

**INTERVIEW WITH FREDERICK
MORGAN, JR., VOLKEMA,
THOMAS, CINCINNATI, OHIO**

In a little noticed False Claims Act case, Northrop Grumman Newport News, General Dynamics Electric Boat and three other defendants have agreed to pay \$13.2 million to settle allegations accusing them of failing to stop obvious quality and fraud problems at a key maker of submarine valves – Hunt Valve of Salem, Ohio.

The whistleblowers in the case were Tina Marie Gonter and her husband William Gonter.

Hunt Valve is the maker of valves for the Los Angeles-based Seawolf-class and Virginia-class submarines. Valves are devices that regulate the flow of liquid and gas.

The lawyer for the Gonters is Frederick Morgan, Jr. of Volkema, Thomas in Cincinnati, Ohio.

We interviewed Morgan on December 26, 2005.

CCR: What law school did you graduate from, when, and what have you been doing since?

MORGAN: I graduated from the Cincinnati College of Law in 1983. I clerked for District Court Judge David Porter in Cincinnati for two years.

I spent the next four-plus years as a trial attorney in the Civil Division of the Justice Department in Washington, D.C.

CCR: What kind of cases did you work on there?

MORGAN: It was called the Federal Programs Branch, which is part of the Civil Division that handles challenges to the constitutionality of statutes and executive actions – a wide variety of cases that don't fall into categories such as torts, or frauds, or other more specific areas within the civil division.

CCR: Maybe they are now working on whether the U.S. has the authority to spy on its own citizens?

MORGAN: That's quite possible. That's just the kind of case that Federal Programs would address. As a line attorney, I handled one of the early cases challenging the constitutionality of the Foreign Intelligence Surveillance Act.

CCR: How did it come out?

MORGAN: They are still using it, so, my side won that one.

CCR: What years were those?

MORGAN: That was 1985 to 1990.

I then came back to Cincinnati. I worked in a small firm for three years doing both plaintiff and defense work. I was on my own for three years and then joined a Cincinnati firm which had a focus on the False Claims Act. That firm is now Helmer Martins Rice & Popham. I was with those good folks from 1996 to 2004. And earlier this year, I opened up a Cincinnati office for the Volkema Thomas firm.

CCR: Where are they based?

MORGAN: Columbus, Ohio.

CCR: Is your exclusive focus False Claims?

MORGAN: Probably to the 90 percent level.

CCR: How did you become interested in the False Claims Act?

MORGAN: I left the government in part because I wanted to represent real people. And I started representing real people and realized that I very much enjoyed representing the taxpayers. The False Claims Act weds those two concepts in a way that is unique – and creates an opportunity to represent both individuals and the government.

It was a natural fit for my skill set.

CCR: How many False Claims Act cases have you

brought?

MORGAN: Ballpark – more than 30.

CCR: How many have resulted in money for your clients?

MORGAN: Probably right now half of them are under seal and a quarter are in active litigation. At the Helmer firm, I was involved in the resolution of a dozen or so qui tam cases, and our clients received payment in about half of those.

These are tough cases.

CCR: Did you go through a couple of cases where you were burned and learned which cases not to take?

MORGAN: Some might think that's still not my strongest point. I listen to the clients. If I feel there has been wrong to the taxpayers and we can prove it, my instinct is to get involved and try to make it work.

A good example is a case I'm handling right now. It involves block grants under the welfare reform system. It is a tough case. It is very vigorously defended. But we are convinced that the relators are right, and that the case deserved to be litigated.

CCR: Who is the relator?

MORGAN: Four mid-level managers within the state agency from which the federal funds were wrongfully paid out.

CCR: Has the government joined the case?

MORGAN: The government declined the case. We are approaching the end of discovery. The case is about four years old.

CCR: How many of those kinds of case - where the government does not join – are you involved in?

MORGAN: More and more. The government is declining more and more cases.

CCR: Why is that?

MORGAN: Several reasons. One is – there are more cases. Two is – there are fewer government lawyers, although they did just get an infusion from the tobacco litigation team. And three, cases have been sitting under seal for a very long period of time.

One of the cases that takes a lot of my time was filed in 1999 and it is still under seal. It took a number of events which I can't talk about because of the seal to get the investigation sparked. But at one point, the investigator in that case had left the country on assignment, came back a year later, and the file was still sitting on his desk in exactly the same place.

And I don't necessarily blame him or his agency for that. That's a resource issue.

But the government has to come to terms with this. Given the limited resources, how do they give voice to the Congressional expectation that private resources be used to the maximum extent possible without compromising what they view as the need to avoid bad precedent, keep control of this area of the law, and keep control of the cases?

Their view is that these are ultimately their cases. Our view is that they are our cases. And while we have a mandate to carry the cases forward, they want to have a say in how this happens.

So, my perception is that they are going through a small transition period in terms of how they approach cases that perhaps are hard, perhaps do not involve enormous sums of money, perhaps not fully developed due to a lack of investigative resources, and move more in a direction of earlier declination in those cases.

CCR: Would you prefer that the government decline earlier than just sit on a case?

MORGAN: I generally would. That's not always the case. Let's look at the Hunt Valve case, which is a declined case which we are now settling.

CCR: How did that case come in the door?

MORGAN: Tina Gonter called me. She had been a nuclear quality assistance specialist at the Norfolk Naval Shipyard working for the Navy. She and her husband moved to Ohio. He is also a relator in the case. She moved to Ohio and started working in the private sector for defense subcontractors. She was shocked at what she found doing quality control work in the defense industry.

CCR: What did she find?

MORGAN: She found quality control systems that were badly broken. To the extent that in this case, the quality control manager at Hunt Valve is now in federal prison and will be for 33 months from this past September, and the company's vice president is awaiting sentencing on a guilty plea to defrauding the United States.

The types of fraud going on at Hunt Valve were staggering. Inspections were certified to have occurred while the inspector was on vacation. Equipment was altered to falsify measurements.

Material was used without knowing whether it met requirements, and certifications were forged, falsified, and altered on a daily basis.

Improper materials were used. Submarine valves were beaten with hammers to make

parts fit together. And on and on.

The Defense Criminal Investigative Service (DCIS) went in with a search warrant and seized all of Hunt's records, and our lawyers and paralegals spent more than two years going through the documents to build the case.

Hunt Valve was a subcontractor to Newport News Shipbuilding, which is a unit of Northrop Grumman, to General Dynamics Electric Boat Company, to Lockheed Martin, and to companies that sold to Bath Iron Works.

CCR: Were all of those companies defendants in this case?

MORGAN: They were. Hunt Valve was also made valves for byproducts of the nuclear fuel refining process, and the Nuclear Regulatory Commission has ordered that many of those valves be replaced.

CCR: There were allegations about the quality of the valves themselves?

MORGAN: Absolutely – both the physical quality of the valves and the failure to conduct required inspections and use proper procedures.

Quality can mean anything from failing to perform an inspection or having a person who is not properly trained or certified performing an inspection to a valve that leaks when you open it up.

Hunt Valve made valves for all nuclear submarines in the modern era. They made valves for all destroyers, probably all nuclear aircraft carriers. Hunt Valves products include what are now 40,000 fleeted items.

Hunt made valves through which you could practically drive an ATV through.

They went into the operating systems of these vessels. They make valves with a 60 inch bore. And I'm not talking about a valve that water is running through. We are talking about a valve through which steam is pouring at incredible pressures. The failure of a valve caused the worst submarine accident in U.S. Navy history.

CCR: Is there any indication that there was a failure of any of these valves as a result of the quality control problems your client reported?

MORGAN: Not a failure in service on a ship. There were many of these valves that had bogus construction and many valves with nonconformances were installed. We did not allege that Hunt Valves are putting the lives of sailors in jeopardy right now. The Navy conducted a very professional, very extensive review of the hardware in conjunction with the shipyards and concluded that the risk levels associated with the Hunt valves

were not high enough to justify the conclusion that there was an imminent safety risk. Were there physical defects in the valves? Absolutely, and many of them.

CCR: Does your client believe that there is a chance that these defects will lead to some kind of a catastrophe?

MORGAN: My belief is that everybody involved thinks there is that risk, and everybody thinks that risk is very, very small. The bottom line is, God forbid a catastrophic failure, but the Navy will never have the security and confidence with respect to these valves that it paid for.

CCR: But they are not taking them out and replacing them.

MORGAN: They are not. And under the circumstances, it is reasonable to conclude that they shouldn't. There could be a bad valve out there somewhere. There may be. But the Navy has a great deal of redundancy engineered into these systems. If a valve failed, there is a good chance that there would be a system redundancy that would catch it and prevent it from causing a catastrophe.

To replace valves means to cut systems apart with torches, which means drydocking a submarine or aircraft carrier, which has implications for our national security.

The problem is that the Navy doesn't know how all of this will perform if, somewhere, sometime, there is a cascade of problems which involves a defective Hunt valve. And that is often the issue in a quality control case. On the other hand, there certainly have been cases where bad parts out there can be picked up, determined to pose a safety risk, and replaced.

For example, a case I was deeply involved in a couple of years ago against Boeing involved helicopter gears made by an Ohio company, SPECO.

Our client there was a quality control engineer who identified metallurgical issues with gears. These are big, primary transmission gears, a foot long and rotating at more than 10,000 rpm.

And in that case, the Army ended up grounding its fleet of Chinook helicopters until certain of these gears could be re-manufactured and replaced.

CCR: What have been your big hits on qui tam cases?

MORGAN: I worked on the Texas oilfield litigation which resulted in more than a quarter-billion in recovery to the government, but did not have a primary role.

The biggest case I've directly handled was the Boeing case. That was wrapped up in 2000 for about \$61.5 million in total.

CCR: Who was the relator?

MORGAN: Brett Roby, a quality assurance specialist at SPECO. The government joined the case, and we worked shoulder-to-shoulder with the government team to resolve it.

CCR: What was the relator's share?

MORGAN: I believe the relator's share was 22 percent.

The Hunt Valve case we are now settling is next, at about \$13 million.

Next, a case against Lockheed Martin involving accelerometers on the F-18. The relator in that case was a quality engineer named Rudy Anderson.

CCR: Did the government join?

MORGAN: The government intervened on the day of settlement. The recovery in that case was about \$6.5 million. The relator's share was, as I recall, above 20 percent. That was in 2002.

CCR: In the Hunt Valve case, how did the Gonters get your name?

MORGAN: They did some research and found my name. Their case was filed in 2001.

CCR: Did the government join the case?

MORGAN: The government joined the case against Hunt Valve. They did not join the case against any of the other defendants – principally General Dynamics, Northrop Grumman and Lockheed Martin.

The Hunt Valve case will be one of the largest non-intervened settlements without a trial, by the way.

We are in the process of finalizing the paperwork. There is a theoretical possibility that the case would not settle, but everyone expects resolution.

CCR: Why did the government intervene against Hunt Valve but not against the big defense contractors in this case?

MORGAN: You would have to ask the government, but I think the military branches are very reluctant to intervene in cases against their prime contractors.

CCR: But this is the Justice Department we are talking about, not the military.

MORGAN: Sure, the Justice Department makes the final decision, but the military branches are clients which are closely consulted. The military branches right now are very busy. And there are fewer and fewer contractors with closer and closer

relationships with the Pentagon.

My sense is that they believe that if they get money from a contractor on one program, they are going to end up paying it back on another program.

CCR: But big companies like Boeing are not immune from False Claims Act settlements.

MORGAN: They are not immune, and we worked with the Justice Department to prove that in the Roby case. As to Hunt Valve, I can tell you that we had evidence of extensive knowledge by the prime contractors that Hunt Valve was engaged in very serious wrongdoing, and had the duty to deliver good parts to the government.

Why the government did not intervene, though, is a question only the government can answer. Had the government chosen to do so, it could have made a very effective case against the primes.

CCR: Lawyers in this field say that it is a much heavier lift if the government doesn't intervene.

How would the case have been different if the government had intervened against the primes?

MORGAN: We'll never know. We had a judge who got active in settlement and pushed hard. He said that money should go to the government and the relators rather than to paying lawyers, and everyone came together and worked it out.

Without the judge's involvement, we probably would have been litigating for years. But I know we would have prevailed against the shipbuilders, because the case was so strong. Hunt Valve settled immediately, and two Hunt Valve senior executives have been convicted of defrauding the United States.

CCR: Was there a criminal charge against Hunt Valve?

MORGAN: Against the corporation, no. In fact, I don't usually give plugs for companies I sue, but Hunt Valve did just what a company sued under the False Claims Act should do – which is conduct a thorough investigation, fire many of the people who were involved in the fraud, bring in a new management team, and do their best to be transparent in that effort and attempt to emerge as a going concern.

They have miles to go before they get there. But they are making progress.

CCR: If the executives of the companies plead guilty to crimes related to the business, then the company is guilty of the crime. Was there a non-prosecution agreement in this case?

MORGAN: I believe there was. That is above my pay grade. However, I was told many times that the

Navy had a strong interest in keeping Hunt Valve as part of the procurement base, which could not happen if it was convicted of a felony. There are not that many valve manufacturers out there for nuclear submarines. When you contrast the military side of the False Claims Act practice with the medical side – you have tens of thousands of Medicare and Medicaid providers. They are essentially fungible until you get into the arena of, say, rural hospitals that can't be replaced.

But there are only a handful of companies – maybe three – that can do what Hunt Valve wants to do. Hunt Valve doing that after a period of rehabilitation is apparently a more attractive proposition to the Navy than trying to go out and find another supplier, or completely qualify from the ground up a new supplier.

CCR: Or they could build the valves themselves.

MORGAN: Interesting you would suggest that. That was one of the proposals made by the government team in the Roby case against Boeing. The government's damages, because they couldn't trust the suppliers in that case, could possibly include the expense of building a factory to make gears under government supervision.

That's not the way the case went. But the proposal came up, and it showed the level of concern that the government had in that case.

CCR: Total settlement in the Hunt Valve case was what?

MORGAN: Total settlement is about \$13 million, which does not include attorney's fees. Hunt Valve is paying about \$670,000. And the remaining contractors are paying \$12.2 million.

Electric Boat is paying the biggest share, which I think is \$7.7 million. They were the lead contractor. They had personnel on site who clearly should have taken more action than they did. We took the testimony of the Electric Boat person on site. And his testimony showed a considerable degree of consternation over what was going on.

Both relators wore wires for the Defense Criminal Investigative Service, in Ms. Gonter's case over a period of many months, including a period where she was recovering from a mastectomy due to breast cancer.

And the results of the taping were exceptional in terms of demonstrating a level of awareness of problems at Hunt Valve by Electric Boat personnel.

CCR: Was there ever a consideration of a criminal charge against the major contractors?

MORGAN: That's a question for the prosecutors in

Cleveland. I'll say this – the criminal team in the case was aggressive. They looked hard at all of the issues. My understanding is that there remains an open criminal investigation, but I don't think that it relates to the quality portion of the case.

There was a defendant named All Stainless. We alleged that All Stainless was used as a minority contractor to funnel Hunt Valve product to General Dynamics. There may have been some certifications in connection with that effort that were inappropriate.

CCR: Well, are these companies too big to criminally prosecute?

MORGAN: You said that – not me. Sometimes people look for quick kills, and shy away from going after big companies. On the other hand, lots of big companies or their executives have been prosecuted in recent years – although that is far less true in the defense sector than the health care and pharmaceutical sectors.

If you look back at the legislative history of the False Claims Act amendments, you'll see that at that time, in 1986, most of the top 10 companies either had been convicted or were under indictment.

The government does currently seem far more interested in FCA prosecutions against smaller companies. For example, just last week, a company in Texas was selling tool kits to Lockheed for use in the manufacture of the F-22 and other military aircraft.

That company, Tools & Metals, Inc. or TMI, was found to have been inflating the price at which it sold to the government.

The president of that company just pled guilty to defrauding the government, but the company is in bankruptcy and there is no indication in the press accounts that the government is looking to Lockheed, even though Lockheed, one supposes, charged the government for what TMI charged it. Whether that related to quality per se remains to be seen.

CCR: As the attorney for the relator, you have an interest in seeing the case settled as quickly as possible. But when the government pursues a case criminal, that slows things down, doesn't it?

MORGAN: Sometimes. Sometimes not. For example, in the Hunt Valve case, the prosecution of the vice president and the quality manager of Hunt Valve undoubtedly helped in the long run, because it made clear how serious the situation had been.

These guys came forward, pled guilty and now – one is in prison and one is waiting to go to prison.

This underscored the gravity of the situation. It also gave us some evidentiary advantages. One of these guys was a corporate officer of Hunt Valve.

The company was not going to be in a position to deny much of what we alleged occurred.

CCR: But if the government pursued a criminal case against the prime contractors, that could have significantly delayed your settlement.

MORGAN: First of all, the False Claims Act makes clear that a criminal case does not have to slow down the civil case. The fact is, the way these cases go, anything could have delayed it.

As I said, the judge worked very hard to get the case settled and without him, we'd still be fighting about the shape of the table. To your question, think about the drug industry model. Think how many cases you've seen in the last couple of years where the False Claims Act settles at the same time that the criminal case is settled with a guilty plea.

Corporate Crime Reporter just reported about the government settling both criminal and civil claims against Eli Lilly just last week.

You are voicing the common wisdom – which is a criminal case can really slow you down. And sometimes it does. But there has been a little bit of a change in that. Companies want just one bad day. And if they can get that one bad day and wrap everything up, they see that as being to their advantage.

CCR: Let's talk about fake debarments and fake guilty pleas. The company will put up a defunct unit to plead guilty. And then the debarment officials exclude that shell from doing business with the government. Is that a dirty deal?

MORGAN: Is it a dirty deal? It probably is not what the Congress or the Pentagon or HHS had in mind when they instituted the debarment process. I hope that debarment and suspension decision makers are people of good faith. But that is not a process that I have a direct window into.

On the health care side, there is more active negotiation during the False Claims case on those issues. But on the military side, there is really a Chinese wall between the debarring personnel and the litigating team.

CCR: Like you said, the company wants one bad day. All of the attorneys are in the room negotiating. And you are privy to those negotiations.

MORGAN: You've touched a real nerve for our bar. Unless you're just baiting me, you would be

very surprised as to how little we are privy to in negotiations between the government and defendants in our cases.

Sometimes we know a lot, but sometimes we are simply told that a case has been settled. Does it make it a dirty deal, as you put it, when there is not a suspension? That's also above my pay grade. To my knowledge, only one prime contractor has been suspended as a result of a False Claims Act case. And that was General Electric in connection with a case Jim Helmer firm brought many years ago.

The suspension was for something like 48 hours. But GE lost the ability to bid on a surprisingly large number of contracts during that two-day period.

Is the debarment system a healthy system? Maybe not. They are up against a lot of hurdles. And I think that the prime contractors have such superb access to people in the Pentagon, that it makes it very dicey for anybody to think seriously of taking a hard line against them – even if it would make sense in the long run.

CCR: If a company defrauds the U.S. government, the big gun is debarment. But debarment itself has become a fraud.

MORGAN: Let's say that debarment has become – and maybe always has been – a very ineffective instrument in terms of policing the power-hitters in the defense industry.

CCR: From a pure justice point of view, it's not working.

MORGAN: From a small "j" justice perspective, debarment and suspension are pretty much irrelevant to me. I have one client and one "sort-of" client. The client is the relator. And the "sort of" client is the United States.

So, if I can get a good result for, first, my client and second, for the government, I sleep at night. The government is going to be living with all of these contractors after I'm done practicing law, after your done writing the *Corporate Crime Reporter* and after every individual at every one of those companies is dead. They have been doing it for 100 years. And they will do it for another 100 years. That relationship informs the whole logic tree in way that is challenging to cope with – it's not for nothing it's called the military industrial "complex."

CCR: From a deterrence perspective, what impact has the False Claims Act had?

MORGAN: Taxpayers Against Fraud did a study a couple of years ago and concluded that there was

huge deterrence. It makes sense that there is. Of course, I don't see the deterred – I see the undeterred.

One factor which has worked badly against deterrence, however, is the crazy push for shareholder return in the 1990's and still this decade. That led to a real need to pinch pennies and cut corners.

Couple that with the lack of engineering graduates, the need to meet delivery schedules, senior people retiring. So, there is a perfect storm on quality assurance, perhaps even on corporate ethics generally.

But deterrence is one of those things you can never know.

Would have there been more deterrence in Hunt Valve if the government went in and took numbers? Of course there would be. At that same time, they have to take into account litigation risk, personnel issues, the burden on the Navy.

CCR: When you say taking numbers, you mean a more aggressive criminal approach?

MORGAN: Or a more aggressive civil approach. There were options available to them that would have resulted in a more effective deterrent. Hunt Valve sold the government \$100 million worth of valves, plus or minus, to the shipbuilders.

Their quality system was bad for a decade. From that perspective, the shipbuilders are not paying very much in damages. On the other hand, the valves right now are performing as required. Damages are a real challenge in a case like that.

CCR: What percentage of the False Claims Act cases being brought today are health care versus military?

MORGAN: I think the military cases are a small fraction. Not too many folks are doing them.

CCR: What about your cases?

MORGAN: Right now, my newer cases are revolving around health care and pharmaceuticals. But I still believe strongly in doing the military-side work and have learned enough about quality systems, metallurgy and the like to be able to work effectively for clients in that arena.

It is just a question of what has been coming in the door.

CCR: You turn away a big portion of your cases. Are those primarily health care or medical care?

MORGAN: We're turning away some of everything. The cases that we've gotten involved in recently have happened to be in health care and

pharmaceuticals.

In terms of dollars per case, the pharmaceutical numbers have been staggering. It is very difficult for both clients and lawyers to evaluate the issues on the military side. It is also very hard for somebody inside a giant defense company to come forward and raise allegations of fraud.

And more and more information is either classified or simply not available.

CCR: If the country moves to national health insurance, would that reduce the amount of fraud in the system?

MORGAN: One would hope. If the professionals are on salary, it seems intuitive that it would have to reduce the fraud. Much of the healthcare fraud results from the relationships between individuals who are passing money around. On the other hand, what impact would national health care on the pharmaceutical side. As far as I know, there is no credible move away from the current pharmaceutical industry model.

CCR: The government has developed many of the breakthrough drugs, why don't they just make them and sell them?

MORGAN: Like helicopter gears. Good question, but it doesn't seem likely.

CCR: But you are not going to see the False Claims Act bar advocating for national health insurance. That would wipe them out, right?

MORGAN: My personal goal is obsolescence. The year that qui tam lawyers get no work is the year that the False Claims Act succeeds. But right now, we are touching on a fraction, a small fraction, of what's out there.

It takes such incredible courage to be one of the people who stands up instead of going along. The privilege is to deal with those people on a daily basis. But the other side of that is that I see from the reactions of their friends, family and employees is that they are in a tiny minority.

There are not many people willing to do it. And that plays right into the hands of the people who are taking the money.

CCR: What percentage of the cases that come to your door you wouldn't touch with a ten foot pole?

MORGAN: Sixty or seventy percent.

CCR: Of the remaining cases, what percentage do you take?

MORGAN: Just a handful. Out of a dozen inquiries, we might develop a case or two.

CCR: Other than yourself, who are the top five qui

tam plaintiffs lawyers or law firms?

MORGAN: I can't include myself in that group, and I can't limit it to five. But certainly think my partner Jennifer Verkamp fits the bill.

More importantly, our bar has developed so well in the past few years that there are a number of really good people.

Some of the folks I admire most are Ken Nolan in Florida, Peter Chatfield at Phillips & Cohen, Glenn Grossenbacher in San Antonio does incredible work, Scott Powell and Don McKenna in Birmingham, my former partners Paul Martins and Jim Helmer, Dave Haron and Monica Navarro, Neil Getnick and Leslie Skillen, Mark Kleiman in Los Angeles.

There has emerged a very dedicated and skilled group of lawyers, and I'm honored most of them will return my phone calls.

Congress got it exactly right when it incentivized private counsel to represent whistleblowers.

CCR: Are there standout defense attorneys who you don't want to be seeing across the table?

MORGAN: The ones that I don't want to see across the table are the ones that don't stand out. The best lawyers are the easiest to work with.

I don't think that dragging a case out, taking a \$15 million case and spending \$10 million in legal fees doesn't serve anybody's interest.

Unfortunately, there are a lot out there who think the only good earth is a scorched earth, even though if we prevail their client has to pay both sets of lawyers.

CCR: What percentage of defense attorneys drag it out for the fees?

MORGAN: More than there should be. But there is a problem in the qui tam arena, which is the assumption that non-intervened cases have no more than nuisance value.

If the government is intervening, they all want to work it out. They consider it a case-ending victory to persuade the government not to come in. They teach at their seminars – if you can win the intervention battle, you win the case.

But Hunt Valve shows that that is not the case. Another of our cases, the Pogue case, shows that is not the case.

But I will say that the initial offer from the defendants in Hunt Valve, after the government declined to intervene, was much lower than the offer they made to the government prior to

declination.

The defense attorneys assume if the government doesn't intervene, they will be able to use all of the tools at their disposal – Rule 9b, original source, public disclosure, plus the general perception that the declined case is a bad case – to get out without paying any money, except to themselves.

CCR: What has happened to the practice under President Bush?

MORGAN: There is a general sense that it has become more politicized than we have seen in the past. But I have no concrete examples of that. And of course, nobody on the government side is going to discuss that overtly. In general, it's a polarized and political era.

Access by corporate folks to people in the government has been broadened and made more acceptable in the last decade.

CCR: You have written this article titled "Of Third Rails and Rabbit Trails" which was published by Taxpayers Against Fraud. This is about the no contract rule and the McDade amendment. What is the no contract rule?

MORGAN: That is the ethics rule that says that I as a lawyer representing a party on one side of the case am not allowed to contact people who could bind the company on the other side if I know that the company is represented by counsel.

So, for example, let's say that I sue on behalf of a client a subcontractor. I can always talk to hourly employees, to people not in a management role.

But as far as managers go, and even hourly people directly involved in the fraud, I can't talk to them generally under the ethics provisions which bind me – which in my case are the Ohio rules of professional conduct.

CCR: What is the McDade amendment?

MORGAN: Joe McDade was a member of Congress from Pennsylvania. He was prosecuted for influence peddling and he was acquitted.

He was extremely upset that federal lawyers and investigators were not bound by the same ethics rules as other lawyers. He proposed legislation to say that they were, and the McDade amendment passed.

And that law says that all lawyers representing the government are bound by the ethics code of all of them. So, if you have lawyers admitted to practice in five states, then all of those lawyers are, at least arguably, bound by the most restrictive of

those five state laws.

Long story short – government lawyers and investigators are now often precluded from talking to anybody inside a corporate defendant without having the company's lawyers present. So, where seven or eight years ago, certainly ten years ago when I started doing this, investigators would go and knock on doors and talk with people, they can't do that anymore. Rather, they now have to go through a process of setting up interviews, which can itself take months.

The company's lawyers have to be contacted, the interviews have to be set up, they have to go through all kinds of scheduling hassles. And most importantly, the company's lawyers spend hours, days or weeks preparing the interview subject for the interview, and then they get to be present. It doesn't take a lot of imagination to understand the effect of this on the ability of someone telling you what really happened, especially if it means criticizing their company or their supervisors.

CCR: These rules don't apply prior to filing a case, do they?

MORGAN: They do if you know that the company is represented on the matter. The filing of the lawsuit doesn't trigger this. It's the "matter."

Practically speaking, this comes into effect more in a post-filing investigation.

But as soon as the company has lawyers, and the government knows it has lawyers, it kicks in. DCIS sends out a subpoena.

The company gets it. The company's lawyers respond.

At that point, a conservative government lawyer is going to take the position that the investigators can't talk to anybody in the company.

I'm working on a case that is still under seal, but not for much longer, where the company has taken the position that the government can't talk with even former employees, and the government has gone along.

My view is it compromised the investigation.

It is especially troublesome in qui tam cases because relator's lawyers are very constrained in terms of the investigation we can do pre-filing.

There are legal issues like the original source and first to file issues which make somebody else catching wind of an investigation very dicey.

And the government expects that when they get a case from us to investigate, it is going to still be secret to the defendant.

So, we are pretty well restrained. We can't go back to current employees who might go back and inform the company.

CCR: How do you get the goods?

MORGAN: You asked about turning down clients and I gave an incomplete answer.

One of the major reasons we will no go forward with a client is because there is not enough corroboration or documentation to persuade the government that it is worth their time to get involved.

Of course, defendants accuse employees of "stealing" documents, but my view is that employees have a right to get legal advice and they often can't do it without documents.

They can't show the government what's going on without documents.

And they usually can't convince us that they're right without documents.

CCR: How would you like to see these laws changed?

MORGAN: The biggest problem we have is not the False Claims Act itself but the unprincipled application of Rule 9(B).

That's a rule of federal procedure that says that in cases of fraud, the circumstances constituting fraud have to be plead with particularity.

Rule 9(B) has become a spanking machine for any and all non-intervened cases.

But it also spilling over into cases the government brings on its own, or the intervene cases.

Some courts have essentially made Rule 9(b) into a rule that says that if you are not a billing clerk who knows exactly when a claim was submitted to the government, you can't bring a case – regardless how much you know about the fraud.

And the McDade law has had a broad unintended consequence of preventing the government from conducting investigations.

The combination of the two is very difficult for our bar.

CCR: Have you lost cases based on Rule 9(b)?

MORGAN: Absolutely. Good cases. Any losing lawyer can talk sour grapes, but the short of it is that 9(b) has become the elephant in the room under the False Claims Act.

[Contact: Frederick M. Morgan Jr., Volkema Thomas, 700 Walnut Street, Suite 400, Cincinnati, Ohio 45202. Phone: (513) 651-4400. E-mail: rmorgan@vt-law.com]