIS 3678, at *2-3 (Bankr. W.D. Tenn. Feb. 16, 2007) (“Although the analysis set for in the court’s prior order is sound, the order cannot have its intended effect because the Debtor died prior to discharge.”).
24. Id. at *5 (emphases omitted) (quoting the district court’s opinion).
25. Id. at *12.*13 (internal citations omitted) (emphasis in original). The Bankruptcy Court ultimately denied the government’s request to determine Winters’ $1.8 million debt non-dischargeable on procedural grounds (the government had failed to file a timely complaint as required under the Bankruptcy Rules).
27. Id. at 798.
28. Id. at 798.
29. Id. at 802.
30. Id. at 798.
32. United States v. McQuaters, 370 F. Supp. 1286, 1288 (W.D. Tex. 1973) (“Plaintiff’s... complaint against the defendant alleged his...
Discharging False Claims Liability in Bankruptcy

liabilities arose because he knowingly falsified invoices and used these to obtain money from plaintiff to which he was not entitled. It requires no citation of authority to support the conclusion that such liabilities fall squarely within those not dischargeable in bankruptcy under [the predecessor to section 523(a)(2)(A)]."

The qui tam provisions of the FCA allow a private citizen to bring suit on the government's behalf and to receive a percentage of any damages awarded. See 31 U.S.C. § 3730(b).

*8-9. As previously discussed, non-dischargeability determinations are fact-intensive inquiries in which bankruptcy courts consider a wide range of evidence. See, e.g., In re Espoito, 44 B.R. 817, 821 (Bankr. S.D.N.Y. 1984); Spicer, 155 B.R. at 804.


34 The qui tam provisions of the FCA exist for the purpose of allowing private individuals to enforce federal law. See, e.g., Patient Protection and Affordable Care Act, H.R. 3590, § 10104(j), 111th Cong. (2009) (amending public disclosure bar and original source exception to expand private enforcement of qui tam actions).

35 11 U.S.C. § 101(41) (“[t]he term ‘person’ includes individual, partnership, and corporation, but does not include governmental unit…”).

36 JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION 767 (5th ed. 2007) ("The private right of recovery created by the qui tam provisions of the FCA exists not to compensate the qui tam relator, but the United States.").


The Editorial Board provides expertise in specialized areas covered by the Section. Individual Board members were appointed by the Interest Group Chairs and Editor Marla Durben Hirsch. If you are interested in submitting an article to the magazine, you may contact one of the Editorial Board members or Ms. Hirsch. With the establishment of the Editorial Board, the Section strengthens its commitment to provide the highest quality analysis of topics in a timely manner.

Michael A. Clark
Sidley Austin Brown & Wood
Chicago, IL
Tax & Accounting
312/853-2135
mclark@sidley.com

Benjamin Cohen*
Offices of Benings
Dept. of Health & Human Services
Baltimore, MD
Payment & Reimbursement
410/786-3169
* Sponsoring the Editorial Board's work in a personal capacity, not as a representative of CMS or HHS, and no endorsement by them should be implied.

Marcelo N. Corpus III
Walgreens Health Services
Deerfield, IL
Business and Transactions
847/964-8228
marcelo.corpus@walgreens.com

Jason W. Hancock
Hospital Corporation of America
Brentwood, TN
Young Lawyer Division
615/372-5480
jason.hancock@hcahealthcare.com

Bruce Howell
Bryan Cave
Dallas, TX
Medical Research, Biotechnology & Clinical Ethical Issues
214/721-8047
bruce.howell@bryan Cave.com

Rakel M. Meir
Tufts Health Plan
Watertown, MA
Managed Care and Insurance
617/923-5841
Rakel_Meir@tufts-health.com

Monica P. Navarro
Frank, Horan, Weiner and Navarro
Troy, MI
Physician Issues
248/390-2323
monnavarro@fhwnlaw.com

C. Elizabeth O'Keeffe
Dartmouth-Hitchcock Medical Center
Lebanon, NH
Public Health & Policy
603/650-3361
Celeste.E.O'Keeffe@hitchcock.org

Leonard M. Rosenberg
Garfinkel, Wild & Truvis, PC
Great Neck, NY
Healthcare Litigation & Risk Management
516/393-2260
Irosenberg@gwtlaw.com

Andrew B. Wachler
Wachler & Associates
Royal Oak, MI
Healthcare Fraud & Compliance
248/952-0400
awachler@wachler.com

© 2010 ABA Journal. All rights reserved. Foster Printing Service: 866-879-9144, www.marketingreprints.com