

[Ninth Circuit Overturns Attorney Fee Award Against the Government](#)

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Court finds that the government did not act frivolously in conducting a factual investigation

In [U.S. v. Capener](#), 2010 DJDAR 392 (2010) the [U.S. Court of Appeals for the Ninth Circuit](#), overturned a fee award, rendered against the government under the so called “Hyde Amendment.”

The Hyde Amendment, [18 U.S.C. § 3006A](#) note, permits the court to award attorneys fees to a defendant in a criminal prosecution where the government has acted in a manner that was “vexatious, frivolous, or in bad faith . . .”

After conducting an investigation initiated by a health insurance carrier, the federal government prosecuted physician Mark Capener for alleged health care fraud. The government claimed that its investigation found indications that the doctor had billed patients for unnecessary and unperformed surgeries.

As a result of the investigation, the doctor was charged with numerous counts of fraud. The government relied on statements made by its retained expert. The expert concluded that certain pathology samples did not contain bone fragments, which would be present if certain surgeries were in fact performed. Further investigation revealed that the samples actually did contain bone fragments. At trial, the government presented the bone fragment theory to support the prosecution.

After further proceedings, the charges against Capener were dismissed by the government and Capener moved to recover his fees under the Hyde Amendment. The district court found that portions of the government’s claims were frivolous, and awarded partial fees. Both the government and the defendant appealed.

The Ninth Circuit reversed in part.

The court noted that under the Hyde Amendment, the court may award a prevailing party reasonable attorney fees where it finds that the government’s position violated the standards set forth in the Hyde Amendment. The Ninth Circuit stated that a failure to sufficiently investigate can rise to the level of frivolousness only when the government had some reason to know further investigation was needed. The court concluded that there were no facts in the record to support a conclusion that the government knew the “bone fragment theory” was wrong.

On this basis the court concluded that the government’s reliance on its expert’s opinion did not rise to the level of misconduct necessary to recover fees under the Hyde Amendment.