

WEAPONS OF MASS CONSTRUCTION:  
THE POTENTIAL LIABILITY OF HALLIBURTON UNDER THE  
FALSE CLAIMS ACT AND THE IMPLICATIONS TO DEFENSE  
CONTRACTING\*

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I. INTRODUCTION

Defense contracting has taken a new turn with the influx of private contracts for military support, equipment, and services.<sup>1</sup> Not surprisingly, the

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1. See William N. Washington, *Participatory Contracting—Defense Contracting*, 7 ACQUISITION REV. Q. 373, 373 (2000).

inevitable chaos of wartime adds extra stressors to these contracting situations. And with increasing reports of insurgents targeting civilian contractor employees and beheading them on television, contractors are not exactly lining up at the government's door to bid for military support work.<sup>2</sup> Thus, the government is somewhat at the mercy of available and willing defense contractors. At the same time, the government is increasingly uncovering mistakes made by private contractors working in war conditions and in highly dangerous areas.<sup>3</sup> How does such mayhem affect the accuracy of claims submitted by wartime contractors? As the government's largest Iraqi contractor, Halliburton is at the center of public debate and government investigations centering on this dichotomy between wartime conditions and accurate contractor billing. As such, serious questions involving the accounting practices and billing procedures of Halliburton and its Kellogg, Brown, and Root (KBR) subsidiary working in Iraq have surfaced.<sup>4</sup> Thus, Halliburton and KBR may face liability under the False Claims Act (FCA) for their work in Iraq. Such potential liability, however, will likely create significant negative effects for both Halliburton and defense contracting in general, which will, in turn, greatly impact military logistics in this most critical time.<sup>5</sup>

This Comment seeks to explore the potential civil liability of Halliburton and its subsidiary KBR with respect to defense contracts for services. Part II of this Comment is devoted to an overview of the False Claims Act. Part III briefly details the history of Halliburton and outlines Halliburton's involvement in Iraq and its military contracts there. Part IV seeks to further develop the potential case against Halliburton regarding FCA liability and to suggest possible defenses available to Halliburton. Part V briefly explores some justifications and consequences for holding Halliburton liable under the FCA and the potential impact of such a holding on the military.

## II. OVERVIEW OF THE FCA

### A. FCA Background

The False Claims Act<sup>6</sup> (FCA) was enacted by Congress in 1863 during the Civil War to protect the government from fraudulent claims, specifically

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2. See *Unprecedented Challenges: The Complex Task of Coordinating Contracts Amid the Chaos and the Rebuilding of Iraq: Hearing Before the H. Comm. on Government Reform*, 108th Cong. 224-25 (2004) [hereinafter *Unprecedented Challenges*] (statement of Rep. Souder, Member, H. Comm. on Government Reform). The report also notes that the conditions of a typical truck driver route to deliver oil required military escorts and dangers of hidden explosives. See *id.* at 536 (statement of Keith Richard, KBR Government Operations Regional Project Manager).

3. See William N. Washington, *DoD Financial Management: More Reliable Information for Decision Makers—U.S. Department of Defense*, PROGRAM MANAGER, Nov. 2000, at 40, 40-41.

4. See, e.g., Neil King, Jr., *Halliburton's Iraq Cost Examined*, WALL ST. J., Mar. 12, 2004, at A8 (outlining some of the reported difficulties the government has had accounting for KBR billing).

5. See *infra* Part V.

6. 31 U.S.C. §§ 3729-3731 (2000).

those submitted for payment by defense contractors.<sup>7</sup> Through a unique combination of civil and criminal penalties,<sup>8</sup> the original FCA embodied a strict approach to regulating fraud perpetrated against the government. The was also strengthened through the inclusion of a qui tam<sup>9</sup> action, allowing a private individual to allege that a defendant committed fraud against the government.<sup>10</sup> The private individual bringing the action is known as the “relator,” and he shares in any recovery the government may garner at the close of the case.<sup>11</sup>

After the end of the Civil War, the FCA was not widely used until World War II.<sup>12</sup> The World War II cases were based on information already available to the government.<sup>13</sup> Yet, each relator nonetheless received a percentage of the damages recovered by the government.<sup>14</sup> Most notably, in *United States ex rel. Marcus v. Hess*,<sup>15</sup> the Supreme Court rejected the notion that the policy of the statute preempted its plain language which allowed “any person” to bring an action.<sup>16</sup> The Court held that, regardless of the amount of information brought by the relator, the suit was justified under the statute as it was then written.<sup>17</sup> In response to the decision and in an effort to curtail these “parasitic” suits, Congress revised the FCA in 1943, substantially weakening the power of a relator in a qui tam lawsuit.<sup>18</sup>

The 1943 amendments provided that a relator is jurisdictionally barred from bringing a suit where the government already has knowledge of the claim.<sup>19</sup> The amendment, not surprisingly, effectively “chilled” relators from bringing a claim since they had no way of determining if the government was aware of a potentially fraudulent situation.<sup>20</sup> Additionally, relators often potentially jeopardized their careers by going to the government, and the amendment stripped their assurance of any potential damage recovery.<sup>21</sup>

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7. Christopher C. Frieden, Comment, *Protecting the Government's Interests: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions*, 47 EMORY L.J. 1041, 1041 (1998).

8. Such penalties were separated within the code in 1874, and today the statute regarding criminal fraud is codified at 18 U.S.C. §§ 286-287, 1001-1002 (2000). See Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 944, 945 n.37 (2002).

9. “Qui tam” is derived “from the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means one ‘who pursues this action on our Lord the King’s behalf as well as his own.’” Bucy, *supra* note 8, at 942 (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (1999)).

10. *Id.* Over the years, qui tam actions have been the subject of much constitutional debate regarding the ability of a private citizen to act effectively as a government prosecutor, but courts have consistently upheld the qui tam action as constitutional. See *id.* at 949-83; see also Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

11. Bucy, *supra* note 8, at 943.

12. Frieden, *supra* note 7, at 1041-42.

13. *Id.* at 1041.

14. *Id.*

15. 317 U.S. 537 (1943), *superceded by* 31 U.S.C. § 3730(b)(4) (1982).

16. *Id.* at 546-48.

17. *Id.*

18. Frieden, *supra* note 7, at 1042.

19. *Id.* at 1046.

20. See *id.* at 1042, 1046-48.

21. See generally William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in*

Nonetheless, the FCA functioned as amended for over forty years until Congress decided in 1986 to strengthen the power of the relator and again encourage qui tam suits.<sup>22</sup>

Due to a dramatic increase in defense contracting fraud in the 1980s, Congress wanted to revitalize the FCA, particularly focusing on qui tam provisions.<sup>23</sup> Congress realized that the laws under which courts could find such perpetrators liable were flawed and ineffective.<sup>24</sup> Therefore, a minor overhaul of the FCA clarified difficulties stemming from prior court interpretations and solved problems which previously deterred qui tam actions.<sup>25</sup>

The 1986 FCA amendments achieved Congress' desired goal.<sup>26</sup> The amendments also increased the number of qui tam actions and the amount of damages recovered by the government in fraud cases.<sup>27</sup> The 1986 amendments changed the 1943 jurisdictional bar and allowed a relator to bring a qui tam action where the government had knowledge of the fraud so long as the relator was the "original source" of the information.<sup>28</sup> Such changes encouraged private citizens to bring actions when they had substantial information regarding a fraud against the government. Under the current procedure, once a qui tam action is filed, it remains under seal for sixty days while the Department of Justice (DOJ) conducts an investigation.<sup>29</sup> The DOJ may then chose to join in the action, decreasing the role of the relator but still assuring that the relator will be awarded a percentage of any recovery.<sup>30</sup> If the government chooses not to intervene, however, the relator may continue the action as a private citizen.<sup>31</sup>

Other significant effects of the reforms on the FCA included the specifically defined intent requirement<sup>32</sup> and the changes to the burden of proof requirement.<sup>33</sup> Congress wanted to make sure that defendants who actively ignore the knowledge that they were submitting false claims to the government—termed an "ostrich-like" denial—could be liable under the statute.<sup>34</sup>

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*Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1819 (1996) (discussing the negative professional repercussions of filing a qui tam suit).

22. See Frieden, *supra* note 7, at 1042.

23. See *id.*

24. S. Rep. No. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5267.

25. See *id.* at 2, 4-5, as reprinted in 1986 U.S.C.C.A.N. 5266, 5266-67, 5269-70.

26. Bucy, *supra* note 8, at 948 (reporting that in 1986 on average only six qui tam actions were filed per year, but after the amendments 3,326 qui tam FCA actions were filed, recovering damages totaling \$4.024 billion of false claims presented to the government); see also Frieden, *supra* note 7, at 1043 (citing that by 1994, only eight years after the enactment of the amendments, the number of qui tam actions had risen to 221 with the government recovering \$379 million).

27. See Bucy, *supra* note 8, at 948; Frieden, *supra* note 7, at 1043.

28. 31 U.S.C. § 3730(e)(4)(A)-(B) (2000) (defining an original source as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information").

29. *Id.* § 3730(b)(2).

30. *Id.* § 3730(c)-(d).

31. *Id.* § 3730(b)(4)(B).

32. See *id.* § 3729(b).

33. See *id.* § 3731(c).

34. S. Rep. No. 99-345, at 15 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5280. In the past,

Therefore, 31 U.S.C. § 3729(b) states that “‘knowingly’ mean[s] that a person . . . (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.”<sup>35</sup> Furthermore, because the action has characteristics of both criminal and civil proceedings, courts occasionally had a difficult time determining the proper burden of proof in FCA cases.<sup>36</sup> Thus, 31 U.S.C. § 3731(c), as amended in 1986, specifically clarified that, “[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.”<sup>37</sup> Such revisions provided strength to the FCA and guidance to the courts in sustaining the effective application of the statute.<sup>38</sup>

### *B. The Elements of the FCA*

Currently, the FCA forbids seven types of false claims against the government.<sup>39</sup> Relevant to the Halliburton claims and to this Comment, the statute provides liability for anyone who “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.”<sup>40</sup> Contained within the statute are the elements the government (or the plaintiff if the government decides not to join)

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courts interpreted the statute to require a “specific intent” to defraud, which was contrary to congressional intent. *See id.* at 7, as reprinted in 1986 U.S.C.C.A.N. 5266, 5272.

35. § 3729(b).

36. *See* S. Rep. No. 99-345, at 31 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5296 (citing *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962) (holding that the FCA requires clear and convincing evidence)).

37. § 3731(c).

38. *See* Frieden, *supra* note 7, at 1444.

39. § 3729(a)(1)-(7).

40. § 3729(a)(1). The statute also provides liability for anyone who

- (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;
- (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
- (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
- (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

*Id.* § 3729(a)(2)-(7).

must show to prove liability under the FCA. In *Wilkins ex rel. United States v. Ohio*,<sup>41</sup> the court enumerated the elements of the FCA:

- (1) that the defendant presented or caused to be presented to an agent of the United States a claim for payment;
- (2) that the claim was false or fraudulent;
- (3) that the defendant knew that the claim was false or fraudulent;  
and
- (4) that the United States suffered damages as a result.<sup>42</sup>

Court interpretations and additional statutory definitions of these elements further develop an understanding of their application to potential false claim actions.

*1. The First Element: Presentation of a Claim to the Government for Payment*

The first element is fairly straightforward. The statute defines a claim as “any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded.”<sup>43</sup> Courts have further interpreted this definition and explained that not all false claims are actionable under the FCA, but “[r]ather, the claim must be one ‘for payment or approval.’”<sup>44</sup> Additionally, “only (i) ‘actions which have the purpose and effect of causing the government to pay out money’ where it is not due, or (ii) actions which intentionally deprive the government of money it is lawfully owed are considered ‘claims’ within the meaning of the FCA.”<sup>45</sup>

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41. 885 F. Supp. 1055 (S.D. Ohio 1995).

42. *Id.* at 1059. *But see* *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784-85 (4th Cir. 1999) (holding that there is no requirement that the government suffer damages as a result of the fraud, rather the claim must be “materially related” to influence a government agency to do or not do something).

43. § 3729(c).

44. *United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844, 850 (E.D. Va. 1995) (quoting *United States v. Bd. of Educ.*, 697 F. Supp. 167, 175 (D.N.J. 1988)).

45. *Id.* (quoting *Bd. of Educ.*, 697 F. Supp. at 175) (citations omitted); *see also* DONALD P. ARNAVAS & WILLIAM J. RUBERRY, *GOVERNMENT CONTRACT GUIDEBOOK 7-7 to -8* (1997) (reporting that courts have found “claims” of false information in such documents as “invoice[s] submitted for payment[,] . . . progress payment invoices,” documents showing expenses, “inflated labor and equipment charges, invoices . . . for higher quality goods, bloated insurance claims, excessive . . . travel vouchers, and fraudulent tax returns.”) (footnotes omitted).

## 2. *The Second Element: A False Claim*

The second element requires that the government prove that the claim was in fact false. Questions about the veracity of claims often arise in contractual situations (such as defense contracting) where the claim for payment depends upon the performance of a contract.<sup>46</sup> Courts have generally held that contractors are not liable under ambiguous contract terms when the contractor's interpretation of those terms is reasonable.<sup>47</sup> For example, the court in *United States ex rel. Butler v. Hughes Helicopters, Inc.*<sup>48</sup> held that a simple misinterpretation of a contract does not constitute a violation of the FCA.<sup>49</sup> In *Butler*, the relator was a former employee of the defendant company who manufactured, engineered, and designed the Apache helicopters under a contract with the Army.<sup>50</sup> The relator alleged that the defendant falsified results from tests performed on individual helicopters before they were delivered to the Army and that the tests were improperly structured.<sup>51</sup> The defendant responded that none of the results had been falsified, all helicopters met the contractual standards set out by the Army, and that the Army was aware of any testing variations.<sup>52</sup> Ultimately, the court concluded that the relator did not present enough information to justify a FCA violation and that whether or not the tests were properly structured was a matter of contract law—a misinterpretation of which did not constitute a violation of the FCA.<sup>53</sup>

Similarly, the Ninth Circuit held in *United States ex rel. Lindenthal v. General Dynamics*<sup>54</sup> that upon the proper admission of extrinsic evidence to interpret ambiguous contract terms, the work performed by the defendant/contractor satisfactorily met Air Force standards, making the claim for payment not false.<sup>55</sup> The defendant, an engineering firm, contracted with the Army to produce suitable drawings for an elaborate radar system.<sup>56</sup> The relators, employees of the awarded contractor, alleged that the defendants “knowingly provided inadequate drawings” to the contractor because the drawings were not “build-to-print” quality and that such fraud was a viola-

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46. Contracting situations also present the opportunity for “collusive bidding,” which the Supreme Court, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943), found to be a “false claim” when the contracts at issue were awarded through “rigged bidding.”

47. See 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.03[B][1] (3d ed. 2006) (citing *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999)).

48. 71 F.3d 321 (9th Cir. 1995).

49. *Id.* at 328.

50. *Id.* at 321.

51. *Id.* at 324.

52. *Id.*

53. *Id.* at 328. *But see* *United States ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844, 854 (E.D. Va. 1995) (pointing out that a party who bills the Army for services never performed has probably submitted a false claim).

54. 61 F.3d 1402 (9th Cir. 1995).

55. *Id.* at 1410-11.

56. *Id.* at 1405.

tion of the FCA.<sup>57</sup> On appeal, the court determined that the Air Force contract with the defendant contained ambiguous specifications regarding the quality of the radar system but that extrinsic evidence showed that the defendants' designs met the expectations of the Air Force, and thus satisfied the contractual obligations.<sup>58</sup> Regardless of the fact that the building contractor had to rework the design to actually produce the system, the court still determined that the satisfaction of contractual obligations meant there was no false claim.<sup>59</sup> Consequently, whether or not contract terms are specific or ambiguous and whether they are reasonably interpreted may bear on a court's determination of the falsity of a claim.

### 3. *The Third Element: Intent—Whether the Defendant Knew the Claim Was False*

The statute requires that a defendant “knowingly” submits a false claim.<sup>60</sup> Courts have interpreted “knowingly” to mean that “[t]he lowest level of intentionality that satisfies the False Claims Act is ‘act[ing] in reckless disregard of the truth or falsity of the information.’”<sup>61</sup> “[S]omething beyond mere negligence, but falling short of specific intent, must be shown for liability to attach.”<sup>62</sup> Still, if a relator or the government is to avoid summary judgment in favor of the defendant, “admissible, credible evidence of a knowing false statement is required.”<sup>63</sup> Therefore, it is clear, both from the court opinions and from the plain language of the statute, that a specific intent is not required for liability under the FCA. Rather, the required intent must consist of more than a mistake or mere negligence to satisfy the requisite scienter necessary for liability.<sup>64</sup>

Courts have, however, determined that certain circumstances may mitigate a defendant's intent and effectively negate liability. In *United States ex rel. Costner v. United States*,<sup>65</sup> the defendant/contractor was accused of submitting false claims to the Environmental Protection Agency (EPA) regarding a hazardous waste disposal contract.<sup>66</sup> The court stated that “[a] contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solu-

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57. *Id.*

58. *Id.* at 1411.

59. *Id.*; see also *United States v. Krizek*, 859 F. Supp. 5, 10 (D.D.C. 1994) (holding that a doctor was allowed to include charges for non face-to-face time into his Medicare billing since the statute was imprecise in its billing requirements, and the doctor made a reasonable interpretation of the patient service code when submitting his claims); 1 BOESE, *supra* note 47, § 2.03[B][1] (discussing *Krizek*).

60. 31 U.S.C. § 3729(a)-(c) (2000); see *supra* note 34 and accompanying text.

61. *United States ex rel. Norbeck v. Basin Elec. Power Coop.*, 248 F.3d 781, 792 (8th Cir. 2000) (second alteration in original) (quoting § 3729(b)(3)).

62. *Id.*

63. *Id.* (quoting 1 BOESE, *supra* note 47, § 2.04[C][1]).

64. 1 BOESE, *supra* note 47, § 2.04[C][1].

65. 317 F.3d 883 (8th Cir. 2003).

66. *Id.* at 885.



tion lacks the intent required by the Act.”<sup>67</sup> The case revealed that the EPA worked closely with the contractor to monitor the waste removal site and had specific knowledge of the problems in the chemical levels as well as OSHA violations onsite.<sup>68</sup> Thus, the court found that “[a]lthough the record indicates that the defendants’ performance under the contract was not perfect, the extent of the government’s knowledge through its on-site personnel and other sources shows that . . . the ‘government knew what it wanted, and it got what it paid for.’”<sup>69</sup> Therefore, the defendant did not meet the intent requirement under the FCA.<sup>70</sup>

The Ninth Circuit, however, has been careful to craft decisions which do not automatically make government knowledge a bar to intent in an FCA claim. In *United States ex rel. Hagood v. Sonoma County*,<sup>71</sup> the court reversed a district court ruling and found the fact that the Army signed a water supply contract knowing that the cost analysis had been ill-prepared did not automatically bar an FCA claim against the contractor.<sup>72</sup> Furthermore, the court held government knowledge is very relevant to a case:

Such knowledge may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth. . . . Only at the stage of trial or summary judgment will it be possible for a court to say, for example, that the Water Agency did merely what the [Army] bid it do . . . .<sup>73</sup>

The Sixth Circuit made a similar finding in *Varljen v. Cleveland Gear Co.*,<sup>74</sup> concerning an action against a contractor working for the Department of Defense whose subcontractor altered the production of worm gears such that they were not produced according to contract specifications, although the quality of the gears was not affected.<sup>75</sup> The court held that the government’s inspection and acceptance of a subcontractor’s product will not absolve the contractor of FCA liability.<sup>76</sup> The court instead relied on the fact that contractors are strictly bound by the terms of the contract.<sup>77</sup> Therefore, while a defendant’s knowledge of the submission of false claims clearly meets the intent standard, open communication with the government about contract difficulties may help alleviate some of the required scienter. Never-

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67. *Id.* at 888 (citing *United States ex rel. Butler v. Hughes Helicopters, Inc.* 71 F.3d 321, 327 (9th Cir. 1995)).

68. *Id.*

69. *Id.* (quoting *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999)).

70. *Id.*

71. 929 F.2d 1416 (9th Cir. 1991).

72. *Id.* at 1417, 1420-21.

73. *Id.* at 1421.

74. 250 F.3d 426 (6th Cir. 2000).

75. *Id.* at 428.

76. *Id.* at 429.

77. *Id.*

theless, courts usually determine such instances on a case-by-case basis and may not consider the relevant facts until trial.

#### 4. *The Fourth Element: Government Damages*

While government damages may be an uncomplicated element to prove because they require only proof that the government has already paid a false claim, some courts have eliminated this element in an effort to punish defendants who merely *attempt* to defraud the government. The court in *Harrison v. Westinghouse Savannah River Co.*<sup>78</sup> determined that government damage is not required but that materiality is an essential element.<sup>79</sup> Materiality, as defined by the court, is the ability of the claim to influence a government agency.<sup>80</sup>

Courts have also held that an attempted settlement of damages or a partial repayment of damages may not alleviate liability under the FCA. In *United States ex rel. Roby v. Boeing Co.*,<sup>81</sup> a relator, who allegedly sold the Army defective transmission gears, filed an action against an Army contractor.<sup>82</sup> At the time of the appeal, the defendant/contractor had already repaid the government \$25 million and there was a settlement in place for an additional \$15 million, depending on the outcome of the appeal.<sup>83</sup> The court held, however, that the partial repayment of government damages did not moot the FCA claim because there was still “a considerable financial stake” in the matter which needed resolution.<sup>84</sup> Therefore, even a substantial repayment of damages may not preclude liability because of the possible existence of further government damages.

### III. OVERVIEW OF HALLIBURTON IN IRAQ

Halliburton, established in 1919, employs 85,000 people in over one hundred different countries.<sup>85</sup> It has built an international reputation for engineering and contracting services.<sup>86</sup> Halliburton was widely recognized for its energy defense contracting work after the Gulf War when it helped the government quell more than 300 oil well fires in Kuwait.<sup>87</sup> Shortly after the end of Operation Dessert Storm, the Department of Defense invited bids

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78. 176 F.3d 776 (4th Cir. 1999).

79. *Id.* at 784-85; *see also* *United States ex rel. Joslin v. Cmty. Home Health*, 984 F. Supp. 374, 383 (D. Md. 1997). Because a strong majority of Halliburton’s alleged false claims have already been paid by the government, this Comment will not explore further the differing court opinions as to the government damage requirements.

80. *See Harrison*, 176 F.3d at 785.

81. 302 F.3d 637 (6th Cir. 2002).

82. *Id.* at 639.

83. *Id.* at 641.

84. *Id.*

85. Halliburton.com, History of Halliburton (2006), <http://www.halliburton.com/about/history.jsp>.

86. *Id.*

87. Halliburton.com, Achievements and Landmarks of Halliburton (2006), [http://www.halliburton.com/about/history\\_achiev.jsp](http://www.halliburton.com/about/history_achiev.jsp).

from contractors and subsequently awarded Halliburton one of the first private military logistics contracts (LogCap) which bound the company to provide services and goods including food, laundry, and transportation to troops stationed worldwide.<sup>88</sup> Halliburton provided these services in countries such as Bosnia, Croatia, Hungary, and others through the 1990s.<sup>89</sup> While the contract only extended for a single year, it contained an option for nine renewals—all without price limits.<sup>90</sup> Thus, Halliburton was already under contract with the Army when troubles in Iraq began.

#### A. Fuel Importation Overcharges

In March 2003, shortly before the war in Iraq broke out, the Army awarded Halliburton, in addition to the preexisting LogCap contract, a non-bid contract for emergency oil-field repairs.<sup>91</sup> The Army Corps of Engineers stated that it planned to follow the non-bid contract quickly with competitively bid contracts to aid in the protection of Iraqi oil.<sup>92</sup> Immediately, the contract was closely scrutinized by Congress and others because there had been no competitive bidding.<sup>93</sup> With the growing inspection of the non-bid contract, criticism regarding Halliburton's spending began to surface. Observers began to suggest that the company was overcharging the government for services.<sup>94</sup> Not surprisingly, in an effort to distance itself from any reports of wrongdoing, the Army continued to push for the award of competitively bid contracts for fuel protection and distribution. However, these contracts were continually stalled or delayed.<sup>95</sup>

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88. *Id.*

89. *Id.* Halliburton generated approximately \$100 million in revenue from each of these countries, specifically Somalia and Haiti, which pales in comparison to the \$900 million Halliburton had already made from its Iraqi contract by the end of 2003. See George Anders & Susan Warren, *For Halliburton, Uncle Sam Brings Lumps, Steady Profits*, WALL ST. J., Jan. 19, 2004, at A1.

90. See Halliburton.com, *supra* note 87.

91. Chip Cummins et al., *Timetable for Iraq Oil Contracts is Unclear*, WALL ST. J., May 20, 2003, at A16. As the Iraqi difficulties continued, the Army became increasingly worried that Saddam Hussein might attempt to destroy the oil wells—a major source of oil for the world and the main source of revenue for the Iraqi people—and wanted to ensure the safety of the oil wells. Chip Cummins & Thaddeus Herrick, *Halliburton Unit Tapped to Oversee Oil Fields in Iraq*, WALL ST. J., Mar. 7, 2003, at A5. David Lesar, CEO of Halliburton, defended the contract and argued that the non-bid emergency contract was merely an extension of the pre-existing LogCap contract, which the government awarded to Halliburton years earlier in a competitive bid. David Lesar, Op-Ed, *Halliburton's Mission*, WALL ST. J., Oct. 17, 2003, at A10.

92. Cummins et al., *supra* note 91. The new contract was originally valued at \$7 billion. *Id.*

93. *Id.* Numerous sources also attribute the close congressional scrutiny of the non-bid contract to Vice President Cheney's position as the former CEO of Halliburton before resigning to run for office, and the fact that the non-bid contract denotes favoritism. See, e.g., *id.*

94. See, e.g., Frank Irvin, Letter to the Editor, *How Much is Halliburton Billing the U.S. Taxpayer?*, WALL ST. J., Oct. 24, 2003, at A15 (reporting how an ex-Halliburton employee claimed that his pay was 33% more when he worked for Halliburton on a government project than he now receives as an employee for a private engineering firm that contracts work with the city of Atlanta); see also Susan Warren et al., *Lawmakers Agree to \$18.4 Billion in New Iraq Aid*, WALL ST. J., Oct. 30, 2003, at A3 (reporting on Congressman Henry Waxman's letter to National Security Advisor Condoleezza Rice, where Waxman questioned the failure of government audits to cite any overbilling when Halliburton charged approximately \$2.65 a gallon for gasoline imported to troops in Iraq).

95. John M. Biers, *Army Engineers Weigh Ending Halliburton Unit's Duties in Iraq*, WALL ST. J.,

As early as December of 2003, the Wall Street Journal reported that the Pentagon had “launched a sweeping investigation” into Halliburton’s fuel supply charges and “found evidence of ‘substantial overcharging,’” allegedly of \$61 million on a total bill of \$1.2 billion.<sup>96</sup> The Defense Contract Audit Agency conducted the investigation and, through efforts of over twenty auditors, examined both contracts under which Halliburton was operating.<sup>97</sup> Halliburton reported to the government that it was importing fuel from Kuwait, and it was adding transportation and safety costs onto the initial fuel price because the transportation of such fuel through war zones was highly dangerous.<sup>98</sup> Subsequently, the Army Corps of Engineers conducted its own inquiry into the situation and exonerated KBR and Halliburton from any wrongdoing, finding that KBR purchased the oil at a “fair and reasonable price.”<sup>99</sup>

Amidst the investigation, however, Halliburton (as a joint venture project) was awarded a competitively bid contract for oil-related work, which was meant to replace the non-bid contract awarded to KBR in 2003.<sup>100</sup> The agreement was a cost-plus contract, such that a contractor is awarded a percentage of profit, in addition to the total cost of the contract (the additional award in the instant case was 2% of the profit).<sup>101</sup> The Wall Street Journal, however, reported in February 2004 that two former managers at KBR claimed that their bosses encouraged them to run up the overall costs of the contract because a larger bill would increase the profit for KBR.<sup>102</sup> The two managers revealed to Congress how KBR officials encouraged them to take large supply contracts and break them into smaller contracts to avoid competitive bidding requirements.<sup>103</sup> Congress then relayed the message to the Pentagon.<sup>104</sup> By late February, the Pentagon opened a criminal investigation to determine whether Halliburton was guilty of fraud for overcharging the government for fuel.<sup>105</sup> The Pentagon’s auditors referred the matter to the

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Nov. 6, 2003, at A10.

96. Neil King, Jr. & Susan Warren, *Halliburton’s Contracts in Iraq Face Investigation by Pentagon*, WALL ST. J., Dec. 12, 2003, at A1. Halliburton initially denied any allegations of overcharging or wrongdoing, despite the fact that the article also reported that the investigation showed that while Halliburton was charging an average price of \$2.64 a gallon for gasoline, the Pentagon’s fuel import service had obtained imported fuel for under \$1.20 a gallon. *Id.*

97. *Id.*

98. *Id.*

99. Neil King, Jr., *Army Corps Clears Halliburton in Flap over Fuel Pricing in Iraq*, WALL ST. J., Jan. 6, 2004, at A1. Nevertheless, the exoneration by the Army Corps did not eliminate concerns of misconduct committed by KBR and Halliburton. Just one week after the Army Corps cleared Halliburton, the Department of Defense asked the Pentagon to launch a formal investigation. Neil King, Jr., *Pentagon Auditor Requests Probe of Halliburton*, WALL ST. J., Jan. 15, 2004, at A3.

100. Susan Warren, *Halliburton Wins New Iraq Contract Amid U.S. Probe*, WALL ST. J., Jan. 19, 2004, at A3.

101. *Id.*

102. Christopher Cooper, *Two Halliburton Ex-Managers Say Superiors Urged Overbilling*, WALL ST. J., Feb. 13, 2004, at A2.

103. *Id.*

104. *Id.*

105. Russell Gold & Christopher Cooper, *Pentagon Weighs Criminal Charges of Halliburton Arm*, WALL ST. J., Feb. 24, 2004, at A3.

Pentagon Inspector General's office, despite the fact that the Army had consistently supported Halliburton and approved the oil suppliers.<sup>106</sup> By March, the Pentagon asked DOJ to join the investigation.<sup>107</sup> Allegations were also made that KBR was unnecessarily using a Kuwaiti oil supplier, Altanmia, which was inflating prices.<sup>108</sup> Evidence surfaced that the Kuwaiti government sent a letter to KBR offering to deal with them directly to negotiate the lowest possible oil prices.<sup>109</sup>

### *B. KBR Officer Kickbacks*

Only a few days after receiving the competitively awarded contract for fuel protection and distribution, Halliburton faced insider offenses. Halliburton admitted to Pentagon officials that two employees accepted kickbacks totaling \$6 million in return for awarding a well-paid supply subcontract to a Kuwaiti company.<sup>110</sup> Despite Halliburton's admission of wrongdoing and its quick response by firing the employees and reimbursing the Department of Defense for the kickback amount, suspicions increased regarding the integrity of Halliburton's accounting practices and business in Iraq.<sup>111</sup>

### *C. Meal Overcharging*

The next allegations of overcharging brought against Halliburton concerned its billing practices for the meals which it provided to troops. Again, Pentagon investigators uncovered that Halliburton allegedly overcharged at least \$16 million for meals at a single base, Camp Arifjan.<sup>112</sup> Reports indicated that during the month of July, KBR billed for 42,042 meals and actually served 14,035 meals.<sup>113</sup> Further, a KBR memo detailed that it was the standard practice to bill for the projected number of meals rather than the actual number served.<sup>114</sup> Halliburton supported KBR's practice, stating that estimating the number of meals to be served is difficult in wartime because there is no precise way to determine the number of soldiers that will show

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106. *Id.*

107. Neil King, Jr. & Glenn R. Simpson, *Pentagon Asks Justice to Join Halliburton Probe*, WALL ST. J., Mar. 11, 2004, at A1.

108. *Id.*

109. *Id.*

110. Neil King, Jr., *Halliburton Tells the Pentagon Workers Took Iraq-Deal Kickbacks*, WALL ST. J., Jan. 23, 2004, at A1 (reporting that the kickbacks were not related to the oil contract or supply but were for materials supplied under the LogCap contract).

111. Neil King, Jr., *Congress Hears More Calls to Probe Halliburton Co.*, WALL ST. J., Jan. 26, 2004, at B3 (reporting that the ranking member of the House of Representatives' Government Reform Committee, Henry Waxman, renewed a prior call for congressional hearings regarding defense contracts in Iraq).

112. Neil King, Jr., *Halliburton Hits Another Billing Snafu in Kuwait*, WALL ST. J., Feb. 2, 2004, at A1.

113. *Id.*

114. *Id.*

up at any given meal and sometimes the numbers are off dramatically.<sup>115</sup> Halliburton did agree, however, for the Department of Defense to withhold some payments until the accounting was worked out and satisfactory accounting practices were proven.<sup>116</sup> Only a few weeks later, Halliburton agreed to allow the Department of Defense to withhold an additional \$140 million in payments for meal charges in response to the Pentagon's investigations.<sup>117</sup> By March of 2004, the Pentagon's investigation on the overcharging of meals expanded, and the Army developed more plans to withhold payment from KBR until proper accounting justifications were produced explaining the bills, but the plan was delayed.<sup>118</sup> In May, despite concerns from Halliburton that such measures could dramatically affect the financial stability of KBR and its ability to provide support services to the military, the Pentagon withheld \$160 million from Halliburton until Halliburton or KBR provided documentation of the more than \$800 million charged for meals since 2002.<sup>119</sup>

By August, in their continuing investigation, Pentagon officials alleged that Halliburton had not sufficiently documented as much as \$1.8 billion of work performed in Iraq and Kuwait under its collective contracts.<sup>120</sup> The Pentagon blamed inadequate accounting procedures and deficient documentation supporting the submitted claims.<sup>121</sup> However, such withholdings greatly concerned Halliburton officials since the company might not have the financial resources to continue effectively performing the contract.<sup>122</sup> Due to other financial difficulties outside of its contracts in Iraq, Halliburton reorganized many of its subsidiaries through Chapter 11 bankruptcy filings.<sup>123</sup> Halliburton was concerned that withholding more payments might significantly affect its financial ability to support the services KBR was still supplying to the troops in Iraq and Kuwait.<sup>124</sup> Still, Halliburton could not produce adequate documentation of its bills.<sup>125</sup> Therefore by September

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115. *Id.*

116. *Id.* A subsequent article reported that Halliburton notified Pentagon officials of other overcharging at different camps and indicated that it would repay close to \$28 million in overcharges for 2003 alone. Neil King, Jr., *Halliburton Unit to Repay U.S. Nearly \$28 Million on Meal Bills*, WALL ST. J., Feb. 4, 2004, at A2.

117. Neil King, Jr. & Christopher Cooper, *Halliburton to Withhold Billing on \$140 Million U.S. Contract*, WALL ST. J., Feb. 17, 2004, at A3.

118. *Halliburton Co.: Military's Plan to Withhold Payments Is Pushed Back*, WALL ST. J., Mar. 22, 2004, at C14.

119. Neil King, Jr. & Russell Gold, *Pentagon Suspends Payments of \$160 Million to Halliburton*, WALL ST. J., May 18, 2004, at A2.

120. Neil King, Jr., *Pentagon Questions Halliburton on \$1.8 Billion of Work in Iraq*, WALL ST. J., Aug. 11, 2004, at A1 (citing also that the \$1.8 billion represents 43% of all the claims KBR billed to the Pentagon).

121. *Id.*

122. *Id.*

123. *Industrial Brief—Halliburton Co.: Court Approves Reorganization of Subsidiaries Facing Suits*, WALL ST. J., July 19, 2004, at B1. Halliburton has since indicated its intentions to sell its KBR subsidiary because of low profit margins. Russell Gold, *Halliburton to Put KBR Unit on the Auction Block*, WALL ST. J., Jan. 31, 2005, at A2.

124. King, *supra* note 120, at A2.

125. Neil King, Jr. & Russell Gold, *Army to Rebid Halliburton Contract*, WALL ST. J., Sept. 7, 2004,

2004, the Army, in efforts to eliminate any further questionable billing, began plans to divide Halliburton's contract into smaller, separately bid contracts.<sup>126</sup>

Nevertheless, the investigations and audits of KBR and Halliburton continued, auditors and investigating officials found more general problems with the accounting system used by KBR.<sup>127</sup> Pentagon Comptroller Dov Zakheim reported that most KBR bills were not documented correctly and that Halliburton was "struggling to catch up with the huge logistical strains of working in Iraq."<sup>128</sup> In fact, Halliburton itself admitted that its accounting system was not completely up to par and noted that KBR does not know the location of many items it has purchased for use in the LogCap contract.<sup>129</sup> Additionally, due to the spontaneous wartime conditions, any paper documentation maintained by KBR is not only voluminous but is also disorganized, rendering a search of the documents virtually impossible.<sup>130</sup> Furthermore, the prices of goods constantly changed, making it difficult for KBR to obtain paper verification of the price that KBR paid for the goods.<sup>131</sup> In essence, auditors and investigators, as well as a KBR internal team of auditors, found the accounting system inefficient and ineffective to support the substantial contract to which KBR was bound.<sup>132</sup>

#### IV. APPLICATION OF THE FCA TO HALLIBURTON

Currently, there is no indication that a qui tam action has been filed against Halliburton. Of course, the procedural nature of the action, which requires a seal for at least sixty days with court imposed extensions if necessary, could stall the release of such information to the public.<sup>133</sup> However, most of the information made public through the press and congressional hearings indicates that the Pentagon has been watching Halliburton for quite some time and that most of Halliburton's "whistleblowers" have voiced

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at A3. Some evidence suggests that the Pentagon is looking to settle with KBR. Apparently, Halliburton recognized that war conditions may prevent KBR from ever rendering a complete account for most of its billing. Neil King, Jr., *Army Plan Would Let Halliburton Keep Funds from Disputed Bills*, WALL ST. J., Oct. 22, 2004, at A1; *see infra* note 204.

126. King & Gold, *supra* note 125, at A3.

127. King, *supra* note 4, at A8.

128. *Id.*

129. Christopher Cooper et al., *Halliburton Unit Faults Its Cost Controls in Iraq*, WALL ST. J., Feb. 27, 2004, at A4.

130. *Id.*

131. *Id.*

132. The Army has, however, recognized that Halliburton may never be able to properly account for the funds that it charged the government. King, *supra* note 125. To resolve this conflict, the army has tried to hire an outside accounting firm to estimate what the proper costs of Halliburton's services would be. *Id.* Such efforts however, may not completely relieve Halliburton from exposure under the FCA, as it applies to Halliburton and KBR's actions.

133. 31 U.S.C. § 3730(b) (2000). However, there is evidence that the FBI is conducting an investigation into allegations of fraudulent procurement with respect to Halliburton. Neil King, Jr. & Gary Field, *FBI Opens Probe of Halliburton's Contract in Iraq*, WALL ST. J., Oct. 29, 2004, at A6.

their opinions to Congress.<sup>134</sup> Therefore, because much of the information needed to form a complaint against Halliburton has been gathered by the government during the Defense Department's audits, it is very likely that someone (whether private plaintiffs, DOJ, or both) may well file an action against Halliburton and its subsidiaries.<sup>135</sup>

If Halliburton does face allegations under the FCA, it is likely to be an interesting contest due to the conditions under which Halliburton performed its work.<sup>136</sup> The wartime conditions required KBR employees and subcontractor employees to work in combat zones, putting their lives at risk. Communication was often shut down and KBR employees always had military escorts accompany them when they delivered oil, both to protect against any attacks and to help navigate through landmine areas.<sup>137</sup> In essence, KBR and Halliburton were organizing performance of contracts under "the first true war zone where people are trying to kill American civilians."<sup>138</sup>

A wartime emergency clause, allowing Halliburton to take whatever measures necessary to procure supplies required under the contract, may alleviate some of Halliburton's liability. However, since the contracts have not been released publicly and therefore cannot be examined, the existence of such a clause is not certain. However, neither members of Congress, nor the media, nor any investigating officials have made a reference to the existence of such a clause. Absent such a mitigating clause, Halliburton's defenses to any potential claims will most likely focus on attacking the second and third elements of the FCA, possibly arguing both that the claims Halliburton submitted are not false as required by the statute and that the claims were not made with the requisite intent. Halliburton is likely to base its arguments on ambiguity resulting from poorly drafted contracts and constantly changing conditions. Halliburton also may argue against any liability for penalties because of its efforts to voluntarily disclose information and work with the Pentagon, the Department of Defense, and the DCAA.

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134. See *Unprecedented Challenges*, *supra* note 2, at 346-72 (statements of James Warren and David Wilson, former Halliburton employees).

135. The Pentagon's Inspector General has, however, investigated whether or not KBR committed fraud on its fuel charges. Russell Gold, *Halliburton Revamps Control System*, WALL ST. J., Jan. 6, 2005, at A5. This investigation does not reveal whether a qui tam action or an FCA allegation has been filed. *See id.*

136. See *Unprecedented Challenges*, *supra* note 2, at 507-08 (statement of Alfred Neffgren, Chief Operation Officer, Americas Region, Kellogg, Brown, and Root) (noting that KBR had not lost a single employee in any war zones in over a decade and that since its entrance into Iraq KBR has lost 42 employees in addition to subcontractor employees).

137. *See id.* at 387-92 (questioning of James Warren and David Wilson by Rep. Edward L. Shrock).

138. Russell Gold, *The Temps of War: Blue-Collar Workers Ship Out for Iraq*, WALL ST. J., Feb. 5, 2004, at A9 (quoting Dan Kent, manager of the Houston office supporting the contract) (quotations omitted).



*A. Liability for Fuel Overcharging*

Evidence strongly supports FCA liability as a result of the alleged overcharging for fuel. It is clear that claims for payment have already been presented to the government because the DCAA already estimates that KBR overcharged the government approximately \$61 million.<sup>139</sup> The claims arguably are false because of government information that fuel in Turkey and throughout the Middle East, at the time that KBR was pricing oil, was substantially lower than the price KBR negotiated with Kuwaiti oil company, Altanmia.<sup>140</sup> Furthermore, the subcontract for fuel required KBR to competitively bid the project, and the Wall Street Journal indicates that KBR received at least two other bids before deciding on its final price with Altanmia, but that KBR may have ultimately awarded the project to Altanmia because of political pressure from the Kuwaiti government regarding follow-on bidding.<sup>141</sup> Therefore, KBR must have known of the inflated price it was paying for the oil and still billed the government the higher price, thereby increasing the overall cost of the contract and subsequently increasing KBR's net profits from the job.

Additionally, the Kuwaiti government, in an evident shift from its prior support of Altanmia, claims they later tried to solicit a direct contract with KBR to provide fuel at a better price, but KBR denies receiving this letter.<sup>142</sup> Evidence shows that KBR did receive the letter and that there is actual proof of such receipt.<sup>143</sup> This behavior is exactly the kind of "ostrich-like" conduct that Congress amended the FCA to protect against. If KBR denied or ignored the letter from the Kuwaiti government, it illustrates a "reckless disregard"<sup>144</sup> for the economic respect of the military contract and an overcharge of the government through a false claim. Finally, similar to *Varljen v. Cleveland Gear Co.*,<sup>145</sup> where the court determined that government inspection and approval does not absolve the contractor of liability, KBR cannot rely on the approval of the pricing from the Army Corps of Engineers. Under the *Varljen* standard, the most important concern is adherence to the contract.<sup>146</sup> If KBR did not adhere to the contract, regardless of any approval by the Army, KBR should still be subject to false claims liability because it knew of lower prices and even had an opportunity to contract for a lower price, but still determined to charge the government almost twice the average fuel rate in the Middle East. Thus, KBR knowingly submitted a false claim to the government for inflated fuel prices and subsequently damaged the government when it accepted payment.

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139. See *supra* Part II.B.1.

140. *Kuwait to Probe Halliburton Charges*, WALL ST. J., Feb. 10, 2004, at A14.

141. See *id.*

142. See *supra* Part III.A.

143. See *supra* text accompanying notes 32-34.

144. See 31 U.S.C. § 3729(b)(3) (2000).

145. 250 F.3d 426, 430 (6th Cir. 2001).

146. See *id.*

In response to these potential claims, Halliburton is likely to point to the harsh and difficult war conditions under which it worked, which arguably led to ambiguous contract language. Halliburton began work in Iraq under an already existing LogCap contract and was then awarded another emergency contract to provide oil and fuel to U.S. troops—known as the Restore Iraqi Oil (RIO) contract.<sup>147</sup> Since Halliburton's mobilization in Iraq, government officials have conducted numerous studies and relied on several audits from the DCAA.<sup>148</sup> Such studies, in addition to pointing to the potential wrongdoings of Halliburton, also indicate that the oversight and procurement of the Department of Defense was highly ineffective and ill-equipped to handle the large scale contracts needed to supply the military troops.<sup>149</sup>

Halliburton is likely to argue that it was reasonable to interpret the contract as stating that the primary job was to deliver fuel as quickly as possible, moving supplies through the dangerous areas of Iraq at the beginning of the war.<sup>150</sup> As Charles Cox, the former project director of the RIO contract for KBR, testified to the Committee on Government Reform, KBR did not have the luxury of time to develop a comprehensive bid scheme for fuel supply.<sup>151</sup> Rather, KBR had to develop a fuel importation plan in three days, whereas the Department of Energy had three months to develop its plan for fuel supply before it took over the duties from KBR.<sup>152</sup> Mr. Cox also reported that KBR did import fuel from Turkey and that the prices from Turkey were much lower because delivering the fuel into Iraq from Turkey did not appear as dangerous.<sup>153</sup> However, Cox accounted for the continued use of Kuwaiti oil because it was “not possible” to import all the oil from Turkey.<sup>154</sup> Thus, Halliburton is likely to argue that its job, at the time of contracting, was to provide the materials and services as quickly as possible to ensure that the troops received what they needed to maintain control and advance military tactics.<sup>155</sup> Halliburton may also cite that the discrepancy in fuel prices between KBR and the government negotiated prices was the result of extra planning time—an amenity KBR did not have at the time of contracting.

Furthermore, due to the insufficient planning of the government and the fact that RIO was issued as an emergency contract, Halliburton is likely to argue that much of the contract language was ambiguous and poorly drafted, leaving room for multiple interpretations. However, a reasonable

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147. See *supra* Part III.A.

148. See *Unprecedented Challenges*, *supra* note 2, at 244 (statement of William Reed, Director, DCAA) (disclosing that the DCAA issued 285 audit reports related to Iraq reconstruction projects in the first eight months of 2004, many of which were devoted to Halliburton and KBR contracts).

149. *Id.* at 197-233 (statement of David Walker, Comptroller General, General Accounting Office).

150. See Lesar, *supra* note 91.

151. *Unprecedented Challenges*, *supra* note 2, at 534-36 (statement of Charles “Stoney” Cox).

152. *Id.* at 534.

153. *Id.* at 535.

154. *Id.*

155. See Lesar, *supra* note 91.

interpretation should absolve Halliburton of any liability because ambiguities should be construed against the drafter,<sup>156</sup> in this case the government. Interpreting the contract as requiring Halliburton to provide the government with fuel as soon as possible to sustain the military troops in wartime is very reasonable. Thus, Halliburton's primary concern was efficient performance of the contract and not economic conservation, and therefore by expeditiously supplying fuel as well as the other support required under the contract, Halliburton fulfilled its contract obligations and did not submit a false claim.<sup>157</sup>

### B. Liability for KBR Employee Kickbacks

Courts have already determined that kickbacks do represent false claims and that collusive bidding violates the FCA.<sup>158</sup> Thus, when Halliburton divulged that two of its officers accepted kickbacks in excess of \$6 million from a Kuwaiti subcontractor, it exposed itself to liability regarding the claims of that subcontractor that had already been submitted for payment.<sup>159</sup> The claims meet the required elements under the FCA: Halliburton presented the claims to the government, when the officers "caus[ed] [the claims] to be presented;"<sup>160</sup> the collusion rendered the claims false;<sup>161</sup> the officers knew they were false;<sup>162</sup> and the government was damaged when it paid the claim.<sup>163</sup>

Halliburton did respond quickly, repaying the government the amount of the kickbacks and firing the two officers who accepted the money.<sup>164</sup> Such a prompt response could limit Halliburton's liability to double damages and preclude any further penalties if Halliburton meets the statutory requirements of voluntary disclosure and government cooperation.<sup>165</sup> The

156. See 1 BOESE, *supra* note 47, § 2.98.

157. Cf. *United States ex rel. Lindenthal v. Gen. Dynamics Corp.*, 61 F.3d 1402, 1410-12 (9th Cir. 1995) (holding that the drawings met the government's expectations and therefore did not constitute a false claim).

158. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-43 (1943).

159. Halliburton is also potentially guilty under the Anti-Kickback Act (AKA), 41 U.S.C. §§ 51-58 (2000), but courts such as the one in *United States v. General Dynamics Corp.*, 19 F.3d 770, 776-77 (2d Cir. 1994), have held that the AKA does not preempt any recovery the government might have under the FCA in a kickback claim. Furthermore, some courts have held that damages resulting from kickbacks are not limited to only the amount of the kickback payment in general but may also extend as far as liability for damages to the government reputation for doing business with companies engaged in such collusion. For further information, see 1 BOESE, *supra* note 47.

160. 31 U.S.C. § 3729(a)(1) (2000).

161. See *Marcus*, 317 U.S. at 542-43.

162. See *supra* Part III.B.

163. See *supra* Part II.B.4.

164. See *supra* Part III.B.

165. See 31 U.S.C. § 3729(a), which provides:

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, 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, except that if the court finds that—

omission of any penalties within subsection seven of the statute seems to indicate that a defendant who cooperates with a government investigation through voluntary disclosure may not be held liable for penalties.<sup>166</sup> However, according to a Congressional hearing, neither KBR nor Halliburton will verify the names of the former employees or the specific amount of the kickback publicly, possibly creating doubt as to whether Halliburton and KBR have fully cooperated with the investigation as required by the statute.<sup>167</sup>

Furthermore, such cooperation may not negate the intent of Halliburton to present false claims because, unlike the *Costner*<sup>168</sup> case where the EPA was involved in the contract problems from the beginning and such government knowledge precluded contractor liability, the government had no knowledge of the kickbacks taken by the KBR officials.<sup>169</sup> Such actions are not only false, but they were committed with the requisite intent because they were known to be false statements when they were presented to the government for payment as the subcontract was awarded by circumventing the competitive bidding process and eliminating competition. Until the specific amount of the kickbacks can be verified, it is impossible to ascertain if the government was damaged through costs passed on from the subcontractor to the government beyond the \$6 million Halliburton has already returned.

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(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

166. See 1 BOESE, *supra* note 47, § 3.04[B][1] (stating that no court has enforced this provision, and it is unclear whether a court would hold that the statute completely prohibits penalties where a defendant has voluntarily disclosed information because such cases usually are settled before litigation).

167. 31 U.S.C. § 3729 (a)(7)(B) (Damages can be reduced if “such person fully cooperated with any Government investigation of such violation.”). However, just because the information is not publicly released may not suggest that Halliburton and KBR did not conform to the standards set forth in the statute; it could possibly be that compliance is not readily determinable.

168. *United States ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003).

169. *Unprecedented Challenges*, *supra* note 2, at 60-63 (statement of General Paul Kern, Commanding General, U.S. Army Material Command) (indicating that some information is not being withheld by Halliburton but by the Department of Justice to protect an ongoing criminal investigation into the kickback matter).

*C. Liability for Meal Overcharges*

Probably the most substantial and most costly claims to the government are the overcharges for meals. Halliburton may be liable under the FCA for the meal overcharges because the contractor essentially billed the government for services which were never performed. The claims have been presented to the government for payment and the DCAA has been conducting investigations and audits since 2003.<sup>170</sup> KBR presented false claims by billing the government for meals that were never served, potentially overcharging by as much as 19% in a variety of different camps.<sup>171</sup> Furthermore, the memo from KBR to its subcontractors instructing them to bill either the actual number or the estimated number of meals served—which ever is highest, even if allowable under the contract—demonstrates that KBR intended to charge the government the highest price it could possibly calculate, which may evidence a reckless disregard for the veracity of its billing to the government.<sup>172</sup> Additionally, Marie E. deYoung, a former KBR logistics specialist, testified before Congress that KBR's practices were to pay old accounts as quickly as possible in order to close the accounts because the government was only investigating the open accounts.<sup>173</sup> Such instructions may possibly indicate their intention, not only to intentionally charge the government the highest price but also to evade investigation. Regardless, the government will potentially argue that it suffered great damage, evidenced by the fact that as of June 2004, the DCAA had already withheld \$168 million from DiFac, one of KBR's meal provider subcontractors.<sup>174</sup>

Unlike the defense contractor in *Windsor*,<sup>175</sup> who was relieved of FCA liability after working closely with the Army to inform them of changing circumstances in the contracts and differences in the services being performed,<sup>176</sup> Halliburton initially did not attempt to inform the Defense Department of the meal service changing conditions, instead instructing its employees and subcontractors to charge the highest prices possible and to close accounts as quickly as possible. And while Halliburton later disclosed information regarding other potential over-billing, the amount in controversy may preclude Halliburton from escaping liability. Similar to the *Boeing*<sup>177</sup> case where, despite the fact that the defense contractor had already paid back a substantial amount of money to the Army, the court did not preclude FCA liability on the grounds that the government still had a substantial financial stake in the matter.<sup>178</sup> The overcharging of so many meals for

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170. *Id.* at 1 (statement of William Reed, Director, Defense Contract Auditing Agency).

171. *Id.* at 2.

172. *See supra* Part II.B.3.

173. *Unprecedented Challenges*, *supra* note 2, at 2 (statement of Marie E. deYoung).

174. *Id.* at 1-5 (statement of William Reed, Director, Defense Contract Auditing Agency).

175. *United States ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844 (E.D. Va. 1995).

176. *Id.* at 853.

177. *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002).

178. *Id.* at 641.

nearly two years places Halliburton in a similar situation. The government has a significant financial stake in resolving this matter because the total charges involved hundreds of millions of dollars, regardless of the money Halliburton has already repaid the government or the money that the government has withheld pending sufficient documentation.<sup>179</sup>

Comparable to the defenses against potential claims for excessive fuel charges, Halliburton is likely to argue that the claims for meals were not in fact false; rather they were the result of ambiguous contract language and were calculated within the permissive boundaries of the contract. Like the disorganization of the fuel contracts, David Walker of the General Accounting Office (GAO) found “the use of the LOGCAP contract in Kuwait and Iraq was not adequately planned, nor was it planned in accordance with applicable Army guidance.”<sup>180</sup> Such findings from the GAO indicate the ambiguous and ill-designed nature of the contracts directing Halliburton’s work. More specifically, William Reed, Director of the Defense Contracting Auditing Agency, reported to the Congressional Committee that the task orders for KBR “under the LOGCAP contract do not specify a specific billing methodology.”<sup>181</sup> Like the *Krizek*<sup>182</sup> case where the court permitted a doctor’s submission of Medicare bills for government reimbursement that included services which were imprecisely defined in the statute, Halliburton may contend that billing for the total number of meals was permissible and reasonable under the contract because, whether or not soldiers were present to eat, the food still had to be prepared, at a cost to Halliburton and its subcontractors. Furthermore, similar to the *Lindenthal*<sup>183</sup> case, in which the court not only allowed extrinsic evidence to decipher the meaning of contract terms but also absolved the defense contractor of liability because the final product met the expectations of the Air Force, any ambiguity in Halliburton’s contracts regarding the specific services to be performed or the billing methods used could dictate that reasonable compliance with the ambiguous terms should absolve Halliburton of liability.<sup>184</sup> If Halliburton actually did comply with contract terms as specified in the contract or as interpreted at the time of contracting, then most certainly, like the defendant in *Lindenthal*, Halliburton did not present a false claim. Such disorganization likely will substantially affect government contracts, such as the LogCap contract, because if a specified billing method was not proposed and KBR subcontractors merely used a different method for billing, the reasonable contract misinterpretation does not provide the intent required under the FCA.<sup>185</sup>

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179. *Id.*

180. *Unprecedented Challenges*, *supra* note 2, at 3 (statement of David Walker, Comptroller General of the United States).

181. *Id.* at 2 (statement of William Reed, Director, Defense Contract Auditing Agency).

182. *United States v. Krizek*, 859 F. Supp. 5, 10 (D.D.C. 1994).

183. *United States ex rel. Lindenthal v. Gen. Dynamics, Corp.*, 61 F.3d 1402 (9th Cir. 1995).

184. *Id.* at 1411.

185. *See United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 328 (9th Cir. 1995).

Additionally, even if a review of KBR's contracts shows little ambiguity, Halliburton will likely claim that it did not act with the requisite intent, rather its overpricing and inadequate documentation was caused by negligence or mistake, resulting from the difficulties of wartime. As the courts have held, mere negligence does not amount to intent under the FCA.<sup>186</sup> A defense of negligence is supported by the fact that the Army is looking into settlement options due to the fact that KBR's records are so scattered and often simply unaccounted for during wartime chaos that the Army may never be able sort through the mountains of records.<sup>187</sup> Furthermore, KBR vice president William Walter attributes the disorganization to the fact that the Army often required KBR to perform procurement and task implementation in a matter of days, leaving virtually no time for the proper documentation that is usually present in other privately contracted jobs.<sup>188</sup> Halliburton may argue that such facts show negligence and not a reckless disregard since KBR was so intent on meeting the military's urgent demands.

Again, Halliburton is likely to rest a defense on the fact that it has tried to maintain cooperation with the government. If such cooperation sufficiently meets the voluntary disclosure and cooperation requirements set forth in the statute, Halliburton may be limited to only double damages rather than any penalties. Halliburton will likely rely on several factors to demonstrate its intent to inform the government of any problems of which it was aware and its desire to correct those difficulties. Examples include the fact that since the DCAA called attention to the meal overcharging and subsequently located the problem in billing procedure, KBR has restructured its billing and has implemented, both for itself and its subcontractors, a plan which bills for only the meals actually served to troops.<sup>189</sup> Also, Halliburton immediately reimbursed the government for the initial discoveries of meal overcharging, totaling approximately \$28 million, and conducted its own investigation into billings for meals, disclosing further overcharges to the government.<sup>190</sup> Halliburton has also been very amenable to the DCAA's withholdings of payment on the LogCap contract until adequate documentation is shown to prove the billing, but it is still providing services to the troops called for in the contract.<sup>191</sup>

As discussed previously, however, such cooperation may not bar a claim against Halliburton merely because such intent mitigators are often decided on a case-by-case basis, taking into account all the potential claims,

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186. See *United States ex rel. Norbeck v. Basin Elec. Power Coop.*, 248 F.3d 781, 791 (8th Cir. 2000).

187. King, *supra* note 125, at A1.

188. *Id.*

189. *Unprecedented Challenges*, *supra* note 2, at 2-5 (statement of William Reed, Director, Defense Contract Auditing Agency).

190. See *supra* Part II.B.3. If Halliburton were liable, such reimbursement, as well as the government retainage of payments, may also have a significant effect on any damage calculations because recovery by the government of any amounts already repaid or retained would be an unjust windfall for the government. See 1 BOESE, *supra* note 47, § 3.01[C][1][a][i].

191. 1 BOESE, *supra* note 47, § 3.01[C][1][a][i].

including whether Halliburton did truly inform the government of wrongdoing and whether Halliburton met the requisite statutory standards.<sup>192</sup> While Halliburton and KBR did actively investigate some of their business procedures, the Pentagon officials found enough evidence to begin criminal investigations regarding the fuel overcharging, which may indicate that the government believes cooperation was not sufficient to waive any claims.<sup>193</sup> Nonetheless, because of the new development of such heavy private contracting during wartime, it is possible that a court might consider many factors when evaluating the veracity of submitted claims and whether or not such claims were knowingly submitted as false.

#### V. CONSEQUENCES OF HOLDING HALLIBURTON LIABLE UNDER THE FCA

Congress passed the FCA with the intent that it would widely apply to false claims in order to combat fraud against the government.<sup>194</sup> However, defense contracting has never looked quite as it does in the United States today. With the ratio of military personnel to contractors at ten to one,<sup>195</sup> more and more civilians are being placed in war zones to perform private sector work in dramatically altered, wartime conditions.<sup>196</sup> Nonetheless, the private contracting work that the military has assigned during the ongoing Iraq war provides invaluable services and support to troops.<sup>197</sup> Such services are undoubtedly costly. However, wartime is a time when the government should arguably be the most protected against fraud because it is a nationally vulnerable time where concerns of safety for servicemen and women are often paramount to economic cost.

Holding Halliburton liable under the FCA would surely have some positive effects for the government and defense contracting in general. First, assuming that there is substantial proof upon which to hold Halliburton accountable, such a proceeding would recover lost damages for the government and essentially restore the government to the condition it occupied before the loss. Such a feature was one of the primary purposes of the FCA.<sup>198</sup> Restoring fraudulently obtained tax payer dollars, especially in the

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192. See *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1418 (9th Cir. 1991).

193. *Gold & Cooper*, *supra* note 105.

194. See *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (“[T]he Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.”); see also *Frieden*, *supra* note 7, at 1043.

195. Frontline, PBS, *Private Warriors: Frequently Asked Questions* (June 21, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/>.

196. *Id.*

197. *Unprecedented Challenges*, *supra* note 2, at 2-4 (statement of Alfred Neffgen, Chief Operating Officer, Americas Region) (stating that in the sixteen months prior to July 2004, Halliburton, through KBR, set up over sixty soldier camps, restored oil flow three months ahead of schedule and delivered more than 1100 gallons of gasoline for Iraqi civilian consumption and military use).

198. S. Rep. No. 99-345, at 345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266.



copious amounts implicated in the Halliburton controversy, would restore significant finances to the U.S. treasury.

Additionally, holding Halliburton liable for any false claims would have a strong effect of deterrence. Whether such claims resulted from purposeful intent or merely reckless disregard for the truth in its pay applications, liability would unquestionably deter other defense contractors from attempting the same deceit and would encourage all contractors to diligently review and document their applications before submitting them to the government. Halliburton, as the front runner and largest contract holder in Iraq,<sup>199</sup> would be forced to reconcile and implement proper accounting methods for itself and its subcontractors, serving as an excellent example to other contractors potentially interested in defense work. By imposing liability on Halliburton, defense contractors would be forced to develop wartime accounting plans and contracting methods so as to operate under tense, dangerous, and chaotic conditions. For example, the amount of disorganization that DCAA found among KBR's records when it conducted its audits might be avoided if contractors had emergency documentation procedures, recording only the bare essentials needed for government payment approval. If Halliburton is not held accountable for its disorganization and any truly false claims submitted to the government, there is virtually no incentive for other defense contractors to comply with the pay regulations and avoid false claims.<sup>200</sup> In essence, the government is tacitly endorsing Halliburton's conduct, excusing it on account of the extreme conditions under which it served.

A decision to hold Halliburton liable under any questionable circumstances that lack "conclusive" proof of wrongdoing might, on the other hand, have a detrimental effect on defense contracting. Because there are now so many reports indicating that the Department of Defense inadequately designed and managed the service contracts,<sup>201</sup> holding Halliburton liable might chill defense contractors from entering into work during wartime. Contractors fear liability due to poorly constructed contracts and requests from the military for work beyond the scope of the contract. Obviously, reluctance by defense contractors could prove detrimental to military efforts. Currently, there are only a handful of contractors who could assume the work that Halliburton has done in Iraq.<sup>202</sup> Any further reluctance might prove to create more difficult situations for the government if no contractor

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199. As of 2003, Halliburton had received contracts from the Department of Defense totaling \$4.3 billion. André Verlöy & Daniel Politi, *Halliburton Contracts Balloon*, CENTER FOR PUB. INTEGRITY, Aug. 18, 2004, <http://www.publicintegrity.org/wow/report.aspx?aid=366>.

200. The government essentially relies on contractors to conduct their own management, oversight, and spending analysis because there are too many contracts to monitor effectively. See Washington, *supra* note 3, at 40.

201. *Unprecedented Challenges*, *supra* note 2 (statement of David Walker, Comptroller General of the United States) (recounting the problems the General Accounting Office has found with military oversight and inadequate planning with respect to LogCap contracts).

202. Warren, *supra* note 100.

agrees to accept the work or if a sole contractor, who could potentially price gouge the government, emerges.<sup>203</sup>

Additionally, holding Halliburton liable not only to repay damages, but in effect to encourage compliance from other defense contractors regarding billing requirements might prove difficult because anticipating war conditions is virtually impossible. Contractors may never be able to adequately prepare for contracting work during wartime, no matter what plans they develop. Such indicators might discourage contractors from disclosing information to the government and from working closely with government agencies on defense contracts for fear of being held liable for any mistake in price estimating or accounting.

## VI. CONCLUSION

It is likely to be a long road for both the government and Halliburton to settle these matters arising from defense contracting in Iraq. The FCA, as well as public policy, requires that if Halliburton did indeed knowingly submit false claims to the government that it should be held liable and should repay the government damages. However, proving that Halliburton knowingly submitted such claims is the most formidable challenge facing the government. Due to the wartime conditions, the probable ambiguities in contract terms, and the military's knowledge of many of the prices and services billed by Halliburton, it is not likely that the government will come to a timely resolution.<sup>204</sup> Further, holding Halliburton liable is likely to have heavy implications on future defense contracting. It is assured, however, that FCA liability for Halliburton will not cure the Department of Defense's inadequacies in oversight, management, and implementation of defense contractors in the future—problems which should be readily addressed by the government as soon as possible.<sup>205</sup> However, merely because the government did not provide the utmost guidance for KBR, Halliburton should not be relieved of liability for fraud against the government due to its known submission of any false claims.

*Abigail H. Avery*

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203. There is recent evidence that the Army may recognize the difficulties holding Halliburton liable might create. See Russell Gold & Neil King, Jr., *Army, Halliburton Settle Bill Dispute*, WALL ST. J., Apr. 6, 2005, at A3. Halliburton may never be able to properly account for the funds that it charged the government, and in efforts to resolve this conflict, the Army has made recent efforts to hire an outside accounting firm to estimate the proper costs of Halliburton's services. See Neil King, Jr., *Army Plan Would Let Halliburton Keep Funds from Disputed Bills*, *supra* note 125.

204. Of course, such information does not consider whether a qui tam action has been filed or whether the government has other classified information which conclusively demonstrates Halliburton's and KBR's intent regarding any false claims.

205. Similar problems may face the government sooner than expected with the recent award of non-bid contracts to contractors such as Fluor Corp. and Bechtel National Inc. to rebuild parts of the gulf coast devastated by Hurricane Katrina. Yochi J. Dreazen, *The Katrina Cleanup—No-bid Contracts Win Katrina Work*, WALL ST. J., Sept. 12, 2005, at A3.