TAF Education Fund
Vol. 29
January 2003

Taxpayers Against Fraud

False Claims Act and *Qui Tam* Quarterly Review

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The *False Claims Act and Qui Tam Quarterly Review* is published by the Taxpayers Against Fraud Education Fund. This publication provides an overview of major False Claims Act and *qui tam* developments including case decisions, DOJ interventions, and settlements.

The TAF Education Fund is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the False Claims Act (FCA). The TAF Education Fund serves to inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions.

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FCA Liability of Government Entities

***Wilkins v. St. Louis Housing Authority*, 2002 U.S. App. LEXIS 27174 68th Cir. Dec. 31, 2002)**

See "Section 3730(h) Retaliation Claims" below at page 10.

***U.S. v. Erie County Medical Center*, 2002 U.S. Dist. LEXIS 22673 (W.D.N.Y. Oct. 30, 2002)**

A New York district court dismissed the Government's FCA claims against a county hospital. The court ruled that municipal entities are not "persons" subject to suit under the FCA, even when the Government alone initiates the suit.

In April 2002, the Government filed this action against the Erie County Medical Center (ECMC), alleging claims for violation of the FCA, common-law fraud, breach of contract, unjust enrichment, and mistake of fact. The Government claimed that ECMC submitted claims for reimbursement of medications not covered by Medicare. In August the Government filed an amended complaint, and in September ECMC moved to dismiss, arguing that it is *non sui juris*, that municipalities are not subject to the FCA, and that some of the common-law claims were time-barred.

Hospital Is *Sui Juris*

The court first addressed ECMC's contention that it is *non sui juris* because it does not have a legal existence separate from that of Erie County. After examining the Erie County Charter, the court rejected this contention. The court found that the Charter incorporates by reference provisions of the New York Public Authorities Law which permits all public general hospitals to sue or be sued. Accordingly, the court ruled, the hospital is *sui juris*.

Municipalities Are Not "Persons" Subject to Suit Under the FCA

However, the court ruled that municipalities are not "persons" subject to suit within the meaning of § 3729(a) of the FCA. ECMC argued that it is not subject to the FCA because of the presumption against imposition of punitive damages on municipalities. However, the court did not address that argument, finding instead that municipalities were not "persons" even under the original 1863 version of the FCA, which clearly did not impose punitive damages. The court noted that the term "person" has remained in the statute unchanged since 1863. While the Supreme Court ruled as early as 1844 that the term "person" presumptively includes corporations, *see Louisville R.R. v. Letson*, 43 U.S. 497, 555-58 (1844), the Court did not specifically indicate that this presumption extends to municipal corporations until 1868, *see Cowles v. Mercer County*, 74 U.S. 118, 121-22 (1868). Therefore, the district court concluded, while it was possible that in 1863 Congress intended "person" to include municipalities, it was far from clear.*

* *Editor's Note*—The court did not discuss the very large body of pre-1863 case law holding municipal corporations amenable to suit on the same terms as natural persons. *See, e.g.*, *Inhabitants of Searsmont v. Farwell*, 3 Me. 450, 452 (1825); *Thayer v. City of Boston*, 36 Mass. 511, 516 (1837) (Lemuel Shaw, C.J.); M'Gary v. President & Council of the City of Lafayette, 12 Rob. 668 (La. 1846); *Ross v. City of Madison*, 1 Ind. 281, 284 (1848); *Town Council of Akron v. McComb*, 18 Ohio 229, 230 (1849); *Mayor and Alderman of Memphis v. Lasser*, 28 Tenn. 757, 760 (1849); *Commissioners of Kensington v. County of Philadelphia*, 13 Pa. 76, 77 (1850) ("A municipal corporation is a person."); *Elliott v. Concord*, 27 N.H. 204, 208-09 (1853); *Paul v. School Dist. No. 2*, 28 Vt. 575 (1856); *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116 (1858); *Cotes & Patchin v. City of Davenport*, 9 Iowa 227, 233 (1859); *Argenti v. City of San Francisco*, 16 Cal. 255, 266 (1860); *Rains v. City of Oshkosh*, 14 Wis. 372, 374 (1861) ("[W]e have no doubt that the word 'person' extends to municipal corporations.").

Furthermore, in the court's view, other considerations supported the conclusion that in 1863 Congress did not intend "person" to include municipalities. Congress' principal concern in enacting the FCA in 1863 was fraud by private contractors. The original version of the FCA imposed liability on a "person not in the military or naval forces of the United States." The court found it odd that Congress would use such language to refer to non-natural persons such as municipalities. The court admitted that the same argument could be made against the imposition of liability on private corporations, which clearly are subject to FCA liability. However, the court distinguished private from municipal corporations by again observing that *Letson*, which dealt with a private corporation, was decided in 1844, while *Cowles*, which dealt with a municipal corporation, was decided in 1868.

Because the court ruled that Congress did not intend "person" to include municipalities even in 1863, it did not address the defendant's argument that municipalities are immune from the "punitive" damages provisions of the 1986 amendments. However, although the 1986 amendments did not alter the definition of "person" in the Act's liability provision, the court nevertheless found that they further supported its conclusion that "person" does not include municipalities. The 1986 amendments added a new provision, § 3733, allowing the Attorney General to issue civil investigative demands to "any person," and defined the word "person" for purposes of this section to include "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." The court reasoned that if "person" standing alone (as in § 3729(a)) referred to political subdivisions such as municipalities, then there would be no need for the definition in § 3733 to refer explicitly to political subdivisions. The court conceded that § 3733 refers explicitly to corporations, which are "persons" under § 3729, but explained this anomaly by once again referring to what it perceived to be a shift in presumptions between *Letson* and *Cowles*, the significance of which other courts, in its view, had uniformly failed to appreciate.

Finally, the court found further support for its interpretation of the word "person" in the Program Fraud Civil Remedies Act (PFCRA) of 1986, which defines "person" to include individuals and private associations but not states or municipalities. The court found it implausible that "person" could have a different meaning in the FCA than it does in the PFCRA. The court dismissed as erroneous the specific statement in the Senate Committee Report on the 1986 amendments to the FCA that the term "person" in the FCA includes "States and political subdivisions thereof."

Because the court concluded that the defendant was not a "person" subject to the FCA, it dismissed the FCA claims. In addition, it dismissed the Government's common-law claims arising outside the statute of limitations. Furthermore, the court dismissed without prejudice the Government's common-law fraud claims pursuant to Rule 9(b) on the ground that the Government failed to identify the non-covered items for which ECMC allegedly submitted false claims.

Falsity of Claim

***U.S. ex rel. Mathews v. HealthSouth Corp.*, No. 01-30862 (5th Cir. Oct. 22, 2002)**

The Fifth Circuit, in an unpublished per curiam decision, reversed a district court's dismissal of a *qui tam* action for failure to state a claim. The court ruled that the relator did state a claim for FCA violations in his allegations

that the defendant falsely certified compliance with the Medicare requirements for exemption from the prospective payment system.

Paul Mathews, a former executive of HealthSouth Corp., filed a *qui tam* action against his former employer, alleging that the company had defrauded Medicare. In 2000 the Government declined to intervene, and in October 2000 the district court dismissed for failure to satisfy Rule 9(b). In November 2000 Mathews filed a third amended complaint, alleging that HealthSouth fraudulently certified that 75% of the patients in its Sunrise Rehabilitation Hospital were being treated for certain specified serious disorders. Certification of compliance with the 75% rule enabled the hospital to obtain reimbursement on a prospective payment system exempt (PPS-exempt) basis, rather than the lower PPS basis. Mathews also alleged that the defendant failed to comply with the Medicare guidelines requiring it to provide three hours of therapy per day to patients.

HealthSouth moved to dismiss the third amended complaint for failure to state a claim and the district court granted the motion. *See* 2001 WL 431690 (W.D. La. Mar. 7, 2001), 22 TAF QR 22 (Apr. 2001). The district court held that although Mathews alleged that the defendant certified compliance with the 75% rule in deliberate ignorance of the true state of affairs, he failed to allege that the defendant actually violated the rule, and therefore the court dismissed this claim. The court also dismissed Mathews' claim based on the three-hour rule, finding that no such rule was mandated by law. Mathews appealed the district court's dismissal of his allegations of false certification of compliance with the 75% rule.

Relator Alleged False Statement

The Fifth Circuit reversed, ruling that the district court erred in ruling that Mathews had not alleged that HealthSouth had made a false statement regarding its compliance with the 75% rule. The court noted that Mathews had alleged that in 1996 Sunrise CEO Kevin Conn informed him that Sunrise was not meeting the 75% rule, and that in fact the population of patients with the specified diagnoses was about 65%. Moreover, because Sunrise operated throughout the relevant period at nearly 100% of capacity, Mathews deduced that it was not in compliance with the 75% rule before or after 1996.

Thus, the court of appeals ruled, Mathews had alleged more than negligence: he had alleged that the defendant made false statements to get its claims approved. Discovery might well turn up further evidence substantiating his allegations. Therefore, the district court erred in dismissing Mathews' claims that HealthSouth falsely certified compliance with the 75% rule. The court of appeals reversed the dismissal of those claims.

The court of appeals also declined HealthSouth's invitation to affirm the dismissal on the alternative grounds that Mathews failed to plead fraud with particularity as required by Rule 9(b). Because the district court did not reach that issue in its March 2001 decision, the court of appeals declined to address the issue at this time.

U.S. ex rel. Aflatooni v. Kitsap Physicians Service, 2002 U.S. App. LEXIS 25750 (9th Cir. Dec. 16, 2002)

The Ninth Circuit affirmed the summary judgment dismissal of a *qui tam* action based on allegations of Medicare fraud. The court ruled that dismissal was appropriate because the relator failed to present evidence that the defendant actually submitted a false claim.

Dr. Alfred Aflatooni brought this *qui tam* action in 1996 against Kitsap Physicians Service, Pathology Associates of Kitsap County, Northwest Diagnostic Imaging, and a number of individual physicians, alleging that the defendants submitted false bills to Medicare

from 1985 through 1987. The Government declined to intervene. In 1997, the district court dismissed for lack of jurisdiction pursuant to the public disclosure bar, but the Ninth Circuit reversed as to all defendants except Northwest, holding that only the allegations against Northwest had been publicly disclosed. *See* 163 F.3d 516 (9th Cir. 1999). On remand, the parties conducted discovery, and the remaining defendants moved for summary judgment in 2001. The defendants argued that Aflatooni had failed to produce evidence of a single false claim and had failed to bring his action within the statute of limitations.

Aflatooni relied almost entirely on a letter dated April 8, 1997 from Dr. John Matan (now deceased) to Robert Wilson, president of Kitsap, and on subsequent statements by the latter. The letter stated that many of Matan's billings had been altered without his knowledge or consent, but did not accuse the physician who made the alterations of any fraud or illegal conduct. In response to the letter, Kitsap engaged attorney John Guadnola to conduct an internal investigation. After reviewing nearly a thousand records, Guadnola concluded that there was no fraud. (Aflatooni later sought to argue on appeal that the Guadnola investigation was a sham, but had failed to present evidence supporting this argument in the district court.)

At the hearing on the defendants' summary judgment motion, Aflatooni argued that the defendants engaged in spoliation of the allegedly false documents and requested an evidentiary hearing on that issue. However, Aflatooni never moved for an extension under Federal Rule of Civil Procedure 56(f). The district court rejected Aflatooni's request for an evidentiary hearing on his claims of spoliation, finding that the defendants had credibly asserted that they destroyed the records in accordance with their normal, lawful retention policy, and that Aflatooni's failure to seek the documents earlier could not be blamed on the defendants. While the district court rejected the defendants' argument that the statute of limitations barred Aflatooni's claim, the court found that Aflatooni presented no evidence that the defendants filed a single false claim, and accordingly dismissed the case. Aflatooni appealed, arguing that the district court erred in failing to give him more time to gather evidence because of the alleged spoliation, and that summary judgment was inappropriate because he had demonstrated by implication that the defendants must have submitted false claims.

Relator Failed to Comply With Rule 56(f)

The Ninth Circuit affirmed. The court of appeals noted that Aflatooni never made a Rule 56(f) motion for a continuance to allow further discovery. The rule requires that any such motion be made before the district court issues its summary judgment ruling. Therefore, the district court did not abuse its discretion in deciding not to grant additional discovery under Rule 56(f).

Spoliation Argument Rejected

The Ninth Circuit also affirmed the district court's finding that there was no spoliation. Defense witnesses testified that the defendants' records were routinely destroyed after they were kept for six years as required by state regulations. Therefore, the 1985-87 documents were destroyed in 1991-94. Because Aflatooni did not file suit until 1996, when the documents had already been destroyed, Aflatoooni's action could not have provided the notice required to establish a valid claim of spoliation.

However, Aflatooni contended that the defendants were put on notice about potential litigation when they initiated the 1987 internal investigation. The court of appeals rejected this contention, noting that the 1987 investigation resulted in an opinion from outside counsel that there was no fraud. The court observed that if it accepted Aflatooni's argument, health care providers would be subject to a de facto

rule requiring them to keep documents in perpetuity where there was a single suggestion of billing changes, even if an external audit absolved the provider of any impropriety. The court stated that such a rule would be unfair to health care providers, who generate enormous quantities of records.

Relator Failed to Present Evidence of a False Claim

The Ninth Circuit ruled that it was not enough for Aflatooni to allege without any stated reason that false claims must have been submitted. He was required either to point to a specific false claim or to present sufficient circumstantial evidence that the defendant actually submitted a false claim. In his opposition to the motion for summary judgment, Aflatooni pointed only to the letter from Matan to Wilson and several statements by the latter. However, none of this evidence described even one specific false claim.

Aflatooni sought to rely on a number of cases allowing plaintiffs with specific evidence of false claims to estimate total damages by extrapolation based on proof that a defendant engaged in systematic fraud. However, the Ninth Circuit ruled, these cases were distinguishable from Aflatooni's case in that Aflatooni failed to present specific evidence of even a single false claim. This failure was fatal to Aflatooni's action. Accordingly, the court of appeals affirmed the district court's dismissal of the case.

False Certification

U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, 2002 U.S. Dist. LEXIS 24425 (D.D.C. Dec. 18, 2002)

A District of Columbia district court denied the defendant's motion for judgment on the pleadings in a *qui tam* suit alleging that the defendant violated the Stark and Anti-Kickback Statutes by paying physicians fees for referral of patients to diabetes treatment centers. The court declined to revisit an earlier ruling that noncompliance with the Stark and anti-kickback laws may give rise to FCA liability under a theory of implied false certification. The court also rejected the defendant's invitation to revisit an earlier ruling that the relator had satisfied Rule 9(b).

Scott Pogue first brought this action, which is now part of a multidistrict FCA litigation against HCA and related entities, in the Middle District of Tennesee. That court originally granted a motion to dismiss for failure to state a claim upon which relief can be granted, but upon reconsideration reversed itself, permitting the suit to go forward under an implied false certification theory, and holding that the FCA does not require a showing of actual damages for recovery. *See United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1508-09 (M.D. Tenn. 1996), 5 TAF QR 2 (Apr. 1996) (*Pogue I*).

Subsequently the action was transferred to the District of Columbia for coordinated pretrial proceedings. The defendant Diabetes Treatment Centers of America (DTCA) moved for judgment on the pleadings, asking the transferee court to revisit whether submission of a claim carries with it an implied certification of compliance with underlying laws and regulations and gives rise to FCA liability in the event of noncompliance. DTCA also argued that the relator failed to plead fraud with particularity, another argument that had already been rejected in this case.

Implied Certification Doctrine Was Law of the Case

The court denied the defendant's motion, both because it declined to revisit the law of the case, and because the law of the case was correct.

The Tennessee district court had held that the relator's allegations stated a cognizable claim under the FCA, and that the relator had pleaded fraud with adequate particularity. That decision by a court of coordinate status was entitled to respect from the D.C. district court, and there were no unusual circumstances that would justify reconsideration of that decision.

Stark and Anti-Kickback Violations Give Rise to FCA Liability

Nevertheless, in the interest of thoroughness, the court undertook a review of the cases that the defendant claimed cast doubt on the validity of the implied certification theory. The defendant relied chiefly on *United States ex rel. Siewick v. Jamieson Science & Engineering, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000), 19 TAF QR 5 (July 2000). However, the *Siewick* court merely held that the relator's implied certification claim failed because he had not proved that the certification of compliance with the statute at issue there (the so-called "revolving door statute") was a condition of the contract. Thus, the D.C. Circuit in no way foreclosed the validity of the implied certification theory in *Siewick*. In the case at bar, in contrast to *Siewick*, it had been determined that compliance with the anti-kickback and Stark statutes was material to the Government's decision to pay. Moreover, since its decision in *Siewick*, the D.C. Circuit again appeared to endorse the implied certification theory in *United States v. TDC Management Corp.*, 288 F.3d 421, 426 (D.C. Cir. 2002), 27 TAF QR 21 (July 2002).

The court observed that the *Pogue I* court found that the Government would not have paid the claims submitted if it had known of the alleged kickback and Stark violations. This finding of materiality was supported by the Medicare Health Care Provider Application, in which providers must certify that they "understand that payment of a claim by Medicare or other federal health program is conditioned on the claim and underlying transaction complying with such laws, regulations and program instructions (including the anti-kickback and the Stark law)." Although this form was only adopted in 2001, before the violations alleged in the case at bar, it was nevertheless evidence of the materiality of such violations.

The court found the defendant's contention that *Pogue I* was followed by a wholesale nationwide rejection of the implied false certification theory "simply wrong." In fact, the court found no court of appeals decisions expressly rejecting implied certification, although some circuits have expressed reservations. The only court to reject implied certification was a district court, which did so in dicta on a matter not fully briefed and not squarely before it. *See United States ex rel. Barmak v. Sutter Corp.*, 2002 WL 987109 (S.D.N.Y. May 14, 2002), 27 TAF QR 24 (July 2002). Because the developing case law has generally supported the holding in *Pogue I* that kickback and Stark violations can support an FCA claim, the court reaffirmed that holding.

The court also rejected the defendant's contention that it could not be held liable because it did not directly submit claims to Medicare or certify compliance with health care laws. The court observed that the FCA imposes liability on any person who presents or "causes to be presented" a false claim. Of course, for liability to attach, the violation must have been made "knowingly," but the court ruled that it was not appropriate to undertake the fact-intensive inquiry into the defendant's knowledge at this time.

Relator Satisfied Rule 9(b)

Like the *Pogue I* court, the D.C. district court also rejected the defendant's argument that the relator failed to plead fraud with particularity. The D.C. court ruled that the Tennessee court's decision on this point was both correct and was the law of the case. The defendant sought

to rely on the D.C. Circuit's recent discussion of the application of Rule 9(b) to *qui tam* cases in *U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551-52 (D.C. Cir. 2002), 27 TAF QR 4 (July 2002). However, the *Totten* court's main concern was that the relator had failed to allege the crucial element of an FCA action, namely the submission of a false claim. In the instant case, in contrast, the relator had adequately alleged the submission of false claims, and had set out a sufficiently detailed description of the false scheme. While the relator alleged the time and place with less specificity, detailed allegations of time may not be required where the allegations involve a vast nationwide scheme extending over many years.

Clausen Criticized

The defendant also relied heavily on *United States ex rel. Clausen v. Laboratory Corporation of America*, 290 F.3d 1301 (11th Cir. 2002), 27 TAF QR 14 (July 2002). In that case, a divided Eleventh Circuit panel affirmed the dismissal of a *qui tam* action for failure to comply with Rule 9(b), because the relator did not provide copies of actual bills or claims, and did not allege specific dates of claims. Judge Barkett, dissenting, criticized the majority for requiring proof rather than particularity, which is inappropriate on a Rule 9(b) motion to dismiss. The D.C. district district court rejected the defendant's reliance on *Clausen*, stating that it agreed with Judge Barkett's dissent, and that it believed that the D.C. Circuit, which has taken a generous approach to pleadings, would come to the same conclusion.

The court distinguished the case at bar from another case on which the defendant relied, *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F. Supp. 292 (D.D.C. 1996), 6 TAF QR 12 (July 1996), where a district court dismissed an FCA claim for failure to identify dates on which false invoices were submitted, invoice numbers, and names of employees who submitted the invoices. While *Alexander* might appear almost as harsh as *Clausen*, a closer look reveals that the *Alexander* court tacitly acknowledged that it was applying Rule 9(b) with severe stringency in order to discourage frivolous accusations. In the case at bar, in contrast, there was no allegation that the relator's suit was frivolous, and his complaint adequately notified the defendant of the claims against it.

Accordingly, the court denied the defendant's motion for judgment on the pleadings. In so doing, the court reaffirmed the rulings of the Tennessee district court.

In another decision in this case issued the same day, the district court granted the relator's motion to compel discovery from HCA and American Healthcorp, Inc., nonparty owners of defendants West Paces Medical Center and DTCA, respectively. *See* 2002 U.S. Dist. LEXIS 24423, summarized in "Litigation Developments" below at page 30.

Section 3730(b)(5) First-to-File Bar

***U.S. ex rel. Trombetta v. EMSCO Billing Services, Inc.*, No. 96 C 226 (N.D. Ill. Dec. 5, 2002)**

***U.S. ex rel. Freeman v. National Emergency Services, Inc.*, No. 99 C 151 (N.D. Ill. Dec. 5, 2002)**

See "Rule 9(b)" below at page 14.

Section 3730(e)(4) Public Disclosure Bar and Original Source Exception

U.S. ex rel. Trombetta v. EMSCO Billing Services, Inc., No. 96 C 226 (N.D. Ill. Dec. 5, 2002)

U.S. ex rel. Freeman v. National Emergency Services, Inc., No. 99 C 151 (N.D. Ill. Dec. 5, 2002)

See "Rule 9(b)" below at page 14.

U.S. ex rel. Mossey v. Pal-Tech, Inc., 2002 U.S. Dist. LEXIS 21129 (D.D.C. Oct. 30, 2002)

A District of Columbia district court denied a defendant's motion to dismiss a *qui tam* action based on the public disclosure bar. The court ruled that the action was not based upon publicly disclosed allegations or transactions, as the only arguable public disclosure related to wrongdoing by a different company than the defendant.

Thomas Mossey brought this *qui tam* action against his former employer, Pal-Tech, Inc., in 1999, alleging that the company submitted false claims, conspired to defraud the Government, and unlawfully retaliated against him for pursuing the matter. In 2000 and 2001, the court dismissed the conspiracy and retaliation counts. Thus all that remained was Mossey's false claims count, as well as a counterclaim by Pal-Tech for trade secret violations and breach of contract.

Pal-Tech moved to dismiss the remaining count of Mossey's complaint, which alleged violations of §§ 3729(a)(1) and (a)(2), on the ground that the court lacked jurisdiction pursuant to the public disclosure bar. Pal-Tech also moved to strike an expert witness report filed by Mossey. Mossey moved to dismiss Pal-Tech's counterclaim pursuant to Fed. R. Civ. P. 12(b)(6).

Allegations Not Publicly Disclosed

The court denied Pal-Tech's motion to dismiss. The court noted that under D.C. Circuit precedent, a *qui tam* suit is barred by public disclosure if information in the public domain "could have formed the basis for a government decision on prosecution, or could at least have alerted law enforcement authorities to the likelihood of wrongdoing." The only information that could be construed as publicly disclosed before Mossey filed suit was a performance audit of Jorge Scientific Corporation by the U.S. Agency for International Development (AID). Like Pal-Tech, Jorge Scientific supplied support services to AID's Center for Population, Health, and Nutrition (PHNC). However, Mossey's allegations involved a very different set of false claims. The court concluded that fraud against PHNC was not so widespread and notorious that other independent contractors working for PHNC were easily identifiable as perpetrators of fraud, and was unwilling to indulge the unreasonable presumption that all support services contractors commit fraud. Without Mossey's actions, it was extremely unlikely that the Government would have been alerted to Pal-Tech's alleged fraud. Therefore, the court concluded, the fraud allegations against Pal-Tech were not publicly disclosed before Mossey filed suit.

Expert Witness Report Stricken

However, the court granted Pal-Tech's motion to strike Mossey's expert witness report. The court found that the report failed to comply with Fed. R. Civ. P. 26(a)(2)(B), because it did not indicate the expert's compensation, past publications, and proposed exhibits, nor did it provide a complete statement of the expert's

opinions and the "basis and reasons therefor." In the court's view, the expert report contained nothing more than legal opinions and unsubstantiated assessments of the evidence.

Finally, the court denied Mossey's motion to dismiss Pal-Tech's counterclaim. Mossey argued that Pal-Tech had failed to allege how he had harmed it. The court was unpersuaded, and found that Pal-Tech had adequately satisfied the notice pleading standard of Fed. R. Civ. P. 8(2)(a). Assuming Pal-Tech's assertions were true, the court could not say that Pal-Tech was not entitled to relief on its trade secrets and breach of contract claims, and therefore denied Mossey's motion to dismiss the counterclaim.

U.S. ex rel. Cosens v. Yale-New Haven Hospital, 2002 U.S. Dist. LEXIS 22469 (D. Conn. Nov. 14, 2002)

A Connecticut district court denied a motion to dismiss based on the public disclosure bar in a *qui tam* action alleging that the defendant hospital billed Medicare for experimental cardiac devices. Although statements that an administrator at another hospital had made to government investigators before the *qui tam* suit was filed were public disclosures, the court ruled, the statements were not disclosures of "allegations" of fraud or fraudulent "transactions."

Kevin Cosens, a former medical device salesman, filed a *qui tam* action in 1994 in the Western District of Washington against the Yale-New Haven Hospital (Yale) and 131 other clinical trial hospitals, alleging that the defendants had fraudulently billed Medicare and other federal health programs for more than 57 different experimental devices, which were not covered under the applicable programs. In April 2002, the action against Yale was severed and transferred to the District of Connecticut. In June 2002, Yale moved under Fed. R. Civ. P. 12(b)(1) and 12(h)(3) to dismiss for lack of subject matter jurisdiction pursuant to the public disclosure bar. Prior to the transfer, Yale and eight other defendants had filed a similar motion, but the court in Washington had ordered it stricken as premature. In August 2002, the Government filed a notice of intent to intervene, but did not immediately file its own complaint. At the end of September 2002, Cosens and the Government filed a joint motion with the Judicial Panel on Multidistrict Litigation to transfer this case and 38 others pending in 27 different districts back to the Western District of Washington for consolidated pretrial proceedings. That motion was still pending at the time the Connecticut court issued its ruling.

The factual basis for Yale's motion to dismiss was the testimony of Robert Maier, who was Director of the Business Office and the Baptist Medical Center in Oklahoma City before Cosens filed his *qui tam* action. Maier stated that he received a call in 1991 from a physician at his hospital seeking to purchase a non-FDA-approved cardiac device for implantation in a Medicare patient. Maier denied the request, advising the physician that Medicare would not reimburse the hospital. The physician then spoke with the manufacturer's representative, who informed him that other hospitals were being reimbursed by Medicaid for similar devices. The physician informed Maier, who passed the information on to the Medicare fiscal intermediary. In 1992 Maier also discussed the matter with Medicare auditors and investigators.

Motion to Dismiss Was Not Premature

The Connecticut court denied Yale's motion to dismiss. Cosens and the Government argued that the motion was premature, noting that the Government had not yet filed its complaint and Yale had not yet been served. (Unusually, Yale learned of the claims against it when the *qui tam* complaint was partially unsealed in connection with another lawsuit). However, the court

noted, the issue of subject matter jurisdiction may be raised at any time, and the court found that the record was sufficiently developed to support a decision on the jurisdictional question.

The Government also argued that the motion was premature because once it intervened, the case would not be subject to dismissal even if the relator were dismissed pursuant to the public disclosure bar. Yale, on the other hand, contended that if the relator's action were dismissed, the court would also lack jurisdiction over the Government's claims, because the Government did not initiate the suit. The court ruled that the Government was correct that it could properly intervene regardless of jurisdictional failures in the underlying suit. Nevertheless, the court ruled, this fact did not make consideration of the question of subject matter jurisdiction over the relator's claims premature.

Statements to Medicare Investigators Were "Public Disclosure"

The court observed that in order for the jurisdictional bar to apply, there must be a "public disclosure" of "allegations or transactions" upon which the relator's claims are based, and of which the relator is not the original source. The court ruled that Maier's statements to Medicare investigators were a public disclosure. Courts have held that disclosure of information to a competent public official whose duties extend to the claim in question is a public disclosure within the meaning of § 3730(e)(4)(A).

Information Disclosed Did Not Constitute "Allegations or Transactions"

Nevertheless, the court ruled, the information that Maier disclosed did not constitute "allegations or transactions" within the meaning of § 3730(e)(4)(A). Although Maier told investigators that other hospitals were billing Medicare for experimental devices and getting paid, he insisted that he never made any statements about what the hospitals stated in their bills, and never alleged that they were committing fraud. Moreover, Maier's statements did not implicate Yale. The court observed that while the public disclosure need not specifically name the defendant for the jurisdictional bar to be raised, the defendant must at least be identifiable from the publicly disclosed information. Because Maier did not make specific allegations of fraud, and did not implicate Yale in his statements, the court ruled that his disclosures did not reveal "allegations or transactions" as required by § 3730(e)(4)(A). Accordingly, the court ruled that the jurisdictional bar did not apply, and denied Yale's motion to dismiss.

Because the court found that Maier's statements did not disclose "allegations or transactions," it did not reach the remaining issues of whether Cosens' action was "based upon" the disclosures, and if so, whether Cosens was an original source. However, in a footnote the court expressed "substantial doubt" that Cosens' action could be said to be "based upon" Maier's disclosures. The court observed that Maier's generic statements failed to identify any fraudulent practice by any specific hospital, or even to identify any hospital by name, and related to only one device, whereas Cosens' action encompassed 57 different cardiac devices.

Section 3730(h) Retaliation Claims

Wilkins v. St. Louis Housing Authority, *2002 U.S. App. LEXIS 27174 (8th Cir. Dec. 31, 2002)*

The Eighth Circuit held that local governments may be sued as employers under the provisions of § 3730(h). The court followed the Ninth Circuit to rule that an employee engages in protected activity when (1) the employee in good faith believes, and (2) a reasonable person in the same or similar circum-

stances might believe, that the employer is committing fraud against the Government.

Randolph Wilkins joined the St. Louis Housing Authority (SLHA) in 1996 as a Quality Control Evaluator for Public Safety. SLHA, a municipal corporation created by the City of St. Louis to administer its public housing developments, receives funding from HUD pursuant to an annual contributions contract. Under HUD's Public Housing Management Assessment Program (PHMAP), SLHA is required to submit annual performance certifications and suggested scores in eight categories or "indicators." After reviewing these certifications and suggestions as well as its own data, HUD assigns final scores. Agencies with scores of 90% or above are designated "high performers"; those with scores between 60% and 89% are designated "standard"; and those with scores below 60% are designated "troubled."

In fiscal year 1997, SLHA received a score of 18.5% and was accordingly designated as "troubled." Wilkins was promoted to Manager of Security Operations and was given responsibility for reporting SLHA's performance in all components of the PHMAP indicator for security. Wilkins repeatedly reported SLHA's noncompliance with HUD security regulations, and as time for the 1998 reporting drew near, he was reassigned to a satellite office and then suspended for two weeks without pay. In the meantime, SLHA compiled and submitted PHMAP data for 1998, certifying a suggested overall score of 37.1%, an improvement of nearly twenty points. (Failure to improve by at least ten points would have put the SLHA into "substantial default," subjecting it to a potential HUD takeover.)

Wilkins returned to work in December 1998 and resumed his efforts to report what he believed to be fraudulent PHMAP reporting practices. After Wilkins intensified his efforts to report SLHA's failing performance, SLHA fired him at the end of 1999. Wilkins sued SLHA under § 3730(h) of the FCA. In the meantime, he found a security job with the Department of Defense that lasted nine months. His case was tried to a jury, which found that SLHA fired Wilkins as a direct result of his statements to SLHA and HUD, and that Wilkins suffered $79,170 in lost wages. After subtracting the $30,000 in mitigating income that Wilkins earned from his job with the Defense Department, the court awarded double back-pay damages in the amount of $98,340. The court denied SLHA's motions for judgment as a matter of law.

SLHA appealed from the jury's verdict and the denial of its motions for judgment as a matter of law, arguing that there was insufficient evidence that Wilkins' conduct was protected activity under the anti-retaliation provisions of the FCA. Wilkins cross-appealed, arguing that in calculating damages the district court should have doubled his back pay before subtracting his interim earnings.

Retaliation Provisions Apply to Municipalities

The Eighth Circuit affirmed the district court in all respects. The court observed that a split has developed among the courts of appeals as to whether local governments are "persons" subject to *qui tam* liability under § 3729 of the FCA. However, none of these recent appellate decisions has addressed whether local governments may be held liable as "employers" under the anti-retaliation provisions of § 3730(h). One federal district court has addressed this issue, and the Eighth Circuit found its reasoning on the issue of § 3730(h) claims against municipalities persuasive. *See United States ex rel. Satalich v. Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Cal. 2001), 24 TAF QR 1 (Oct. 2001). The Eighth Circuit did not express an opinion on the *Satalich* court's holding that municipalities are not "persons" subject to *qui tam* liability under § 3729 because

of the "punitive" nature of FCA treble damages. But the Eighth Circuit agreed with the *Satalich* court that retaliation claims under § 3730(h) do not depend on the plaintiff's ability to succeed on, or even file, a claim under § 3729, and that the double back-pay damages in the anti-retaliation provision are compensatory rather than punitive. Therefore, the Eighth Circuit concluded, like the *Satalich* court, that a municipality may be an "employer" subject to liability under § 3730(h).

FCA Protects Employees With Reasonable Good Faith Belief That Employer Was Committing Fraud

SLHA argued that Wilkins did not act in furtherance of an FCA action because falsely reported PHMAP scores do not constitute a "claim" under the FCA. However, the court rejected this argument, holding that it missed the distinction between the standards for a successful *qui tam* suit and those for a claim for retaliation. The court adopted the Ninth Circuit's approach to retaliation claims, under which "an employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government." *Moore v. California Institute of Technology Jet Propulsion Laboratory*, 275 F.3d 838, 845 (9th Cir. 2002), 26 TAF QR 19 (Apr. 2002).

The court was persuaded that Wilkins had both a good-faith and an objectively reasonable belief that SLHA was committing fraud against the Government. The court found that Wilkins reasonably believed that SLHA was in effect fraudulently concealing its provision of defective goods (*i.e.*, unsafe public housing) for which the Government had paid full price. Accordingly, the court of appeals affirmed the district court's denial of SLHA's motions for judgment as a matter of law. The court also ruled that the district court did not abuse its discretion when it did not specifically submit the issue of protected activity to the jury. The district court acted properly in submitting the factual component of the issue to the jury via special verdict form, and reserving to itself the legal determination whether the conduct that the jury found Wilkins to have engaged in amounted to protected activity.

Back Pay Damages Doubled After Subtracting Interim Earnings

Finally, the Eighth Circuit addressed Wilkins' cross-appeal. The court found that the district court properly doubled Wilkins' back-pay damages after subtracting his interim earnings. While the FCA is silent on the issue of mitigation, the court expressed confidence that this approach met the statute's goal of making the whistleblower whole. Moreover, the Eighth Circuit had previously observed, in a non-FCA context, that doubling back-pay damages before subtracting mitigating income would result in a windfall to a plaintiff who had suffered no actual damages. The court ruled that this policy applied with equal force to the FCA context. Although Wilkins had in fact suffered actual damages, the court found that the district court's award of nearly $100,000 completely compensated him for the $80,000, offset by $30,000 in mitigating income, that he lost as a result of his retaliatory termination.

Rule 9(b)

***U.S. ex rel. Goldstein v. Fabricare Draperies, Inc.*, 2002 U.S. Dist. LEXIS 19655 (D. Md. Oct. 8, 2002)**

***U.S. ex rel. Goldstein v. Leonard's Draperies, Inc.*, 2002 U.S. Dist. LEXIS 19707 (D. Md. Oct. 8, 2002)**

U.S. ex rel. Goldstein v. Mill End Shops, Inc., 2002 U.S. Dist. LEXIS 19708 (D. Md. Oct. 8, 2002)

U.S. ex rel. Goldstein v. Skyline Mills, 2002 U.S. Dist. LEXIS 19709 (D. Md. Oct. 8, 2002)

A Maryland district court dismissed four *qui tam* actions alleging that various defendants violated the FCA in connection with the sale of curtains and related items to the Government. The court ruled that the relator's allegations were conclusory and failed to plead fraud with particularity as required by Rule 9(b).

Jeffrey Goldstein, the former president and owner of Commercial Drapery Contractors, Inc., was convicted of defrauding the Government in connection with the sale of draperies, curtains, blinds, bedspreads, and related items to the Government. He then brought a number of *qui tam* actions against other companies in the same industry, alleging that they engaged in the same type of misconduct for which he was convicted. The defendants moved to dismiss on the grounds that the complaints failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b).

Conclusory Allegations Did Not Satisfy Rule 9(b)

In four separate but essentially identical opinions, the court granted the defendants' motions and dismissed the actions. Goldstein contended that he satisfied Rule 9(b) because he specified the numbers and dates of the government solicitations and resulting contracts, as well as the specific documents containing the alleged misrepresentations and their contents. However, the court ruled that the specificity of Goldstein's allegations was illusory. After reciting generic terms of the bid and contract documents, Goldstein simply alleged in conclusory fashion that the defendants' representations to the Government were false and fraudulent. Goldstein claimed that his experience in the industry was the basis of his knowledge of the alleged fraud. However, the court observed, this generic claim did not provide a specific basis for Goldstein's fraud allegations.

The court noted that in his opposition, Goldstein "cavalierly" stated that each defendant needed only open its file drawer and examine the specified proposals and contracts in order to prepare an answer. However, the court observed, ensuring adequate notice to the defendants of the scope of the allegations is only one of the purposes of Rule 9(b). The Rule also serves to protect defendants from frivolous suits, fishing expeditions, and harm to their goodwill and reputation. The Rule does not permit a plaintiff to use his general knowledge of the type of bid and contact documents used in the industry as a means to root though defendants' files in search of evidence of fraudulent conduct. Therefore, the court dismissed Goldstein's complaints, and granted him 21 days in which to file amended complaints in these actions.

U.S. v. Rogan, 2002 U.S. Dist. LEXIS 21021 (N.D. Ill. Oct. 29, 2002)

An Illinois district court denied motions pursuant to Rule 9(b) to dismiss an FCA action alleging that the defendants provided kickbacks for patient referrals and billed for unnecessary services. The complaint adequately alleged the details of the submission of false claims, and it was reasonable to presume that false statements in cost reports were the collective actions of the officers of the defendant companies, who could be held liable under the FCA for frauds committed by their agents acting with apparent authority.

In 2002, the Government filed an eight-count

complaint stating FCA and common-law claims against Peter Rogan, Braddock Management, Inc. (Braddock), Bainbridge Management, Inc. (Bainbridge Inc.), and Bainbridge Management, L.P. (Bainbridge L.P.). From 1995 to 1998, Rogan was the president of Waldo Point Management, the general partner of Braddock, which operated Edgewater Hospital and Medical Center in Chicago. Since 1998, Rogan has been president, secretary, and director of Bainbridge Inc., as well as the trustee of its sole shareholder. Bainbridge Inc. was the general partner of Braddock and Bainbridge L.P. In March 2002, Bainbridge L.P. bought out Braddock's contract with Edgewater.

The complaint alleged that from 1995 until at least December 2000, the defendants provided kickbacks (disguised as legitimate payments) to physicians for patient referrals, hospitalized patients who did not require hospitalization, performed and billed for a variety of unnecessary procedures, including angioplasties and heart catheterizations, and offered cash and other inducements to patients to generate admissions. By falsely certifying compliance with the Stark statute's prohibition on self-referral, falsely representing that the services provided were medically necessary, and creating other false records, the Government alleged, the hospital obtained over $13 million from Medicare and over $4 million from Medicaid. Roger Ehmen, an employee of Bainbridge L.P. and Braddock who served as Edgewater's senior vice president, submitted the allegedly false cost reports.

The defendants moved to dismiss, arguing that the complaint failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). The defendants argued that the complaint failed to identify the specific person who made the alleged misrepresentations, their content, and how they were communicated to the Government. Rogan also argued that the complaint did not inform him of his role in the fraud.

Principal Liable for Acts of Agents

The court denied the defendants' motions. The court noted that the complaint alleged that Ehmen, an employee of Bainbridge L.P. and Braddock, submitted false cost reports that misprepresented compliance with the Stark statute, the medical necessity of the services provided, and other material matters. Thus, the Government had adequately alleged the "who, what, when, where and how" of the fraud.

As to the defendants' contention that the complaint did not adequately inform them of their role in the fraud, the court noted that in the case of corporate fraud where the fraud is conveyed in "group-published information" such as cost reports, it is reasonable to presume that the false statements are the collective actions of the corporate officers. The court also observed that in fraud cases, a principal is liable for fraud upon a third person committed by an agent acting with apparent authority. The complaint adequately supported the inference that Ehmen was an agent of Braddock, Bainbridge L.P. and Bainbridge Inc. who acted with authority in submitting the allegedly false cost reports. Thus the allegations in the complaint adequately informed the defendants of their role in the alleged fraud. Accordingly, the court denied the defendants' motions to dismiss.

U.S. ex rel. Trombetta v. EMSCO Billing Services, Inc., No. 96 C 226 (N.D. Ill. Dec. 5, 2002)

U.S. ex rel. Freeman v. National Emergency Services, Inc., No. 99 C 151 (N.D. Ill. Dec. 5, 2002)

An Illinois district court denied motions to dismiss FCA claims in two related *qui tam* actions. The court ruled that the first-to-file rule did not bar claims against a new defen-

dant in the second action, and that the complaint in that second action did not preclude jurisdiction over new claims subsequently asserted in an amended complaint in the first action, because those new claims were not based upon allegations in the second action. The court also ruled that the amended complaint in the first action satisfied Rule 9(b), declining to require greater particularity where the details of the alleged false bills lay in the exclusive control of the defendants.

In January 1996, Linda Berline (now Trombetta) filed a *qui tam* action against eighteen corporate and three individual defendants, alleging that they violated the FCA by upcoding Medicare and Medicaid claims for emergency room physician services. Three years later, Linda and James Freeman filed a *qui tam* action against several of the same defendants and a new defendant, National Emergency Services, Inc. (NES), which involved essentially the same alleged scheme but was limited to overbilling for emergency room visits by Medicaid patients. In December 2001, the Government intervened in part in the Trombetta case, and shortly thereafter, Trombetta filed an amended complaint adding as defendants NES and National Healthcare Services, Inc. In 2002 the Govermment filed its own complaint. A group of defendants moved to dismiss the claims against them based on the first-to-file bar, the public disclosure bar, and Fed. R. Civ. P. 9(b).

First-to-File Rule Did Not Bar Second Relator's Claim Against New Defendant

The court denied the defendants' motions in their entirety. The court rejected NES' argument that the first-to-file rule of § 3730(b)(5) barred the Freemans' claims against it. The court observed that Trombetta's original complaint included no allegations concerning NES. Although the Medicaid overbilling schemes described in the two complaints largely overlapped, the Freeemans were the first to connect NES to the scheme, introducing new allegations that appeared to have substantially increased the potential total recovery. The alleged involvement of NES, the court ruled, was not a matter of mere detail, but a new material fact. Because the Freemans provided exactly the kind of information that the *qui tam* provisions were designed to encourage relators to disclose, the court rejected NES' attempt to invoke the first-to-file rule against them.

First Relator's Claim Was Not Based Upon Public Disclosures

The court also rejected NES' argument that Trombetta's non-intervened claims should be dismissed under the public disclosure bar on the grounds that they were based upon the Freemans' complaint. Trombetta pointed out that her non-intervened claims dealt with emergency room visits billed to *Medicare* and procedures billed to both Medicare and Medicaid, while the Freemans' complaint dealt only with visits billed to *Medicaid*.

Nevertheless, the Freemans were the first to allege that NES was involved in the billing scheme, and Trombetta later asserted new claims against NES in her amended complaint. Nevertheless, the court ruled, even assuming that the Freemans' complaint was a public disclosure of NES' role in the alleged fraud, there was no indication that Trombetta actually derived any information from the Freemans' complaint. The unrebutted affidavit of Trombetta's attorney indicated that she learned of NES' role from her participation in the investigation and from a stock purchase agreement. Because the Seventh Circuit has adopted the minority view that "based upon" for purposes of the public disclosure bar means actually derived from, the district court ruled that Trombetta's claims were not based upon public disclosures.

Complaint Satisfied Rule 9(b)

The court ruled that Trombetta had stated her FCA claim with sufficient particularity to satisfy Rule 9(b). It rejected the defendants' contention that Trombetta had failed to delineate each defendant's role in the alleged fraud. The court noted that Trombetta had averred that each and every defendant engaged in each and every alleged fraudulent practice. To the extent that any residual ambiguity remained, the court ruled, the moving defendants, which consisted of closely related corporations and their sole owner and CEO, could most likely sort out their involvement without significant difficulty.

The court also ruled that Trombetta had specified the content of the alleged misrepresentations with ample particularity. This was not a case of one or two isolated misrepresentations that could be fully described in a short and plain pleading. Rather, Trombetta alleged that the defendants' billing practices were intentionally and systematically flawed, resulting in hundreds of thousands of false claims. The defendants complained that Trombetta had failed to identify a single fraudulent bill that was submitted to the Government. However, Trombetta argued, and the court agreed, that the critical documents lay exclusively in the defendants' control. Although the bills themselves might be in the hands of the Government, specific instances of fraud could be identified only by comparing the bills with patients' medical charts, which remained in the defendants' exclusive control.

Trombetta also adequately specified the dates of the misrepresentations as occurring between June 1989 and June 1998. With a fraudulent scheme of this magnitude, the court ruled, more particularity as to the dates of specific misrepresentations could not reasonably be required. Moreover, since Trombetta left the defendants' employ in 1995, she could not reasonably be expected to recall the exact dates of particular bills.

Arbitrability of FCA Claims

U.S. ex rel. Schultz v. Cancer Treatment Centers of America, 2002 U.S. Dist. LEXIS 21681 (N.D. Ill. Nov. 4, 2002)

An Illinois district court denied the defendants' motion to dismiss or stay a *qui tam* action pending arbitration. The court ruled that a binding arbitration agreement in the relator's employment contract with one of the defendants did not apply to the *qui tam* claim, because the Government was not a party to the arbitration agreement but was the real party in interest in the *qui tam* claim.

In December 1999, Jaqueline Grandeau (formerly Jacqueline Schultz) filed a *qui tam* action against Cancer Treatment Centers of America (CTCA), which operates cancer centers throughout the United States, and the Midwest Regional Medical Center (MRMC) in Zion, Illinois, where she worked from 1997 until she was dismissed in May 2000. Grandeau was hired as a quality assurance coordinator by Professional Corporation of Illinois (PCI), a third defendant in her *qui tam* action, and was later promoted to the position of business manager for PCI and MRMC. In July 2002, Grandeau filed a second amended complaint. She alleges that the defendants collaborated to bill the United States and the State of Illinois for services that were not provided or not reimbursable, that she was terminated in violation of federal and state laws protecting whistleblowers from retaliation, as well as the Family and Medical Leave Act. The defendants moved to dismiss or stay the action pending arbitration.

Arbitration Clause Inapplicable to FCA Claims

The court denied the motion with respect to Grandeau's FCA claims, but did dismiss two state law claims in her complaint. The court observed that Grandeau's employment contract provided for arbitration of "any dispute aris[ing] between the parties hereto." Although there is a strong federal policy in favor of arbitration, arbitrability of a particular issue is a matter of contract interpretation, and a party cannot be required to submit to arbitration any dispute that it has not agreed to submit. The court ruled that it was clear that the parties did not agree to arbitrate a *qui tam* action arising from the employment relationship. The contract provided only for resolution of disputes between the parties to it, namely Grandeau and CTCA. However, the dispute underlying Grandeau's *qui tam* claim was between the defendants and the governments of the United States and Illinois, not between the defendants and Grandeau.

Grandeau's wrongful termination claims, in the court's view, were a closer call. The court rejected Grandeau's arguments that the arbitration agreement was too vague to be enforceable, that it applied only to CTCA, that the costs of arbitration would be prohibitive, and that the arbitration agreement violated public policy. Nevertheless, the court was not convinced that the arbitration clause, liberally construed, covered the wrongful termination claims. The court found that the intent of the parties when signing the agreement was to protect confidential information acquired by Grandeau during her employment, not to establish blanket terms to define her employment. The court concluded that Grandeau's wrongful termination claims did not arise under her employment agreement, and were thus not subject to its arbitration clause.

However, the court dismissed two state law claims in Grandeau's complaint. The defendants had argued that those claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Grandeau did not address the defendants' arguments on this point, and the court found them persuasive.

First Amendment/Media Access

***U.S. ex rel. Franklin v. Parke-Davis*, No. 96-CV-11651 (D. Mass. Oct. 10, 2002)**

A Massachusetts district court modified a protective order in a *qui tam* case so as to permit the relator to distribute nonconfidential materials to the press. The court ruled that a blanket protective order covering all materials obtained in discovery was overinclusive, violating the First Amendment.

David Franklin, a former medical liaison with the Parke-Davis division of Warner-Lambert Company, brought this *qui tam* action in 1996, alleging that Parke-Davis engaged in a scheme involving the promotion the drug Neurontin for off-label uses, resulting in the submission of false claims to the Government. In 1999 the Government declined to intervene. Parke-Davis moved to dismiss, and in 2001 the court dismissed certain claims, but not Franklin's claims of Medicaid fraud involving Neurontin. *See* 23 TAF QR 16 (July 2001).

In January 2002, the court entered a protective order providing that materials obtained in discovery were to be used for the purposes of litigating the *qui tam* action, "and for no other purpose whatsoever." The protective order also provided for additional protections for material designated as "confidential" by the parties. Two news media companies, the New York Times Company (publisher of the *New York Times* and the *Boston Globe*) and the National Broadcasting Company, sought to intervene to

modify this protective order, contending that it was overbroad and violated the First Amendment. The relator supported the position of the media companies, while Parke-Davis opposed it, arguing that release of the documents would jeopardize its right to a fair trial.

Protective Order Modified to Permit Dissemination of Nonconfidential Material

The court granted the media companies' motion to intervene as well as their motion to modify the protective order. The defendants argued that the protective order forbade the dissemination of any discovery material, while the relator and the media intervenors argued that it forbade only dissemination of confidential material. The court concluded that the defendants' interpretation was correct, and that the January protective order barred non-litigatory use of all materials provided during discovery.

Upon review, the court determined that such a broadly sweeping order was not consistent with Fed. R. Civ. P. 26(c) and the First Amendment. Rule 26's requirement of "good cause" for protective orders framed the court's analysis of First Amendment concerns. The defendants argued that they had shown good cause in two ways. First, they argued that release of the information would jeopardize their Seventh Amendment right to a fair trial. However, the court found no evidence of pervasive media coverage that would taint a jury pool. Second, the defendants argued that a broad protective order served to expedite the litigation by eliminating the need for document-by-document review for confidentiality. They argued that any modification to the order would unfairly prejudice them because they relied on its protections in managing discovery. The court found these arguments unpersuasive, noting that the defendants had litigated over the protective order extensively, had overasserted confidentiality in producing documents, and had hardly expedited the discovery process.

The court observed that blanket protective orders are not favored. Although such orders may be useful in expediting pretrial discovery, they are by their nature overinclusive and therefore peculiarly subject to later modification. Because the January order was overinclusive in violation of the First Amendment, and there was no good cause under Rule 26(c) for application of the order to nonconfidential materials, the court modified the order to limit its application to confidential materials only.

***In re Search of 1372 Boggs Drive*, 2002 U.S. Dist. LEXIS 20101 (M.D.N.C. Oct. 15, 2002)**

A North Carolina district court denied a motion to seal a search warrant, search warrant application, affidavit, return, and inventory in the case where the movant was a possible defendant in a *qui tam* action. The court ruled that the public's common law right of access to the materials overrode the privacy and reputation rights of the defendant and its employees.

In September 2002, the agents of the Department of Defense conducted a search pursuant to a warrant of premises owned by the L.S. Starrett Company in Mount Airy, North Carolina. The agents seized 139 items, and on October 3, 2002 made a return of the warrant with an inventory.

On October 1, 2002, prior to the filing of the return, the Government moved for an order partially sealing the search warrant affidavit. On the same date, Starrett filed an emergency motion requesting that the search warrant, application, affidavit, and inventory return be maintained under seal. The court issued an

order outlining its search warrant procedures issued in compliance with *Baltimore Sun Company v. Goetz*, 886 F.2d 60 (4th Cir. 1989). The court observed that the Government's motion complied with these procedures, but Starrett's did not, because it requested that its entire motion be filed under seal. The court struck Starrett's motion and brief, but allowed Starrett to make a new request.

The New York Times Company (NYTC) also moved to intervene. The NYTC publishes the *Telegram & Gazette*, a Worcester, Massachusetts newspaper that serves the town of Athol, where Starrett is headquartered. The *Telegram & Gazette*, as well as the *Wall Street Journal*, had reported that Starrett was a defendant in a *qui tam* action, still under seal in federal court in Massachusetts, brought by Richard Parks, a former Starrett Technician. *See* 28 TAF QR 53 (Oct. 2002). The articles alleged that Starrett was under investigation to determine whether it sold substandard equipment to the Government.

The NYTC argued that the public, including Starrett's employees and retirees, as well as the Athol community, had a right to timely and accurate information about the company. It also asserted that the news was important to the national investment community. The NYTC did not object to the Government's motion to partially seal the affidavit, to the extent that that motion rested on the need to protect confidential sources and an ongoing investigation. However, the NYTC objected to the sealing of any other part of the warrant papers.

Starrett filed a motion to intervene and an amended motion to seal, seeking to seal all the same papers as in its previous request. It contended that sealing was necessary to protect the privacy and reputations of the company and any employee mentioned in the search warrant papers. Noting that its stock price lost 27% or $31.8 million in shareholder value after the *Wall Street Journal* article was released, Starrett worried that additional information about the investigation could further harm the share price and endanger its business and the jobs of its employees.

On October 9 the court held a hearing, where it inspected the Government's request in camera and took additional oral evidence under seal. Relying on *Baltimore Sun*, the court approved the NYTC's right to intervene. The court also ruled that Starrett, whose property was the subject of the search warrant, had standing to intervene.

Common Law Right of Access Overrode Privacy and Reputation Rights of Defendants

In its October 15 decision the court noted that under *Baltimore Sun*, search warrants are governed by the common-law qualified right of access rather than the First Amendment right of access. The judicial officer issuing a warrant may seal papers when it is both essential and narrowly tailored to the preservation of "higher values."

Starrett raised the possibility that there might be a pending *qui tam* action against it under seal, and argued that if there were one, the court should consider this factor in exercising its discretion. Neither the Government nor the court would confirm or deny that there was such an action, but the court ruled that assuming hypothetically that there was a *qui tam* action, the court would order redaction of specific information coming solely from that action.

Starrett also requested that the court redact any mention of its employees from the search warrant papers, and seal the entire search warrant, application, and return. Starrett argued that neither it nor its employees could defend themselves against the allegations since charges had not yet been brought, and therefore sealing was necessary to protect privacy interests and

reputation, and to prevent economic harm to itself and its employees.

The court ruled that cognizable reputation and privacy interests of potential targets named in search warrants must be tied to potential misuse of the documents, and declined Starrett's invitation to recognize a broader independent reputation or privacy right. The court worried that recognition of an independent privacy right would lead to the routine sealing of search warrants, overwhelm the courts, and ultimately swallow the common-law right of access to search warrant papers.

However, the Fourth Circuit has repeatedly stressed the importance of the common-law right of access. The right enables the citizens to keep a watchful eye on the activities of the Government and obtain information about its operations. Government searches conducted by armed agents can cause public anxiety, which is best abated by the release of information showing that the actions are authorized and justified.

After reviewing the search warrant, the court found that all statements were sufficiently relevant to the probable cause finding and were not based on inflammatory or unsubstantiated evidence. Therefore, the court saw no cause to redact the information further. Because the public interest in access to the search warrant overrode the privacy and reputation rights of Starrett and its employees, the court denied Starrett's motion to seal the warrant papers.

***U.S. ex rel. McCauley v. Best Care Home Health, Inc.*, 2002 U.S. Dist. LEXIS 19506 (D. Minn. Oct. 7, 2002)**

In October 2002, a Minnesota district court granted the Government's motion to amend its complaints in a *qui tam* action based on allegations that the defendants submitted false claims for home health care services to Medicaid and Medicare. In 1998 and 1999 Shelley Rae McCauley and Nancy Bernard filed separate but related *qui tam* actions against Best Care Home Health, Inc., Nazneen Khatoon, a shareholder and agent of Best Care, Grand Rapids Senior Care (GRSC), Great River Care (GRC), and a number of other individuals and entities. The Government intervened in 2001 and the two actions were consolidated. Best Care and Khatoon moved to dismiss allegations in the complaints that GRSC and GRC were uncertified subunits of Best Care. The Government moved to amend its complaints. Best Care and Khatoon opposed this motion, and filed a declaration from Khatoon in support of their opposition. The Government moved to strike the Khatoon declaration.

The court granted the Government's motion to amend, rendering moot the defendants' motion to dismiss, but denied the Government's motion to strike. The court observed that the proposed amended complaint represented a shift in the Government's theory of liability. While the original complaints alleged that claims submitted under Best Care's provider number for home health services provided by GRSC and GSC were false because GRSC and GSC were not properly certified branch offices or subunits of Best Care, the proposed amended complaints asserted that the claims were false because Best Care did not provide any of the qualifying services directly, nor did it supervise the administration of the services that GRSC and GRC provided, as required by law.

The court concluded that it was appropriate to exclude the Khatoon declaration from consideration of the defendants' motion for partial dismissal, because Rule 12(b)(6) does not allow consideration of matters outside the pleadings when the court is assessing the legal sufficiency of a complaint. However, the court ruled that it was appropriate to consider the declaration in connection with the defendants' opposition to the Government's motion to amend, and therefore denied the Government's motion to strike.

The court noted that under Rule 15(a), leave to amend "shall be freely given when justice so requires." The court rejected the defendants' argument that amendment would be futile, because the Medicare regulations expressly provide that when services are provided "under arrangement" with a home health agency, the agency must provide at least one of the qualifying services directly through agency employees, and services not provided directly must be monitored and controlled by the parent agency. Since the proposed amended complaints alleged that Best Care's arrangement with GRSC and GRC failed to comply with these requirements, which are a condition of payment, the proposed amendments would not be futile. The court also rejected the defendant's argument that the Government deserved no further chances to amend, because it had already settled lengthy administrative proceedings concerning Medicare payments to Best Care. Those proceedings, the court found, made no reference to Best Care's provision of home health services under arrangement with GRSC or GRC.

Accordingly, the court granted the Government's motion to amend. The defendants' motions for

partial dismissal were thus rendered moot and the court denied those motions.

***Boundy v. Dolenz*, 2002 U.S. Dist. LEXIS 20445 (N.D. Tex. Oct. 21, 2002)**

In October 2002, a Texas district court granted a *qui tam* relator's motion for summary judgment on the defendant's counterclaim, but denied the relator's motion for summary judgment on his own FCA claim. The defendant, Bernard Dolenz, a physician and attorney, treated Mildred Avery for injuries resulting from a slip and fall, and also for a workers' compensation injury. While under his care, Avery assigned to Dolenz any potential bad faith claims against Avery's insurance carrier in the event that the carrier denied reasonable medical care.

In 1992 Avery retained John Boundy to represent her in the slip and fall case. Boundy discovered that after one office visit by Avery, Dolenz submitted identical claims to three different parties, and that Dolenz repeatedly billed Avery's carriers for psychotherapy that was never performed.

In 1993 Avery was subpoenaed to appear in a deposition in a state court lawsuit that Dolenz had filed against Avery's insurance carrier. In March 1994, Avery, represented by Boundy, intervened in the state case. The state court eventually dismissed the carrier and realigned the parties, with Avery as the plaintiff and Dolenz as the defendant. In 1995 the state court issued an interlocutory partial default judgment against Dolenz.

In 1996 Boundy filed his *qui tam* action against Dolenz under seal. The complaint alleged that Dolenz had submitted false claims to the Government for the treatment of Charlotte Cobin, an employee of the Department of Defense. Meanwhile, a government criminal investigation of Dolenz was underway. In December 1996, the Government elected to intervene in Boundy's action, but moved to stay and administratively close the case under seal pending the outcome of the criminal matter.

In 1998 Dolenz was found guilty of mail fraud, sentenced to 90 months in prison, and ordered to repay $1.68 million in restitution to 45 victims including the Department of Labor, which is the federal insurance carrier for worker compensation claims made by federal workers. In 1999 the Government withdrew its intervention, and the court unsealed the *qui tam* complaint.

At the end of 2000, Dolenz filed counterclaims against Boundy and others, seeking recovery for frivolous litigation, abuse of process, and tortious interference. Boundy moved to dismiss the counterclaims, or in the alternative, for summary judgment on them. In May 2002, the court granted summary judgment to Boundy on the frivolous litigation and abuse of process counterclaims. However, the court denied Boundy's motion under Rule 12(b)(6) to dismiss the tortious interference counterclaim, because Boundy failed to show that there was no set of facts that would entitle Dolenz to relief on that claim.

Boundy then moved for summary judgment on the tortious interference counterclaim on the ground that the counterclaim was barred by the statute of limitations, or alternatively, on the ground that Boundy's conduct was not tortious. Boundy also filed an additional motion for summary judgment asserting that he was entitled to affirmative relief on his *qui tam* claim based on the collateral estoppel effect of the state court action.

In its October 2002 memorandum order, the court granted Boundy's motion for summary judgment on the tortious interference counterclaim, but denied his motion for summary judgment on his own *qui tam* claim. The court noted that Boundy argued that any claim for tortious interference accrued before 1994, and such a claim is subject under Texas law to a two-year statute of limitations. However, Dolenz argued that his counterclaim did not accrue until he was served with the *qui tam* complaint in 2000.

Nevertheless, the court noted, justification is an affirmative defense to a tortious interference claim. Even assuming arguendo that the counterclaim was not barred by the statute of limitations, the court ruled that Boundy had established the affirmative defense of justification. The court had repeatedly concluded that Boundy's *qui tam* action was not frivolous, and therefore Boundy was acting under the legal protection of the retaliation provisions of the FCA. Because Dolenz had produced no evidence that Boundy lacked privilege or justification for his acts, nor that any intentionally tortious or illegal acts caused Dolenz damage, the court granted Boundy's motion for summary judgment on Dolenz' remaining counterclaim.

However, the court denied Boundy's motion for summary judgment his *qui tam* claim based on the collateral estoppel effect of the state action. To invoke collateral estoppel under Texas law, a party must show that the facts sought to be litigated in the second action were fully and fairly litigated, and were essential to the judgment, in the prior action, and that the parties to the second action were cast as adversaries in the first action. The court observed that the issues in this case were apparently different from the issues in the state case. Avery's state action did not raise a claim that Dolenz intended to defraud the United States, while Boundy's *qui tam* complaint did not even mention Avery. Therefore, because the record did not indicate that Boundy's allegations of FCA violations were fully and fairly litigated in the state court proceedings, the court denied Boundy's motion for summary judgment on collateral estoppel grounds.

Burns v. Lavender Hill Herb Farm, Inc., 2002 U.S. Dist. Lexis 21826 (E.D. Pa. Oct. 30, 2002)

In October 2002, a Pennsylvania district court dismissed a pro se *qui tam* action. Thomas Burns, a former employee of Lavender Hill Herb Farm (Lavender), sued Lavender, its sole shareholder (and Burns' ex-wife) Marjorie Lamb, and various other defendants, alleging that they engaged in a broad conspiracy to sell conventional produce as organic and engage in related offenses, which, he alleged, violated the FCA, the Sherman Antitrust Act, and RICO. Count 1 alleged that the defendants violated the FCA by delivering mislabeled produce to the Government, while Count 2 purported to assert an FCA claim for filing false federal tax returns. Burns also asserted numerous state law claims ranging from civil conspiracy to assault and battery.

The defendants moved to dismiss for failure to state a claim. Burns did not file a response, but opposed the motion at oral argument. During oral argument, he abandoned Count 2.

The court dismissed the remaining FCA claim because Burns had failed to follow the required procedures for filing a *qui tam* action. Burns did not file his complaint in camera and under seal, instead serving it immediately upon the Government and all defendants. The court noted that there was ample case law supporting dismissal of the FCA claims on that basis.

Moreover, the court observed, dismissal was particularly appropriate in this case because Burns' allegations (which sat on the public docket for seven months before the Government declined to intervene) appeared to have little or no merit, and might have unduly blemished the defendants' reputations. Noting that the harm arising from a failure to follow the FCA procedures cannot be cured, the court dismissed Burns' FCA claims with prejudice.

The court also dismissed Burns' non-FCA claims. The court ruled that he had failed to allege antitrust injury, and had no standing to assert his RICO claims. In the absence of a viable federal claim, the court dismissed Burns' state law claims for lack of jurisdiction.

***U.S. v. Howard*, 2002 U.S. App. LEXIS 23711 (4th Cir. Nov. 18, 2002)**

In November 2002, a divided panel of the Fourth Circuit, in an unpublished opinion, affirmed the district court's grant of judgment on partial findings to the defendant in an FCA action based on allegations of crop insurance fraud. The defendants, James Howard and his corporation Down East Farms, Inc., farmed approximately 2,400 acres of land in 1992 and sold approximately 45,000 bushels of corn in the fall of that year under a fictitious name. During that same year, the defendants obtained $85,893 in federal crop insurance payments. In their application for the insurance payments, they did not report the 45,000 bushels they sold that year. If the 45,000 bushels were from the 1992 harvest, the defendants would have been ineligible for the crop insurance payments.

The Government sued the defendants under the FCA and various common law theories. The basis of the Government's claim was its contention that the corn the defendants sold in 1992 was from the 1992 harvest. The Government presented evidence at trial that the moisture level in samples drawn from the corn the defendants sold in 1992 was too high to permit the corn to be stored for long periods without spoiling, and argued that this evidence showed the corn had been harvested in 1992. The defendants contended that the corn they surreptitiously sold in 1992 was harvested in 1991 or earlier. To explain the high moisture levels, they claimed that they sprayed water on the corn either during storage or before shipment. As an "expert witness" in support of this claim, the defendants called Harold Smith, the grain dealer who purchased the 45,000 bushels under the false name of Jack Peele. Over the objection of the Government, Smith performed an in-court experiment in order to show that spraying corn with water increases the moisture content. At the close of the trial, the district court, relying in part on the experiment in its factual findings, granted the defendants' motion for judgment on partial findings pursuant to Fed R. Civ. P. 52(c) against the Government on all claims. The Government appealed, challenging the admission of the defendants' expert testimony and in-court experiment.

A divided panel of the Fourth Circuit affirmed. The majority ruled that the in-court experiment was relevant, satisfying Fed. R. Evid. 402, and because the case was tried without a jury, the experiment could not be excluded as unfairly prejudicial under Fed. R. Evid. 403. The majority also found that the district court based its disputed factual findings only on the experiment, which was admissible, and not on the opinion testimony of Smith. Therefore, the majority ruled, to the extent that the district court may have admitted opinion testimony in violation of Fed. R. Evid. 701 and 702, such error was harmless. Therefore, the majority

affirmed the judgment of the district court.
Judge Hamilton dissented. He observed that the Government presented evidence though two expert witnesses that the moisture readings from the corn sold in 1992 indicated that the corn had been harvested from the fields and not from storage bins, and that the readings could not have been obtained in the manner suggested by the defendants. The Government also introduced evidence that Howard's purported method for storing and rehydrating corn was not practical, logical, or economically beneficial for large samples. While it might be possible to obtain higher moisture readings in small samples by the methods demonstrated in the in-court experiment, the Government argued that it was not possible to do so with large samples, because of the highly unstable moisture patterns that would result.

The defendants never identified Smith as an expert witness and never provided an expert report. Consequently, his testimony was not admissible as expert opinion under Fed. R. Evid. 702. Furthermore, Judge Hamilton maintained, Smith's testimony was not admissible as the opinion testimony of a lay witness under R. 701, because it was based on pure speculation, not reason, and rested on unstated and untested scientific assumptions. On cross-examination, Smith admitted that he had no personal knowledge of farmers adding water to corn to raise the moisture level; that he had no education or training concerning corn; that he was not aware of any method whereby farmers could add moisture to corn in large quantities; and that he had no idea how Howard might have added moisture to the corn he sold, or how much he might have added.

Judge Hamilton rejected the majority's view that the district court's admission of Smith's expert testimony was harmless error. In the absence of Smith's expert testimony, the Government's evidence that corn cannot be rehydrated as the defendants claimed would have been uncontroverted. Finding that the district court unmistakably relied on Smith's inadmissible expert testimony and ignored the expert testimony presented by the Government, the dissent urged that the case should have been remanded for a new trial.

***Nguyen v. City of Cleveland*, 312 F.3d 243 (6th Cir. Nov. 27, 2002)**

In November 2002, the Sixth Circuit dismissed an interlocutory appeal in a § 3730(h) retaliation action. In 1998, Pram Nguyen left his job with the City of Cleveland and began working for Parsons Engineering Science, Inc. Nguyen then brought a *qui tam* action against the city. The Government intervened and the case was unsealed. At that point, according to Nguyen, the city began pressuring Parsons to remove Nguyen from all work on city contracts. Nguyen's work, which primarily involved city contracts, came to a standstill, and in December 1999 Parsons dismissed him. Nguyen then brought a separate action for unlawful retaliation in violation of § 3730(h) against the city and Parsons.

Parsons argued that the dispute was subject to a mandatory arbitration clause in Nguyen's employment contract. However, in 2000 the district court rejected that argument, ruling that a *qui tam* relator is fundamentally different from others seeking to avoid arbitration because the relator acts for the public and not for himself, and because a conflict exists between the policies underlying the Arbitration Act and the FCA. *See* 121 F. Supp. 2d 643 (N.D. Ohio 2000), 21 TAF QR 15 (Jan. 2001). Parsons moved for reconsideration, and on reconsider-

ation the court reaffirmed its prior ruling, but found that there was substantial ground for differences of opinion and that an immediate appeal might advance the ultimate resolution of the matter. Accordingly, the court certified its earlier ruling for interlocutory review by the court of appeals. *See* 138 F. Supp. 2d 938 (N.D. Ohio 2001), 23 TAF QR 15 (July 2001).

The Sixth Circuit dismissed the appeal, finding that the district court had improvidently granted certification. The court of appeals observed that Nguyen had raised various factual questions concerning the scope of his arbitration agreement and whether he knowingly waived his right to have his whistleblower claim heard in federal court. The district court did not rule on these questions, but simply assumed that a valid arbitration agreement existed.

The Employee Dispute Resolution Form that Nguyen signed when he began working at Parsons stated that he had received a copy of the Employee Dispute Resolution Handbook as well as policy information on the dispute resolution program. However, Nguyen alleged that he never received these materials. Moreover, according to Nguyen, when he received his employment offer he asked the vice president of Parsons how the agreement would handle job termination. Nguyen claimed that the vice president promised to get back to him but failed to do so. Nguyen then signed the agreement, assuming it did not apply to wrongful termination; two weeks later, according to Nguyen, the vice president informed him that the dispute resolution program only applied to disputes during the course of employment. In short, Nguyen argued that he did not consent to submit wrongful termination claims to arbitration, and never agreed to the terms outlined in the Handbook.

In light of the *qui tam* action that Nguyen was bringing against the city, and his substantial involvement in city contract work at Parsons, the court of appeals found his concerns at the time about dispute resolution reasonable. Because Nguyen raised serious questions as to whether he had assented to the arbitration agreement and whether it covered the factual situation underlying his retaliation claim, there was a distinct possibility that in deciding the interlocutory appeal the court of appeals would render an advisory opinion on a highly contested issue in a case of first impression. Therefore, because the district court improvidently granted certification without first resolving the disputed factual issues, the Sixth Circuit dismissed the interlocutory appeal.

***U.S. ex rel. Cosens v. St. Francis Hospital*, 2002 U.S. Dist. LEXIS 22937 (E.D.N.Y. Nov. 29, 2002)**

In November 2002, in a *qui tam* Medicare fraud case, a New York district court granted the defendant permission to file motions before the service of the complaint and ordered the case file unsealed. Kevin Cosens filed a *qui tam* action in the Western District of Washington against 132 hospitals, including St. Francis Hospital, in 1994, alleging that they violated the FCA by billing Medicare for experimental cardiac devices. In April 2002, the actions against the various hospital defendants were transferred to their home districts. Thus the action against St. Francis was severed and transferred to the Eastern District of New York, and in August the Government filed a notice of election to intervene in that action.

In its notice, the Government stated that once it had finished filing its intervention decisions for all the remaining defendants in the original action, it intended to apply to have all the cases consolidated for pre-trial proceedings. The

Government requested that the court's file (the documents transferred from the Western District of Washington) remain under seal, on the ground that the documents identified a number of defendants whose cases remained under seal in other districts. The Government also requested an order directing St. Francis not to file any motions until after it was served with the complaint, on the grounds that any such motions would be premature before the Government filed its application for consolidation.

On August 21, 2002, the court ordered that the then-current contents of the file (with the exception of the Government's notice of election to intervene and the August 21 order itself) remain under seal, but that all matters filed after the August 21 order be unsealed. The court also ordered the Government to serve its complaint on St. Francis by December 16, 2002, and directed St. Francis not to file any motions until it was served. In September, St. Francis moved for reconsideration of the August 21 order, seeking immediate unsealing of the entire file and permission to file any appropriate motion, or in the alternative, an order directing the Government to serve the complaint within ten days. The Government opposed this motion in its entirety, but later withdrew its opposition to unsealing the file because the original district court in the Western District of Washington had meanwhile unsealed virtually all of the same documents.

Upon reconsideration, the New York district court granted St. Francis' now unopposed request for unsealing and lifted its blanket prohibition on the filing of motions before the service of the complaint. The court observed that under the rules of the Judicial Panel on Multidistrict Litigation, the pendency of a motion to consolidate does not suspend pretrial proceedings in the transferor district in which the action is currently pending. Furthermore, the court found, the Government's substantive arguments for opposing motion practice before the service of the complaint were without merit. The Government's claim that all such motions were premature was overbroad, because it covered motions that might not be premature, such as a motion to preserve testimony. The Government's contention that any motion would likely cover the same issues and request the same relief as other motions in related cases was merely speculation. The Government's claim that filing of motions at this time would disrupt the orderly process of litigation was similarly unpersuasive and unsupported by case law. Moreover, the district court in the Western District of Washington had vacated a prior decision prohibiting motion practice in that action.

Therefore, the New York district court vacated its prior order prohibiting motion practice as well, and granted St. Francis permission to file any proper motion in compliance with the rules. However, the court ruled that its prior order granting the Government 120 days in which to serve its complaint was reasonable, and therefore declined to alter the December 16 deadline previously imposed.

***U.S. ex rel. Stewart v. Louisiana Clinic*, 2002 U.S. Dist. LEXIS 24062 (E.D. La. Dec. 11, 2002)**

In December 2002, a Louisiana district court granted in part and denied in part the defendants' motion for an order to protect the confidentiality of nonparty patient records sought in discovery by the relators in a *qui tam* action. Mary Jane Stewart, Jr. and Margaret Catherine McGinity filed this action in 1999, alleging that the Louisiana Clinic and several of its doctors billed Medicare and Medicaid for unreasonable

and unnecessary services and made false statements in connection with requests for payment. In 2001 the Government declined to intervene. In February 2002, the district court dismissed many of the relators' claims pursuant to Rule 9(b), with leave to amend. *See* 2002 WL 257690 (E.D. La. Feb. 22, 2002), 26 TAF QR 35 (Apr. 2002). The relators then filed a second amended complaint, and the defendants again moved to dismiss. The court found that the relators had cured some, but not all, of the defects identified in its previous order and denied any further leave to amend. *See* 2002 WL 1066745 (E.D. La. May 28, 2002), 27 TAF QR 25 (July 2002).

The relators sought production of nonparty patients' medical records, and the defendants moved for a protective order. They asked the court to require redaction of all patient-identifying information. They argued that if they were compelled to produce unredacted information, they could incur civil liability to the nonparty patients under Louisiana law. They contended in this regard that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its accompanying regulations do not preempt Louisiana law. They also requested that the Government be prohibited from receiving copies of any nonparty patient records produced. The relator and the Government filed memoranda in opposition to the defendants' motions.

The court ruled that federal common law rather than Louisiana law applies to privilege questions in an FCA action. The court also rejected the defendants' contention that HIPAA requires it to apply Louisiana privilege law. HIPAA, which delegates to the Secretary of HHS the authority to promulgate Standards for Privacy of Individually Identifiable Health Information, expressly supersedes any contrary provision of state law unless the state law "relates to the privacy of individually identifiable health information" and is "more stringent" than HIPAA. The defendants argued that Louisiana provider-patient privilege law is more stringent than federal law because it requires either patient consent or a court order, which may be issued only after a contradictory hearing with the patient.

However, the court ruled that Louisiana law relating to the privacy of individually identifiable health information is not more stringent than, and therefore does not supersede, federal law. Under the HIPAA Standards, "more stringent" state law is defined as law that

> [w]ith respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of the individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.

45 C.F.R. §160.202. The court held that the Louisiana statute does not address "the form, substance, or need for express legal permission from an individual." Rather, in the court's view, "the Louisiana statute provides a means for negating the need for such permission." Accordingly, the court ruled that Louisiana law does not apply.

The relators and the Government argued that the HIPAA Standards do not apply because the final compliance date for health care providers is April 14, 2003. The court disagreed, observing that the

Standards indicate a strong federal policy to protect the privacy of patient medical records, and would go into effect in a mere four months, at a time when the lawsuit would still be ongoing, and the patient records at issue would be in full use by the parties (trial was set for October 2003). The court found that both the relators and the defendants had complied with HIPAA by seeking an appropriate protective order.

However, the defendants wanted all patient-identifying information redacted before they produced the documents to the relators. The relators proposed a twofold production in which defendants would produce a redacted set and a second, unredacted set marked "confidential, for counsel's eyes only," to be used only by counsel and their staff. The court found that such a twofold production best served the interests of the parties and the nonparty patients. The court held that the relators needed the patient names to be able to investigate the validity of claims for services rendered to those patients. However, the court limited disclosure of the "counsel's eyes only" documents to counsel of record, as well as two paralegals and one expert per party.

Finally, the court ruled that the Government was entitled to receive unredacted copies of the documents. The defendants argued that because the Government declined to intervene, it was a nonparty with no right to participate in the discovery underway, and if it were to receive any documents, it should be ordered to use them only for purposes of the litigation at bar. However, the court observed that even when the Government does not intervene, it remains the real party in interest, and retains control over several aspects of the litigation. The court found that these factors entitled the Government to receive documents produced during discovery, subject to the same protective order as the parties.

Moreover, the court ruled, the Government was not limited to using the patient records for the purposes of the instant litigation, but could use them for any legitimate health oversight activities. The court noted that the Standards specifically permit disclosure of such documents to the Department of Justice pursuant to its function as a "health oversight agency."

Accordingly, the court granted in part the defendants' motions for protective orders, by issuing a protective order as outlined above. However, the court denied their motions in all other respects.

Alcohol Foundation, Inc. v. Kalmanovitz Charitable Foundation, Inc., 2002 U.S. App. LEXIS 25720 (2d Cir. Dec. 13, 2002)

In a December 2002 unpublished summary order, the Second Circuit affirmed a district court decision dismissing, pursuant to the public disclosure bar, a *qui tam* action seeking to hold alcoholic beverage manufacturers liable for federal payments of medical costs of treating alcohol-related diseases. The Alcohol Foundation, Inc. filed this action in 2000. In 2001 the Government declined to intervene, and suggested that the court lacked subject matter jurisdiction over the complaint. In 2002 the district court dismissed the action for lack of jurisdiction pursuant to the public disclosure bar, rejecting the relator's argument that by compiling publicly available facts into a "mosaic" it became an original source of the allegations upon which its action was based. *See* 186 F. Supp. 2d 458 (S.D.N.Y. 2002), 26 TAF QR 17 (April 2002).

The Second Circuit affirmed. The court observed that the relator admitted that the research it relied upon had been previously published, and was thus "publicly disclosed."

Nevertheless, the relator contended that it had synthesized this publicly disclosed research into original "meta analyses" [sic]. The court of appeals rejected this claim, ruling that the relator was not the original source of any of the information upon which it relied. Accordingly, the Second Circuit ruled, the district court properly dismissed the action.

***U.S. ex rel. Pogue v. Diabetes Treatment Centers of America*, 2002 U.S. Dist. LEXIS 24423 (D.D.C. Dec. 18, 2002)**

In December 2002, a D.C. district court granted a motion to enforce subpoenas duces tecum served by the relator on nonparties in a *qui tam* action. Scott Pogue brought this action against Diabetes Treatment Centers of America, Inc. (DTCA), West Paces Medical Center, and other persons, alleging that the defendants provided illegal kickbacks to physicians for patient referrals to diabetes treatment centers, in violation of the Anti-Kickback and Stark Statutes. Pogue originally brought this action, which is now part of a multi-district FCA litigation against HCA and related entities, in the Middle District of Tennesee. Subsequently the action was transferred to the District of Columbia for coordinated pretrial proceedings.

Pogue served subpoenas duces tecum on HCA-The Healthcare Company, parent of West Paces, and American Healthcorp, Inc. (AHC), parent of DTCA. The subpoenas were issued in the Middle District of Tennessee, where both HCA and AHC have corporate offices. HCA and AHC responded with various objections, and Pogue moved to compel. HCA moved to quash the subpoena.

The court granted the relator's motion to compel, and denied HCA's motion to quash. The court observed that 28 U.S.C. § 1407 bestows upon the transferee court in multi-district litigation cases the powers of a district judge in any district for the purpose of conducting pretrial depositions." While it is not entirely settled whether the transferee court has jurisdiction to enforce a subpoena duces tecum under this grant, the court concluded that the weight of authority, as well as the purposes of the multi-district litigation statute, supported a finding of jurisdiction.

The court denied the motions of HCA and AHC for leave to file surreplies. The court ruled that HCA and AHC took a litigation gamble in failing to address the merits of the relator's subpoenas in their responses to the motion to compel, and would not now be permitted to file a surreply to put them back in the game. Nevertheless, the court sua sponte took notice of any issues raised in the proposed surreplies to the limited extent that they might have introduced any law that it would be patently unjust to ignore.

The court also denied HCA's motion to quash. The court observed that this motion was untimely, that it violated local rules, and that it was a photocopy of a fax of a previously filed motion, captioned in a different court and lacking an original signature.

Because HCA and AHC failed to challenge the merits of the subpoenas in their responses to the motions to compel, the court deemed them to have conceded the merits. Accordingly, the court granted the relator's motion to compel.

In another decision in this case issued the same day, the district court reaffirmed that violations of the Stark and Anti-Kickback Statutes may give rise to FCA liability. *See* 2002 U.S. Dist. LEXIS 24425, summarized under "False Certification" above at page 5.

SPOTLIGHT

Notes from the Field: Practicalities of the *Qui Tam* "Working Partnership" under the 1986 False Claims Act Amendments

Frederick M. Morgan, Jr. and Jennifer M. Verkamp[1]

The 1986 Amendments to the False Claims Act dramatically enhanced the Government's ability to root out and prosecute fraud. It achieved this primarily by strengthening the role of the *qui tam* relators who hire FCA attorneys to investigate and prosecute their cases. By combining the resources of the private citizenry with the often- limited resources of the Government, Congress sought to facilitate creation of a united front against pervasive fraud and abuse by government contractors by empowering citizens (and their lawyers) to rise to the occasion as full partners in aggressive pursuit of contractor fraud and abuse. Congress intended a "working partnership between both the Government and the *qui tam* plaintiff."

"Working partnership." The phrase packs a lot into two words. The authors of this article, who represent *qui tam* relators, strive to report faithfully on the view of the partnership from the other side—government lawyers and investigators—with an eye toward assessing both how relator's counsel can best work with their government counterparts, and whether the partnership has been realized. During 2002, we had the privilege of serving on panels at two in-service sessions of federal enforcement personnel which gave us revealing glimpses into the perspectives of government lawyers and investigators.[2] All of the insights we gained were welcome, but some were, frankly, unflattering to the community of relator's counsel. The feedback of these seasoned federal attorneys and agents undoubtedly was more valuable for us than for the "students," and we were sufficiently struck by their views to think that we should pass them along.

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2 Rick joined Civil Frauds Assistant Branch Director Stephen Altman and McKenna, Long & Aldridge partner Michael Scheininger at the Department of Justice's National Advocacy Center in Columbia, South Carolina to discuss *qui tam* cases with ACE (Affirmative Civil Enforcement) Co-ordinators from U.S. Attorney's Offices around the country. We both presented our views on the relator's role in effective *qui tam* litigation to a Midwest-region training seminar for Department of Defense Inspector General's Defense Criminal Investigative Service ("DCIS") Special Agents.

Are relators providing the resources and oversight Congress intended? And are the federal players facilitating the relator's role, obstructing it, or both?[3] The answers to these questions vary from case to case (if not day to day), but the Amendments are now almost two decades old, and patterns have evolved which bear noting. We do not presume to answer these questions, but will try to identify common themes we have encountered.

The dynamic is strange by nature. Whistleblowers are generally intelligent and articulate people committed to a relatively bright-line approach to their jobs—and their lives. They believe that questions have answers, and want to know them. Trial lawyers are used to controlling their cases, as much as possible, and having whatever answers their clients seek. Government investigators and attorneys, on the other hand, are used to being accountable within their chain of command; some take well to working with "outsiders," while others view relators as no different from any citizen who brings information to the Government—albeit citizens who are open to suspicion due to financial incentive. The claim is, after all, owned by the Government, which has assigned a portion of it to the relator; aside from retaliation claims, the relator has suffered no cognizable injury.

The result? Sometimes the relationship works like a charm. Relators are informed regarding investigative progress, treated as valuable sources of information, asked to review documents or help investigators or attorneys prepare for witness interviews, and in other ways treated as the full partners Congress anticipated. But in other cases, relators and their counsel are treated like the proverbial mushrooms, with little—sometimes no—information regarding the course of the investigation, and no opportunity to bring to bear expertise, manpower, or other resources. In nearly every case, relators and their counsel must consider such matters as whether there are rules which govern the sharing of information; the nature and extent of their participation during the sealed phase of the case; and whether the Government need even give them a seat at the table when it discusses their case with the defendant.

From the perspective of relators and their counsel, there are common-sense responses to these questions: *Of course* the Government should keep them informed, involve them in discussions with the defendants, and give them the opportunity to shed light on whatever information is obtained during the investigation. And sometimes it does. But these seemingly-obvious points are not in the statute itself. Rather, there are neither clear answers nor bright lines. Relators and the Government sometimes prosecute the case

3 Two issues are outside the scope of this article. First, we do not delve in detail into how relators should proceed in full-blown disputes with the United States, although we do discuss the legal standards applicable to opposing extension requests. Second, we do not discuss the nature of the post-intervention relationship, where it is presumed that relators will be full parties. *See generally United States ex rel. Roby v. Boeing*, 995 F. Supp. 790, 796 (S.D. Ohio 1998).

side-by-side, and are on the same page from the outset. In other cases, relators and their counsel find themselves in a more adversarial relationship with the Government.

What makes the difference? Undoubtedly, top-down influences in the guise of "policy" cannot be wholly discounted. There is a perception among the relators' bar that the present federal administration is less relator-friendly than its predecessor. But government practices vary substantially from case to case, making clear that there are not wooden requirements imposed from the top. Rather, it may seem that many decisions are driven by the preferences of individual government counsel or investigators.

Our present effort is not to examine the institutional issues of, for example, the Department of Justice's occasionally-stated position that relators must, in order to qualify for a relator's share, satisfy the terms of Rule 9(b), or its recently-declared practice of excluding relators from participation in their sealed cases unless they agree to waive claims not precisely detailed in their complaint. Rather, we report the perceptions of those who have the latitude, on a case-by-case basis, to embrace relators as a litigating partner, keep them at arm's length, or simply shut them out. In our presentations, we heard about these perceptions, and about the reasons for them, from Department of Justice counsel, Assistant United States Attorneys, and DCIS agents.

The responses were uniform. There is a perception afield that there are too many overzealous, "under-helpful," financially-driven relators with weak or non-existent cases, the investigation of which depletes, rather than augments, federal resources. With what appears to be increasing frequency, these perceptions lead to an adversarial relationship between the Government and relators: Instead of alliance against a common adversary, the house risks division. Because this shifts the relationship closer to that which Congress sought to correct in 1986, relators and their counsel must consider what they can do to facilitate (or, in some cases, re-create) the working partnership intended by Congress.

The following paragraphs include a brief recap of the legislative history, followed by discussion of perceptions that are obstacles to the working partnership. We then suggest approaches to overcome these problems in working with government personnel.

While some of what we have learned is discouraging, we bring to this task a great deal of optimism. This is the golden age of the whistleblower. *Time*'s "Persons of the Year,"[4] the magazine says, "reminded us of what American courage and American values are all

4 *Time* magazine selected Cynthia Cooper of WorldCom, Coleen Rowley of the F.B.I., and Sherron Watkins of Enron as its 2002 Persons of the Year based on their attempts (which were gallant, but in the context of many *qui tam* relators of the past decades, generally unsuccessful) to blow the whistle on wrongdoing in their organizations. *See* Richard Lacayo & Amanda Ripley, *Persons of the Year 2002*, Time, Dec. 30, 2002.

about." *Qui tam* cases have put billions back into the Treasury, and the Act's deterrent effects cannot be overstated. The difference between a *qui tam* relator and the Government has been compared to that between "the enterprising privateer [and] the slow-going public vessel;"[5] it is inconceivable that the Government could want to take the wind out of the privateer's sails.

But *qui tam* cases gore powerful oxen. They cost contractors millions of dollars and result in bad publicity. When a *qui tam* investigation causes another form of government waste—the waste of investigative resources on cases which are poorly analyzed and cavalierly developed—ammunition is provided to those who would attack the *qui tam* provisions.

THE LEGISLATIVE HISTORY: WHAT WAS INTENDED

Congress had no illusions regarding governmental inertia, and wanted to empower relators to help the "slow-going public vessel" in its fight against "large, profitable corporations [which] are . . . able to devote many times the manpower and resources available to the Government" by greatly expanding the role of relators. S. Rep. No. 99-345, at 8, *reprinted in* 1986 U.S.C.A.A.N. 5266, 5273. The amendments were intended to "allow and encourage assistance from the private citizenry" because "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." *Id.* at 5267. Congressman Berman said:

> The law makes clear that this person, the *qui tam* plaintiff, will be a party to the action *with all the rights and responsibilities that a party receives under the Federal Rules of Civil Procedure.*
>
> * * *
>
> The law we vote on today is intended to encourage a *working partnership between both the Government and the qui tam plaintiff.* The public will be well served by having more legal resources brought to bear against those who defraud the Government.

132 Cong. Rec. 29315, 29321-22 (October 7, 1986) (emphasis supplied).

The drafters of the Amendments made clear that relators were intended to play a substantial role in the prosecution of the case in order to "keep pressure on the Government":

5 *Hughes Aircraft Co. v. Schumer*, 520 U.S. 920, 949 (1997) *quoting United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943), quoting in turn United States v. Griswold, 24 F. 361, 366 (D. Or. 1885).

> Another reason for providing for this full party status is to keep pressure on the Government to pursue the case in a diligent fashion. Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming case loads they maintain. I do not say this to impugn the ability or character of Government attorneys, but only to reflect the harsh reality of today's funding limitations of Government activities in all areas which include the budgets of the Government's prosecuting agencies. If the Government can pass a law that will increase the resources available to confront fraud against the Government without paying for it with taxpayer money, we are all better off. *This is precisely what this law is intended to do: deputize ready and able people who have know ledge of fraud against the Government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the Government.* *Id.* (emphasis supplied).

Thus, Congress made clear that relators were expected to keep tabs, if you will, on the Government's investigative progress.[6] The Amendment "provides *qui tam* plaintiffs with a more *direct role* not only in keeping abreast of the Government's efforts and protecting his [sic] financial stake, but *also acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason*." S. Rep. No. 99-345, at 25-26, *reprinted in* 1986 U.S.C.A.A.N. at 5291 (emphasis supplied). The provisions of the Act granting relators the right to prosecute *qui tam* allegations demonstrate that Congress fully intended relators to be at the Government's elbow. Relators have both the right and the responsibility to "keep pressure on the United States to prosecute the cases."[7] Indeed, "much of the purpose of *qui tam* actions would be defeated unless the private individual is able to advance the case to litigation."[8]

Thus, Congress empowered relators to become full parties to the litigation of *qui tam* cases, with all the rights and responsibilities of any other party. However, how relators fulfill their parallel roles of fraud-fighter and public watchdog can be problematic.

6 Two courts have observed that "providing the relator a right to recover, a role in the action when the government intervenes . . . , and a right to object to dismissal or settlement by the government . . . , also serve[s] the additional purpose of giving the relator the incentive to 'act [] as a check that the government does not neglect evidence, cause undue delay, or drop the false claim case without legitimate reasons.'" *United States ex rel. Roby v. Boeing*, 995 F. Supp. 790, 796 (S.D. Ohio 1998), *quoting United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 964 n.8 (9th Cir. 1995) (internal citations omitted).

7 *United States ex rel. McCoy v. California Medical Review, Inc.*, 715 F. Supp 967, 958 (N.D. Cal. 1989), citing S. Rep. No. 99-345, at 24.

8 *United States ex rel. Pentagen Technologies International Ltd. v. CACI International, Inc.*, 885 F. Supp. 80, 82 (S.D.N.Y. 1995) *quoting* S. Rep. No. 99-345, at 24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289.

Relators do not have tools (short of seeking judicial intervention, a move which may itself raise separation-of-powers issues) to *make* the Government share information. Their principal goal is to seek an unsealed lawsuit which they can proceed to litigate. But many relators' counsel have bought into the thesis, counter-intuitive against the legislative background, that government intervention is essential for success; and it is hardly a secret that the Government often will, when faced with an unsealing which it opposes, decline intervention.

Congress anticipated this, too, giving relators full powers to continue on their own; however, the defense bar—rarely opposed on this point by the Government—has succeeded beyond its fondest hopes in creating the impression that a declined case is no case at all. Thus, factoring in professional obligations to private clients, at least one of whose interests is, after all, to maximize recovery against the defendant, the choice of how to proceed in the face of governmental refusal to share information can be quite confusing. The situation is further complicated by the fact that private counsel have their own resource limitations. They frequently have little idea what the Government is doing—or when. A case which sat under seal for four years may suddenly be declined and placed on the public record. A first-filed case may emerge. And their co-counsel is a public monolith with decades of preconceptions and an institutional incentive to keep them in their place. That is, the thinking goes, while it benefits the Government to have money put back in the Treasury, it does not benefit it to have relators get too big for their britches. The Government will have case after case after case, year after year after year (and will, if history is a guide, intervene in no more than one in five of those which are filed), while most relators' counsel will have no more than a few cases, virtually no relator will have more than one.

In sum, there is much to commend the development of collegial relations with government counterparts wherever possible. But this is possible only with an under standing of the potential obstacles; and it is in this area where our recent experiences may be of some use.

THE REALITY: WHAT WE LEARNED, AND WHAT YOU CAN DO ABOUT IT

The team approach envisioned by Congress exists, we believe, in no more than a small minority of relator and government relationships. Sadly, the others range on a spectrum from relators providing sporadic assistance, to relators being treated as no different than any other witnesses. In some cases, relators' counsel have worked hand in glove with the Government from the inception of the investigation, reviewing documents, formulating strategy, and sharing information. In others, relators and their counsel have little if any involvement during the seal period. What is the difference? Are there policies that prevent the Government from coordinating with relators or sharing documents and information in some instances?

In our discussions with government lawyers and agents, we received the same message. There are neither policies nor clear guidelines. Rather, these decisions are made on a case-by-case basis. The critical element is trust. Because there are no clear guidelines or policies regarding what information can and cannot be shared with relators, that decision is very much in the hands of individual government attorneys and agents. Many of them have become mistrustful of the *qui tam* process itself because of bad experiences with relators and counsel whose *qui tam* allegations were overblown, causing the diversion of limited resources (yes, the same limited resources with which Congress was concerned in 1986) to wild goose chases which lead to a finding of no violation, no damage, no intent, or all of these. These cases may be worth, according to relators or counsel, tens of millions (if not billions) of dollars, and are presented as a mishmash of allegations with little or no documentation and less legal analysis. And there is an additional factor upon which we had not focused until this process: The Government must investigate *every case* in order to decide whether to join the fray.

Variations on the theme which have caused government counsel to become gun-shy of *qui tam* cases include:

- Relators who file *qui tam* actions based on factual allegations which sound bad, but who have no understanding of the underlying statutory or contractual framework. The Government then must work to determine whether the facts actually violated any contractual or other provision; it is, we were told, not uncommon that they did not.
- Relators who file *qui tam* actions, but know only a tiny part of the contracting puzzle and lack understanding of how the conduct fits into the bigger picture. Fundamental misunderstanding of the extent of the relator's knowledge can cause the Government to burn its resources investigating only to find out there is nothing there.
- Relators who file blunderbuss complaints, asserting myriad violations which, on investigation, result in few or no claims with merit.
- Relators who demand access to broad categories of information in the Government's possession and do not tailor requests to information necessary to prove their claims.
- Relators and counsel who offer things they cannot deliver in order to create the appearance of a willingness to help, rather than offering what they are able to give. Some in the Government may view offers of assistance with jaundiced eye, believing that whatever work is committed to will not get done.
- Relators or counsel who appear obsessed with the financial aspects of the case, rather than the work needed to determine whether there *is* a case, how it should be proved, and what it is really worth.

- Relators and counsel who are unwilling to hear about problems with the case. Government lawyers perceive themselves as more than advocates, and they are right. They have a public trust to find, so far as they can, the truth. When a relator's lawyer reacts to their attempts at objectivity with resentment or accusations, they well may take offense.
- Relators who engage in "bracket creep"—the incessant addition of new allegations, often in an incomplete or haphazard fashion (although it may be difficult to avoid this when the relator still works for the contractor and violations are ongoing).

Government investigators approach these issues from a somewhat different perspective than government attorneys. In general, we found them to have greater empathy for the hurdles faced by relators, and a greater hunger for meaningful contributions by relators and their counsel. But they tell the same story. When we asked DCIS agents about their interactions with relators, they voiced substantial uncertainly regarding when they could share information (and also noted that the answer varied substantially depending on the government attorney assigned to the case). They voiced even more frustration about their relationships with relators and their counsel. Remember: It is the agents who must do the investigating. They must investigate every *qui tam* complaint, and must do so within relatively tight time constraints. If an agent is working on a file which she has developed from solid leads and a *qui tam* comes in, the *qui tam* gets priority, regardless of relative merit. In other words, understand that when you file a complaint, you trigger the immediate diversion of resources.

Thus it is unsurprising that resource-allocation issues were high on the agents' list. Examples:

- Relators who bring seemingly-serious facts but have no understanding as how those facts establish either a breach of contract or a False Claims Act violation. This circumstance requires the agents to do immediate investigation to determine whether there are real risks afield, which in turn can cause friction with program personnel.
- Relator's counsel who fail to establish realistic client expectations by describing the process and ensuring that the relator knows how long a *qui tam* investigation will take. This circumstance results in impatient relators who call the agents directly, often, and sometimes early in the morning.
- Relator's counsel who are unaware of, or who fail to prepare relators for, the possibility that the client may be asked to engage in consensual monitoring or otherwise actively assist the agent with her investigation.
- Relators who are not candid regarding the extent of their role in the fraudulent conduct, or the existence of personal animosity or other reasons motivating their whistle-

blowing (leaving the investigators to learn such facts from the target), or who are not candid regarding blemishes in their past which bear upon their credibility.

- Relator's counsel who treat the investigators as employees, making work assignments and demanding the results of investigative activities without acknowledging the burdens under which the agents labor.
- Relator's counsel who promise information or resources and then fail to deliver.
- Relators and counsel who significantly overstate the seriousness of the problem, the existence of safety hazards, or the extent of the harm to the Government.
- Counsel who are unwilling to acknowledge the realities of program and resource limitations. Some agencies have strong institutional resistance to *qui tam* claims. Some investigating offices spend the last quarter of the fiscal year with insufficient money for an agent to buy an airplane ticket. (A suggestion: Ask an agent what she has to do to obtain approval to conduct an interview.)
- Relators and counsel who throw new and incomplete allegations into the mix once they have the investigator's attention, expecting that she will switch focus from work already underway to a new issue.

Anyone who does this work knows that while the trial attorney assigned to the case and her supervisors will drive the intervention decision and associated resource allocations, the investigating agents will have substantial input into the decision in many, if not most, *qui tam* cases. They do many or all of the field interviews; they convey their first impressions of relators (and their counsel) to government and agency counsel; and they decide how far to push before moving on. If they do not push, the case is likely to wither on the vine. Such problems are wholly avoidable.

Some specific suggestions for relators' counsel:

1. Unless your client knows that serious and immediate safety risks are present, do not contact an agent until you understand what the client knows—and does not know—about the issues. (The exception is where there is a real first-to-file concern. If that is an issue, tell the agent that your investigation is ongoing but that you need to make an early disclosure. They know the False Claims Act as well as you do, and will understand.)
2. Never overstate what your client knows, minimize what she doesn't know, or sugarcoat her reasons for bringing information forward. Never minimize what she does not know. Do not oversell your client's position or knowledge.
3. Always offer the agent the opportunity to debrief your client as soon as possible—but be aware that "as soon as possible" means after you have fully debriefed her yourself; used Internet and other resources to research the target and any related companies in every way you can think of; done everything you can to identify the standards which govern the target's conduct; and checked out the *bona fides* of the relator.

4. Be sure your client knows he may be asked to wear a wire, work to identify witnesses, be consulted about locations of documents, or otherwise actively participate in the investigation.
5. Do not offer help and then fail to provide it. If you say you will review documents, attend a meeting, compile data, or anything else—follow through.
6. Do not expect the agent to think you have the best—much less the only— case in the world. These are busy men and women. They are highly trained. They have other responsibilities in addition to investigating your case (for example, a DCIS agent may have responsibility for anti-terrorism investigations).
7. Do not take on a *qui tam* case if you do not have the resources to provide meaningful investigative and administrative help. There are many lawyers around the country now with real expertise in these cases. Find one of them and talk things through.
8. Listen to what lawyers and agents tell you about the constraints they face. Find out if they need help with photocopying, document review, databasing, legal research, experts, or whatever. And then provide the help.
9. If new allegations surface, present them to the lawyer or investigator in a concise fashion, preferably in writing and accompanied by a commitment that the allegations will be included in an amended or supplemental complaint.
10. Listen to what they tell you about the merits of your case. You don't have to agree; but you should hear them out. You may be able to bring forward countervailing information, but even if you cannot, you will learn invaluable information which will guide your future decision-making—and you will gain respect.
11. To the extent you have information available, focus early and often on the development of a credible damage analysis. Damages are a primary concern of the Justice Department as it makes its own resource-allocation decisions. Do not be shy about proposing a model that takes into account all damage caused by a defendant's conduct, but do not undercut your credibility by generating impossibly high numbers in hopes of catching the attention of government counsel. Do not tell a government lawyer or agent that a case is worth millions or billions unless you can credibly explain. You will best catch their attention by providing defensible numbers.

There is no magic to these suggestions, and many of relator's attorneys can improve on them. But the fundamental point is that if you seek a working partnership, you must both work, and show your willingness and ability to be a partner.

Remember that *Qui Tam* Cases Can Be Resource Sinkholes for the Government.

Congress planned for relators to provide additional arsenals of resources to the Government, but did not spend much time thinking about what that meant. The irony revealed in our discussions with government lawyers and investigators is their concern that *qui tam* cases themselves drain resources—a concern which is a significant motivator for those federal actors whose instinct is to keep relators at arm's length.

It is also clear that resource decisions are the linchpin of the Government's approach to many, if not most, *qui tam* cases. This is no surprise: Congress attempted to alleviate the problem of the disproportionate resources of the Government by increasing the role of relators. Unfortunately, it is not always cut-and-dried. If the Government continues viewing relators as a resource drain, rather than a resource bonanza, we have serious problems. But that is a part of the current landscape, because lawyers and agents often burn resources to investigate weak or meritless claims; because demanding relators and relators' counsel require time and effort; because efforts are diverted from investigations which are perceived to (and well may) be more worthwhile; and because the Government may actually be *liable, to a defendant that prevails, for that defendant's costs of defending against supposedly "frivolous" cases.*[9] We hope that awareness of these factors will allow relators' counsel better to provide the help Congress intended, to the inevitable benefit of their clients.

Do Not Trigger Investigations of Overstated Claims

Because of previous experiences with, or apocryphal tales of, far-flung allegations which turn into dry holes, many government lawyers and agents approach every allegation which is presented without defined boundaries and well-plotted avenues of proof with a skeptical eye. For example, while it may be the case that every part which comes from a defense plant with a bogus quality-program is nonconforming, the Government is unlikely to be interested in such an allegation unless the relator also can demonstrate that specific parts have specific problems.

The lesson here is a simple one, and a good one. Draft your complaint and relator's statement in a manner which captures the true scope of all problems of which your client is aware. But also provide details. Details are indispensable in a fraud case, and their existence gives a *qui tam* plaintiff enormous credibility.

Make it a Pleasure—Not A Chore—For Them To Involve Your Team.

That many government actors view increased relator involvement as meaning more work rather than more help is a shame, but it is true. If investigators serve enormous subpoenas at the relator's behest and end up with a warehouse full of boxes and no help, then the perception is reality. If investigators talk to a witness who, they have been assured, will confirm everything, only to find that he knows nothing (or that his story contradicts the relator's), then they have hardly been helped.

On the other hand, where relator's counsel is able to provide government agents and lawyers with real help—for example, placing a team of paralegals in the agent's office to

9 This is discussed in more detail below.

go through those documents, or providing a notebook of documents for use in questioning witnesses —the agent will become accustomed to such help. If relators' counsel routinely provided government counsel with credible legal analysis of damage issues, for example, they would undoubtedly find that the barriers between private and government attorneys would melt away, and a team would more often than not begin to form.

In short, you get what you pay for. The currency in these cases is not just money, but resources. If relators' counsel do not provide capable support to the litigating effort, they are not meeting the challenge laid down in the statute. And while doing everything one can to help does not ensure a working partnership, it cannot possibly go unnoticed—and will, in the long run, not go unrewarded.

Be Aware That The Taxpayers Are at Risk For Contractor's Costs for Litigating Non-Intervened, Unsuccessful Claims

Another concern of government lawyers arises from the fact that a defendant who prevails can charge the taxpayers for up to 80% of its legal bills.[10] This cannot occur where the contractor is found liable, or if there is a "judicial determination that the contractor sought to induce its employees to commit fraud against the government."[11] But where a case is worthless and the contractor succeeds in dismissal or summary judgment, this provision can be a serious problem—and a serious misallocation of resources resulting from the overzealous pursuit of a meritless claim. So relators should bear in mind that when they file a case that they don't fully understand and assume that the Government will handle it for them, they are setting in motion a chain of events which may result in Treasury dollars flowing to Washington law firms.

When they Say It's Not About the Money . . .

Sometimes, and for some people, it's about the money. This is hardly surprising, since each and every governmental actor with whom a *qui tam* litigator or relator has contact is acutely aware of the relator's financial interest—and that the upside may be many times their yearly salary. And they know that the relator's counsel expects to recover attorney's fees, which some perceive as depleting resources available for settlement or judgment.

That said, it is not our experience that they believe relators or their counsel are in it just

10 The Federal Acquisition Regulations allow government contractors to recoup the costs incurred in connection with defending a False Claims Act action if (1) the proceeding resulted in a settlement; (2) the United States did not intervene; (3) the costs were not otherwise unallowable by regulation or by separate agreement with the United States; and (4) "the contracting officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits." 48 C.F.R. § 31.205-47(c)(2).

11 *Boeing North American, Inc. v. Roche*, 298 F.3d 1274, 1281 (Fed. Cir. 2002).

for the money (the work, done right, is just too hard), but it is inescapable that certain interests of the working partners diverge. Indeed, in each of the seminars in which we participated, the subjects of large relator's shares, contingent and hourly attorney fees, and financial motivation to pursue frivolous cases came up, and undoubtedly they come up repeatedly in discussions between the contractor's lawyer and government counsel and agents.

Nobody expects relators' counsel to work for free, and few in the Government resent the fact that relators are rewarded for the personal and professional risks they take and the time they invest. While the precise relationship between relators and their counsel is a matter between them (and perhaps the court), if these subjects are raised by government personnel and relators' counsel evade or dissemble, they lose credibility and defeat the trust essential to the partnership. On the other hand, most federal professionals are doing public work for reasons of commitment to principle. Relators' counsel should not hesitate to make it clear that they, too, are doing this work for the right reasons, and the most effective way to demonstrate that fact is by being a working partner.

Do Not Underestimate the Contractor's Access to the Government, or Play Into the Contractor's Hands

A word about opposition tactics. Relators' counsel must not underestimate the access government contractors have to relators' potential allies in government service, and should not forget that the relationship between the United States and, say, Lockheed Martin is a long-standing one. By way of example, our presentation at the DCIS seminar was preceded by a speech by in-house counsel for a large defense contractor. While we were not able to observe, we have no doubt that his presentation sought to fuel the fire of anti-relator sentiment. Contractors routinely assert that relators are out for personal gain and that *qui tam* stands for "he who sues more for himself than for the Government." Familiar themes of the contractor community are that *qui tam* suits are a "litigation lottery" and that there is no mechanism by which the Government can avoid investigating "frivolous" cases. Contractors will also assert that the Government should submit reasons for declination to the court, and that the relator should not be allowed to benefit from documents obtained during the government investigation because then "the playing field is unequal."

The seminar speaker happened to work for a contractor against whom we shortly thereafter secured summary judgment in a non-intervened case about which several of the agents knew. So far as we know, he did not gain much sympathy from his audience that day. But the wolves are at the door, and the same lamentations are heard day in and day out from lobbyists, bureaucrats, and others who view *qui tam* cases as get-rich-quick schemes which take government resources away from the real business at hand.

In sum, the message we took away from both lawyers and investigators was that while they very much value the efforts of whistleblowers with strong cases, they are frequently frustrated that they must treat all cases basically the same way. While they want to work closely with relators and their counsel, they are concerned that promises will be made and broken; that the relator's knowledge will be so slight as to cause enormous wasted time and effort; and that, in a nutshell, their own work will fail to secure any benefit to the United States because they are provided with weak or seriously incomplete information. This is not to say that they expect it on a platter: They do not. They understand that relators almost always know only part of the story. But so many cases have created so much bad law and ill-will that it is necessary that relators' counsel do everything they can to ensure that good cases are brought, and brought with the highest level of professionalism.

These cases are serious business. You can bet that as soon as the contractor learns about the investigation, its lawyers will fall all over themselves to provide the government with documents, summaries, PowerPoint presentations, scientific explanations, regulatory analysis, and anything else that counsel thinks will help pull the fat out of the fire. Unless plaintiffs proceed professionally, carefully, and diligently, they can be outflanked.

You Are Not Helpless When It Just Doesn't Work.

Sometimes, the Government just won't take relators' help. Maybe it doesn't need their help. Maybe, albeit extremely rarely, there are significant national-security concerns. Maybe the responsible officials know something that counsel does not know about the relator. Maybe they don't like him, or his counsel. Sometimes there may be no recourse; sometimes you may be able to open avenues of communication.

The best way to avoid this, of course, is to offer and deliver support, information, and resources from the first time you talk to the government agent or attorney, but if you find yourself in this corner, don't try to fight your way out. The worst thing you can do is to engage in recrimination or attack. The second-best thing you can do is to seek judicial intervention. The best thing you can do, in our judgment, is to add resources yourself. In other words, put your money where your mouth is. Hire an expert witness in a relevant field. Provide a summary or database of documents. Draft proposed subpoena requests. But always understand that the Government intervenes in a small minority of cases, and that it is a very easy thing, in many cases, for an AUSA or Civil Division attorney to obtain authority not to intervene in your case. That may be a good thing: Recoveries in non-intervened cases can be high, and the Government is not the final arbiter or whether a case has merit. But before you rattle the cage of lawyers or agents regarding not keeping you in the loop or moving quickly enough, remember—Be careful what you ask for.

We note in this context a course of action—available, but perilous—in cases where the Government seems not to be taking a case seriously, you are concerned that evidence may be slipping away due to the unrestrained use of the seal period, or you are simply kept in the dark regarding what is or is not being done and so cannot be sure you are protecting your client's interests. You may oppose an extension request in order to ensure that your case is being diligently prosecuted. There is certainly legal authority to support such a step.[12] We must strongly caution, however, that this approach will certainly induce tension, and is likely, if it succeeds in causing a court to deny further extensions, to result in a declination decision. Be certain your own house is clean before you criticize the housekeeping of another, and be prepared to step to the plate—that is, to litigate the case on your own, without government intervention—before you ask the court to become involved.

Your goal, of course, is to do everything you can to avoid becoming the adversary of the United States whether it intervenes or not. Congress intended relators and the Government to join forces to flush out and aggressively prosecute abuse of taxpayer funds. When this becomes more of an adversarial relationship rather than a working partnership, both sides lose sight of what they are supposed to be doing. The public fisc will suffer unless the situation is repaired—or the relator has the resources to go it alone. While there will undoubtedly be times when relators must stand and fight against the executive branch, we hope that these pages provide a bit of insight into the reasons for many of the reactions relators' counsel get from federal lawyers and investigators.

12 The Act requires the United States to show "good cause" to extend the seal on the case beyond 60 days. 31 U.S.C. § 3730(b)(3). "The 'good cause' requirement of the statute is . . .a substantive one, which the government can only satisfy by stating a convincing rationale for continuing the seal." *United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1190 (N.D. Cal. 1997). "The legislative history of the False Claims Amendments Act makes abundantly clear that Congress did not intend that the government should be allowed to prolong the period in which the file is sealed indefinitely." Id. The Senate Report which accompanied the 1986 Amendments states:

> The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow government coordination, review and decision. Conse quently, "good cause" would not be established merely upon a showing that the government was overburdened and had not had a chance to address the complaint.

Id., quoting S. Rep. No. 99-345, at 24, reprinted in 1986 U.S.C.C.A.N. 5266, 5290. "Congress stated, 'the government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the *qui tam* litigation.'" *United States ex rel. McCoy v. California Medical Review, Inc.*, 715 F. Supp 967, 969 n.1 (N.D. Cal. 1989); *see also United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228, 1230 (S.D. Ala. 2000) ("Unnecessary delay causes injury to the relator."). "Congress clearly intended to bestow upon relators in proceedings under the Act substantial power to force the prosecution of cases." *McCoy*, 715 F. Supp. at 970.

CONCLUSION

The future of the working partnership planned by Congress is promising, but far from secure. The False Claims Act was repeatedly changed over the past 140 years as it moved toward what some have called "golden mean" between whistleblower involvement and federal interests. While the current version of the Act comes reasonably close to this goal, problems remain. If relators' counsel do not come to terms with them, they risk their credibility and, in the long run, their ability to serve as working partners in the fight against government contract fraud.

ALLEGATION: KICKBACKS AND SUBSTANDARD MATERIALS

Utah Department of Transportation

In October 2002, a *qui tam* lawsuit was unsealed alleging that numerous defendants, including the Utah Department of Transportation and contractors working on the reconstruction of Interstate 15 through the Salt Lake Valley in Utah, used substandard materials and solicited kickbacks during the four-year project. The complaint also alleges that the defendants knowingly made claims and received payment for more dirt and other fill material than what was actually supplied for the I-15 project. Steven Maxfield, CEO of Mighty Max Truck Parts, Inc., and John Peterson, an independent trucker, filed this *qui tam* suit in 1999. The Government has not yet decided whether to intervene.

ALLEGATION: FAILURE TO SUPERVISE SURGERY

U.S. v. Henry, No. 3:02CV-671-S (W.D. Ky.)

In November 2002, the Government reportedly filed an FCA suit against Kentucky Lieutenant Governor Steve Henry for defrauding Medicare and Medicaid. Henry, who also is an orthopedic surgeon in charge of supervising surgeons in training at the University of Louisville, is accused of billing for his services during 44 operations he did not participate in. Medicare and Medicaid regulations require that supervising doctors be present during surgery to bill for their time. The Government estimates that Dr. Henry's improper billing cost the two programs $60,000.

ALLEGATION: ALTERING RADIATION EXPOSURE RECORDS

Lockheed Martin

In November 2002, a *qui tam* lawsuit was unsealed alleging that Lockheed Martin, Lockheed Martin Utility Services, and the U.S. Enrichment Corporation altered the records of workers' exposure to radiation at the Portsmouth Gaseous Diffusion Plant in Piketon, Ohio. The defendants allegedly provided the false and unreliable exposure readings in order to receive federal incentive payments for operating a safe work environment. Jeff Walburn, a plant security guard, filed this *qui tam* action in 2000. The Government has not yet decided whether to intervene.

ALLEGATION: BILLING MEDICARE FOR CHEMOTHERAPY SERVICES "INCIDENT TO" PHYSICIAN SERVICES NOT SUPERVISED BY PHYSICIANS

U.S. ex rel. Callahan v. Oncology and Hematology Associates of Southwest Virginia, Inc., No. 7:00CV00350 (W.D. Va.)

In November 2002, the Government intervened in a *qui tam* suit against an oncology practice and 12 owner physicians. The suit alleges that the defendants billed for intravenous chemotherapy services provided incident to physician services on holidays and weekends when no physicians were present. Other allegations include upcoding patient referral office visits to consulting services, charging for chemotherapy drugs provided free of charge by drug manufacturers, and charging for unnecessary tests performed by the in-house medical laboratory. The complaint alleges about $15 million in single damages. Timothy Callahan, a former clinic office

manager, filed this suit in 2000. Candace McCall of Candace McCall, P.C. and Warner Young III of Allred, Bacon, Halfhill & Young, P.C. (both of Fairfax, Virginia) represent the relator. Trial Attorney Susan Lynch of the DOJ Civil Division and Assistant U.S. Attorney Julie Dudley are handling the case for the Government.

ALLEGATION: BILLING FOR EXPERIMENTAL DEVICES

***U.S. ex rel. Cosens v. Cedars-Sinai Medical Center*, No. CV 02-03264 (C.D. Cal.)**

***U.S. ex rel. Cosens v. Loma Linda University Medical Center*, No. 02-06153 (C.D. Cal.)**

***U.S. ex rel. Cosens v. St. Louis University Hospital*, No. 4:02CV1390 DJS (E.D. Mo.)**

***U.S. ex rel. Cosens v. Barnes-Jewish Hospital*, No. 4:02CV13901 DJS (E.D. Mo.)**

***U.S. ex rel. Cosens v. Stanford Hospital and Clinic* (N.D. Cal.) No. C99-4121 MJJ**

***U.S. ex rel. Cosens v. Yale-New Haven Hospital* (D. Conn.) No. 3:02CV688**

***U.S. ex rel. Cosens v. St. Francis Hospital* (E.D.N.Y.) No. 02-CV-2324**

In November 2002, the Government intervened in four cases filed by Kevin Cosens against Cedars-Sinai Medical Center, Loma Linda University Medical Center, St. Louis University Hospital, and Barnes-Jewish Hospital for submitting false claims to Medicare.

In December 2002, the Government intervened in 27 additional cases filed by Cosens against Stanford Hospital and Clinic, Yale-New Haven Hospital, St. Francis Hospital, Washington Hospital Center, Emory University Hospital, Northwestern Memorial Hospital, and the Hospital of the University of Pennsylvania, among others, for submitting false claims to Medicare. The Government alleges that from 1987 to 1995 these hospitals falsely charged Medicare for procedures involving experimental cardiac devices that were not reimbursable. Cosens, a former medical device salesman, initially filed *qui tam* actions against 132 hospitals. December's interventions bring to 40 the number of hospitals that the Government is currently pursuing. 31 other hospitals have settled for a combined total of over $42 million. *See* 28 TAF QR 54 (Oct. 2002) and this issue's Judgments and Settlements section below at page 51. Don Warren and Phil Benson of the Warren & Benson Law Group (San Diego & Los Angeles) represent the relator.

ALLEGATION: FALSIFYING MAGAZINE CIRCULATION TO OBTAIN DISCOUNTED POSTAGE RATES

U.S. ex rel. Sprague v. Medical World Communications

In December 2002, the Government intervened in a case against Medical World Communication, a medical magazine publisher. The Government alleges that from 1994 to 2000, Medical World purposely inflated its subscriber numbers in order to qualify for reduced postage rates. The false circulation numbers allegedly enabled the company to avoid paying more than $2 million in postage. Peter Sprague, Medical World's former chief operating officer, filed this *qui tam* action in 1999. Nicholas Harbist represents the relator.

ALLEGATION: MEDICARE/MEDICAID KICKBACKS AND HOME OFFICE NURSING HOME COST REPORT FRAUD

***U.S. ex rel. VanThiel v. HCMF Corp.*, No. 7:99 CV 00300 (W.D. Va.)**

In December 2002, the Government intervened in the remaining claims of a *qui tam* suit alleging that defendants HCMF Corp. and Pharmerica Drug Systems, Inc. violated the Anti-Kickback Act when HCMF sold its institutional pharmacy operation to Pharmerica. The suit alleges that HCMF and its officers formed a pharmacy operation, which operated for only about two days, and then sold it for $7.2 million. The only potential sales base consisted of contracts for HCMF nursing homes, approximately 90% of whose occupants are Medicare and Medicaid beneficiaries.

Previously, in July 2002, the Government intervened in the allegations of home office cost reporting fraud in this *qui tam* suit. In those claims, the relator alleged that HCMF charged Medicare and Medicaid for home office salaries and health insurance benefits for persons not employed by HCMF. All defendants except Pharmerica have agreed to settle the home office cost report fraud claims for $4.25 million, $1.7 million of which is criminal restitution from HCMF and one of its officers. This settlement is being treated as an alternative proceeding under the FCA. A portion of the $4.25 million will be paid to the State of Virginia to compensate for losses from the Medicaid program fraud.

William VanThiel, a former chief operating officer of HCMF Corp., filed this action in 1998. Candace McCall of Candace McCall, P.C. and Warner Young III of Allred, Bacon, Halfhill & Young, P.C. (both of Fairfax, Virginia) represent the relator. Trial Attorney John Henebery of the DOJ Civil Division and Assistant U.S. Attorney Julie Dudley are handling the case for the Government.

ALLEGATION: FEMA DISASTER RELIEF CLAIMS FOR SERVICES NOT PROVIDED

***U.S. ex rel. Hensley v. Guy C. Eavers Excavating Corp.*, No. 3:00CV0046 (W.D. Va.)**

In December 2002, the Government intervened in a *qui tam* action alleging that the Guy C. Eavers Excavating Corp., a contractor for the Virginia Department of Transportation (VDOT), caused the submission of false claims for disaster relief funds from the Federal Emergency Management Agency (FEMA). The suit alleges that the defendants contracted for emergency flood and road work with VDOT for state and rural highways, funded heavily by FEMA. According to the complaint, the defendants submitted invoices for the use of up to double the number of trucks it owned and for ghost employee drivers, and charging higher than allowed rates for the type of trucks used, over a period of about 5 months. The initial settlement demand is $1.3 million. Glendon Hensley, the owner of a competing truck company, filed this action in 2000. Candace McCall (Fairfax, Virginia) represents the relator. Assistant U.S. Attorney Julie Dudley and several FEMA attorneys are handling the case for the Government.

ALLEGATION: UPCODING MEDICAID AND MEDICARE CLAIMS

Dr. Michael Judge

In December 2002, the Government reportedly filed an FCA suit against Dr. Michael Judge of Warwick, Rhode Island for defrauding

Medicaid and Medicare. The complaint alleges that from 1997 to 2001 Dr. Judge upcoded 90% of his reimbursement claims. The Government also has charged Dr. Judge with criminal Medicaid fraud.

***U.S. ex rel. Foster v. Pfizer* (E.D. Tex.)**

In October 2002, the Pfizer Corporation agreed to pay **$49 million** to settle allegations that it defrauded Medicaid. The Government will receive $27,913,300 plus accrued interest. The remainder of the settlement is to be divided among 40 states. The Government alleged that Pfizer fraudulently avoided fully paying the rebates owed to the states and federal government for the cholesterol-lowering drug Lipitor. The Medicaid Rebate program requires drug manufacturers to report to CMS the best price they offer to any commercial, for-profit customer, and to pay a quarterly rebate based on that best price. Pfizer failed to disclose $250,000 of cash discounts given to a managed care customer in Louisiana, which allowed Pfizer to retain over $20 million in Medicaid Rebates owed to Medicaid. David Foster, a former Parke-Davis/Warner-Lambert employee, filed this *qui tam* action. The relator's share is $5,945,958 or 21.3% of the settlement recovery. Joel Androphy of Berg & Androphy (Houston) represented the relator.

***U.S. v. Gentiva Health Services, Inc.* (E.D.N.Y)**

In October 2002, DOJ announced that Gentiva Health Services had agreed to pay **$3.15 million** to settle civil allegations of Medicare fraud. The Government alleged that Gentiva, one of the largest home health care providers worldwide, inflated the costs of home care visits to Medicare beneficiaries by including Medicare-covered visits and non-covered visits in its calculations of the average cost of home health care visits. The settlement amount represents double the amount of damages caused by Gentiva's alleged misconduct. The HHS OIG investigated this matter.

***U.S. ex rel. Cosens v. LDS Hospital*, No. 2:02cv01018 (D. Utah)**

In October 2002, DOJ announced that LDS Hospital in Salt Lake City, Utah had agreed to pay **$850,000** to settle allegations that LDS improperly billed Medicare for experimental cardiac devices undergoing FDA clinical trials, in violation of a Medicare manual rule excluding coverage of such services. Kevin Cosens, a former medical device salesman, has filed similar suits against 132 hospitals, 31 of which have previously settled for a total of over $42 million. *See* 28 TAF QR 54 (Oct. 2002). Cosens will receive 20% of the LDS settlement, and to date has received over $8 million in total settlement share. Don Warren and Phil Benson of the Warren & Benson Law Group (San Diego & Los Angeles) represented the relator. HHS OIG investigated the matter. David Cohen and Lani Remick of the DOJ's Civil Division is handling these cases for the Government.

***U.S. ex rel. Weatherford v. Frigidaire Home Products*, No. 00-4168 (W.D. Ark.)**

In October 2002, DOJ announced that Electrolux Home Products, formerly Frigidaire Home Products, had agreed to pay **$687,781** to settle allegations that it defrauded the U.S. Customs Service. The Government alleged that from 1996 to 2001 Electrolux failed to declare on entry summaries it filed with the Customs Service the true value of certain tooling molds, assembly labels, and other parts that it provided to overseas manufacturers. Jay Weatherford, a former customs compliance officer with Electrolux, filed this *qui tam* action. The Customs Service investigated this matter.

***U.S. ex rel. Boulris v. McCarthy*, No. 98-CV-2158 (M.D. Fla.)**

In October 2002, Dr. Owen McCarthy and his wife, Dottie McCarthy, reportedly agreed to pay **$600,000** to settle a *qui tam* suit based on allegations of Medicare fraud. The Government alleged that the McCarthys upcoded claims and improperly billed for the services of unqualified physician assistants. Dr. Craig Boulris, a former associate of the McCarthys, filed this *qui tam* action in 1998. The relator's share was $84,000. Christopher Casper and W. Christian Hoyer of James, Hoyer, Newcomer, & Smiljanick, P.A. (Tampa) represented the relator.

***U.S. v. Al Shalchi*, No. SA01CA0905HG (W.D. Tex.)**

In October 2002, Najah Al Shalchi reportedly agreed to pay **$563,000** to settle allegations that he and his son filed hundreds of false claims for Medicare reimbursement. Al Shalchi, a physician and owner of Internal Medicine of San Antonio, and Hareth Al Shalchi, his son and employee, were sued for submitting claims for in-hospital critical care services that were never rendered. The investigation and subsequent lawsuit began after several Medicare beneficiaries called a Texas complaint hotline to report that they were being billed for services they did not receive. Assistant U.S. Attorney Harold Brown represented the Government.

U.S. ex rel. Health Outcomes Technologies v. Roger Williams Medical Center

In October 2002, DOJ announced that Roger Williams Medical Center had agreed to pay **$400,000** to settle Medicare fraud allegations. The Government alleged that Roger Williams, a Rhode Island-based hospital, upcoded a pneumonia diagnosis code in order to receive higher reimbursements rates from Medicare. Health Outcomes Technologies, a Pennsylvania-based software company, filed this *qui tam* action in 1996 after analyzing diagnosis code billing patterns using publicly available MedPars data. The relator's share of the recovery was $57,540. Michael Holsten of Drinker, Biddle & Reath (Philadelphia) represented the relator. The HHS OIG investigated this matter.

***U.S. v. Venezia* (D. Mass)**

In October 2002, DOJ announced that David Venezia had agreed to pay **$55,500** to settle civil claims against him for submitting false and fraudulent claims to the Department of Education and the Department of the Army. The Government alleged that Venezia, while employed by the Army, improperly received funds from the Army to pay for college tuition and then falsified a death certificate to fraudulently discharge his federally guaranteed/insured student loans. *See* 26 TAF QR 42 (April 2002). The Department of Education, Department of the Interior, National Park Service, and Department of the Army investigated this matter. Assistant U.S. Attorney Patricia Connolly represented the Government in this case.

***U.S. ex rel. Rauh v. McLeod Regional Medical Center*, No. 3 98-3178 (D.S.C.)**

In November 2002, DOJ announced that McLeod Regional Medical Center of the Pee Dee, Inc. had agreed to pay **$15,909,470** to settle allegations of health care fraud. This is the largest FCA settlement ever in South Carolina. The Government alleged that McLeod overpaid to acquire six physician practices in order to induce the physicians to refer their patients

to the hospital. The Government further alleged that McLeod submitted false claims to Medicare, Medicaid, and TRICARE, the military's health care program, through the physicians with whom McLeod had improper financial relationships. Richard Rauh, a former McLeod employee in charge of the physicians services program, filed this *qui tam* action in 1998. Rauh waived all right to recover a share of the settlement or to recoup any attorneys' fees under the FCA in exchange for a release from civil liability for his own role in the alleged misconduct. The HHS OIG, FBI, and DCIS investigated the matter.

***U.S. ex rel. Kneepkens v. Dialysis Holdings Inc.*, No. 97-10400 (D. Mass)**

In November 2002, Dialysis Holdings reportedly agreed to pay **$4.1 million** to settle allegations that its predecessor corporations defrauded Medicare by performing medically unnecessary laboratory tests and blood draws on its sickest patients. The Government alleged that Dialysis Holdings' predecessor repeatedly split a single series of blood tests into two and administered the series on two different days, thereby creating a second false claim for reimbursement. A former general manager of Dialysis Holdings filed this *qui tam* action. The relator's share was $697,397 or 17% of the total recovery.

Woods Memorial Hospital District

In November 2002, Woods Memorial Hospital District agreed to pay **$1.2 million** to settle allegations of Medicare fraud. The Government alleged that Woods Memorial falsified cost reports and upcoded pneumonia diagnosis codes. The investigation stemmed from a Medicare audit of the hospital's cost reports. Assistant U.S. Attorney Cynthia Freemon Davidson represented the Government in this matter.

U.S. v. Marshall

In November 2002, Daniel Marshall, M.D., reportedly paid **$986,321** to settle allegations that he upcoded claims for Medicare reimbursements. The Government alleged that from 1996 to 2002 Dr. Marshall billed Medicare for unnecessary exams and more extensive exams than he actually performed on nursing home residents.

Rancocas Valley Anesthesia Associates

In November 2002, Rancocas Valley Anesthesia Associates (RVAA) and anesthesiologist Mark Goldberg agreed to pay **$470,000** to settle Medicare overbilling allegations. The Government alleged that from January 1995 to March 1998 RVAA and Goldberg billed Medicare for more time than was properly billable for anesthesia services provided by RVAA-associated physicians. The civil settlement, which resolved the dispute without the filing of a lawsuit, also mandates that RVAA be permanently excluded from participation in Medicare, Medicaid, and all other federal health insurance programs and that Goldberg enter into a five year integrity agreement with the Government.

***Franvale Nursing Home* (D. Mass)**

In November 2002, DOJ announced that Quality Care Centers of Massachusetts, d/b/a Franvale Nursing Home, and its parent company, Pioneer Health Care Inc., had agreed to pay **$89,994** to settle allegations that the nursing home filed false and fraudulent claims under the Medicare and Medicaid programs. The Government alleged that from January 1994 to

December 1996, the nursing home improperly billed for medical supplies not covered under Medicaid and Medicare. The HHS OIG investigated the matter. Assistant U.S. Attorney Patricia Connolly represented the Government.

U.S. v. Sandler **(E.D. Mo.)**

In November 2002, DOJ announced that Scott Sandler had agreed to pay **$58,325** to settle allegations that he submitted false claims to Medicare from January 1995 to June 1995. The Government alleged that Sandler and his co-conspirators improperly billed Medicare for medically unnecessary incontinence supplies for some 600 Chicago area nursing home residents. The Government estimated that a total of $1.5 million was improperly paid out as a result of the false billings. The FBI investigated the matter. Assistant U.S. Attorneys James Crowe Jr. and Suzanne Gau represented the Government in the case.

Lovelace Health Systems

In December 2002, DOJ announced that Lovelace Health Systems had agreed to pay **$24.5 million** to settle Medicare fraud allegations. The Government alleged that Lovelace Health Systems, a hospital and HMO owned by Cigna Corporation, submitted costs reports to Medicare that it knew contained unallowable costs. Additionally, the Government alleged that the hospital set aside cash reserves in an amount equal to the unallowable costs in order to repay the Government in the event that the unallowable costs were detected. Mark Razin, a former employee of Lovelace Health System's cost report consultant, filed this *qui tam* action. Stephen Meagher and Mary Inman of Phillips & Cohen, LLP (San Francisco) represented the relator. HHS OIG, the U.S. Postal Inspection Service, and DCIS investigated the matter.

U.S. ex rel. Johnson-Porchardt v. Rapid City Regional Hospital

In December 2002, Rapid City Regional Hospital and Oncology Associates LLP reportedly agreed to pay **$6,525,000** to settle allegations of Medicare fraud. Rapid City Regional will pay $6 million while Oncology Associates will pay $525,000. The Government alleged that Rapid City Regional billed Medicare for referrals from doctors to whom it gave sweetheart deals on rent and other expenses in violation of the federal Stark Law. This is the largest False Claims Act settlement in South Dakota history. Karen Johnson-Porchardt, a former hospital administrator, filed this *qui tam* suit in 2001. The relator's share will be determined at a January 2003 federal court hearing. David Lillehaug represented the relator.

U.S. ex rel. Romano v. Columbia University, No. 00-8798 (S.D.N.Y.)

In December 2002, Columbia University reportedly agreed to pay **$5.1 million** to settle allegations that it defrauded Medicaid. The Government alleged that Columbia University obstetricians routinely billed Medicaid for deliveries actually handled by certified nurse midwives. Denise Romano, a former Columbia University employee, filed this *qui tam* action. The relator's share was approximately $1.122 million or 22 percent. Timothy McInnis represented the relator. Assistant U.S. Attorney Sheila Gowan represented the Government in this case.

U.S. v. Worner v. Dianon Systems, Inc., No. 3:99CV407 (D. Conn.)

In December 2002, DOJ announced that Dianon Systems had agreed to pay **$4.8 million** to settle allegations of Medicare fraud. The Government alleged that Dianon Systems, a

Connecticut-based lab specializing in cancer testing, billed Medicare for medically unnecessary tests and improperly charged for investigational tests. Dr. Theresa Worner, a health care plan claims reviewer, filed this *qui tam* action. The relator's share was $535,569. Robert Vogel of Vogel & Slade L.L.P. (Washington, DC) represented the relator. HHS OIG and OPM OIG investigated the matter.

Raytheon Aircraft Company

In December 2002, Raytheon Aircraft Company reportedly agreed to pay **$3.99 million** to settle allegations of improper billing. The Government alleged that from 1988 to 1999 Raytheon billed the Department of Defense for its aircraft product liability insurance using an allocation method not in compliance with cost accounting standards, resulting in higher charges to the Department of Defense. The Defense Contract Audit Agency and DOD OIG investigated this matter.

U.S. v. Farkas, No. 00-8187 (S.D.N.Y.)

In December 2002, Tibor Farkas, Roxanne Farkas, and Sanjeev Nath agreed to pay a total of **$831,000** to settle charges of Medicare fraud. The Farkases will pay $531,000 while Nath will pay $400,000. The Government alleged that from 1994 to 2000 the Farkases and Nath improperly sought excessive levels of reimbursements for their ophthalmology services.

Outreach Programs, Inc.

In December 2002, DOJ announced that Outreach Programs, Inc. and several related entities had agreed to pay **$600,000** to settle allegations that they defrauded Medicare from 1995 to 2001. The Government alleged that Outreach Programs over-billed Medicare for physical, occupational, and speech therapy services it provided to patients. This *qui tam* action was filed by two whistleblowers in 2000. The FBI and HHS OIG investigated the matter.

Woodbine Healthcare and Rehabilitation Centre

In December 2002, DOJ announced that Woodbine Healthcare and Rehabilitation Centre had agreed to pay **$25,000** to settle allegations that it defrauded Medicare and Medicaid. The Government alleged that Woodbine, a Missouri-based nursing home, requested federal reimbursements for basic care that was not actually provided to its elderly residents. Special Assistant U.S. Attorney Andrew Lay represented the Government in this case. HHS OIG and the U.S. Postal Inspection Service investigated this matter.

TENTATIVE SETTLEMENT:

In re Columbia/HCA Healthcare Corp., No. 01-MS-50 (D.D.C.)

U.S. ex rel. Schilling v. Columbia/HCA, No. 99-3289 (D.D.C.)

U.S. ex rel. Alderson v. Columbia/HCA, No. 99-3290 (D.D.C.)

In December 2002, DOJ announced that HCA, formerly known as Columbia/HCA Healthcare Corporation, had agreed to a tentative understanding to pay more than **$880 million** to settle allegations of health care fraud. This amount includes $631 million in fines and penalties to resolve all outstanding civil litigation with the Justice Department and $250 million to be paid to the Medicare program to resolve expense claims. The Government alleged that HCA submitted false cost reports,

false management fees and marketing expenses from its wound-care centers, and that HCA paid illegal kickbacks for doctor referrals. If formally approved, this settlement, when added to prior civil and criminal settlements by HCA, would bring the Government's total recoveries to approximately $1.7 billion. Eight whistleblowers filed separate *qui tam* actions in this matter. John Schilling and James Alderson, represented by John Phillips of Phillips & Cohen L.L.P. (Washington, DC), filed suits related to the cost report fraud. The other firms representing the cost report whistleblowers are Heller Ehrman; Hennigan, Bennett & Dorman; Irell & Manella; Boies Schiller & Flexner LLP; and James, Hoyer, Newcomer & Simljanich.

TAF News

FCA Conference Materials

- As part of its information clearinghouse activities, TAF has materials available for distribution at conferences and other programs. Information can be tailored to a legal or general audience. Resource material, including statistical information, is also available for those writing articles on the FCA.

Qui Tam Practitioner Guide

- The *TAF Qui Tam Practitioner Guide: Evaluating and Filing a Case* can be ordered at no charge by phone, fax, or mail. This "how to" manual includes sections on evaluating the merits and viability of a case, pre-filing and practical considerations, and preparing and filing the complaint.

TAF on the Internet

- TAF's Internet presence is designed to educate the public and legal community about the False Claims Act and *qui tam.* TAF's site is located at http://www.taf.org.

Previous Publications

- Back issues of the *Quarterly Review* are available in hard copy as well as on TAF's Internet site.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). To discuss a potential article, please contact *Quarterly Review* Editor Bret Boyce.

Anniversary Reports and Video

- To mark the anniversary of the 1986 FCA Amendments, TAF has available a variety of resources including a Tenth Anniversary Report, an Assessment of Economic Impact, and an educational video highlighting the effectiveness of the Act. These materials are available at no charge.

Call for Experts and Investigators

- In response to inquiries, TAF is working to compile a list of experts and investigators across an array of substantive areas. Please contact TAF with any suggestions you may have.

Qui Tam Attorney Network

- TAF is continuing to build and facilitate an information network for *qui tam* attorneys. For an Attorney Network Application or a description of activities, please contact TAF. Be sure to ask about TAFNET, our electronic mail system for Attorney Network members.

TAF Library

- TAF's FCA library is open to the public, by appointment, during regular business hours. Submissions of case materials such as complaints, disclosure statements, briefs, and settlement agreements are appreciated.

Acknowledgments

- TAF thanks the Department of Justice and *qui tam* counsel for providing source materials.