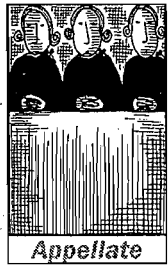


## Circuit Splits Affect Conflicts Of Authority

By Laura W. Brill, Alana B. Hoffman, Ted M. Sichelman, Jonathan P. Steinsapir

Federal circuit courts in April created or deepened conflicts of authority on significant matters of interest to the business community, among them a case involving relators in qui tam actions challenging fraud against the federal government.

Other significant circuit splits include matters relating to the federal Truth in Lending Act, the treatment of shipping agreements in federal bankruptcy law, and the scope of sovereign immunity in actions under the Federal Tort Claims Act.



Appellate

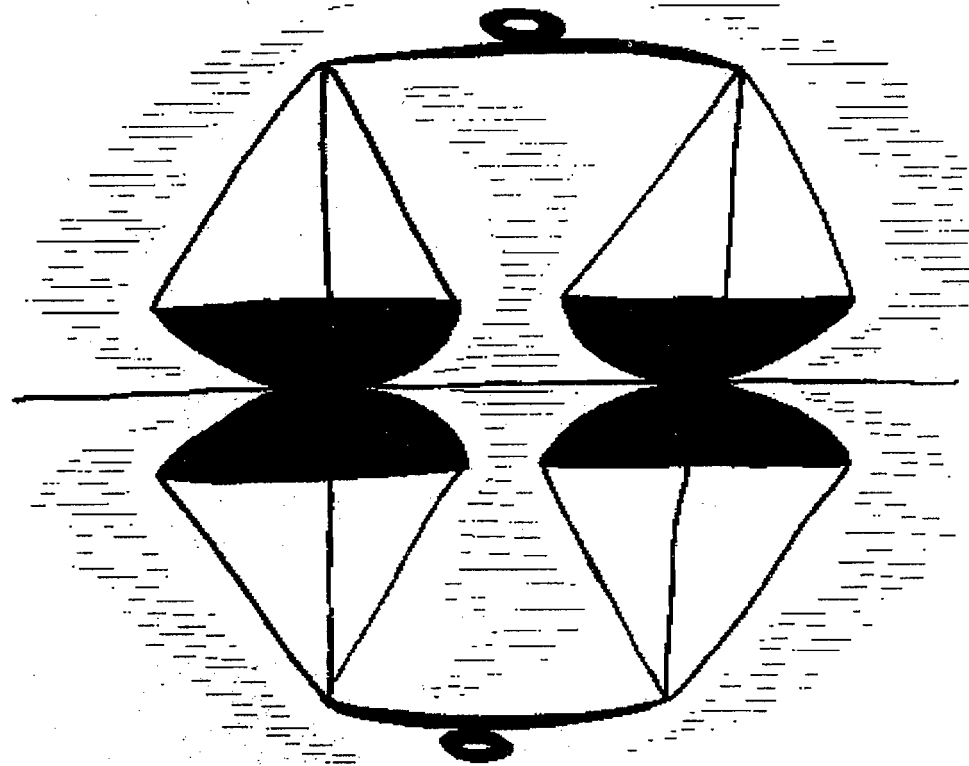
### False Claims Act

The False Claims Act imposes liability on those who defraud the federal government. A well-known provision of the act provides for so-called qui tam actions, that is, actions in which a private citizen sues in the name of the United States and is allowed to share in any recovery by the United States. See 31 U.S.C. Section 3730(b).

To discourage opportunistic parties from instituting qui tam actions, the act prohibits (with some exceptions) qui tam actions based on certain publicly disclosed fraud allegations: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. Section 3730(e)(4)(A).

In *U.S. ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (April 19, 2006), the 9th Circuit addressed whether information disclosed pursuant to a Freedom of Information Act request constituted such a public disclosure. The court held that it was not such a disclosure because a Freedom of Information Act request does not resemble any of the sources listed in Section 3730(e)(4)(A).

Further, the court noted that holding that a Freedom of Information Act request bars a qui tam suit would not further the purposes on the bar of qui tam actions based on publicly known information: "While the government can be ex-



*Texas Medical Center Regional Healthcare System*, 384 F.3d 168 (2004).

pected to be on notice of fraud when the allegations are contained in a public disclosure such as an administrative or congressional hearing, when responding to a [Freedom of Information Act] request, the government need not assimilate the information contained in the requested documents."

The court noted that its decision created a circuit split on the issue, because the 3rd Circuit held that when information forming the basis of a qui tam action has been disclosed previously in a Freedom of Information Act request, the qui tam action is barred. *U.S. ex rel. Mistick PBT v. Housing Authority of City of Pittsburgh*, 186 F.3d 376 (1999) (Alito) ("the disclosure of information in response to a [Freedom of Information Act] request is a public disclosure").

The 5th Circuit is aligned with the 3rd in finding that qui tam actions based on information discovered in Freedom of Information Act requests are barred. *U.S. ex rel. Reagan v. East*

### Truth in Lending Act

Under the Truth in Lending Act, 15 U.S.C. Section 1601, et seq., if a lender does not comply with certain disclosure requirements in a loan transaction secured by a borrower's principal dwelling, the borrower may rescind the loan agreement up to three years after it was made.

The Truth in Lending Act provides that in

rescinding the loan agreement, the lender's security interest in the home is released and the lender must refund certain fees paid by the borrower when the transaction was entered into. In *Barrett v. JP Morgan Chase Bank N.A.*, 445 F.3d 874 (April 18, 2006), the 6th Circuit addressed whether refinancing the original loan extinguishes the right to rescind. Following a 9th Circuit case, *King v. California*, 784 F.2d 910 (1986), the District Court held that when a loan is refinanced, a borrower loses his or her right to rescind the agreement because the original agreement no longer exists and thus "there was nothing left to rescind."

The 6th Circuit reversed the District Court and rejected the 9th Circuit's analysis because the act allows rescission of the entire loan transaction, including fees previously paid, not just rescission of a lender's security interest. *Barrett*. In so doing, the 6th Circuit agreed with an unpublished decision of the District of Columbia Circuit, which also had rejected the 9th Circuit's decision in *King*. See *Duren v. First Government Mortgage and Investors Corp.*, 221 F.3d 195 (D.C. Cir. June 7, 2000).

### Federal Courts — Sovereign Immunity

The Federal Tort Claims Act waives the sovereign immunity of the U.S. government to allow private parties to sue for a wide variety of torts committed by the United States and its agents. At issue in *T.L. v. U.S.*, 443 F.3d 956 (8th Cir. April 6, 2006), a malpractice suit against doctors

employed by federally funded health facilities, was whether compliance with the Federal Tort Claims Act's two-year statute of limitations is a jurisdictional prerequisite to filing suit or simply an affirmative defense on the part of the government.

If the former, a district court typically may not equitably toll the statute, and it may weigh preliminary factual issues to determine its jurisdiction; if the latter, the exact opposite holds true.

The 8th Circuit held that in view of the most recent Supreme Court precedent, in *U.S. v. Brockamp*, 519 U.S. 347 (1997), the Tort Claims Act's statute of limitations is a "jurisdictional prerequisite" but that equitable tolling of the statute is available if "Congress intended it to apply." In so doing, the 8th Circuit joined the 1st, 2nd, 4th and 10th Circuits, but split with the 3rd Circuit, which held in *Hedges v. U.S.*, 404 F.3d 744 (2005), that the limitations requirement under the Federal Tort Claims Act was not jurisdictional, even in view of *Brockamp*. The significance of *T.L.*'s jurisdictional ruling is limited somewhat by the fact that the 8th Circuit held that Congress did intend equitable tolling to apply to Federal Tort Claims Act claims. Accordingly, the availability of such tolling was "one of the 'terms' of the government's consent to be[ing] sued."

### **Bankruptcy**

There is a practice in the freight transportation industry of "interlining," which consists of several companies working together to move a shipment of freight under a single bill of lading. When a shipment is transported pursuant to such an arrangement, one company collects payment from the shipper and forwards shares to each carrier involved. Some circuits have held that, under federal common law, the collecting company holds the payment for such shipments under trust for the other shippers. In circuits recognizing this principle, known as the "interline trust doctrine," if the collecting company files for bankruptcy, the as-yet-undistributed payment is not part of the bankruptcy estate but rather is disbursed immediately to the other shippers.

In *Norfolk S. Ry. Co. v. Consolidated Freightways Corp. (In re Consol. Freightways Corp.)*, 443 F.3d 1160 (April 10, 2006), the 9th Circuit recently declined to recognize the interline trust doctrine, holding that state law, rather than federal common law, governs the status of payments for interlining shipments.

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