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The *False Claims Act and Qui Tam Quarterly Review* is published by Taxpayers Against Fraud, The False Claims Act Legal Center (TAF). This publication provides an overview of major False Claims Act and *qui tam* developments including case decisions, Department of Justice interventions, and settlements.

TAF 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. TAF's mission is both activist and educational. Established in 1986, TAF serves to: (1) collect and evaluate evidence of fraud against the Federal Government and report such fraud through the filing of False Claims Act *qui tam* suits; (2) work in partnership with the Government to effectively prosecute *qui tam* suits; (3) inform and educate the general public, the legal community, and other interested groups about the False Claims Act and its *qui tam* provisions; and (4) advance public, legislative, and government support for *qui tam*.

TAF is based in Washington, D.C., where it maintains a comprehensive False Claims Act library for public use and a staff of lawyers and other professionals who are available to assist *qui tam* plaintiffs and counsel.

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Public Disclosure Bar and Original Source Exception

***U.S. ex rel. Kusner v. Osteopathic Medical Center of Philadelphia et al.*, 1996 WL 287259 (E.D. Pa. May 30, 1996)**

Adopting the 4th Circuit's definition of "based upon" as meaning "derived from," a Pennsylvania district court held that a *qui tam* suit was not "based upon" earlier publicly disclosed litigation between the relator and the defendant. According to the court, because the earlier suit was based upon the relator's privately obtained information, the *qui tam* action was not "based upon" the public disclosure of the allegations contained in that earlier suit. Instead, the *qui tam* action was "based upon" the information known to the relator before the earlier suit was filed.

David Kusner filed a *qui tam* action in 1988, five years after bringing a state court action against the same defendants. In 1989, the Government declined to intervene in Kusner's *qui tam* suit. Thereafter, he filed a motion to unseal the case, but, for unknown reasons, the court never ruled on this motion. Two years later, having assumed the record was unsealed, he served the complaint on all of the defendants. After the defendants failed to respond, Kusner obtained default judgments. However, he never moved for entry of default judgment against the defendants. In May 1995, Kusner obtained new counsel and, after the court conducted a search for the record, filed a motion to unseal the case and a motion to compel discovery. The defendants responded with a motion to dismiss for lack of jurisdiction and failure to prosecute.

Defining "Based Upon" as "Derived From" Is Consistent with Language and Intent of the Act

The court focused its jurisdictional inquiry on whether the *qui tam* action was "based upon" the allegations publicly disclosed in Kusner's earlier state court action against the same defendants. Noting that the 3rd Circuit has yet to define "based upon," the court looked to the differing approaches of the 2nd and 4th Circuits. The 2nd Circuit has held that "based upon" should be defined as "the same as." U.S. ex rel. Doe v. John Doe Corp., 960 F.2d 318,324 (2d Cir. 1992). The 4th Circuit, however, has ruled that "based upon" should be defined as "derived from." U.S. ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1348 (4th Cir.), cert. denied, 115 S.Ct. 316 (1994).

According to the court, the 4th Circuit's "derived from" definition in Siller "best matches both the language and intent" of the FCA's public disclosure bar. First, "derived from" is consistent with the dictionary definition of "base," defined as "to use as a base or basis for." Second, the court concluded that "the same as" definition adopted by the 2nd Circuit "is simply too broad." The 2nd Circuit's approach could deny jurisdiction even where the relator actually does not have knowledge of any previous public disclosures. This, in turn, could "frustrate the goal of encouraging suits based on private information while not aiding the goal of preventing people from turning public knowledge into private gain." In contrast, the "derived from" definition would grant jurisdiction in such a situation because the relator's suit would not be "based upon" public disclosures of which the relator had no knowledge, the court stated. This definition encourages relators to pursue *qui tam* suits "derived from privately obtained information," but still bars

them from "pursuing parasitic suits derived from previous public disclosures."

Applying this definition to the facts, the court found that Kusner's action was not based upon publicly disclosed allegations in his earlier civil suit, "but rather it is based upon the information known to Mr. Kusner before that suit was filed." However, the court denied the defendant's motion to dismiss without prejudice because it deemed the current record relatively undeveloped.

Dismissal Not Warranted When Relator's Service of Pleadings Did Not Frustrate Purpose of Seal Provision

The defendants also moved for dismissal because before the action was officially unsealed by the court, Kusner served the complaint, issued a subpoena, and served various motions. The court noted that the purpose of the seal period is to give the Government an opportunity to decide whether to intervene in an action before the defendant or public is made aware of the *qui tam* allegations. But because the FCA does not require dismissal with prejudice for a seal violation, and because in this case the provision's purpose was fulfilled (the Government had investigated and chosen not to intervene prior to any seal violations), the court held that dismissal was not warranted. Moreover, the defendants failed to show that they had been prejudiced in any way by violations of the seal.

Defendant Motions Concerning Delay in Prosecution Rejected

Finally, the court denied defendants' motion to dismiss for failure to pursue the FCA claim promptly. The court pointed out that Kusner appeared to have met the FCA requirements since he provided prompt notice to the Government of his *qui tam* suit. Likewise, the court denied motions to dismiss for lack of prosecution and laches. According to the court, while there was a history of dilatoriness on the part of the relator, such evidence pointed to only one of six relevant factors in determining lack of prosecution. Because the other factors were inconclusive or weighed against dismissal, the court concluded that it would be inappropriate to dismiss the complaint for lack of prosecution. The court also ruled that, given the FCA's statute of limitations and its lack of equitable remedies, the equitable doctrine of laches is not available in FCA cases.

U.S. ex rel. Devlin, Sidicane, and Kodman v. State of California et al., 84 F.3d 358 (9th Cir. May 24, 1996)

In a pro se case filed just days after publication of the fraud allegations in a news article, the 9th Circuit affirmed dismissal because the relators could not meet the FCA's original source exception to the public disclosure bar. The court found that, while they were a source for the news article, the relators, who had learned of the fraud from an employee of the defendant, did not have sufficient firsthand information to satisfy the "direct" knowledge prong of the original source definition.

The three relators alleged that the Social Services Department of Mariposa County (SSD) defrauded the Government by inflating client statistics in order to qualify for increased federal funding under various federal programs. Relators Kodman and Devlin learned of the alleged fraud from an SSD employee, William Cotey, who reportedly had participated in the fraud by falsifying records. Cotey did not join the relators in filing the suit. Devlin then made efforts to verify the fraud by contacting persons who told him that they did not receive services for which SSD allegedly billed the Government. Devlin and Cotey also told a

Mariposa Gazette reporter about the alleged fraud. The reporter then published an article in the Gazette describing the misconduct. Five days later, the relators filed this *qui tam* action.

Relators Not "Original Sources" Because Knowledge Not Direct

The only question before the court was whether the relators satisfied the FCA's "original source" requirements that are triggered when an action is based upon a public disclosure. *(The court appears to have assumed without analysis that the relators' complaint was "based upon" the publicly disclosed allegations.)* In determining whether the relators met the "original source" test, the court limited its analysis to whether the relators had "direct and independent" knowledge. The court concluded that they did not because they did not discover the information firsthand. The relators did not see the fraud through their own eyes or obtain their knowledge through their own labor unmediated by anything else, the court found. Instead, the relators learned of the fraud secondhand from Cotey.

Relators' Verification Efforts Added No Significant Information

The Court rejected relators' argument that their knowledge was direct because of their efforts to verify the accuracy of Cotey's information by contacting a list of persons who had not received the services allegedly billed for by SSD. While the court recognized that the relators took this action, it concluded that nothing significant was added to Cotey's information. According to the court, armed with all the information disclosed in the news article, anyone, including federal investigators, could have verified the information as Devlin had. Thus, Devlin's knowledge "did not make a genuinely valuable contribution to the exposure of the alleged fraud," the court stated.

***Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. Apr. 15, 1996)**

A lower court's dismissal of a reverse false claim *qui tam* suit alleging that the Sonoma County Water Agency (Water Agency) underpaid the U.S. Army Corps of Engineers (Corps) for dam construction work was affirmed by the 9th Circuit. First, the appellate court ruled that the district court properly dismissed on public disclosure grounds an allegation that the Water Agency violated the Water Supply Act (WSA) by contracting for a fixed repayment schedule. According to the 9th Circuit, this allegation was previously made in another public proceeding and the relator was not an original source. Second, while the relator was an original source with respect to a separate allegation of an improper cost allocation, the court ruled that the relator's evidence supporting that claim failed to establish an FCA violation. The appellate court found that the relator at most established improper management of the dam project by the Corps and, therefore, the district court had properly granted summary judgment.

Hagood, formerly an attorney for the Corps, filed this *qui tam* suit in March 1988. The instant decision reflects the case's second trip to the 9th Circuit. (The 9th Circuit previously reversed and remanded a district court dismissal for failure to state a claim under the FCA. U.S. ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991).)

The facts underlying the suit date back to 1962 when Congress authorized the Corps to construct the Warm Springs Dam (WSD) in California for the purposes of flood control, recreation, and water supply. Under the Water Supply Act, local interests that benefit from the water supply component of federal dam pro-

jects must shoulder the portion of the construction costs allocated to water supply. Accordingly, in 1964 the Water Agency signed a contract with the Corps in which it agreed to pay 30 percent of the dam construction costs. In the late 1960s, the Corps expanded the project and adjusted the cost allocation for water supply storage downward to 27.76 percent. In 1974, the GAO questioned continued use of these cost allocation figures and recommended a reallocation based on current information. Between 1974 and 1982, there was considerable confusion and dispute both inside and outside the Corps about the validity of the cost allocation for water supply and whether a new cost allocation was required. In 1982, the Corps negotiated an amended contract with the Water Agency to reflect the dam project's expansion, but did not revise the cost allocation. Hagood, who as Assistant District Counsel for the Corps was assigned to draft the amended contract, refused to do so believing that the WSA required a new cost allocation.

Between 1978 and 1982, there was also a dispute regarding the timing for the Water Agency to make its payments to the Government. Repayment ordinarily is tied to the local interest's actual use of the stored water. However, because the WSD was to be operated together with another nearby dam which would require periodic releases of water from the WSD's storage, the Water Agency was concerned that such releases would prematurely trigger repayment obligations. To avoid this, the Corps and Water Agency agreed to adopt fixed repayment schedule dates regardless of when actual use of the water occurred.

During this same period, the City of Ukiah challenged the Federal Energy Regulatory Commission's (FERC) granting of a permit to the Water Agency to control releases from WSD. Ukiah alleged in proceedings before the FERC, and then in a D.C. Circuit petition for review, that the fixed repayment schedule violated the WSA by decoupling commencement of repayment and actual first use of water.

Hagood Not an Original Source on Repayment Allegation Because No Evidence He Mentioned Allegation Prior to its Public Disclosure

On the fixed repayment schedule claim, the district court found that the allegation that a fixed repayment schedule violated the WSA was publicly disclosed in the litigation brought by the City of Ukiah. Hagood's appeal contended that the district court erred because, among other reasons, Ukiah did not actually allege fraud as he had.

The 9th Circuit found that there was a public disclosure during the Ukiah FERC proceedings of allegations that the fixed repayment schedule violated the WSA. According to the court, Ukiah "all but accused the Water Agency of fraud in its letters to the Corps, which it also filed with the FERC." Moreover, Ukiah's allegations were further disclosed in a petition that Ukiah filed with the D.C. Circuit after losing in the FERC proceedings. "An issue need not be decided in prior litigation for the public disclosure bar to be triggered; rather its mere disclosure suffices," stated the court.

The court further found that Hagood failed to satisfy the "original source" exception to the public disclosure bar because he failed to show that Ukiah's knowledge or allegations concerning the repayment schedule came from him. In fact, complaints by Hagood in 1981 and 1982 did not mention the fixed repayment schedule issue, according to the court. Thus, Hagood failed to "have had a hand in the public disclosure of allegations that are part of one's suit," which, the court concluded, is required in order to qualify as an original source.

Furthermore, the 9th Circuit was not persuaded by Hagood's assertion that his allegations

could not have been publicly disclosed in the Ukiah proceedings because they involved factual predicates that did not arise until 1987 when the Water Agency actually began using the water. According to the court, the public knew in 1982 that the amended contract might allow the Agency to begin using water without initiating repayment so that Hagood's new factual assertion when "'fairly characterized' . . . repeats what the public already knows." The court also found that Hagood's allegation of improper political pressure, like the "actual use" claim, rested on the same foundation as his main allegation that the fixed repayment schedule violated the WSA. Since that allegation was already found to be barred by FCA §3730(e)(4), the court ruled that the political pressure allegation was also barred.

Hagood Is an Original Source on Cost Allocation Allegation Because He Assisted Public Disclosure

On the other hand, the court found that Hagood was an original source of the cost allocation allegation. Although that too was raised by Ukiah in litigation, it was not done so until after Hagood complained about the issue in 1981. Moreover, Hagood had "direct and independent knowledge" because he worked on the WSD project. The court also found that Hagood voluntarily provided the information when he provided his superiors with a memo as to why he thought a new cost allocation was required. Although other employees had lodged the same complaint, the court ruled that the original source test is met by "anyone who helped to report the allegation to the government or the media," since they have "indirectly helped to publicly disclose it."

Imprecision, But Not Falsity

Having established jurisdiction over the cost allocation allegation, the court then addressed its merits. According to the court, the gist of Hagood's cost allocation claim was that the Water Agency induced the Corps to rely on information which the Water Agency had reason to know was false. Hagood's contention regarding falsity was twofold. First, the 1982 cost allocation was based on the same source data as the 1964 cost allocation despite the project's expansion. Second, the original allocation was based on a 10-year deferral of water supply benefits, thus a 10-year discounting, whereas the amended contract was based on an 8-year deferral; therefore, the percentage of costs allocated to water supply should have been higher. The court found that Hagood's evidence merely supported an inference that the allocation was imprecise, but not that it was false. The issue of how precise and how current the cost allocation needed to be was a disputed legal issue within the Corps. Even viewing it in the most favorable light, Hagood's evidence was not enough to support a reasonable inference that the allocation was false within the meaning of the FCA, the court concluded.

Taking Advantage of Disputed Legal Question Does Not Constitute Knowledge of Falsity

Moreover, the court ruled that Hagood's evidence failed to meet the FCA's knowledge standard. Taking advantage of a disputed legal question is neither acting in deliberate ignorance nor reckless disregard of the truth of the information, the court found. The evidence indicated that "the Water Agency did merely what the Corps bid it do." This did "not support a reasonable inference that the Water Agency caused the Corps to rely on such information as was before it to make the decisions it made." Paraphrasing its holding in U.S. ex rel. Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992), the court found that "'known to be false' does not mean incorrect as a matter of proper accounting methods, it means a lie."

Finally, the court found that evidence of political pressure used to obtain the contract's approval, even if true, did not make the contract false within the meaning of the FCA. In sum, the court concluded, Hagood produced persuasive evidence that the Corps "may have been wasteful, or too eager to build the dam, or been given too much discretion by the statutes governing its operations." This, however, did not establish that the Water Agency violated the FCA.

Primary Jurisdiction/Exhaustion of Administrative Remedies

***Luckey v. Baxter Healthcare Corp.*, Memorandum Opinion and Order, No. 95 C 509 (N.D. Ill. May 9, 1996)**

Neither primary jurisdiction nor exhaustion of administrative remedies called for dismissal of an FCA case involving alleged false certifications to the Government in connection with testing for contamination of plasma products, ruled an Illinois district court. In addition, the court found that the relator's investigatory activities preceding litigation were protected by §3730(h).

Joan Luckey filed a two-count complaint against her former employer, Baxter Healthcare Corp. (Baxter), alleging violations of the FCA and retaliatory discharge under §3730(h). The allegations involved Baxter's production and sale of plasma products to the Government for Medicare and Medicaid patients and for Veterans' and other hospitals. According to the complaint,all plasma must be tested for contaminants before being pooled to form plasma products. Plasma can potentially carry bacterial and viral contaminants including HIV and Hepatitis C. The contaminant tests can be inaccurate, however, in the presence of saline. Baxter allegedly knew that the plasma collection procedures at its donor centers were not preventing saline contamination, but took no appropriate remedial measures. Baxter falsely guaranteed to the Government that its plasma products were adequately and effectively tested for contaminants, the complaint alleged.

Luckey became aware of the facts underlying her complaint during her employment with Baxter and notified her immediate supervisor and/or fellow employees. According to her complaint, she was harassed, threatened, and intimidated so that she would be discouraged from investigating and reporting the issue. In April 1995, she was discharged in retaliation for her efforts. Shortly thereafter, she filed a *qui tam* suit.

Baxter moved to dismiss the *qui tam* action on several grounds and urged the court to refer the case to the Food and Drug Administration (FDA) under the primary jurisdiction doctrine. The Government declined to intervene in the *qui tam* action but filed an amicus brief opposing Baxter's motion to dismiss. The court denied Baxter's motion to dismiss in its entirety.

Primary Jurisdiction Not Invoked to Obtain FDA Input

Baxter moved to dismiss Luckey's case on the ground that it involved a "technical disagreement" over plasma screening methods which the FDA was better equipped to handle. In analyzing Baxter's argument, the court noted that primary jurisdiction promotes proper relationships between courts and administrative agencies. Thus, if a case requires the resolution of an issue that a regulatory scheme places in the sphere of an administrative body, the court has the discretion to suspend proceedings until the agency acts or to dismiss the case without prejudice. Factors that can assist the court in making this determination include promoting consistency and uniformity, placing

complex issues in the forum with the expertise to handle them, and serving judicial economy. Each case must be evaluated on its own facts as no formula exists to mandate the result.

The court agreed with the Government and Luckey that it was not appropriate to invoke primary jurisdiction in this case. First, the FDA has no jurisdiction or special expertise to adjudicate or provide relief for an FCA action. Instead, the district court "is the only forum with jurisdiction to decide a false claims action and to provide the compensatory and treble damages" sought by the complaint. Moreover, the Government did not exercise its prerogative under the FCA to move the case to the FDA or to dismiss it altogether, showing that the Government saw no need for judicial deference. The court noted that although the case will necessarily involve technical questions regarding the quality of plasma testing procedures and products, it is no different from the many tort actions that regularly require the court to resolve complex technical issues. The court, however, added an assurance that it would seek expert input as necessary, including any input offered by the FDA, on technical issues the case raised.

No Need to Exhaust Administrative Remedies

Baxter also urged that the FDA should decide the scientific and technical questions in the case before the court took further action. The court dismissed this argument for many of the same reasons it dismissed Baxter's primary jurisdiction argument.

The court likened the doctrine of exhaustion of administrative remedies to the doctrine of primary jurisdiction, finding that both are designed to promote proper relationships between the courts and administrative bodies. Repeating its conclusion that the FDA has no power to decide the material issues in the case nor to grant Luckey the relief she sought, the court found no reason to require exhaustion and denied Baxter's motion.

Section 3730(h) Covers Investigatory Activities Preceding Litigation

Baxter sought to dismiss Luckey's retaliation count for failure to state a claim, arguing that her investigatory activities were not performed in furtherance of an FCA action. Instead, according to Baxter, Luckey simply uncovered a disagreement about Baxter's choice between technological alternatives for detecting saline in plasma samples. The court rejected Baxter's "deft" reframing of Luckey's complaint and found a sufficiently alleged retaliatory discharge count.

The court cited Neal v. Honeywell, Inc., 33 F.3d 860 (7th Cir. 1994), as controlling precedent in the 7th Circuit. Neal states that §3730(h) protects those who assist in the discovery and prosecution of fraud and covers their investigatory activities preceding litigation. Reading the complaint in the light most favorable to Luckey, the court found that she alleged that Baxter knowingly and intentionally sold plasma products to the Government that did not meet its guarantees. As such, her investigations leading to those FCA allegations were protected as lawful acts done in furtherance of an FCA case.

Related Litigation/Discoverability of Disclosure Statement

***U.S. ex rel. O'Keefe v. McDonnell Douglas Corporation*, 918 F. Supp. 1338 (E.D. Mo. Mar. 20, 1996)**

A Missouri district court ruled that the existence of related litigation in the Court of Federal Claims did not require dismissal of an FCA case against McDonnell Douglas

Corporation. The court also ruled that the relator could continue to pursue claims that the Government did not adopt when it ggggggghghhhhhhhintervened, but that the relator must produce his written disclosure statement for the defendant.

In 1988, the U.S. Navy awarded McDonnell Douglas Corporation (MDC) and General Dynamics Corporation (GDC) a contract for the full scale engineering development of the Advanced Tactical Aircraft (A-12) with a target price of just over $4.3 billion. The Navy terminated the contract in 1991 for default based on the contractors' failure to make progress within the contract schedule and in accordance with contract specifications. The termination for default was subsequently converted into a termination for convenience following litigation in the Court of Federal Claims.

In 1993, Daniel O'Keefe filed a *qui tam* action alleging that MDC improperly billed labor costs to various Department of Defense contracts. In August 1995, the Government intervened and adopted some, but not all, of O'Keefe's allegations. The Government alleged that MDC intentionally inflated the estimated labor costs of the A-12 contract by about $11 million. It further alleged that MDC charged labor hours to the A-12 and other contracts that had actually been worked on other projects.

Judicial Estoppel and Federal Comity Do Not Apply

MDC contended that the Government's complaint should be dismissed on judicial estoppel and federal comity grounds. The basis for its argument was a 1991 claim filed by MDC and GDC in the Court of Federal Claims under the Contract Disputes Act. That court found that the Government had not properly terminated the contract for default and converted the termination into one for convenience, thereby permitting MDC and GDC to recover certain termination costs.

Regarding MDC's claim of judicial estoppel, the court determined that the issue in the Court of Federal Claims was different from the Government's claim in the district court that MDC behaved fraudulently. As such, it ruled that the Government did not abandon its FCA claim and rejected MDC's judicial estoppel argument.

The court defined "federal comity" as a doctrine that permits a court to decline jurisdiction over an action when a complaint involving the same parties and issues is already filed in another district. The "first to file" rule gives the first court in which jurisdiction attaches priority to consider the case. Since the legal issues pending before the Court of Federal Claims and the district court were different, the district court rejected MDC's federal comity argument as well.

Written Disclosure Statement Is Work Product, But Discoverable Under Undue Hardship Standard

MDC also filed a motion to compel production of the written disclosure statement required by FCA §3730(b)(2). The court found that the FCA does not address whether the written disclosure statement is discoverable. Absent statutory direction, the court applied the Federal Rules of Civil Procedure to MDC's motion. MDC cited F.R.C.P. 26(b)(1) (all nonprivileged and relevant matters are discoverable) as compelling production. The relator claimed that the written disclosure was protected from discovery under the work product privilege. The court agreed with the relator, reasoning that the statement was prepared in anticipation of litigation.

The court stated, however, that MDC could nevertheless obtain the document if it showed substantial need and undue hardship under F.R.C.P. 26(b)(3). According to the court, the document would assist MDC in understanding

the allegations against it, and it would be unduly burdensome to require MDC to reconstruct the document's contents through interrogatories, document requests, and depositions. Therefore, the motion to compel was granted by the court.

Relator Permitted to Pursue Claims Declined by the Government

Finally, the court ruled on relator's request that MDC be ordered to answer three counts that the Government did not adopt when it intervened. These counts related to: false claims submitted by MDC with regard to "unverified" materials used in MDC's work on government contracts; retaliatory discharge claims; and the intentional infliction of emotional distress. The Government did not object to the relator pursuing these claims.

The court found that the FCA does not remove the relator from a case upon the Government's intervention, and that nothing in the FCA prevents the relator from pursuing his claims. Although the Government may petition the court to limit the relator's role in the litigation, it did not do so in this case. Thus, the court ruled that O'Keefe could pursue his claims by filing an amended complaint.

Retroactivity

U.S. ex rel. Hyatt and King v. Northrop Corp., 80 F.3d 1425 (9th Cir. Apr. 11, 1996)

In a *qui tam* action that was filed prior to the 1986 FCA amendments, the 9th Circuit held that the 1986 §3730(e)(4) jurisdictional provision applied because it did not have "retroactive effect" on the defendant. Recognizing that each provision of a statute should undergo a separate and independent retroactivity analysis, the appellate court reached a different conclusion with respect to whether the 1986 §3730(b)(2) filing and service requirements applied. Because the filing and service requirements would impose new duties on the relator with respect to a complaint already filed, the relator could not be held to those requirements. Finally, the court held that the relator's §3730(h) retaliation claim would have "retroactive effect" and therefore must be dismissed. In short, the addition of §3730(h) in 1986 created a new cause of action and thus imposed new duties on the defendant for actions already taken.

Hyatt, a former Northrop employee, sued Northrop under the *qui tam* provisions just prior to the enactment of the 1986 FCA amendments. The Government declined to intervene and requested that the court dismiss the case pursuant to the pre-1986 "prior government knowledge" jurisdictional bar. The district court dismissed Hyatt's case, holding that the Government had prior knowledge of the information underlying the claim and that the 1986 amendments did not apply retrospectively. In 1987, Hyatt brought another action adding a §3730(h) retaliation claim, but it too was dismissed by the court, which held that §3730(h) did not apply to Northrop's termination of Hyatt because it took place before the new law was in effect.

1986 Jurisdictional Provision Does Not Have "Retroactive Effect" Under Landgraf Analysis

In keeping with its recent decisions on retroactivity, the 9th Circuit applied the "retroactivity" test established by the Supreme Court in Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994). Under Landgraf, the court must first determine whether Congress has expressly prescribed the statute's proper reach. If Congress

has not demonstrated its intent, then the court determines whether application of the amendment will have "retroactive effect," i.e., will impair substantive rights existing at the time of the conduct, increase liability for past conduct, or impose new duties upon completed transactions. If it will, the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."

The court summarized its recent FCA retroactivity decisions as making it clear that the 1986 §3730(e)(4) jurisdictional provision does not have "retroactive effect." In both U.S. ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402 (9th Cir. 1995), 3 TAF QR 7 (Oct. 1995), and U.S. ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995), 3 TAF QR 4 (Oct. 1995), the court rejected the defendants' argument that the pre-1986 government notice jurisdictional bar is an absolute defense that would be improperly eliminated by application of the 1986 provision. In both cases the 9th Circuit held that the jurisdictional provision as amended did not "infringe on substantive rights of the defendant" and, therefore, did not rebut the presumption that jurisdictional provisions will be applied retrospectively.

1986 Filing and Service Requirements Would Have "Retroactive Effect" on the Relator

Since the instant case was different than Lindenthal and Schumer in that Hyatt had filed his suit prior to the enactment of the 1986 amendments, the 9th Circuit addressed whether this factual distinction compelled a different outcome. First, the court recognized that the 1986 addition of §3730(b)(2), with its specific requirements regarding filing under seal and service of a written disclosure statement, did not exist at the time Hyatt filed his suit. Under Landgraf, Hyatt's failure to comply with the provision would have "retroactive effect" by imposing new duties concerning a complaint already filed. Thus, the court held that §3730(b)(2) could not be applied retrospectively to Hyatt's complaint.

However, this did not end the inquiry. The court then addressed whether application of the 1986 jurisdictional provision was barred by the determination that §3730(b)(2) could not be applied. According to the court, Landgraf instructed that statutes were not to be analyzed on an all or nothing basis. Rather, each provision has to be considered separately in light of the Landgraf factors. Indeed, in Lindenthal the 9th Circuit emphasized that its holding applied only to the jurisdictional provision and that a "finding that one provision could be applied retrospectively did not bar a finding that another provision could not." Since its analysis of the jurisdictional provision was not controlled by its determination that §3730(b)(2) did not apply, the court here held that, based on its decision in Schumer, the 1986 jurisdictional provision properly applied in this case.

§3730(h) Retaliation Claim Cannot Be Applied Retrospectively

In contrast to the jurisdictional provision, the 9th Circuit found that Hyatt could not maintain his retaliation claim based on pre-1986 conduct. The appellate court agreed with the district court that the addition of §3730(h) in 1986 "created a new federal cause of action, or a new federal substantive right. . . ." This provision "did not merely expand the remedies available for actions that were already unlawful; instead, it defined additional conduct as unlawful (i.e., retaliatory discharge), and provided a remedy to a party aggrieved by such conduct." According to the court, Northrop's actions at that time were technically "innocent" in the eyes of the federal law. To apply §3730(h) retrospectively would run afoul of Landgraf by impairing Northrop's rights when it acted,increasing its liability for past conduct,

and imposing new duties on Northrop for actions already taken. Accordingly, the 9th Circuit affirmed the district court's holding that §3730(h) could not be applied retrospectively to Northrop's termination of Hyatt.

Section 3730(h) Retaliation Claims

***Field v. F&B Manufacturing Co.*, Memorandum Opinion and Order, No. 94 C 5379 (N.D. Ill. May 6, 1996)**

An Illinois district court ruled that a potential relator who was fired after alleging improper welding procedures by his employer may pursue a retaliation claim under FCA §3730(h), even if no actual FCA violation occurred. According to the court, the pivotal issue is whether the relator had a reasonable basis for his allegations given the information he knew at the time he notified his employer of the allegations. Later investigations revealing the absence of fraud have no bearing on the §3730(h) action.

Alan Field sued his former employer, F&B Manufacturing Co. (F&B), a supplier of industrial components for defense contracts, claiming retaliatory dismissal under §3730(h) of the FCA. As a welder for F&B, Field was responsible for assisting in and supervising the welding of a part supplied to General Electric (GE) for use in afterburner assemblies of Navy jet engines. Part of the manufacturing process included cleaning the parts prior to welding. The exact cleaning requirements were central to the dispute between Field and F&B.

Field contended that F&B failed to clean the parts as required by F&B's internal specifications and in violation of GE's production requirements. According to Field, F&B supervisors instructed him only to clean the parts according to those standards when GE officials were at the plant supervising the manufacturing. After Field complained to plant supervisors about the alleged cleaning failures, Field was terminated. F&B stated on Field's termination form that he was fired for "causing problems by spreading false accusations" about F&B's failure to follow certain welding practices. A few months after Field was fired, GE conducted an investigation and found that only a few parts failed testing and that there were no intentional procedure violations or shipments of nonconforming hardware. F&B moved for summary judgment, claiming that since there was no FCA violation, Field was not engaged in protected activity under the Act.

Elements of Retaliatory Discharge

Citing recent precedent, the court found three elements necessary for a successful §3730(h) retaliatory discharge claim: engaging in conduct protected under the statute; corporate awareness of the conduct; and termination in retaliation for the conduct. According to the court, there appeared to be little doubt that Field could meet the last two elements. The disagreement occurred with respect to whether Field's behavior was protected under the FCA even though no FCA litigation ensued and there existed some evidence that there may not have been an FCA violation.

The court pointed out that the FCA protections apply to activities related to "an action filed or to be filed" under the FCA. Citing Neal v. Honeywell, 33 F.3d 860 (7th Cir. 1994), the court noted that filing an action under the FCA is not a necessary prerequisite to protection. According to the court, a "better understanding is that 'to be filed' limits coverage to situations in which litigation could be filed legitimately -- that is, consistently with Fed.R.Civ.P. 11." Under that rule, while §3730(h) is liberally construed, it does not protect an employee who fabricates a fraud claim or has no reasonable basis for a fraud claim.

Field's Fraud Allegation Was Reasonable, Albeit Not Ultimately Fileable

In determining whether Field's fraud allegations were "reasonable," the court looked only to the information Field had at the time he made the allegations. Again, citing Neal, the court pointed out that §3730(h) must be read as linking protection to events as they were understood at the time of the investigation of the employee's allegations. Therefore, the court ruled that later investigations revealing the absence of fraud were "of no import" in its analysis of the reasonableness of Field's allegations.

Measuring the information Field had when he first complained by the "reasonableness" standard, the court found that genuine issues of material fact precluded summary judgment. According to the court, the fact that Field allegedly was instructed to follow more elaborate cleaning procedures only when GE personnel were present might, by itself, lead a reasonable employee to believe that something "fishy" was afoot. Additionally, Field's belief that certain unperformed cleaning procedures were required could be reasonable in light of other evidence, including the admission by Field's most recent supervisor that he also would have cleaned the parts with the same technique as Field. Therefore, the court ruled, a jury could conclude that Field had reasonable cause for suspicion and for initiating an inquiry into F&B's potentially fraudulent conduct.

Definition of "Claim"

U.S. ex rel. Alexander v. Dyncorp, Inc. et al., 924 F. Supp. 292 (D.D.C. Apr. 30, 1996)

Three of the four counts in a *qui tam* complaint -- filed by a losing bidder against a competitor that was awarded a Department of Justice (DOJ) support services contract -- met the statutory definition of "claim" under the FCA, according to a D.C. district court. With respect to one of the counts which alleged that the defendant lied in its contract proposal,the court found that if the defendant had obtained its contract fraudulently, then all claims submitted under the contract would be fraudulent. Nevertheless, the court dismissed all counts, invoking the FCA §3730(e)(4) public disclosure bar, the FCA §3730(e)(3) jurisdictional bar, and F.R.C.P. 9(b).

Relator Florence Alexander, d/b/a Ebon Research Systems (Ebon), unsuccessfully bid on a contract for the performance of administrative support services in connection with the DOJ's Asset Forfeiture Program. The DOJ support services contract was awarded to Dyncorp, Inc. On January 28, 1994, the relator filed suit in federal court against the DOJ, Dyncorp, and several individuals alleging various constitutional and statutory violations (Ebon I). On January 31,1994, the relator filed a four-count *qui tam* suit against Dyncorp and three individuals alleging: violations of the FCA for submitting false statements in connection with the DOJ support services solicitation (Count I); false information to the DOJ to obtain unauthorized funds under the support services contract in the form of a revised wage determination and false invoices for work not actually performed (Count II); false invoices and billing statements to the Army in connection with work on a Fort Belvoir base maintenance contract (Count III); and false annual and interim reports to the Securities and Exchange Commission (SEC) (Count IV). The Government declined to intervene in the *qui tam* action. The defendants moved to dismiss on a number of grounds.

Failure to Set Forth a "Claim"

After finding as a preliminary matter that dismissal for lack of personal jurisdiction was

inappropriate, the court turned to the defendants' argument for dismissal of Counts I, II, and IV for failure to set forth a "claim" as defined under the FCA.

The court rejected defendants' contention that Counts I and II of the complaint failed to meet the statutory definition of "claim." The court cited Supreme Court precedent for the principle that "claims for payment submitted to the government pursuant to a fraudulently obtained contract violate the FCA, even if the claims themselves do not contain false statements." Accordingly, regarding Count I the court concluded: "If Dyncorp obtained the 1993 Contract fraudulently, then all claims submitted under the contract are fraudulent." With respect to Count II, the court found that "submission of false information which resulted in the issuance of new Wage Determinations, then incorporated into the Contract, would have the effect of causing the government to pay out money which it would not otherwise have paid."

On the other hand, the court dismissed Count IV (regarding the SEC reports) for failing to meet the "claim" requirement. The allegedly false SEC reports were relied upon by private investors in deciding to give Dyncorp money for stock and investments. But the court found that there had not been any "request or demand upon the United States for money."

Public Disclosure Bar

The court next addressed whether the remaining Counts I, II, and III were jurisdictionally barred under FCA §3730(e)(4). The court set forth the "two-part framework" for determining whether §3730(e)(4) applied to the relator's claims, explaining the §3730(e)(4)(A) test as follows:

> The initial "public disclosure" prong of the two-part test includes two elements: (1) "publicly disclosed," and (2) "based upon transactions and allegations." Courts have broadly interpreted the term "publicly disclosed." . . . However, judicial interpretation of the term "transaction or allegation" is less straightforward. . . . In deciding whether the information conveyed to the court is "based upon a publicly disclosed allegation or transaction," the question is whether the 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...." (quoting Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668, 674 (9th Cir. 1978)). *(Editor's Note: Pettis relates to the pre-1986 government knowledge bar, not the current public disclosure bar.)*

The court explained the §3730(e)(4)(B) "original source" exception to the bar against "publicly disclosed" claims as follows:

> In order to be an "original source," the *qui tam* plaintiff must have both "direct and independent knowledge of the information on which the allegations are based." Courts have interpreted "direct" knowledge as "marked by the absence of an intervening agency." "Independent" knowledge is knowledge that is not "itself dependent on the public disclosure." . . . [I]t is sufficient for plaintiff to have "direct and independent knowledge of any essential element of the underlying fraud transaction."

Applying these standards, the court found that three of the four Count I allegations were "publicly disclosed." Moreover, "[a]ll three allegations fail to satisfy the 'original source' exception, because the nature of the allegations eliminates the possibility that plaintiff obtained her information 'directly.'" For example, the relator's information would have to have been derived from court records or

agency hearing records. However, the court found that the allegation involving the defendants' alleged false representations that they did not use former Ebon employees to help prepare their proposal was not "publicly disclosed."

As with Count I, the court found that some Count II allegations failed the two-part §3730(e)(4) test, while others had not been "publicly disclosed." The court found that Count III was based upon an article published in the Washington Post regarding an FBI investigation into Dyncorp's performance of a contract at Fort Belvior. Count III failed the public disclosure test altogether, warranting dismissal in full.

Section 3730(e)(3) Jurisdictional Bar

The court then ruled that the allegations in Alexander's *qui tam* complaint that were previously set forth in her federal lawsuit against the DOJ (Ebon I) should be dismissed pursuant to FCA §3730(e)(3), which provides: "In no event may a person bring [a *qui tam* action] which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." This left only one *qui tam* allegation still surviving.

Rule 9(b)

The court dismissed this final allegation -- that defendants submitted false invoices and billing statements to the DOJ for legal technician and supervisor positions which were not filled by such employees -- pursuant to F.R.C.P. 9(b) for failure to plead with particularity. (The court stated that it was treating the failure to plead with particularity as a ground for dismissal for failure to state a claim upon which relief can be granted.) The court asserted that Alexander's complaint failed to provide the dates on which the alleged false invoices were submitted, invoice numbers, the identity of employees responsible for the invoices, and any facts from which one could infer a knowing violation on the part of the defendants. Moreover, Rule 9(b) "discourages 'the initiation of suits brought solely for their nuisance value' and protects defendants from 'frivolous accusations of moral turpitude.'" The court concluded: "Given that plaintiff has filed a lengthy complaint with seemingly overlapping and duplicative allegations, the Court looks to the purpose behind Rule 9(b) and dismisses the remaining allegation . . . ."

Service Contract Act Violations

***U.S. ex rel. Sutton v. Double Day Office Services, Inc. et al.*, 1996 WL 207766 (N.D. Cal. Apr. 23, 1996)**

A California district court dismissed a furniture mover's *qui tam* suit against his former employer, ruling that he did not have standing to bring a False Claims Act suit exclusively based upon violations of the McNamara-O'Hara Service Contract Act (SCA). The court reasoned that the SCA restricts employee remedies to administrative channels, and permitting the relator "to enforce the SCA through a FCA suit . . . would destroy the administrative scheme established by the SCA and negate the congressional intent to delegate such matters to the Department of Labor."

In May 1992, Richard Sutton filed a *qui tam* complaint against his former employer, Double Day Office Services, Inc. (Double Day), as well as various officers and employees of Double Day, alleging false claims arising from Double Day's underpayment of prevailing wages in violation of the SCA. (As stated by the court, "[t]he purpose of the SCA is to ensure that service employees working on government contracts are not paid wages or benefits below prevailing wages and benefits being

paid in the locality by non-government contractors.") Double Day was required to pay its employees SCA prevailing wages under its contracts to provide moving and storage services to various federal agencies. Sutton, a furniture mover and packer, alleged that Double Day did not pay him and other employees the mandated prevailing wages and falsely represented to the Government that it had.

In November 1992, the Government declined to intervene in the case. In January 1994, noting the inactivity of the case file since the filing of the complaint, the district court required Sutton to show cause why the action should not be dismissed pursuant to F.R.C.P. 41(b) for failure to prosecute. In March 1996, the court again ordered Sutton to show cause why the action should not be dismissed pursuant to Rule 41(b) "based on plaintiff's long history of dilatory conduct and inability to proceed to trial as scheduled." Also before the court was defendants' F.R.C.P. 12(b)(6) motion to dismiss the action for lack of standing, "contending that the facts alleged in the purported FCA action fall within the provisions of the SCA, and that the administrative remedy provided by the SCA is an exclusive one, thereby barring any private civil action."

SCA's Exclusive Administrative Remedy Bars Any Private Right of Action

According to the district court, "[i]t is well established that the SCA does not confer a private right of action, but rather provides the Secretary of Labor with the exclusive right of administrative enforcement." While the SCA "authorizes a limited governmental cause of action for underpayment," under 9th Circuit law "it is settled that a plaintiff does not have standing to enforce violations of the SCA." The court characterized the 9th Circuit's reasoning in Miscellaneous Service Workers, etc. v. Philco-Ford Corp., 661 F.2d 776 (9th Cir. 1981) as follows: "To imply a private right of action under the [SCA] would undercut the specific remedy prescribed by Congress; what plaintiff will pursue his administrative remedies under the Act where more direct and expeditious relief is available in a private suit?"

The court noted that Sutton "concedes that the 'false claims' alleged in his complaint arise from the underpayment of prevailing wages and are thus violations of the SCA." And, relying on Miscellaneous Service Workers, the court rejected Sutton's argument that it was irrelevant whether the acts forming the basis for his alleged FCA violations also formed the basis for the SCA violations.

The court cited the reasoning of the D.C. Circuit in Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220 (D.C. Cir. 1991), which relied on Miscellaneous Service Workers, as "applicable to the instant action because plaintiff seeks a remedy outside of that provided by the SCA." The Danielsen court held that the plaintiff did not have standing to bring an action under the Racketeer Influenced and Corrupt Organizations Act (RICO) for alleged violations of the SCA. According to the Sutton court, just as with RICO, "[r]elief under the FCA is both more expeditious and more lucrative." Permitting Sutton "[t]o frame the action in terms of the FCA rather than the SCA would allow plaintiff to receive greater relief than Congress intended for violations of the SCA."

Court Distinguishes SCA From Other Statutes That Do Not Restrict Remedies

The court noted that Sutton failed to address Danielsen and instead relied "on a series of cases that hold that violations of certain statutes were enforceable through the mechanism of the FCA." The FCA cases cited by Sutton involved violations of the Environmental Protection Act, the Anti-Kickback Act, and the Fair Housing Act. According to the court, reliance on those cases was misplaced because "[those] statutes,

unlike the SCA, do not provide for exclusive administrative enforcement."

The court concluded: "Although couched in terms of the FCA, the gravamen of plaintiff's claims is a violation of the SCA. Plaintiff has no private right of action under the SCA; accordingly, plaintiff has no standing to bring the present action." Therefore, noted the court, the issue of whether the action should be dismissed for failure to prosecute did not need to be addressed.

Relator Ability to Compel DOT Employee Testimony

***U.S. ex rel. Lamers v. City of Green Bay*, 924 F. Supp. 96 (E.D. Wisc. Apr. 29, 1996)**

A Wisconsin district court ruled that a relator who served a subpoena on a Department of Transportation (DOT) employee must comply with DOT regulations concerning legal proceedings between private litigants, rather than those concerning legal proceedings in which the Government is a party. The court rejected the relator's argument that, because the Government is the real party in interest in a *qui tam* action, the relator need not comply with the private litigant regulations.

Allen Lamers' *qui tam* suit alleged that the City of Green Bay had committed fraud in connection with its receipt of funds from the Federal Transit Administration (FTA) for school bus services. Having earlier declined to intervene in the suit, the Government moved to quash a deposition subpoena served by Lamers on the Regional Counsel for the FTA (a branch of the DOT), Dorval Carter. Carter was responsible for investigating allegations in an administrative complaint prompted by Lamars through his company, Lamars Bus Line. The Government further moved for a protective order limiting the relator and the defendant to using joint interrogatories to obtain evidence from Carter and precluding them from seeking expert testimony from him.

According to the district court, a federal employee cannot be compelled to obey a subpoena that acts against valid agency regulations. The DOT has regulations governing the testimony of employees in legal proceedings in which the Government is a party and also in legal proceedings between private litigants. The purposes of these regulations include conserving the time of employees for conducting official business and protecting confidential, sensitive information and the deliberative process of the agency.

Private Litigant Regulations Apply Even Though Government is Real Party in Interest

Lamers argued that he need not comply with DOT's regulations concerning legal proceedings between private litigants because, even though the Government declined to intervene in his case, the Government was the real party in interest. Rejecting this argument, the district court asserted that "the relator has clearly confused the distinction between the United States being a party versus the United States being the real party in interest." According to the court, "it does not follow that because the relator is suing in the name of the United States that his counsel represents the United States . . . . The [FCA] empowers the *qui tam* relator to act as a private prosecutor but does not empower it to replace the government."

The court ruled that the relator had to comply with the DOT regulations concerning private litigants, and the Government's motions to quash the subpoena and for a protective order were granted.

SPOTLIGHT

The Federal False Claims Act As a Remedy to Poor Care

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On February 21, 1996, a civil complaint was filed by the United States of America, in the Eastern District of Pennsylvania, against the owner (Tucker House II, Inc.) and former manager (GMS Management-Tucker, Inc.) of Tucker House Nursing Home (United States v. GMS Management-Tucker, Inc. et al., No. 96-1271 (E.D. Pa. 1996)), a 180-bed nursing facility located in Philadelphia, Pennsylvania. The complaint alleged the inadequate provision of nutrition and wound care to three former residents of Tucker House Nursing Home. For the first time, the Government invoked the Federal False Claims Act (the "FCA") in conjunction with the Nursing Home Reform Act to remedy the provision of inadequate care that was paid for by government funds. The result was a $600,000 settlement that included consent orders aimed at ensuring adequate care in the future.

Background

On October 1, 1990, the Nursing Home Reform Act (the "Act") took effect and mandated that nursing facilities comply with federal requirements relating to the provision of services. 42 U.S.C. §1396r(b). Specifically, in terms of the quality of life for residents of nursing facilities, the Act states: "A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." 42 U.S.C. §1396r(b)(1)(A).

Additionally, the Act mandates that a nursing facility "provide services and activities to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident in accordance with a written plan of care which-- (A) describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met; . . . ." 42 U.S.C. §1396r(b)(2)(A).

The Act places a legal duty on the nursing facility to fulfill the residents' care plans by providing, or arranging for the provision of, inter alia, nursing and related services and medically-related social services that attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, pharmaceutical services and dietary services that assure that the meals meet the daily nutritional and special dietary needs of each resident. 42 U.S.C. §1396r(4)(A)(i-iv).

Moreover, the Social Security Act mandates that skilled nursing facilities that participate in the Medicare Program and nursing facilities that participate in the Medical Assistance

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[1] The opinions expressed herein do not represent the position of the United States Department of Justice and are solely those of the author.

Program, also known as Medicaid, meet certain specific requirements in order to qualify for such participation. These requirements are set forth at 42 C.F.R. §483.1 et seq. and "serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." 42 C.F.R. §483.1.

Federal regulations, when addressing quality of care concerns,mandate that "[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." 42 C.F.R. §483.25. The regulations specifically address the area of nutrition:

> (i) **Nutrition.** Based on a resident's comprehensive assessment, the facility must ensure that a resident--
>
> (1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels,unless the resident's clinical condition demonstrates that this is not possible; and
>
> (2) Receives a therapeutic diet when there is a nutritional problem. 42 C.F.R. §483.25(i).

Additionally, the Federal regulations specifically address those individuals who are tube-fed:

> (g) **Naso-gastric tubes.** Based on the comprehensive assessment of a resident, the facility must ensure that--
>
> (1) A resident who has been able to eat enough alone or with assistance is not fed by naso-gastric tube unless the resident's clinical condition demonstrates that use of a naso-gastric tube was unavoidable; and
>
> (2) A resident who is fed by a naso-gastric or gastrostomy tube receives the appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers and to restore, if possible, normal eating skills. 42 C.F.R. §483.25(g).

Nursing homes are also subject to state regulations. By Pennsylvania state regulation, facilities are required to meet the daily nutritional needs of patients. 28 Pa. Code §211.6(a). Additionally, if consultant dietary services are used, the consultant's visits must be at appropriate times and of sufficient duration and frequency to provide continuing liaison with medical and nursing staff and provide advice to the administrator and participate in the development and revision of dietary policies and procedures. 28 Pa. Code §211.6(m).

Under state regulations, rules are also set forth pertaining to the various professional personnel responsible for the provision of care to nursing home residents. Long-term care facilities are required to provide nursing services that meet the needs of residents. 28 Pa. Code §211.12(a). It is incumbent upon the director of nursing services to assure that "preventive measures, treatments, medications, diet and other health services prescribed are properly carried out. . . ." 28 Pa. Code §211.12(e)(9).

A nursing facility is also required to retain a medical director who is responsible for the "coordination of the medical care in the facility to ensure the adequacy and appropriateness of the medical services provided to patients." 28 Pa. Code §11.2(k).

Finally, a nursing home administrator is charged with the general administration of the facility whether or not his or her functions are shared with one or more other individuals. 63 P.S. §1102(2). According to regulations promulgated by the Nursing Home Administrators Board, a nursing home administrator is responsible for: (a) evaluating the quality of resident care and efficiency of services, (b) maintaining compliance with governmental regulations, and (c) developing policies which govern the continuing care and related medical and other services provided by the facility which reflect the facility's philosophy to provide a high level of resident care in a healthy, safe, and comfortable environment. 49 Pa. Code §§39.91(1)(i),(ii),(vi).

Factual Basis for False Claims Complaint

On March 2, 1994, an elderly gentleman was transported from Tucker House Nursing Home to Hahnemann University Hospital in Philadelphia suffering from 26 decubitus ulcers, a gangrenous leg, and other complications. Hospital staff, upset at the condition in which this man entered their facility, contacted the local long-term care ombudsman program which in turn contacted law enforcement officials. The Pennsylvania Department of Health surveyed the Tucker House facility and found numerous deficiencies and ordered the transfer of several residents to area hospitals. An investigation was commenced by the United States Attorney's Office into the care of this gentleman as well as two other former residents of the facility.

The United States retained several experts, including a geriatrician with expertise in nutrition and a decubitus ulcer specialist in order to review various hospital and nursing home records. A review of the residents' records evidenced the fact that all victims suffered from a spiraling functional decline with inadequate provision of nutrients and that the residents became profoundly malnourished thereby making it impossible for their bodies to heal the multiple decubitus ulcers that developed. The inadequate provision of nutrition to the three residents occurred over a 15-month period of time.

Theory of Prosecution

Tucker House Nursing Home is a licensed long-term care nursing facility under federal and state law and is certified to participate in the Medicare and Medical Assistance Programs. As a prerequisite to enrollment as a provider in the Medical Assistance Program, Tucker House entered into a provider agreement and agreed to the following provisions:

> 1. That the submission by, or on behalf of, the Facility of any claim, either by hard copy or electronic means, shall be certification that the services or items from which payment is claimed actually were provided to the person identified as a medical assistance resident by the person or entity identified as the Facility on the dates indicated.***
>
> 5. That the Facility's participation in the Medical Assistance Program is subject to the laws and regulations effective as to the period of participation, including all of those that

may be effective after the date of the agreement and that the Facility has the responsibility to know the law with respect to participation in the Medical Assistance Program.

These provisions make clear that the submission of a claim to the Government for payment certifies that the services billed were actually provided. The Government interpreted these requirements to include the provision of the services in a manner that comports with federal and state law and regulations. The Government alleged that Tucker House II, Inc., as the owner and licensee of Tucker House Nursing Home, was responsible for ensuring that all state and federal laws, regulations and requirements were complied with at all times.

Tucker House II, Inc. had entered into a management contract with defendant GMS Management-Tucker, Inc. for the operation of Tucker House Nursing Home. To that end, GMS Management-Tucker, Inc. acted as the general manager of Tucker House Nursing Home and had overall responsibility for the daily operation of that facility and was responsible for monitoring the quality of services provided to the victims.

The Government's theory was that nutritional requirements for the victims were not met, yet claims for such care were submitted to and reimbursed by the Medicare and Medicaid Programs. The corporate subsidiary of Geriatric & Medical Companies ("Geri-Med") was responsible for the provision of nutrition and employed nutritionists/dieticians to perform nutritional evaluations of residents of Tucker House Nursing Home. By state and federal regulation, the nutritionists were also responsible for ensuring that residents received adequate nutrition. The Government contended that this simply did not occur.

Additionally, the provision of adequate nutrition was the responsibility of not only the nutritionists but the Tucker House nursing staff as well. The nursing staff at Tucker House was supervised by the Director of Nursing, and the Director of Nursing was apprised of all Tucker House Nursing Home residents that were losing weight. The Director of Nursing was an employee of GMS Management-Tucker, Inc.

Upon review of the payments made to the facility by the various federal programs, the billing information applicable to the care provided to the victims was transmitted from Tucker House staff to agents and/or employees of the management company (GMS Management-Tucker, Inc.) for submission to the Government for payment. The Government alleged that false, fictitious, or fraudulent claims were submitted to the Pennsylvania Department of Public Welfare, Medical Assistance Program, and the Medicare Program for nutritional services that were not adequately rendered from January 1993 through March 1994. These submissions certified that the billing information contained on the invoices, diskettes, or tapes was accurate and complete with the full understanding that payment and satisfaction of the claims was from Federal and State funds and that prosecution for false claims, statements or documents, or concealment of material facts was a part of the certification.

Finally, it was the Government's contention that the named defendants failed to ascertain the truth or falsity of the claims for services and acted in reckless disregard of the care and

services ordered and actually provided in submitting claims to the Medicare Program and Medicaid Program for payment. From the Government's perspective, the continued submission of claims for the three individuals identified in the complaint and their actual physical condition rose to the level of a violation of the FCA.

Remedies

In February 1996, the defendants agreed to pay the Government a total of $600,000 to settle the FCA claims. On March 6, 1996, the Honorable Jan E. DuBois, United States District Court Judge for the Eastern District of Pennsylvania, entered two agreed-upon Consent Orders between the United States and the two defendants. These Consent Orders transcend remedying the treatment of the three victims that were the subject of the lawsuit by mandating the inclusion of all 18 facilities owned by Geri-Med (approximately 4000 residents) as well as Tucker House Nursing Home and by providing for a state-of-the-art nutrition and wound care monitoring program to be implemented at all of these facilities.

The Consent Order entered into by Geriatric & Medical Companies, Inc. (Geri-Med) provides the following:

- A corporate compliance program that ensures appropriate response to weight loss and addresses the nutritional needs of all residents in the 18 Geri-Med facilities;
- Provision of wound care in accordance with the Agency for Health Care Policy and Research (AHCPR) Guidelines;
- Training of staff responsible for provision of care to the residents on nutrition policies and procedures, wound care, and corporate compliance program;
- Monthly reports of nutritionally at risk or compromised residents to be provided to the U.S. Attorney's Office upon request.

The Geri-Med Consent Order also provides for the review and analysis of nutrition and wound care provided at seven Geri-Med facilities by the University of Pennsylvania's Institute on Aging with reporting to the U.S. Attorney's Office of all findings. The Institute on Aging will analyze the nutritional services and wound care management at the various nursing homes and will evaluate and refine a nutritional risk assessment tool in order to identify those residents who are at risk of clinical complications from nutritional decline. The United States and Geri-Med agreed that innovative approaches and experimentation are needed to improve the nutritional health of nursing home residents and have attempted to facilitate such approaches including the strengthening of an interdisciplinary response to nutrition issues.

The Consent Order entered into by Tucker House Nursing Home requires the following:

- Implementation of a nutritional monitoring and quality assessment program;
- Provision of wound care in accordance with the AHCPR guidelines;
- Training of all Tucker House Nursing Home staff on the nutrition and wound care requirements;
- The U.S. Attorney's Office will monitor compliance with the Consent Order and the facility is required to report to the Government on all nutritionally compromised or at risk residents for a period of at least one year.

Conclusion

The implications of this case are dramatic from a quality of care perspective in that the provision of inadequate care now translates into a false claim to the Government for payment. The FCA provides for treble damages and the imposition of between $5,000 and $10,000 per claim submitted for payment. Therefore, the potential economic consequences to companies or facilities that engage in the provision of inadequate care to the frail and most vulnerable members of our society are enormous.

Additionally, the incorporation of the AHCPR Guidelines into the Consent Orders offers a test market for the policies and procedures that were cooperatively developed by industry representatives and licensed healthcare professionals. While some may argue that the FCA does not allow for the imposition of terms governing how care should be provided, it was the Government's position that these providers had to do more than just comply with the existing regulations since their failure to meet basic care needs was so dramatic. If, in fact, the guidelines are shown to improve care, their adoption by more long-term care facilities could become a reality.

Finally, it is clear that this case has *qui tam* implications. While the case law in the Eastern District of Pennsylvania has been that private parties may not enforce the Nursing Home Reform Act, a false claims case may be brought alleging fraudulent billings for the provision of inadequate care. Poor care, however, does not automatically translate into a False Claims Act case, and every case must be evaluated on its own merits. Medical malpractice and simple negligence cases should be pursued in the usual manner. A lack of appropriate staffing of nurses and nurses aides may not rise to the level of a false claims matter.

The response to this case from the advocacy community as well as the private bar has been very positive. Attorneys representing potential *qui tam* relators have expressed a keen interest in this type of action.

It is hoped that the nursing home industry will respond in such a way as to ensure quality care to residents of long-term care facilities thereby negating the need for further prosecutions.

Spotlight

Qui Tam Recovery Without "Actual Damages"

By Charles Tiefer and Michael Blumenfeld

Qui tam relators are increasingly bringing actions aimed at new types of fraud beyond the traditional core where the relief sought would simply be restitution for the taxpayers of specific sums of federal monies wrongfully enriching the recipients. Rather, some relators are now looking to sue fund recipients whose false claims injure a variety of government interests without necessarily enriching the recipients. Government defrauders may be sued where, without themselves garnering specific sums, they created the risk (without actualization) of wrongful receipt of funds; or where their fraud imposed added costs of inspection and investigation; or where their fraud impaired the varied purposes served by required certifications and disclosures, such as testing and quality control "insurance;" or where their fraud impaired more general aspects of the government agencies' missions, such as protection of agency and fund-recipient integrity. It is well-settled that the False Claims Act (FCA) imposes no requirement of "actual damages," i.e., wrongful enrichment of the defendant by transfer of specific quantifiable funds from the Treasury as a prerequisite for liability. But, how far does this go? Can *qui tam* relators recover in instances of injury to the Government without equivalent enrichment of the defrauders?

A certiorari petition now pending in the Supreme Court from a recent 9th Circuit case shows what a defendant can try by novel arguments to narrow the scope of *qui tam* recovery. Even if the Supreme Court does not take the case, defendants will likely resist suits for lack of cognizable "injury" when *qui tam* relators bring actions that seek recovery for the Government absent specific quantifiable enrichment of the defendant. This is especially likely keeping in mind that *qui tam* defendants increasingly extend beyond the familiar category of government contractors, to the universe of fund recipients: grantees, health care providers,and recipients of funds from combined federal/state or federal/local systems such as Medicaid and housing subsidies. Defendant challenges are particularly likely where the recovery is based on the civil penalty or "forfeiture" of $5,000 to $10,000 per claim, as opposed to quantifiable damages, and the defendant argues that recovery is grossly punitive. As one commentary put it, "[e]specially in cases where actual damages are not only unproved, but also appear from the record to be nonexistent, some courts have become uncomfortable when faced with the issue of whether the FCA is remedial or punitive." American Bar Association Procurement Fraud Subcommittee, <u>*Qui Tam* Litigation Under the False Claims Act</u> 107-108 (1994).

Accordingly, it may be useful to develop concepts for explaining the various types of "injury" to the Government in the absence of simple "actual damages." The certiorari petition now pending in the Supreme Court from <u>U.S. ex rel. Schumer v. Hughes Aircraft Company</u>, 63 F.3d 1512 (9th Cir. 1995), represents one of the battles in a new emerging war over the boundaries of allowed *qui tam* actions. Given the tensions in this area of the law, the ulti-

mate outcome may well be an elaborate set of boundaries regarding those cases where there is "injury" to the Government, and therefore liability, without "actual damages."

The facts of the Hughes case itself illustrate this issue. In the 1970s and early 1980s, Hughes Aircraft Company contracted with the Department of Defense to develop and produce radar systems for the F-15 and F-18 fighter planes. Hughes also subcontracted with Northrop Corporation regarding the B-2. In the mid-1980s Northrop requested a government audit of Hughes accounting procedures, and the audit results fostered questions concerning whether Hughes allocated costs appropriately and also whether Hughes obtained the proper authorization for the agreements governing costs common to more than one project ("commonality agreements"). William Schumer, a manager in the Radar Systems Group of the Hughes Aircraft Company, filed a *qui tam* action alleging, among other things, that Hughes violated Cost Accounting Standards (CAS) by failing to adequately disclose to Northrop and the Government its commonality agreements.

With regard to the issue of interest here,the "injury"issue,the 9th Circuit held that the claim was not precluded under the FCA even though the Administrative Contracting Officer had concluded that the noncompliance had an "immaterial impact" on costs, and that there was no actual harm from the CAS violation. The Court of Appeals cited, as the foundation for this holding, Rex Trailer Co. v. United States, 350 U.S. 148, 152 (1956), and United States v. Kensington Hosp., 760 F. Supp. 1120, 1127 (E.D. Pa. 1991). In Rex Trailer, where the Government recovered from the fraudulent claimant of a veteran's preference, the Supreme Court not only held that there is neither a statutory nor judicial requirement that specific damages be demonstrated, but it also compared the Government's recovery to liquidated damages provisions. The Court explained that liquidated damages provisions are utilized to establish damages for anticipated losses as opposed to "actual damages." Thus, where damages are unmeasurable or uncertain, as in many government contracts, a system of liquidated damages is advantageous. Consequently, this analogy illustrates that the failure to establish "actual damages" does not necessarily preclude recovery under the FCA.

Hughes Aircraft Company petitioned for certiorari on a variety of grounds including the lack of sufficient "injury" from the CAS violation to sustain a *qui tam* suit. Hughes argues that the 9th Circuit erred in finding that the FCA does not require the establishment of sufficient injury to the public fisc. Hughes relies on the ruling of the 7th Circuit in United States v. Azzarelli Constr. Co., 647 F.2d 757 (7th Cir. 1981), an FCA suit against alleged bid-riggers of highway contracts paid from federal transportation funds, that "the lack of any requirement of specific evidence of damages does not dispense with the need to establish injury."

Schumer's opposition to the certiorari petition counters Hughes' arguments by asserting that the Government and *qui tam* relators do not have to establish actual or specific damages to recover under the FCA. The relator notes that even the Azzarelli opinion permits suits on claims not paid, but that might have been paid, by holding that injury can be established if the false statement is capable of causing injury to the funds or property of the United States. Azzarelli, 647 F.2d at 759. Thus, while it is widely understood that the FCA

was created to inhibit the loss of government money during the Civil War period, the Supreme Court has on several occasions found that " the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims." Rainwater v. United States, 356 U.S. 590, 592 (1958).

Other precedents and general forms of injury without "actual damages" besides the CAS violation in Hughes have emerged. The FCA is applicable where claimants engage in falsity and deception to obtain funds the Government would not disburse otherwise to them or to anyone, or to gain advantage in obtaining funds the Government would disburse to others but not to them. For example, in United States v. Village of Island Park et al., 888 F. Supp. 419 (E.D.N.Y. 1995), when a New York town's fraudulent scheme led to federal housing subsidies benefiting not their intended minority beneficiaries but instead connected whites, the district court upheld a *qui tam* suit, finding that the fraudulent scheme was the type of conduct that the FCA was designed to address. A related type of FCA suit targets violations of Medicare anti-kickback and self-referral laws, where, again,the Government might have disbursed the funds to someone but, in the absence of fraud, not to the fraudulent claimants. See U.S. ex rel. Pogue v. American Healthcorp Inc., 914 F. Supp. 1507(M.D. Tenn. 1996).

Arguably, rather than seeing a landscape scattered with diverse categories of cases of injury without "specific or actual damages," there is an identifiable hierarchy or spectrum of cases. At one end of the spectrum, the Federal Government is defrauded of a specific sum of money and the fraudulent recipient is wrongfully enriched by precisely that sum, so that a *qui tam* suit collects damages for the unjust enrichment. Next on the spectrum come cases where the fraud was "capable" of causing such straightforward unjust enrichment but was caught before consummation. In this category the fraudulent party has not obtained government funds, but was seeking wrongful enrichment and has clearly imposed added costs of inspection and investigation necessary to detect the fund recipient malfeasance regardless of whether the Government pays the claim. See Cato v. United States, 359 U.S. 989 (1959).

Further along the spectrum come instances where the fraudulent scheme avoided complying with some government requirement, such as in the "false testing" cases, where contractors frustrate the Government's quality control program by falsely stating that they have conducted certain tests on products. In cases where the products are not actually defective, the fraudulent party would argue both that it had no specific enrichment and that the Government had no concrete sum lost. Yet, as a recent D.C. Circuit opinion shows, the courts recognize the value of *qui tam* cases regarding false reports about product success or progress. See U.S. ex rel. Schwedt v. Planning Research Corporation, 59 F.3d 196 (D.C. Cir. 1995). An economic analysis of the "false testing" cases is that the Government loses the "insurance" value, a concretely valuable aspect of quality control, inherent in a fully operative product testing and certification system. The Government loses something it pays competing producers to provide; the fraudulent producer frees itself from something its competitors would have counted as one of their costs to provide. Another way, more of a regulatory analysis, for understanding the "false testing" cases is that they involve loss of the governmental interest expressed by the FAR's contractor self-inspection clauses (which come in

two levels, the General Inspection and the Higher-Level Contract Quality Requirement Clauses) and its "Certificate of Conformance" system. See Donald P. Arnavas & William J. Ruberry, Government Contract Guidebook 14-6 - 14-7 (2d ed. 1994). Either way, product testing is something sought and valued in itself.

The Hughes Aircraft case involves another step on this spectrum, because the contractor asserted that its challenged accounting system cost the Government nothing; it contended that, in fact, by some other accounting system the Government would have paid it more. What the 9th Circuit upheld was a *qui tam* suit regarding Hughes Aircraft's failure to fulfill the CAS's requirements, expressed in a special CAS disclosure statement form, for disclosure about the accounting system. As in the product testing case, the contractor argues that the Government lost nothing and that the recipient was not enriched. Analogously, one could find injury to the Government based on either economic or regulatory ways of understanding the government interest behind the accounting disclosure standard. An economic analysis might focus on the economic loss to the Government if it cannot trust contractors' disclosure of their internal accounting -- loss in additional needs for governmental auditing and, in the long run if not in the specific case, by increased likelihood of contractor accounting that is disadvantageous to the Government. A regulatory analysis might focus on the purpose of the CAS disclosure statement, signified by the high importance ascribed to Form CASB-DS-1. See Arnavas & Ruberry, 5-22 - 5-24.

Can one reach a final conclusion at this time? The Government and *qui tam* relators will likely continue to argue that where there is fraud, there is injury to the Government, and where there is injury, there should be a recovery. Defendants will respond, when they have not been enriched by some specific sum, that contentions about "injury" are vague, speculative, or punitive. Perhaps the courts will resolve these issues on a case-by-case basis. Or, in the long run, perhaps *qui tam* relators will come to be seen not just as the watchdogs of the federal treasury against specific loss, but in a broader role, as the "private attorneys general" for protecting the effectiveness of government programs against fraud in a broad variety of respects.

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Michael Blumenfeld is a third year student at the University of Baltimore Law School, completing a joint J.D.-M.B.A. program.

***Los Angeles County Metropolitan Transportation Authority ex rel. Lissack v. Lazard Freres & Company* (Sup. Ct. CA No. BC 132 836)**

In April 1996, the Los Angeles County Metropolitan Transportation Authority (LAMTA) joined a *qui tam* suit filed last year by Michael Lissack under the California False Claims Act. According to the lawsuit, the investment bank Lazard Freres improperly used its position as the agency's financial advisor to obtain illegal profits. The firm allegedly made misrepresentations regarding the fairness of the purchase price of Treasury securities, resulting in overcharges to LAMTA. Lazard Freres had persuaded the agency not to seek competitive bids for the securities but to use the firm for a complex refinancing deal. Mr. Lissack, a former Smith Barney executive, is represented by Robert L. Palmer of Hennigan, Mercer & Bennett (Los Angeles, CA) and John R. Phillips and Eric Havian of Phillips & Cohen (Washington, D.C. and San Francisco, CA).

Blue Shield of California

As reported in April 1996, Blue Shield of California has agreed to pay a criminal fine of $1.5 million and to plead guilty to criminal counts of conspiracy and obstructing federal audits. According to an information filed in Sacramento, Blue Shield employees concealed claims processing errors by altering or discarding documents, substituting corrected or backdated documents for faulty ones, and misrepresenting carefully assembled files as random samples. In addition to the criminal action, the company reportedly faces a pending *qui tam* suit in San Francisco.

***Cedars-Sinai Medical Center et al. v. Shalala* (CD CA No. 95-2902)**

In April 1996, a California district court reportedly ruled in favor of 25 hospitals that the Department of Health and Human Services could not enforce 1986 Medicare rules prohibiting payment for "investigational devices" because the rules were not promulgated in accordance with the Administrative Procedure Act (APA). These rules were in effect until 1995 when, after reported intense lobbying by industry groups, HHS changed course and decided to reimburse for most investigational devices. The court rejected HHS's argument that these rules were simply interpretive and, therefore, did not fall under the APA's requirements for notice and comment.

What effect, if any, this ruling will have on a pending government investigation into false Medicare billings for investigational devices during the 1986 to 1995 time period is unclear. The investigation stems from a *qui tam* suit against more than 130 hospitals. To date, at least one hospital has reached a settlement with the Government in connection with this matter. *See* U.S. ex rel. Relator v. Healthwest Regional Medical Center et al., 5 TAF QR 13 (Apr. 1996).

***U.S. ex rel. Peterson and Kroll v. Northrop Grumman Corp.* (CD CA No. __)**

In May 1996, a federal jury in Los Angeles found in favor of Northrop Grumman Corp. in a lawsuit alleging fraud involving the MX nuclear missile guidance system. According to the suit, filed in 1987 by Northrop supervisor David Peterson and engineer Jeffrey Kroll and subsequently intervened in by the Government, the company defrauded the Air Force by using an unusual arrangement of fictitious businesses

and post office boxes to purchase parts for the MX program. Northrop previously settled with the relators concerning allegations that the relators were wrongfully fired.

U.S. ex rel. Pogue v. American Healthcorp., Inc. et al. ***(MD TN No. 3-94-0515)***

The 6th Circuit has denied a petition by defendants for an interlocutory appeal of a recent decision in a *qui tam* suit alleging fraudulent Medicare claims resulting from anti-kickback violations. *See* 5 TAF QR 2 (Apr. 1996). The district court had held that a general release signed by the relator did not bar an action under the FCA. It also ruled that the relator had stated a sufficient cause of action even though actual loss to the Government was not alleged. The 6th Circuit decided that it could not conclude that an immediate appeal would necessarily advance the termination of the litigation. While a reversal could advance the litigation in the lower court, an affirmance would merely leave the litigation in its present state. Moreover, "not every novel question of law is appropriate for interlocutory appeal," the appellate court stated.

Interventions and Suits Filed/Unsealed

***U.S. ex rel. Donnelly v. Nevada Electric Investment Company et al.* (D UT No. 94-C-286 G)**

In March 1996, DOJ intervened in a *qui tam* suit brought in 1994 by John Donnelly alleging that the Department of Interior was defrauded on royalties for coal extracted from federal property. Low monthly royalty payments were allegedly based upon improper calculations rather than true fair market value. The Government joined as against Genwal Coal Company, Inc. and Castle Valley Resources, Inc. but declined intervention as to Nevada Electric Investment Company and individual defendants. Representing the relator are Evan A. Schmutz (Provo, UT) and Chris L. Schmutz (Salt Lake City, UT). The Government is represented by Assistant U.S. Attorney Stephen J. Sorenson and Stephen D. Altman and Allie Pang of the DOJ Civil Division.

***U.S. v. EER Systems Corp. et al.* (D MD No. __)**

In April 1996, a False Claims Act suit was reported against EER Systems Corp., its president, and a group vice president alleging that the aerospace company improperly shifted labor costs from fixed price contracts to cost-reimbursable contracts. Cost overruns were allegedly reassigned through changes in accounting codes on employee time cards. The fixed price contracts involved the production of a communications systems network for NASA and development of a vessel tracking system for the Coast Guard. Along with NASA's OIG, the investigation was conducted by the DOT OIG and the Defense Criminal Investigative Service.

***U.S. ex rel. Woodward v. Teledyne Industries, Inc. et al.* (WD MO Civ. No. 91-354-CV-S-4)**

In April 1996, DOJ intervened in a *qui tam* suit alleging that Teledyne Industries, Inc. created several schemes to hide shortages of military aircraft engine parts it held in inventory under Department of Defense contracts. The suit was filed in 1991 by former Teledyne employee Gerald Woodward; the Government declined to join as against the remaining defendants cited by Woodward. According to DOJ, in connection with the misconduct, Teledyne's director of materials has pleaded guilty to a felony violation of making a false statement.

According to Woodward's complaint, Teledyne's military contracts required it to repair aircraft engine parts, to establish and maintain accurate inventories of government parts, and to pay the Government for shortages or unaccounted parts. Teledyne, however, concealed shortages through various schemes including altering and destroying official property records. In addition, the company allegedly used some of the missing government parts in repairing commercial aircraft, while others were sold to non-government parties. The relator is represented by William H. McDonald of Woolsey, Fisher, Whiteaker & McDonald (Springfield, MO). Representing the Government are Assistant U.S. Attorney Earl W. Brown, III and Joel D. Hesch of the DOJ Civil Division.

***U.S. ex rel. Gerlinger v. Parsons-Dillingham* (CD CA No. __)**

In April 1996, a *qui tam* suit was unsealed alleging that Parsons-Dillingham, a subway construction consulting firm, overcharged the Metropolitan Transportation Authority for labor costs and committed other accounting improprieties. According to published reports, allegations of wrongdoing include charging for

time employees spent with transit agency officials at football games, overbilling for overtime work, and improperly billing for legal fees related to the firm's unsuccessful defense of wrongful termination actions. The relator was formerly a finance manager for Parsons-Dillingham. The suit has now been amended to include charges under the California False Claims Act. DOJ has declined to intervene in the federal action. The relator's counsel is Daniel Bartley (Larkspur, CA).

U.S. v. Sperbeck and Logistics Information Systems *(D MA No. _)*

In May 1996, the U.S. Department of Transportation announced that DOJ filed a False Claims Act suit against William Sperbeck of Wellesley, Massachusetts and Logistics Information Systems of Framingham, Massachusetts for billing violations in connection with computer software work for DOT. According to the complaint, Sperbeck and Logistics acted as a subcontractor for software development to EG&G Dynatrend, a computer services prime contractor to DOT. Sperbeck and Logistics allegedly submitted false invoices to EG&G, which were passed on to the Department. Specifically, Sperbeck and Logistics claimed hours worked that had not been worked and claimed wage rate reimbursement levels for employees who lacked the requisite qualifications, in violation of the express terms of the contract. For example, Sperbeck and Logistics allegedly billed for employees with no bachelors' degrees in labor categories for which the contract required a bachelor's degree. The suit further alleges that Sperbeck and Logistics billed DOT for time spent on commercial software development. The case was investigated by the DOT OIG in Cambridge and the Naval Criminal Investigative Service. Assistant U.S. Attorney Sara Miron Bloom is representing the Government.

U.S. ex rel. Riley v. St. Luke's Episcopal Hospital et al. *(SD TX No. _)*

In May 1996, a *qui tam* suit was reported alleging that St. Luke's Episcopal Hospital inflated the number of its organ transplant patients to increase profits. According to the lawsuit, patients who were not gravely ill had their organ transplant status artificially upgraded, leading to overbilling of Medicare and CHAMPUS. The action was filed in 1994 by Joyce Riley, a former nurse at the hospital. Also reported as defendants are individual doctors, Surgical Associates of Texas, University of Texas Health Science Center at Houston, Baylor College of Medicine, and the Texas Heart Institute. DOJ has declined to join the lawsuit.

U.S. ex rel. Benczer v. Galloway Pain Control Centers et al. *(SD FL No. 94-2467)*

In June 1996, DOJ intervened in a *qui tam* suit alleging that Galloway Pain Control Centers and an acupuncturist defrauded Medicare by billing for services not covered under the federal program. The complaint was filed in 1994 by Galloway patient Benjamin Benczer with the assistance of Taxpayers Against Fraud, The False Claims Act Legal Center. According to the lawsuit, Galloway concealed the provision of acupuncture, which is not covered under Medicare, under the guise of physical therapy, which is covered. As part of the scheme, Galloway billed bogus physical examinations that never occurred to establish the patients' eligibility for physical therapy. DOJ did not join the case as to individual doctors cited by the relator. Mr. Benczer is represented by William J. Blechman of Kenny Nachwalter Seymour Arnold Critchlow & Spector (Miami, FL). Assistant U.S. Attorney Mark Lavine and Rosemary Filou of the DOJ Civil Division are handling the case for the Government.

***U.S. ex rel. Bortner v. Philips Electronics North America Corporation et al.* (ED TX Consolidated Civil Action No. 1:95CV363)**

In February 1996, Philips Electronics North America Corporation agreed to pay the Government **$1 million** to settle a *qui tam* suit alleging fraud in connection with the sale of office automation products. DOJ, which had declined intervention in the action, has since filed a notice of appeal of the court's order approving the settlement, objecting to the release language.

According to the lawsuit, filed in 1995 by former company employee Lloyd Bortner, Jr., Philips concealed from the Government its decision to withdraw from the U.S. market through a scheme of misrepresentations and by falsely touting its products. As a result of the misrepresentations and omissions, federal agencies including the National Labor Relations Board and the Department of Interior's Bureau of Land Management were induced to purchase,lease, or rent products and services that they would not otherwise have, had they known of the company's plan to shut down its U.S. operations and cancel contracts with dealers. The suit further alleged that Philips intentionally destroyed over 1,000 boxes of documents to conceal the fraud and hinder prosecution. The relator's share was 30 percent or $300,000. Mr. Bortner was represented by R. Stephen Berry and J. Daniel Leftwich of Berry & Leftwich (Washington, D.C.).

***U.S. v. GMS Management-Tucker, Inc. et al.* (ED PA CA No. 96-1271)**

In February 1996, DOJ announced that the owner of Tucker House Nursing Home and the management company that ran it agreed to pay the Government **$600,000** to settle False Claims Act allegations concerning the quality of care provided to residents. According to the Government, three residents' nutritional and wound care needs were not adequately met,and the continued billing for these services to the Medicaid and Medicare programs constituted false claims under the Act. The complaint charged that the residents became nutritionally at risk and suffered clinical complications as a result of poor nutrition. According to DOJ, this is the first False Claims Act case to specifically address the quality of nutrition and wound care provided to nursing home residents.

Under the settlement, Geriatric and Medical Companies, Inc. (Geri-Med), on behalf of its subsidiary GMS Management-Tucker, Inc., the former manager of Tucker House, agreed to pay $575,000, with Tucker House II, Inc., the owner of the facility, paying $25,000. Geri-Med also agreed to a consent order requiring a strict corporate compliance program aimed at ensuring adequate care for patients. A second consent order requires Tucker House II to implement a nutrition monitoring and quality assurance program. The case was handled by Assistant U.S. Attorney David R. Hoffman. *(For a more detailed discussion of this case and the application of the False Claims Act to quality of care, see SPOTLIGHT at page 17 above.)*

***U.S. ex rel. Duchek v. Ethyl Corporation and Ethyl Petroleum Additives, Inc.* (ED MO No. 4:94CV00625)**

In March 1996, Ethyl Petroleum Additives, Inc. and its parent Ethyl Corporation (EPAI) agreed to pay the Government **$4.75 million** to settle a *qui tam* suit brought in 1994 by former EPAI employee Charles Duchek. The lawsuit alleged that additives sold to other companies for use in defense vehicles failed to meet military specifications. According to DOJ, the Government purchased petroleum additive

packages for engine oils that EPAI falsely certified met military standards and passed specified testing. The Government's investigation revealed that EPAI submitted false documents and information to the Lubricants Research Institute so that its products would be included on the Qualified Products List the Institute maintained for the Government. Alan G. Kimbrell (St. Louis, MO) represented the relator. The Government was represented by Michael D. Taxay of the DOJ Civil Division.

U.S. ex rel. Hubbard v. Fire Protection District No. 5, Mason County et al. ***(WD WA C94-5454)***

In March 1996, a Washington State fire district agreed to pay the Government **$160,000** to settle a *qui tam* suit filed in 1994 alleging fraudulent billing of Medicare for ambulance services. According to the complaint, Fire Protection District No. 5, Mason County (Mason 5) offered “discounts” on its paramedic services including a waiver of the co-payment obligations of Medicare participants. While it touted its services as “free” to beneficiaries, Mason 5 did not inform Medicare that it had reduced its charge and continued to bill Medicare for its share of the full amount, which included the waived 20 percent co-payment. The complaint further alleged that Mason 5 channeled all calls for emergency paramedic services to its own dispatchers, charged Medicare for a higher level of service than was provided or necessary, and billed for services performed by others. DOJ did not intervene in the action. The relator's share was 28 percent. Mr. Hubbard, a former employee of a private competitor of Mason 5,was represented by Steve Berman and Jeff Sprung of Hagens & Berman (Seattle, WA).

U.S. ex rel. Rybacki v. Medline Industries, Inc. ***(ND IL No. 95 C 6636)***

In April 1996, Medline Industries, Inc., a manufacturer and wholesaler of health care products, equipment, and supplies,agreed to pay the Government **$6.4 million** to settle a *qui tam* suit alleging that it presented more than 3,200 false invoices to the Department of Veterans Affairs. The complaint was filed in 1995 by a former Medline employee who had served as the company's Vice President for International Sales. Although a contract between Medline and the VA required “domestic end products” (i.e., made in the United States, in a designated country, or a Caribbean basin country), Medline was awarded 126 items that it failed to disclose were actually manufactured in non-designated countries, including Malaysia, the People's Republic of China, the Philippines, and Thailand. The settlement also covers additional VA purchases under a separate contract with the company. The relator's share was $1 million. Mr. Rybacki was represented by Thomas J. Scorza (Chicago, IL). Handling the case for the Government was Assistant U.S. Attorney Linda A. Wawzenski.

U.S. ex rel. McKay and Danyal v. Air Industries Corp. ***(CD CA No. _)***

In April 1996, DOJ announced that Air Industries Corp. agreed to pay the Government **$6.8 million** to settle a *qui tam* suit alleging that it delivered millions of improperly tested aircraft fasteners. According to published reports, former company employees Dan McKay and Tony Danyal filed the lawsuit in 1992, claiming that, notwithstanding defects, Air Industries shipped the parts to such clients as the Boeing Co. With this settlement, Air Industries reportedly has paid nearly $10 million since it pleaded guilty in September to related mail fraud charges. The relators' share was 22.5 percent or $1.53 million. The relators were represented by

William Ramsey. Assistant U.S. Attorney Frank Kortum handled the case for the Government.

Superior Surgical Manufacturing Co., Inc.

In April 1996, DOJ announced that Superior Surgical Manufacturing Co., Inc. will plead guilty to a one-count felony information and pay the Government **$6.5 million** to settle allegations that it made a false certification and overcharged the Department of Veterans Affairs, the General Services Administration, and other agencies for medical and clothing items. The settlement resolves potential criminal and civil cases against Superior Surgical resulting from an investigation conducted by the VA's OIG and the Defense Criminal Investigative Service.

According to the Government, Superior Surgical knowingly withheld from VA and GSA contract negotiators its complete pricing and discount policy in violation of the contract solicitations and federal law. False and misleading material statements included statements that no regular or quantity discounts and/or concessions were given to any other customers, and that the Government was getting the same or equal price of the "most favored customer."

The plea agreement provides for a $300,000 fine. In connection with the civil settlement, Superior Surgical will pay $6.2 million. According to DOJ, this is one of the largest civil fraud recoveries in the history of the Middle District of Florida. The criminal case was prosecuted by Assistant U.S. Attorney Edward J. Page, and the civil case was handled by Assistant U.S. Attorney Rusty Nisbet and DOJ Attorney Mitch Lazris.

U.S. ex rel. King v. Jaramillo, Medical Institute for Mental Health, and Memorial Hospital *(D NM Civ. No. 92-1045 MV/PJK/WWD)*

In May 1996, DOJ announced that a New Mexico psychiatrist and a hospital he partially owned agreed to pay the Government a total of **$700,000** to settle a *qui tam* suit alleging false claims under Medicare, Medicaid, and CHAMPUS. According to the lawsuit, filed in 1992 by Victoria King, Dr. Jaramillo billed for psychiatric services that were not provided or were provided by a non-physician assistant without appropriate supervision. Memorial Hospital allegedly billed Medicare for hospital care provided to Jaramillo's patients when they did not require hospitalization and failed to provide "active treatment" for psychiatric patients as required by the federal program. The settlement follows Jaramillo's 1995 conviction in Albuquerque on 228 counts of criminal fraud related to the same allegations. As part of the settlement, Memorial Hospital agreed to ensure future compliance with applicable Medicare rules. Along with the HHS OIG, the case was investigated by the FBI and the Defense Criminal Investigative Service. The relator's share was 15 percent. Ms. King was represented by Ronald Segel of Sutin, Thayer and Browne (Albuquerque, NM) and Frank L. Spring of Duhigg, Cronin and Spring (Albuquerque, NM). Assistant U.S. Attorney Edwin Winstead and James E. Ward IV of the DOJ Civil Division represented the Government.

U.S. ex rel. Laul v. Battelle Memorial Institute *(ED WA No. SC-95-0095-WFN)*

In May 1996, Battelle Memorial Institute agreed to pay the Government **$330,000** to settle a *qui tam* suit alleging it improperly used government-owned equipment to service commercial customers. The lawsuit was

brought by Jagdish Laul, a former Battelle scientist at the Department of Energy's Pacific Northwest Laboratory. Battelle, a not-for-profit Ohio corporation, operates the laboratory on behalf of DOE under a $500 million annual contract. According to the suit, Battelle did not inform DOE of its commercial use of equipment and failed to pay DOE for such use, as required under its contract. Under the terms of the settlement, Battelle will be credited for a prior payment of $110,000 to the Department. The relator's share was $60,800. The relator was represented by A. Alene Anderson of the Government Accountability Project (Seattle, WA). Philip Shaikun of the DOJ Civil Division handled the case for the Government.

Dana Corporation

In May 1996, DOJ announced that Dana Corporation agreed to make a final payment of **$10.175 million** to the Government to settle the remaining portion of a False Claims Act lawsuit alleging that Dana's former division, Beaver Precision Products, Inc., overcharged on parts used in F100 jet engines obtained by the Air Force. Last September, Dana paid $19.5 million to the Government to settle related claims. *See* 3 TAF QR 34 (Oct. 1995). The $29.675 million total payment resolves the Government's 1992 lawsuit, brought in the Eastern District of Michigan, alleging that Beaver inflated proposals on sole-source, negotiated government contracts for ball screw actuators. Ball screw actuators are motorized control devices used on Patriot and MLRS missiles, B-1, C-5, C-130 and F-14 aircraft, and the F100 jet engine. Joining in the Government's investigation were the Defense Contract Audit Agency, the Army Criminal Investigative Division, and the Defense Criminal Investigative Service.

Massachusetts Hospitals "72 Hour" Rule

In May 1996, the U.S. Attorney's Office in Boston announced that 83 Massachusetts hospitals agreed to pay the Government over **$3.4 million** to settle False Claims Act allegations of improper billing. The agreements were reached as part of the Government's ongoing nationwide investigation into hospitals' Medicare outpatient billing practices. Rather than seeking payment as part of the flat rate DRG payment window, the hospitals in question allegedly billed separately for outpatient services performed within 72 hours of a patient's admission. The "72 Hour" probe has already returned settlements from Pennsylvania hospitals totaling approximately $1.3 million. Federal authorities have estimated that as many as 4,600 hospitals nationwide owe money in connection with the duplicate billing.

The Massachusetts announcement identified the settling hospitals along with their respective payment obligations. Massachusetts General Hospital, for example, was listed as being subject to the highest fine, over $400,000. According to DOJ, the Massachusetts double billing persisted despite repeated audits by HHS. As part of the settlement, the hospitals have agreed to implement procedures to ensure future compliance. In addition, some senior citizens will be repaid money by the hospitals if they were charged deductibles or co-payments in connection with the outpatient tests. Assistant U.S. Attorney Susan Winkler represented the Government.

U.S. ex rel. Davis and Dennison v. M/G Transport Services, Inc. et al.* *(SD OH No. C-1-92-1001)

In June 1996, the towboat company M/G Transport Services, Inc. and its parent corporation, The Midland Company, agreed to pay

$4.6 million to settle a *qui tam* suit filed in 1992 by former company employees Harold Davis and Danny Dennison. According to the lawsuit, the defendants delivered coal by barges to the Tennessee Valley Authority pursuant to a government contract that required compliance with the Clean Water Act. Contrary to the terms of the contract, however, they pumped oily bilge, trash, and sewage into the river. Further, the defendants failed to report the discharges as required by the TVA contract and federal law, and company documents concealed such illegal discharges. While DOJ did not intervene in the *qui tam* action, in a related criminal matter M/G Transport Services and individual defendants were found guilty of violating the Clean Water Act. The relators' share was 29.5 percent. The relators were represented by Paul B. Martins of Helmer, Lugbill, Martins & Neff (Cincinnati, OH) and Meredith L. Lawrence (Covington,KY).

U.S. ex rel. Piacentile v. Wolk, Advanced Care Associates, Inc. et al. ***(ED PA No. 93-CV-5773)***

In June 1996, DOJ announced that Advanced Care Associates, Inc. and its former owners agreed to pay the Government **$4.03 million** to settle a *qui tam* suit alleging they falsified documents relating to the medical condition of Medicare beneficiaries to obtain reimbursement for lymphedema pumps and sleeves, which are used to treat swelling in limbs. According to the complaint, the durable medical equipment supplier altered information on certificates of medical necessity signed by physicians without authorization and forged the signatures of physicians. Advanced Care also routinely misrepresented to beneficiaries that there would be no charge to them for the equipment to induce them to purchase the pump and assign the Medicare claim to the company. Generally under Medicare, beneficiaries are required to pay a co-payment. The complaint further alleged that Advance Care made false representations that new equipment was being supplied when in fact it was used.

According to DOJ, this action is one of several nationwide against lymphedema pump suppliers and manufacturers for Medicare fraud. As part of the settlement, the individual defendants are barred for life from participating in the Medicare program and certain state health care programs. In addition, Advanced Care and its parent company, The Care Group (which was not a defendant), agreed to a compliance program. The relator's share was 15 percent. The relator was represented by Robert Meister of Piper & Marbury (NY, NY). Assistant U.S. Attorney Susan Dein Bricklin and Marlene F. Gibbons of the DOJ Civil Division represented the Government.

U.S. v. First Union Mortgage Corporation ***(ED MO No. 4:94CV922)***

In June 1996, First Union Mortgage Corporation agreed to pay the Government **$7 million** to settle a 1994 False Claims Act lawsuit alleging that it falsely certified the eligibility of borrowers for federally insured mortgages who subsequently defaulted on their loans, resulting in a $4.3 million loss to the Department of Housing and Urban Development. According to DOJ, the payment is the largest ever obtained in a False Claims Act case involving HUD's Single Family Mortgage Insurance Program. Under the Program, HUD insures lenders against losses on mortgage loans to qualified borrowers.

The suit alleged that First Union, then named Cameron-Brown Mortgage Company, misrepresented to HUD that borrowers on 43 St. Louis-area properties had made required down payments. According to the suit, the down

payments were shams because the seller Richard Powelson, working together with First Union, immediately canceled or refunded the down payments at the closings.

The lawsuit also alleged that many of the borrowers were “straw buyers” who qualified for the loans on behalf of Powelson and then “flipped” back the properties to him after the closing. HUD regulations prohibited Powelson from obtaining the mortgage insurance on his own; therefore, he paid these individuals $2,000 to qualify for loans on his behalf. The suit charged that First Union employees solicited investors for the properties and assured them that the transactions complied with HUD regulations. Most of the buyers were novice real estate investors culled from “no money down” real estate seminars given by Powelson.

As part of the settlement, HUD agreed not to debar or suspend First Union from further participation in HUD mortgage insurance programs. (Previously, HUD debarred Powelson and sanctioned five others involved in the transactions, including two First Union employees.) The Government was represented by Philip Shaikun of the DOJ Civil Division.

TAF NEWS

1986 FCA Amendments Tenth Anniversary Celebration

- On September 11, 1996, TAF will be hosting an early evening reception to mark the Tenth Anniversary of the False Claims Act Amendments of 1986. The program will include remarks by Senator Charles Grassley and Representative Howard Berman, co-sponsors of the Amendments. The event will be held at the Decatur House in Washington, DC, a property of the National Trust for Historic Preservation. Please look for your invitation in the coming weeks.

Library Resources

- TAF has available in its library a variety of resources on the False Claims Act and *qui tam*. The library is open to the public during regular business hours. Please call in advance to schedule an appointment. Submissions of case-related materials such as complaints, briefs, and settlement agreements are appreciated.

Qui Tam Attorney Network

- In conjunction with its library project, TAF is working to build and facilitate an information network for *qui tam* attorneys. For further details, please contact TAF Staff Attorney Gary W. Thompson.

Quarterly Review Submissions

- TAF would like to include submissions by readers in future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). We thank our outside contributors for their articles that appear in this issue. If you would like to discuss a potential article,please contact Associate Director Alan Shusterman.

TAF On The Move

- TAF has moved to a new location,a short walk from our former site south of Dupont Circle. TAF's new address is: 1220 19th Street, NW, Suite 501, Washington, DC 20036. Our phone and fax numbers have not changed.

Previous Publications Available

- Back issues of the *Quarterly Review*, including the "1995 Year In Review," are still available at no cost. Requests can be made by phone,fax, or mail.

TAF On The Internet

- TAF's Internet presence, designed to educate the public and legal community about the False Claims Act and *qui tam*, now features issues of the *Quarterly Review* as well as information on TAF's *Qui Tam* Attorney Network and Library Resources. The Internet presence, which includes an on-line version of the Act, will be updated regularly to highlight available resources and new developments in the field. TAF's site is located at http://www.taf.org/ or via e-mail at taf-info@taf.org.

Acknowledgments

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