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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, DOJ 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 (FCA). 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 facilitate the filing of meritorious FCA *qui tam* suits; (2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to effectively prosecute *qui tam* suits; (3) inform and educate the general public, the legal community, and other interested groups about the FCA 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 FCA library for public use and a staff of lawyers and other professionals who are available to assist anyone interested in the False Claims Act and *qui tam*.

Public Disclosure Bar and Original Source Exception

U.S. ex rel. Ramseyer v. Century Healthcare Corporation et al., 90 F.3d 1514 (10th Cir. July 24, 1996)

A relator whose allegations were similar to findings made in a routine state audit report did not base her suit upon publicly disclosed information because the report remained in government files and was never released to the public, according to the 10th Circuit. In order to trigger the public disclosure bar, the allegations or transactions underlying the suit must have been "affirmatively disclosed to the public," the appellate court ruled. The court reversed the district court's decision to the contrary and sent the case back to proceed on the merits of the allegation that defendants' mental health facilities submitted false Medicaid claims due to widespread noncompliance with program requirements for treatment services.

Ramseyer, who worked as a consultant and then clinical director of a mental health facility operated by defendants, filed a *qui tam* suit and §3730(h) claim in 1992. According to her suit, she repeatedly complained of program noncompliance to her superiors, but the facility continued to submit improper claims to Medicaid. She further alleged that she was fired in retaliation for her repeated protests. Independent of Ramseyer's efforts, the Oklahoma Department of Human Services (DHS) performed a routine audit and found deficiencies in the defendants' treatment program similar to those discovered by Ramseyer. Only three copies of the report were made, all of which remained within DHS files. The report was available to the public only upon specific written request and upon approval from the DHS legal department. The district court dismissed the *qui tam* suit, finding that the DHS report was publicly disclosed simply because it was available to the public upon written request. The court also dismissed the §3730(h) retaliation action, but without explanation. Ramseyer appealed both rulings to the 10th Circuit.

Only Affirmative Acts of Disclosure Constitute Public Disclosures

The 10th Circuit ruled that the district court had erred in finding that the information contained in the DHS report constituted a public disclosure. The appellate court rejected the notion that theoretical or potential availability to the public can constitute a public disclosure. Rather, it agreed with the D.C. Circuit and the 9th Circuit that public disclosure requires "actual disclosure" of the information. In short, the court ruled that "in order to be publicly disclosed, the allegations or transactions upon which a *qui tam* suit is based must have been made known to the public through some affirmative act of disclosure."

According to the court, this interpretation is supported by the common usage and understanding of the term "disclose," defined in the dictionary as "to make known; reveal or uncover." A report only potentially available, but not actually "made known" to the public, does not come within the "ambit of public disclosure," the court found.

Actual Disclosure Rule Encourages Citizens to Come Forward and Expose Fraud

Requiring an affirmative act of disclosure furthers the FCA's purpose of encouraging citizens to come forward and expose instances of fraud, the court stated. Congress amended the Act in 1986 to ensure that citizens would bring forward information about fraud "even if government officials should decide not to initiate proceedings based on information contained in government files." The 1986 amendments changed the focus of the jurisdictional bar from mere government possession of information about fraud to actual disclosure of the information to the public. Not requiring an affirmative act of disclosure would simply reinstate the pre-1986 jurisdictional bar that Congress sought to replace, in part, because it was concerned that the Government was not pursuing known instances of fraud. "If the mere existence of a 'no action' recommendation buried in an unreleased internal audit report has the effect of foreclosing *qui tam* actions, the 1986 amendments were for naught," stated the court.

In this case, the relator possessed some first-hand knowledge of her employer's allegedly fraudulent Medicaid billing practices. While her allegations were similar to information contained in the DHS report, "the mere placement of that report in the DHS files does not constitute public disclosure." According to the court, but for the relator's suit, the defendants' fraudulent activity may have gone undetected because the evidence was essentially "hidden in files."

§3730(h) Liability Attaches Only if Defendant is on Notice that Plaintiff Was Acting in Furtherance of FCA Action

To state a claim under §3730(h), Ramseyer had to allege facts showing that her discharge resulted from her actions to further a *qui tam* suit, the court stated. More specifically, Ramseyer had to establish that the "defendants had been put on notice that she was either taking action in furtherance of a *qui tam* action or assisting in a FCA action brought by the government."

The court found that Ramseyer did not satisfy her burden of pleading facts that would establish that the defendants were sufficiently on notice. She never suggested to defendants that she intended to utilize her complaints about program noncompliance in furtherance of an FCA action, nor did she suggest she was going to report the noncompliance to government officials or that she was contemplating her own *qui tam* action. Rather, her monitoring and reporting activities "were exactly those she was required to undertake in fulfillment of her job duties," the court stated. Since Ramseyer never sought leave to further amend her pleadings, the appellate court affirmed dismissal of her §3730(h) retaliatory discharge claim.

U.S. ex rel. Mikes v. Straus et al., 931 F. Supp. 248 (S.D.N.Y. June 26, 1996)

A *qui tam* suit alleging that several physicians submitted false claims to Medicare for medically unnecessary MRIs and spirometry tests was not jurisdictionally barred under §3730(e)(4) because there was no public disclosure of "allegations or transactions," a New York district court found. In a separate holding, the court ruled that §3730(b)(2) did not require the relator to file amendments to the complaint under seal or serve them upon the Government. Finally, the court dismissed several counterclaims that were, in effect, attempts at contribution or indemnification, which are not allowed in *qui tam* actions.

Mikes brought this *qui tam* action in 1992 alleging that her physician employers had submitted false Medicare claims for unwarranted and improperly administered spirometry tests and that she was a victim of retaliatory discharge under §3730(h). After the court granted leave to amend for failure to satisfy Rule 9(b), Mikes filed an amended complaint further detailing the defendants' fraudulent practices, including allegations that they caused the submission of false Medicare claims by referring patients for MRI tests more frequently than medically necessary.

The defendants moved to dismiss, or in the alternative to compel arbitration. Upon converting the motion to one for summary judgment, the court denied summary judgment on the *qui tam* and retaliation claims, but granted in part the motion to compel arbitration on the latter. *See* 4 TAF QR 32 (Jan. 1996). Subsequently, the defendants filed an answer with affirmative defenses and counterclaims and moved to dismiss on the basis that the *qui tam* suit was subject to the §3730(e)(4) public disclosure bar. Mikes moved to strike certain affirmative defenses and to dismiss the counterclaims.

Previous Civil Suit Did Not Disclose "Allegations or Transactions"

The critical issue before the court was whether the "relator's allegations were publicly disclosed elsewhere and prior to the *qui tam* action — not just information concerning the allegations as defendants imply." Defendant Straus, a general partner of J & M Enterprises, had previously filed a civil suit for breach of contract against an MRI clinic, Tri-County (J & M Litigation). As its defense, Tri-County alleged that the contractual agreement was illegal because it called for payment to J & M for MRI referrals. The defendants in the Mikes case argued that the relator's MRI-related allegations were based upon the allegation of MRI referral payments from Tri-County to J & M, which was publicly disclosed in the J & M Litigation. The court did not agree.

"The information disclosed in the J & M Litigation cannot rise to the level of 'allegations or transactions' so as to prevent the exercise of jurisdiction," the court stated. Mikes did not allege fraud for receipt of MRI referral fees. Rather, she alleged that the physicians had knowingly submitted false Medicare claims for unnecessary MRIs. According to the court, the J & M Litigation documents lacked any allegation of false or fraudulent claims knowingly filed with the Government. Moreover, none of the cases cited by defendants compelled a different result. While they were all instructive on other public disclosure issues, they were irrelevant on the issue of "allegations or transactions."

As the court explained, under §3730(e)(4)(A) "jurisdiction hinges upon the public disclosure of 'allegations or transactions' occurring prior to a *qui tam* complaint, not the public disclosure of 'information' relating to the allegations. It is the distinction between allegations and information that is crucial." Thus, Mike's allegations were not publicly disclosed within the meaning of that provision prior to the filing of her *qui tam* action. Moreover, Mikes, as an insider with first-hand knowledge of allegedly unnecessary services, is the "quintessential whistleblower" envisioned by the drafters of the FCA, the court added.

§3730(b)(2) Does Not Require That First Amended Complaint Be Filed Under Seal or Served Upon Government

The court agreed with the relator that requiring her amended complaint to be filed and served in accordance with §3730(b)(2) was not necessary to "effectuate the intent of Congress in permitting the Government to review the matter in secret before intervening." The Government already had an opportunity to investigate the case while under seal and could intervene at a later date for good cause. Moreover, failing to file the amended complaint under seal did not prejudice the rights of the Government or defendants, nor establish a basis for dismissal. According to the court, the notification provision is a "mere procedural requirement of the exercise of the right created by the statute, not a jurisdictional requirement" that would compel dismissal of the action.

The court noted that the 9th Circuit has repudiated the notion that the seal requirement was enacted to protect defendants. Similarly, the 2nd Circuit has recognized that the provision was created primarily to protect the interests of the Government and only secondarily to protect the defendant from having to prepare a defense without knowing whether the relator or the Government would be proceeding in the action. In this case, both of these interests had been protected.

Defendants Cannot Seek Contribution, Indemnification, or Punitive Damages in *Qui Tam* Action

Defendants had raised counterclaims arguing that Mikes was not entitled to a relator's share because of her role in planning and initiating the fraud, that they were entitled to attorneys' fees under §3730(g) (allowing reasonable attorneys' fees to prevailing defendants if the court finds the action to be clearly frivolous), and that the relator should be assessed punitive damages for attempting to extort money from the defendants.

Disposing of the first counterclaim, the court found that §3730(d)(3), authorizing reduction in the relator share for having "planned and initiated" the FCA violation, conferred no right on the defendants to assert a counterclaim against the relator. Nor could the defendants attempt to reduce their liability by relying on this provision. Citing numerous FCA cases, the court stated that "[a]ny attempt by defendants to offset their FCA liability by seeking contribution or indemnification from the relator is futile." As to the counterclaim for fees and costs, the court ruled that it was procedurally improper because the defendants had not yet prevailed in the action. Finally, the counterclaim for punitive damages was dismissed for public policy reasons because it could discourage would-be relators from bringing claims under the Act.

Counterclaim for Independent Damages Can Proceed in Separate Trial

The court did find, however, that there was precedent for allowing the defendants' counterclaim for extortion. "[T]he modern trend does not support a ban on compulsory counterclaims which are based on damages which are 'independent' of the *qui tam* claim," stated the court. The court was persuaded by the approach taken in previous cases in which counterclaims for independent damages were allowed to go forward but in a separate trial from the *qui tam* action. According to the court, this would have the effect both of protecting relators from pretextual counterclaims which were really attempts at contribution or indemnification and of protecting defendants' constitutional right to assert compulsory counterclaims.

U.S. ex rel. DeCarlo v. Kiewit/AFC Enterprises, Inc. et al., 1996 WL 479251 (S.D.N.Y. Aug. 23, 1996)

See "Prefiling Release of *Qui Tam* Claim" directly below.

Prefiling Release of *Qui Tam* Claim

U.S. ex rel. DeCarlo v. Kiewit/AFC Enterprises, Inc. et al., 1996 WL 479251 (S.D.N.Y. Aug. 23, 1996)

Public policy militates against enforcement of a broad release executed prior to the filing of a *qui tam* action, a New York district court has ruled. Following the 9th Circuit's hold-

ing in U.S. ex rel. Green v. Northrop Corp., the court found that the Government's failure to intervene does not change the public policy reasons for rendering the release unenforceable. In addition, the court ruled that, because the relator had independent knowledge of the basis of the complaint from non-public information and first-hand observations, he satisfied the original source exception to the public disclosure bar.

Relator Philip DeCarlo worked on the Hutchinson River Parkway Bridge Rehabilitation Project site for Massachusetts Electric Construction Co., Inc. (Mass Electric) for just over a year before he was terminated. He filed suit for wrongful termination against Mass Electric, Kiewit/AFC Enterprises (Kiewit), and a Kiewit employee. In settling that action, DeCarlo executed a broad general release. Among other things, the settlement released the defendants from "all actions . . . which against the RELEASEE, the RELEASOR . . . ever had, now have [sic] or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE . . . . " Subsequently, DeCarlo filed an FCA case against Kiewit regarding payments it submitted to the Federal Highway Administration, the Department of Transportation, and other agencies. The Justice Department declined to intervene in the action.

Federal Common Law Governs Enforceability of Prefiling Releases

The court first addressed the defendants' motion to dismiss on the ground that DeCarlo released Kiewit from this action when settling the Mass Electric case. It noted that, while the language of the release was broad enough to encompass the action, the FCA is silent on the validity of a prefiling release of a *qui tam* action.

Given the absence of explicit direction in the FCA, the court turned to the question of whether federal common law or state law should apply. Applying Supreme Court precedent, the court concluded that there should be a uniform federal standard regarding whether a prefiling release of a *qui tam* action is enforceable. Among other reasons, the court stated that (1) there is a reasonable likelihood that state law would overemphasize the interest favoring final, ironclad, and enforceable general releases at the expense of federal policy, (2) the application of state law would frustrate the purpose of the FCA, and (3) application of a uniform rule would not disrupt commercial relationships predicated on state law. The court emphasized that it wanted to avoid giving potential relators an inducement to settle claims before alerting the Government to fraudulent conduct. Its purpose in avoiding such an inducement was to prevent a decrease in the amount of fraud deterred and treasury funds recovered.

Public Policy Interest Outweighs Interest in Settling Litigation

In fashioning the uniform standard, the court embraced the 9th Circuit's holding in U.S. ex rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir. 1995), 3 TAF QR 1 (Oct. 1995), cert. denied, 116 S.Ct. 2549 (1996). There the 9th Circuit looked to Supreme Court precedent holding that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." Town of Newton v. Rumery, 480 U.S. 386, 392 (1987).

In the present case, the court identified serious public interests at stake — taxpayers' and the Government's interest in recouping lost funds and the public interest in exposing fraudulent activity. It balanced those considerations against another judicially recognized concern — finalizing and settling litigation — and concluded that the generalized interest in settlement is heavily outweighed by the costs of eviscerating the incentives created by the FCA. Thus, the court found that federal common law does not recognize the effect of the parties' prior settlement on the present FCA action.

Same Rule Applies Whether or Not Government Intervenes

The court dismissed as flawed defendants' argument that the rule should be different when the Government declines to intervene in the *qui tam* litigation. Non-intervention is not necessarily a sign of governmental disinterest in a case, the court stated, as the Government is entitled to most of the recovery even if it opts not to intervene. Further, adopting defendants' proposed exception to allow the Government to invalidate a case would likely discourage a relator from filing the *qui tam* case altogether.

Relator, Though Not a Defendant Employee, Was an Original Source

The court next turned to subject matter jurisdiction and the "original source" issue. Defendants claimed that the information forming the basis of DeCarlo's *qui tam* action was publicly disclosed during the wrongful termination action. They further argued that DeCarlo was not an "original source" of the information underlying the complaint's allegations.

The court determined that the basis of the *qui tam* suit was publicly disclosed through information obtained during the Mass Electric litigation. However, it rejected the defendants' claims that DeCarlo was not an original source. Kiewit argued that, because the complaint was filed upon information and belief, DeCarlo tacitly admitted that he lacked the requisite "direct and independent" knowledge and was therefore not an original source. Kiewit also argued that DeCarlo was not an original source because he neither worked for Kiewit nor had any involvement in, or personal knowledge of, Kiewit's submission of documents to the Government other than that gained through the wrongful termination action.

The court disagreed, finding that DeCarlo was the type of relator envisioned by the Act since he had independent knowledge of the defendants' conduct from first-hand observations during his employment with Mass Electric. Throughout his employment, DeCarlo claimed to have witnessed, among other things, Kiewit's failures to install safety measures and to give appropriate credits for unperformed work. Accordingly, the court found that DeCarlo had sufficient direct and independent knowledge to qualify as an original source.

Complaint Dismissed Without Prejudice for Failure to Conform to Rule 9(b)

Finally, the court addressed defendants' motion to dismiss for failure to plead fraud with particularity. The court stated that Rule 9(b) applies to all allegations of fraud, including allegations under the FCA, and that it prohibits pleadings based on "information and belief" unless information is particularly within the defendant's knowledge. Since DeCarlo's complaint included 25 fraud-based allegations made on information and belief, and failed to refer to specific employees and particular payroll issues, the court dismissed the complaint without prejudice so that he could conform his pleading to Rule 9(b).

Section 3730(h) Retaliation Claims

<u>Childree v. UAP/GA AG Chem. Inc. et al.</u>, 92 F.3d 1140 (11th Cir. Aug. 28, 1996)

Anti-retaliation protections under §3730(h) are available whenever an FCA action is a

"distinct possibility," the 11th Circuit ruled. Further, an FCA case need never be filed or even contemplated by a plaintiff or the Government for the provision to apply.

Denise Childree's job at UAP/GA AG Chem (UAP) included billing customers for fertilizer, seeds, and other farming products. In 1989, one of the company's customers asked that she re-bill certain invoices to other companies. Childree refused, believing that the request was part of an attempt to defraud the Department of Agriculture's Agricultural Stabilization and Conservation Service (ASCS). ASCS reimburses farming businesses up to a maximum of $50,000 per claim for costs related to various farming activities. Childree believed that the re-billing request was an attempt to use subsidiary fronts to evade the $50,000 per claim ceiling and thereby illegally obtain excessive payments from the Government. Childree continued to refuse to comply with the customer's request despite a directive from one of her supervisors to process the re-billings. Ultimately, that supervisor processed the re-billings himself.

One month later, an ASCS representative questioned the validity of the re-billings. Childree spoke candidly with the representative in the presence of another of her supervisors. After the interview, Childree made copies of the completed re-billing forms and took them home. The supervisor who had participated in the ASCS interview was aware Childree made copies of the forms and told her to do whatever was necessary to protect herself.

Four years later, Childree was subpoenaed to testify in a Department of Agriculture (DOA) administrative hearing about the alleged fraud. Although reluctant to testify because she feared she could lose her job, Childree did testify and handed over the re-billing forms she had copied four years earlier. During a break in the hearing, an officer of UAP allegedly said that Childreee had "blown the whole thing and [that she] didn't know how to handle business." The DOA found that the UAP customer had engaged in a scheme designed to evade ASCS payment limitations and that UAP had assisted and participated in the scheme.

A week after she testified before the DOA, Childree was suspended, then terminated from her employment. UAP stated that the termination resulted from Childree's removal of confidential customer files from the company's premises without authorization.

Prior to her termination, Childree had not considered bringing an FCA case and, in fact, did not even know of the FCA's existence. She did not file an FCA case, and the statute of limitations had run. Nor did the Government ever bring, threaten to bring, or even consider bringing an FCA case against UAP for its role in the fraudulent scheme. However, in 1994 Childree filed a retaliation action under §3730(h) of the FCA. The district court granted defendants' motion for summary judgment, concluding that Childree's conduct was not covered by the FCA's whistleblower protection provisions. *See* 3 TAF QR 18 (Oct. 1995). According to the district court, Childree had failed to show a nexus between her conduct and the furtherance of a potential FCA action.

§3730(h) Protections Apply When There is a "Distinct Possibility" of an FCA Suit

On appeal, Childree and the United States as *amicus curiae* argued that the district court erred in granting summary judgment to the defendants. While conceding that the administrative hearing was not an FCA "action" as contemplated by §3730(h), they contended that Childree was protected because she assisted in what could have been an FCA case. Childree and the Government urged the 11th Circuit to follow Neal v. Honeywell, Inc., 33

F.3d 860 (7th Cir. 1994), in which the 7th Circuit ruled that §3730(h) applied to an employee who had provided false claims information to the Government even though no FCA case was ever filed.

Agreeing with the reasoning in Neal, the 11th Circuit ruled that the words "to be filed" in §3730(h) do not require that an FCA case be filed. To find otherwise, the court reasoned, would lead to an absurd result — a putative defendant could erase an employee's §3730(h) claim by settling with the Government before a case was filed. Instead, the court found that §3730(h) protections are available when the filing of an FCA case by either an employee or the Government is "a distinct possibility" at the time the employee renders assistance. In this case, viewing the facts in the light most favorable to Childree, the court determined that an FCA case was a distinct possibility for the Government when she assisted it.

Protections Not Limited to Only Those Who Know About FCA

The court also acknowledged that some employees, like Childree, will not be aware of the FCA's existence and §3730(h) protections. It found, however, that nothing in the language of §3730(h) suggests that its protections are limited to those who know about the Act or are motivated by it. As such, the court declined to read a knowledge requirement into the provision. Accordingly, the district court's summary judgment ruling was reversed and the case remanded.

U.S. ex rel. Ramseyer v. Century Healthcare Corporation et al., 90 F.3d 1514 (10th Cir. July 24, 1996)

See "Public Disclosure Bar and Original Source Exception" above at p. 1.

U.S. ex rel. Hopper v. Anton et al., 91 F.3d 1261 (9th Cir. July 31, 1996)

See "Falsity of Claim/Regulatory Noncompliance" below on this page.

Counterclaims

U.S. ex rel. Mikes v. Straus et al., 931 F. Supp. 248 (S.D.N.Y. June 26, 1996)

See "Public Disclosure Bar and Original Source Exception" above at p. 2.

Falsity of Claim/Regulatory Noncompliance

U.S. ex rel. Hopper v. Anton et al., 91 F.3d 1261 (9th Cir. July 31, 1996)

Summary judgment for the defendant was proper in a *qui tam* case alleging, without more, that a school district failed to comply with certain regulations, the 9th Circuit ruled. Because the relator did not point to requests for payment by the school district that incorporated some knowing falsity, the case was not actionable under the FCA. The court also ruled that the relator's retaliation claim under §3730(h) should have been dismissed for failing to show that the relator had engaged in protected activity or that the school district was aware that the relator had engaged in protected activity.

Sheila Hopper was a special education teacher in the Los Angeles Unified School District (LAUSD) who filed a *qui tam* case along with a §3730(h) retaliation claim. Her *qui tam* action alleged that LAUSD violated state law and federal regulations by conducting special education evaluations of students without classroom teachers being present. She also claimed that LAUSD violated state and federal law by prolonging the evaluation process, thereby avoiding the placement of eligible students in special education classes.

LAUSD moved for summary judgment on both the *qui tam* and §3730(h) claims. The district court granted the motion on the *qui tam* claim, holding that a violation of law or regulations without a knowing false claim for payment does not give rise to a viable action under the FCA. The §3730(h) claim, however, was allowed to proceed to trial. The jury found that one of the defendants had retaliated against Hopper, and LAUSD moved for judgment as a matter of law. LAUSD's motion was denied. Hopper appealed the summary judgment on her FCA claim, and LAUSD cross-appealed the denial of its motion for judgment as a matter of law on the §3730(h) claim.

FCA Liability Requires Knowing Falsity

The 9th Circuit upheld summary judgment on the *qui tam* claim, stating that a breach of contract or a violation of regulations or law alone does not automatically constitute an FCA violation. Rather, an FCA violation requires a claim for payment made with the requisite knowledge of falsity.

In this case, Hopper alleged that LAUSD failed to meet certain requirements imposed by the Individuals with Disabilities Education Act (IDEA) and that its receipt of federal funds for special education therefore gave rise to FCA liability. In reviewing the Federal Government's mechanism for funding special education, the court found that there was no requirement that recipients certify their compliance with federal laws and regulations. Further, there was no evidence that LAUSD had made any false statements or certifications. Moreover, the court found that regulatory compliance was not a condition for receipt of funding. According to the court, there are administrative and other remedies for mere regulatory violations that do not rise to the level of knowing false claims for payment. As such, the court found no evidence that defendants had submitted a false claim giving rise to liability under the Act.

Hopper Offered Insufficient Evidence of Knowingly False Certification

Hopper also argued that LAUSD's submission of a certification to the state government, containing general assurances that the school district generally intended to comply with applicable law, was an actionable false certification. The court recognized that false certification of compliance "creates liability when certification is a prerequisite to obtaining a government benefit." The court found, however, that the general certification by the school district was not a prerequisite to receiving annual IDEA funds. In addition, for the certification to be false, there must be sufficient evidence to support an inference of knowing fraud. According to the court, the record in this case was devoid of any showing that the school district did not intend to comply with the applicable laws at the time the certification was made.

Hopper Was Not Engaged in Activity Protected by §3730(h)

With respect to Hopper's retaliation claim, the 9th Circuit reversed the district court's decision to uphold the jury's verdict. The appellate court stated that there are three elements to a §3730(h) claim: (1) employee conduct protected under the Act; (2) employer knowledge that the employee is engaging in the conduct; and (3) employer discrimination against the employee because of the protected conduct. In reviewing Hopper's conduct, the court found that she was attempting to get classroom teachers into special education evaluation sessions.

Because, according to the court, the relator's activity did not have any nexus to the FCA, she could not receive §3730(h) protections. Further, the individual defendant whom the jury found liable for retaliation was never given any indication that Hopper was investigating the school district for defrauding the Federal Government. As such, the court concluded that the second element of a retaliation claim also was not met and the district court should have granted judgment as a matter of law.

Statute of Limitations

U.S. ex rel. Hyatt v. Northrop Corp. et al., 91 F.3d 1211 (9th Cir. July 26, 1996)

The equitable tolling provision of the FCA's statute of limitations applies to a *qui tam* relator as well as to the Government, the 9th Circuit ruled. However, the limitations period for a *qui tam* relator is tolled only until the date that the relator (not the Government) knew or reasonably should have known of the facts material to the claim. According to the court, the Act requires a relator to bring his case within three years of when he knew of the violation, or within six years of when the violation occurred, whichever is later.

The relator Michael Hyatt worked as an engineer at Northrop Corporation from 1981 to 1986. In late 1982, he reported to his superiors his concerns about the defective design, development, and manufacture of the Inertial Measurement Unit used in the Peacekeeper (MX) missile program. In May 1986, Hyatt was terminated. The *qui tam* case before the court was filed in April 1993. In two previous cases filed by Hyatt against Northrop the allegations were either dismissed or settled.

The district court dismissed the third complaint as untimely filed because the complaint alleged violations that occurred more than six years before the filing. Hyatt had argued that the §3731(b)(2) equitable tolling provision added to the FCA in 1986 should apply to his case, thereby extending the statute of limitations to three years after the date when facts material to the action were known by appropriate government officials. While the district court agreed that tolling provision applied retrospectively, it decided that the FCA made equitable tolling available only in suits initiated by the Government and not in *qui tam* suits. Hyatt appealed the district court's dismissal.

FCA's Statute of Limitations Provisions, Including Tolling, Apply to All FCA Suits

The 9th Circuit agreed with the district court on the question of retrospective application of the amended statute of limitations. However, on whether the equitable tolling provision applies to suits initiated by relators, the 9th Circuit disagreed with the district court, finding that the FCA's "clear and unambiguous" language supports application of the tolling provision. Because §3731(b)(2) refers to a "civil action under section 3730," it covers both government actions under §3730(a) and *qui tam* actions under §3730(b). According to the appellate court, "there is nothing in the entire statute of limitations subsection which differentiates between private and government plaintiffs at all."

The defendants argued that because legislative history referred only to "the Government" in its discussions of the tolling provision, it should not apply to *qui tam* litigation. The court rejected defendants' argument, pointing out that the legislative history of the Act is "replete with many instances in which the word 'government' is used when referring to suits brought in the name of the United States by either the Attorney General or private *qui tam* plaintiffs."

Relator's Duty to Act is Triggered by His Own Knowledge, Not the Government's

In applying the tolling provision, the court explained that the provision is derived from an equitable doctrine "grounded in the venerable notion that it would be unfair to bar a fraud action as untimely where the defendant successfully concealed the fraud from the plaintiff during the limitations period." The rationale behind tolling requires that the statute of limitations start to run when the plaintiff acquires knowledge of the wrongful activity. To peg the extension of time to the Government's knowledge of the defendant's wrongdoing would, the court reasoned, inappropriately permit relators to control the length of their own limitations periods. Thus, the court concluded that a relator's duty to act is triggered by his knowledge, not the Government's knowledge. Thereafter, the relator has three years in which to file suit (or six years from the commission of the fraud, whichever is later).

Anti-Kickback and Self-Referral Violations

U.S. ex rel. Thompson v. Columbia/ HCA Healthcare Corp. et al., Memorandum and Order, No. C-95-0110 (S.D. Tex. July 22, 1996)

A *qui tam* action alleging that the defendants violated the FCA by billing for Medicare claims while violating anti-kickback and self-referral statutes (Stark laws) failed to state a claim under the FCA, according to a Texas district court. The court's holding is contrary to other recent district court decisions allowing FCA cases predicated on violations of the anti-kickback and Stark laws. In a separate holding, the court dismissed on Rule 9(b) grounds the relator's allegation that the defendants submitted claims for unnecessary services. According to the court, the allegation referred only to a general statistical study without specifying any particular physicians, patients, or claims.

James M. Thompson, M.D., brought a *qui tam* suit against Columbia/HCA Healthcare Corp. and several of its subsidiaries and affiliated corporations operating in Corpus Christi, Texas. Thompson alleged that the defendants created a number of incentive arrangements and provided financial inducements to physicians for patient referrals in violation of the Medicare anti-kickback statute and the Stark self-referral laws. He further alleged that the violations of these laws made the defendants' Medicare claims false. Moreover, according to the complaint, the defendants allegedly filed false compliance certifications with Medicare which rendered all their claims false or fraudulent, and they allegedly filed claims for services which were not medically necessary. The Government declined to intervene in the suit.

Court Declines to Follow Pogue in Ruling that Violation of Anti-Kickback and Self-Referral Laws Does Not State a Claim Under FCA

According to the court, the primary issue for resolution was whether Medicare claims filed for services which were rendered in violation of the anti-kickback and self-referral laws are "a fortiori" false claims under the FCA. The court reviewed several recent decisions in which FCA claims predicated on violations of other federal statutes survived either summary judgment or Rule 12(b)(6) motions to dismiss. The court recognized that nearly identical allegations to those at hand were the subject of U.S. ex rel. Pogue v. American Healthcorp, Inc., 914 F. Supp. 1507 (M.D. Tenn. Jan. 5, 1996), 5 TAF QR 2 (Apr. 1996). In that case, it was held that the relator had stated a claim under the FCA because the Act "was intended to govern not only fraudulent acts that create a loss to the government but also those fraudulent acts that cause the government to pay out sums of money to claimants it did not intend to benefit." Nevertheless, the court here stated that it was compelled to reach the opposite result in light of the 5th Circuit's ruling in U.S. ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035 (1978) (finding no FCA liability for violations of Anti-Pinkerton Act). In Equifax, the 5th Circuit cited U.S. v. McNinch, 356 U.S. 595 (1958), for the proposition that the FCA "was not designed to reach every kind of fraud practiced on the Government" and that the Act is "primarily directed against contractors' billing for nonexistent or worthless goods or charging exorbitant prices for delivered goods."

The district court ruled that Thompson had not sufficiently alleged that the defendants submitted claims that themselves were false or fraudulent — in other words, "claims or claim amounts that the government would not have had to pay but for the fraud." Allegations that medical services were rendered in violation of the Medicare fraud and abuse statutes did not by themselves state a claim under the FCA, the court found.

Defendants' False Statements in Compliance Certifications Did Not Render Claims False

Thompson also alleged that the defendants had violated the FCA by submitting HCFA cost reports with false certifications that the provider was in compliance with the anti-fraud statutes. Thompson contended that the filing of these false certifications allowed the provider to participate in the Medicare program when it was not legally entitled to in light of its anti-kickback and self-referral violations. With little analysis, the court ruled that, since it had already concluded that FCA liability requires that the claims themselves be false or fraudulent, "false statements in the HCFA 2552 certifications do not render the claims false, as well."

Allegation Regarding Claims for Unnecessary Services Did Not Comply with Rule 9(b)

According to the court, Thompson's only allegation asserting that the claims were false or fraudulent was his contention that the defendants billed for medically unnecessary services. In support of this, the complaint cited only a statistical study concluding that forty percent of services rendered by physicians who had received financial inducements to refer patients were not medically necessary. The court determined that this allegation did not comply with Rule 9(b)'s requirement to plead fraud with particularity. Thompson had not identified any specific physicians who referred patients for medically unnecessary services or any specific claims for medically unnecessary services. Viewing this allegation as a "last minute effort" to otherwise avoid dismissal of the suit, the court dismissed the complaint without allowing leave to amend.

Attorneys' Fees

U.S. ex rel. Virani v. Jerry Lewis Truck Parts & Equipment, Inc. et al., 89 F.3d 574 (9th Cir. July 10, 1996)

Statutory attorneys' fees awarded by the court must go to the relator's attorneys rather than to the relator himself, the 9th Circuit held, reversing the district court's order that the fees be paid directly to the relator. In addition, the appellate court found that the fees were reasonable and the defendant could not avoid paying them by alleging that the relator's attorneys had acted unethically.

The law firm of Hall & Phillips (HP) represented Alnoor Virani in a *qui tam* action against Jerry Lewis Truck Parts & Equipment, Inc. (Lewis). Following settlement of the action, the court awarded $316,500 in statutory attorneys' fees. The defendant's attempt to have the fee lowered, based upon its allegation that the fee arrangements in the case were "fraudulent and unconscionable," was rejected by the district court.

Virani then claimed that he was entitled to receive the awarded fees personally. The district court agreed, concluding that it had not retained jurisdiction to determine the proper allocation of the statutory fees under the fee agreements between HP and Virani. In effect, Virani could keep the fees unless HP was able to obtain them from him in a separate action.

Attorneys Are Entitled to Receive Fees Awarded by Court

The 9th Circuit reversed the district court's order, holding that the FCA requires payment of court-awarded attoneys' fees directly to the attorneys. The appellate court found that the "client's right is really a power to obtain fees for his attorney." That is, only the relator has the power to demand that the defendant pay his attorneys' fees; unless the relator exercises that power, no one has the right to collect fees from the defendant, and the defendant has no duty to pay them. However, once the relator exercises that power, the attorneys' right to the fees is vested, the defendant's duty to pay becomes fixed, and the fees must go to the attorneys rather than to the client.

According to the court, if the statutory fees did not go directly to the attorneys, "a wrong would be perpetrated upon the government. If the amount went to the plaintiff, it would be a compensatory payment which really belongs to the United States subject to allocation of a portion to the plaintiff." Moreover, "plaintiffs would obtain possession of fee awards, and attorneys would be left to attempt to obtain the money paid for their services as best they could."

In short, the court concluded: "Under no condition was Virani entitled to receive direct payment of those fees from Lewis. If HP did not earn them, Lewis should not have to pay them at all; if HP did earn them, Lewis must pay them to HP."

Attorneys' Fees Were Reasonable

Lewis argued that the awarded statutory fees could not have been reasonable because HP did not treat Virani ethically. The district court did not address this issue, reasoning that fee disputes are entirely between the attorney and the client and have nothing to do with the defendant. The 9th Circuit identified the appropriate question raised by Lewis' argument as: What is a reasonable attorneys' fee?

Lewis contended that under California law an attorney cannot recover any fee if an ethical violation is shown. The 9th Circuit, however, clarified that California courts "have often held that when the ethical violation in question is a conflict of interest between the attorney and the client . . ., the appropriate fee for the attorney is zero," but where the ethical violation is some other impropriety, California courts have not denied fees in their entirety. In the latter cases, the attorneys were still allowed to recover the reasonable value of their services.

Here, the court found that "there is no hint in this case that there was any conflict of interest whatever. Nor was there any suggestion that HP did not perform valuable services for Virani or that anything was amiss in the calculation of the reasonable amount of fees for those services." In sum, the court concluded: "After Virani exercised his power to have the fee assessed against Lewis, he decided that he would like to receive the fee himself. He cannot; the fee must go to HP. Lewis would like to ward off its duty to pay the fee by taking advantage of the falling out between Virani and HP. It cannot; the fee must go to HP."

Concurrence Would Require a Contractual Assignment of Fees to Attorney

Differing from the majority's statutory interpretation, a concurring opinion asserted that "absent a contractual assignment to the attorney, the False Claims Act requires payment of the attorneys' fee award to the party, with the ultimate disposition of the award dependent upon the contract between the attorney and client." The concurrence stated that its view was supported by precedent involving other fee shifting statutes and a plain reading of the FCA. According to the concurrence, because Virani had assigned his right to the statutory fees to HP, the majority's result was correct in this case.

False Claims Involving Compliance with Environmental Laws

U.S. ex rel. Stevens v. McGinnis, Inc. et al., Order, No. C-1-93-442 (S.D. Ohio Aug. 27, 1996)

In a case alleging, among other things, reverse false claims arising from violations of the Clean Water Act (CWA) by a contractor and a subcontractor delivering jet fuel to the Government, an Ohio district court examined whether each of the contractors' alleged failures to record bilge discharges in their logs resulted in a false record to avoid payment to the Government. Granting summary judgment for the subcontractor, but not the prime contractor, the court focused on whether each of the contractors normally recorded such incidents in their logs and whether the Government relied on the logs.

Ashland, Inc. entered into four contracts with the Government for the sale of jet fuel and into an agreement with McGinnis, Inc., a barge towing company, for services that would enable Ashland to deliver the fuel to the Government and other entities. Ashland's government contracts required that it comply with specific provisions of the CWA and that it "take all measures as required by law to prevent oil spills . . . ." The terms of the Ashland government contracts exempted McGinnis from contract provisions requiring it to inform Ashland or the Government of its compliance with environmental laws. Both Ashland and McGinnis maintained log books, contemporaneous writings kept in the regular course of business.

Darrell Stevens was an employee of McGinnis during the period that Ashland was carrying out its contracts with the Government and McGinnis was providing services to Ashland. He filed a *qui tam* case against McGinnis and Ashland claiming that McGinnis' CWA violations caused Ashland to submit false claims to the Government and that McGinnis failed to record or report illegal discharges of waste into the Ohio River to avoid payment of CWA penalties, fines, and clean-up costs. The case was first before a magistrate judge on defendants' motions for summary judgment. All parties sought district court review of the Magistrate's Report and Recommendation.

Records are False if Occurrence That Would Normally Be Recorded is Omitted

The relator claimed that McGinnis made, used, or caused to be used false records or statements based on its failure to record illegal bilge discharges in its vessel log. The magistrate judge determined that McGinnis' vessel log was clearly a record. Further, the vessel log would be a false record if an event or occurrence that would normally be noted in the record was omitted from it. Also, the magistrate found that the FCA does not require that the false record be one that the defendant is under a legal obligation to maintain. The district court agreed with the magistrate's statement of the law.

Subcontractor's Omission Did Not Render Record False

The district court concluded that there was no genuine issue of material fact regarding whether McGinnis' vessel logs constituted false records under the FCA. It determined that testimony and documents had established that (1) McGinnis would not normally record in its vessel logs bilge discharged overboard, (2) McGinnis had no company policy requiring such recordings, (3) the Government did not expect McGinnis to record bilge discharges, and (4) the Government did not rely on the absence of entries regarding bilge discharges in determining compliance with pollution laws. Because bilge discharges would not normally be recorded in McGinnis' vessel logs, the court reasoned, McGinnis'omission of the bilge discharges from a vessel log did not make the log a false record. The court held that McGinnis' failure to disclose illegal discharges in the vessel logs was, at most, a failure to self-report which could not support liability under FCA §3729(a)(7).

Prime Contractor's Omission May Result in Violation

The district court reached the opposite conclusion regarding Ashland's log books. The court found that Ashland did record and had a policy to record pollution incidents in its wheelhouse log books. There were genuine issues of fact, according to the court, as to whether Ashland failed to record spills which normally would be recorded in those log books, and as to whether other elements of a claim under §3729(a)(7) existed. In addition, unlike McGinnis, Ashland submitted claims to the Government under contracts in which Ashland had agreed to use its best efforts to comply with the CWA. Because the relator came forward with evidence sufficient to establish to a reasonable juror that Ashland knowingly failed to perform its agreements and sought payment from the Government as if it had fully performed all agreements, the court denied Ashland's motion for summary judgment on this issue.

Claims Submitted by Contractors Who Knowingly Fail to Perform Material Contract Requirements are False

Ashland also argued for summary judgment on the relator's §3729(a)(1) claims, contending that there could be no basis for liability because its invoices contained no false statements, CWA compliance was not a material part of its contracts because payments were not contingent upon compliance with the CWA, and the invoices could not have had the purpose and effect of causing financial loss to the Government. Rejecting Ashland's arguments, the court noted that a "contractor who knowingly fails to perform a material requirement of the contract, yet seeks or receives payment as if it had been fully performed without disclosing the nonperformance, has presented a false claim under §3729(a)(1)." Because the court found genuine issues of fact underlying whether Ashland violated the CWA and whether compliance with the CWA was a material part of Ashland's contract, summary judgment was not granted.

Ashland Could Not Escape CWA Compliance Responsibility by Relying on McGinnis' Exempt Status

The magistrate had recommended partial summary judgment for Ashland based on the earlier determination that, under the terms of the government contracts, McGinnis was exempt from any contractual requirement which might otherwise have required McGinnis to certify its compliance with the CWA to either Ashland or the Government. The relator argued that McGinnis' status as an exempt subcontractor should not affect whether Ashland violated the FCA based on McGinnis' alleged CWA violations. According to the court, Ashland was not free to abrogate its responsibilities under the contracts by shifting responsibility to McGinnis. The court ruled that evidence regarding whether Ashland knew or should have known of McGinnis' violations of the CWA would be relevant to a determination of whether Ashland complied with the terms of its contracts. Because there was an issue of fact as to Ashland's knowledge, Ashland was not entitled to summary judgment.

Retroactivity

U.S. ex rel. Colunga v. Hercules, Inc. et al., 929 F. Supp. 1418 (D. Utah May 24, 1996)

A Utah district court ruled that it was improper to retrospectively apply the §3729(b) knowledge standard of the 1986 FCA Amendments to defendant conduct occurring before the 1986 Amendments; rather, an actual knowledge standard should be applied. On the other hand, the court ruled that the 1986 §3730(e)(4) jurisdictional provision should have retrospective application.

Katherine Colunga's *qui tam* complaint alleged various forms of falsification and concealment by the Hercules, Inc. and others from 1981 to 1992 in connection with government contracts for nine missile systems. Hercules argued that, under applicable retroactivity analysis, neither the knowledge standard nor the *qui tam* jurisdictional bar contained in the 1986 FCA Amendments should be applied retrospectively. In assessing Hercules' contentions, the court relied on the standards established by the Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244 (1994).

Retroactivity of §3729(b) Knowledge Standard

The court first rejected Colunga's argument that there was congressional intent to apply the 1986 Amendments retroactively and then performed an exhaustive analysis of case law addressing the pre-1986 meaning of the term "knowing" (or "knowingly"). While identifying "a minor split in the opinions of the circuits," the court concluded that the majority view was that actual knowledge or intent to defraud was required prior to 1986 for an FCA violation. Thus, the 1986 §3729(b) constructive knowledge standard constituted an "expansion of the substantive standard for FCA liability over the pre-1986 law."

Applying the Landgraf criteria, the court concluded that §3729(b) should not be applied to the defendants' pre-1986 conduct. According to the court, the case at hand implicated the concern in Landgraf about "the potential for unfairness and lack of adequate warning to a person." Retroactive application of §3729(b) "would impose a different duty of mental attention, after the fact, with regard to transactions already completed and impair the substantive standard for liability that a party could expect to be applicable to pre-1986 transactions."

Retroactivity of §3730(e)(4) Jurisdictional Provision

Turning to the 1986 §3730(e)(4) "public disclosure" jurisdictional provision, the court stated that "Congress amended the FCA to eliminate some of the restrictive scope of the prior jurisdictional bar" and "[t]he amendment obviously expands the instances when a private person may bring a *qui tam* action." The court clarified that "[t]here is no expansion of the kind of conduct giving rise to liability, merely an expanded status of persons and circumstances under which the suit could be maintained."

Relying on the 9th Circuit's decisions in Lindenthal v. General Dynamics Corp., 61 F.3d 1402 (9th Cir. 1995), 3 TAF QR 7 (Oct. 1995), U.S. ex rel. Schumer v. Hughes Aircraft, 63 F.3d 1512 (9th Cir. 1995), 3 TAF QR 4 (Oct. 1995), and U.S. ex rel. Hyatt and King v. Northrop Corporation, 80 F.3d 1425 (9th Cir. 1996), 6 TAF QR 9 (July 1996), the court held that retrospective application of the §3730(e)(4) jurisdictional provision was proper. According to the court, applying the jurisdictional provision retrospectively "does not impose liability where none previously existed." Rather, "it only gives the relator the opportunity to pursue the claim. Although in practical terms this may cause a claim to be pursued where otherwise it would remain hidden or unable to be pursued because of insufficient Government resources, this is not a retroactive effect by establishing liability where none existed."

Change of Venue

U.S. ex rel. Penizotto v. Bates East Corp. et al., Memorandum, No. 94-3626 (E.D. Pa. July 19, 1996)

Where the Government intervenes and moves for a transfer of venue, the venue preference of the Government, as the real party in interest, should prevail over a relator's original choice of forum, according to a Pennsylvania district court. In this case the defendants, not the relator, objected to the transfer.

Todd Penizotto filed a *qui tam* case against a franchisee of Home Americair Inc. in the Eastern District of Pennsylvania alleging submission of false Medicare claims involving oxygen and related equipment. Subsequently, a similar case, U.S. ex rel. Frisco and Jones v. Home Americair of California, Inc. et al., was filed in the Central District of California. The Government intervened in both actions, then sought a change of venue to California from the Pennsylvania court under 28 U.S.C. §1404(a).

A motion under §1404(a) calls for a two-pronged test, according to the district court. First, the court must determine whether the case could have originally been filed in the proposed transferee district. In this situation, it was undisputed that the Pennsylvania suit could have originally been brought in California. Second, the court must determine whether transfer would serve the convenience of the parties and be in the interests of justice.

The second prong of the test requires a more elaborate evaluation than the first, including consideration of seven factors: (1) the plaintiff's selection of forum; (2) the relative ease of access to proof; (3) the availability of compulsory process for the attendance of witnesses; (4) the cost of obtaining attendance of witnesses; (5) the possibility of viewing premises; (6) the practical issues that make trial easy, expeditious, and inexpensive; and (7) public interest factors like the relative congestion of court dockets and choice of law considerations. Of these seven factors, the court indicated that the plaintiff's choice of forum is the paramount consideration and the plaintiff's preference ordinarily should be given great deference.

Because Government is Real Party in Interest, Its Choice of Forum Prevails

The court acknowledged that because this *qui tam* case was now being brought by two plaintiffs — the relator and the intervening United States — the court needed to make a threshold determination as to which plaintiff's choice of forum should be accorded more weight.

Reasoning that the Government was the real party in interest, the court concluded that the Government's choice of forum should prevail over the relator's. Moreover, the relator did not object to the transfer.

The defendants argued that the Government's choice of forum should be accorded less deference by the court because (1) the original plaintiff resided in Pennsylvania and (2) few operative facts alleged in the complaint took place in California. Rejecting this argument, the court again stressed that the real party in interest was the Government and that an FCA action can take place in any judicial district where the defendant company transacts business. Moreover, in this case any false claims originating in Pennsylvania were submitted to Home Americair, Inc. to be filed from its California office. According to the court, the "California office was therefore an integral part of this alleged scheme to defraud the government and the location of many operative facts."

As to the other factors in the second prong, the court concluded that because they favored the Government or neither side, the Government had met its burden of proving that transfer was warranted.

Whistleblowers, Public and Private Attorneys, Legislators, and Others Gather to Celebrate Tenth Anniversary of False Claims Act Amendments of 1986

On September 11, TAF hosted a celebration to mark the tenth anniversary of the False Claims Act Amendments of 1986. The event, held in Washington, D.C., honored the original sponsors of the Amendments, Senator Charles Grassley and Representative Howard Berman. Following are excerpts from the remarks presented that evening:

DR. PETER BUDETTI, *Chairman of the Board of Directors, Taxpayers Against Fraud, The False Claims Act Legal Center*

Ten years ago, President Reagan signed the 1986 Amendments into law in the face of widespread fraud going undetected and unremedied. Ten years later, the law has proven to be a tremendous success. . . . This is a reflection of a remarkable public/private partnership that has brought about a transformation of the approach toward trying to combat fraud in government programs. All together since the Amendments passed, 3.5 billion dollars has been returned to the Treasury and over a billion dollars of that has come from *qui tam* cases . . . .

"The 1986 Amendments are a success as a result of the hard work, courage, and dedication of many people who are working together."

The 1986 Amendments are a success as a result of the hard work, courage, and dedication of many people who are working together. First of all, we'd like to recognize the whistleblowers themselves, the citizens who have been willing to step forward and to point out fraud against the Government and to take this dramatic step towards combating fraud for everybody's sake and for the Government's sake. We salute you for being good citizens in the finest tradition of this country. . . .

We'd also like to recognize a second group of people, government attorneys and investigators who work on the False Claims Act cases. Both the Department of Justice and the Inspectors General in many of the cabinet agencies have worked very hard to bring about the success. . . . We congratulate you on your continuing efforts to try to combat fraud and to ensure integrity in government programs . . . . We look forward to continual growth in this public/private partnership.

The third triad of this public/private relationship is the private sector attorneys who have worked to make this possible, and we recognize their willingness to join in the challenge of fighting fraud against the Government and their willingness to dedicate private resources, time, and talent to serve the public interest. . . .

Finally I get to the point of the evening to introduce and recognize the two legislators who championed these Amendments in 1986, Senator Charles Grassley and Congressman Howard Berman. I think this is, if you'll excuse the expression, the odd political couple from the opposite ends of the political spectrum who really stand for the proposition that good government is not a partisan issue. And I think the fact that we have a solid Republican and a solid Democrat joining ranks to bring about this law is a testimony to the importance of this work and to their abilities to bring about bipartisan consensus on such an important effort. . . .

SENATOR CHARLES GRASSLEY *(R-IA)*

. . . I thank you for the special tribute, Dr. Budetti, and I'm obviously deeply honored to receive it. And I accept it on behalf of all you in this room, and of course countless others who are not in this room, because it has taken a partnership to make this law a success . . . . I'd like to pay tribute to those responsible with some specificity and I of course could start with Taxpayers Against Fraud. You've devoted your resources to exposing fraud and bringing back scarce dollars to the Treasury and that's not only good for the taxpayers, that's good for the credibility of good government. . . .

There are other private groups as well. You've mentioned the attorneys . . . . You have been pioneers and you put together and put into practice what we in Congress could only hope for — an effective weapon against fraud.

I'd like to also salute my colleague here, Congressman Berman, my partner throughout the life of this law. And we still live not to pass it, but to protect it and to make sure it's a continued good tool. And as you said, that's an ongoing proposition. Today, it's one billion dollars later, and no one can question the effectiveness of Howard Berman's work and how we worked together. We're equally proud parents of this legislation. And for me, its passage is the single greatest accomplishment that I want to refer to in my years in the Senate. . . .

And then finally, as I just mentioned, the courageous ones — the whistleblowers. They're the ones who put their

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> **"My philosophy regarding *qui tam* is simple: It works because it's a true partnership. It's a partnership between private citizens and the Government."**

lives, their careers, and sadly even their families on the line. . . . They put their reputations on the line and, as far as I can tell from everyone I've dealt with, they did it because it was the right thing to do. It's the honorable thing to do. Telling the truth is the one thing that can stop fraud dead in its tracks, and we'd be nowhere in this fight without those who are willing to tell the truth and blow the whistle. . . .

My philosophy regarding *qui tam* is simple: It works because it's a true partnership. It's a partnership between private citizens and the Government. It joins private resources with government resources. It's a successful formula that we honor Lincoln for. In his wisdom, President Lincoln knew that you could create a team of public servants and private citizens and that they would work together for a common good serving the American taxpayer. . . .

We're celebrating the tenth anniversary and for ten years we've managed to keep our promise to the taxpayers. We're working hard to protect the taxpayers' hard-earned dollars. It's not often the Congress does what it promises, and it's because of all of you that we've done that in the case of *qui tam*. This hasn't been an easy proposition. It takes dedication. And all of you have shown that. . . .

"I take great pride in being involved with this legislation and what, most importantly, people have done with the law since we passed it."

REPRESENTATIVE HOWARD BERMAN *(D-CA)*

Thank you very much for choosing to honor us today. . . . I consider the passage of the False Claims Amendments as one of my most significant legislative accomplishments. . . . I take great pride in being involved with this legislation and what, most importantly, people have done with the law since we passed it. Because if you believe that government has a role in helping people, in accomplishing things and making our country stronger, nothing can more quickly undermine people's faith in government than the notion that inefficiencies, waste, fraud, and cheating goes on and takes the taxpayers' money. So in my sight, for me, the False Claims Act Amendments affirm my belief in what an honest government, and a vigilant government dealing with the people it does business with, can do on behalf of the public's relationship to that government. . . .

TENTH ANNIVERSARY
1986 FCA AMENDMENTS

. . . I note Taxpayers Against Fraud has sponsored a study which essentially concludes that over the next ten years we can probably expect approximately 6 billion dollars in additional taxpayer recoveries as a result of this law. That's something to be proud of. But it's another figure in that report that maybe should give us even more sense of reward and accomplishment in terms of this legislation, because the real goal here is the deterrent value. . . . According to the report, approximately 100 billion dollars in that same ten year period of time will be saved to the taxpayers from conduct not undertaken because of the fear of the consequences that come from all this.

> **"[N]othing can more quickly undermine people's faith in government than the notion that inefficiencies, waste, fraud, and cheating goes on and takes the taxpayers' money."**

I want to join with Senator Grassley in paying tribute to the parties that are doing this: The U.S. Government — We finally have a Justice Department who thinks this is a constitutional law and sees the benefits of it. I like that. [Assistant Attorney General] Frank Hunger, I noticed was here earlier. He's been very helpful in testimony in front of Senator Grassley's subcommittee on this issue.

And as to both the whistleblowers and their lawyers . . . the risks personally, with family and business, in terms of just your own freedom and stability in doing something like this, are tremendous. And they're far greater than those experienced by any of us who have been involved in this as a matter of our jobs as legislators. So I tip my hat to you as well.

THE VICE PRESIDENT
WASHINGTON

September 27, 1996

Taxpayers Against Fraud
The False Claims Act Legal Center
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Dear Friends:

I am pleased to send my personal greetings as you celebrate the tenth anniversary of the 1986 "False Claims Act Amendments." As you know, this important measure has resulted in the return of billions of dollars defrauded from the federal government.

In particular, the "qui tam" provisions of this law have recovered $1.3 billion of the American people's money. By revitalizing the original 1863 "False Claims Act", Americans now possess the tools needed to help us stop fraud and abuse of many government programs. Certainly, this represents the kind of public-spirited participation in government that needs to be encouraged and applauded.

Once again, please accept my warmest best wishes. I look forward to working with you in the future.

Sincerely,

Al Gore

Al Gore

AG/cco

PRINTED ON RECYCLED PAPER

TENTH ANNIVERSARY
1986 FCA AMENDMENTS

EDWIN MEESE III
214 MASSACHUSETTS AVENUE, N.E.
SEVENTH FLOOR
WASHINGTON, D.C. 20002

15 August 1996

Taxpayers Against Fraud
The False Claims Act Legal Center
1220 19th Street, NW, Suite 501
Washington, DC 20036

Dear Friends:

It is a pleasure for me to join you in marking the tenth anniversary of the enactment of the False Claims Act Amendments of 1986, which was signed into law by President Ronald Reagan. It was my privilege to have been Attorney General of the United States at that time, and I have continued to appreciate the significance of this important legislation.

Because of this statute, private citizens have provided information and filed lawsuits on behalf of the federal government to recover taxpayer funds from those engaged in fraud and abuse of the people's money. This law has strengthened the incentives and protections for those individuals who have served their country in this manner, and has thus been an excellent example of privatization in the public interest.

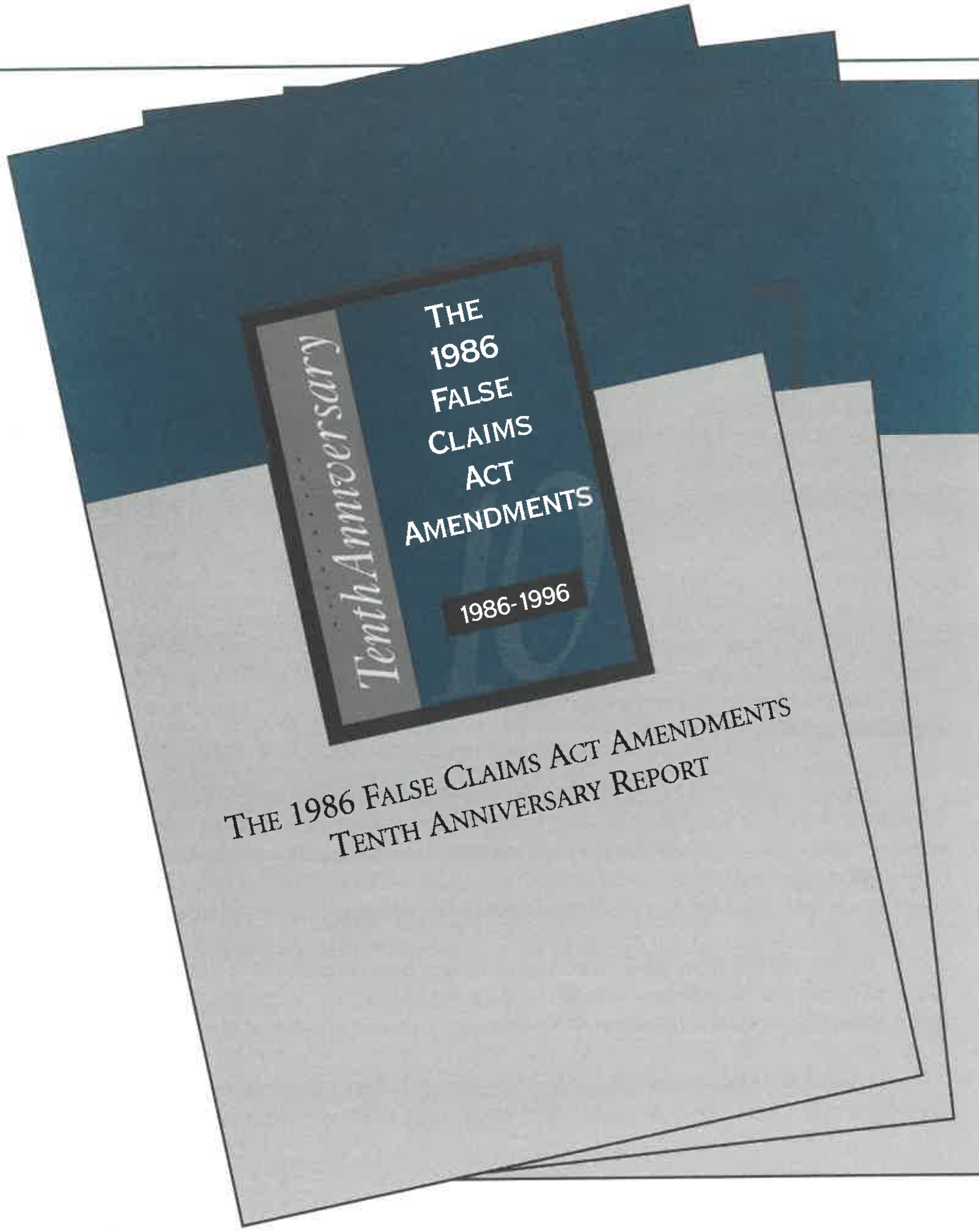
Recent reports from the Department of Justice indicate that over a billion dollars has been recovered in civil fraud cases brought under the False Claims Act during the past decade. These substantial returns to the Treasury show the value of this Act.

I commend your organization for its support of integrity in government and protection of the interests of America's taxpayers. Best wishes for continued success.

Sincerely,

Edwin Meese III

TENTH ANNIVERSARY
1986 FCA AMENDMENTS

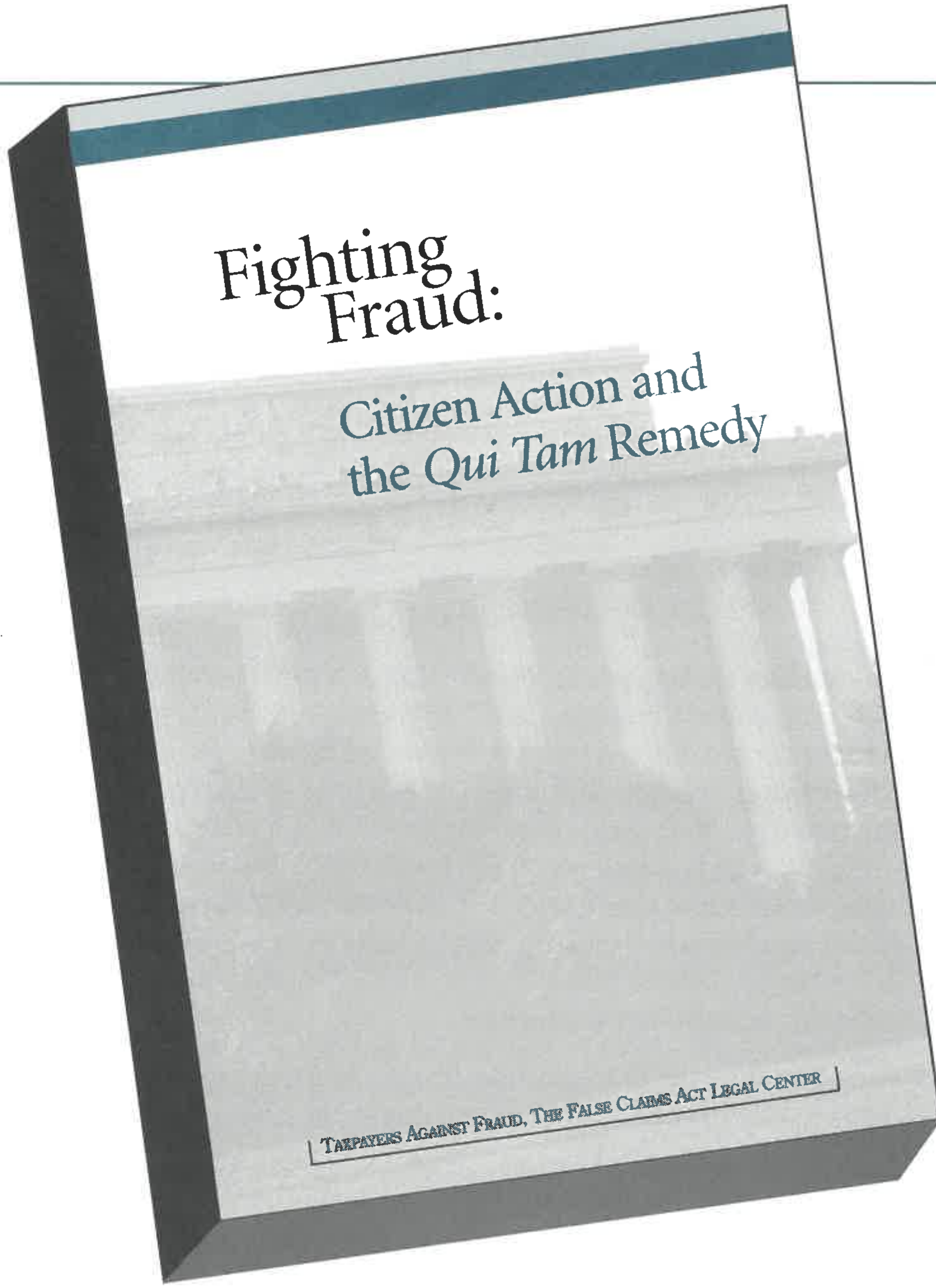


TAF has prepared a Tenth Anniversary Report on the False Claims Act Amendments of 1986. The publication features the following:

- Historical Background of the FCA
- Overview of Key Statutory Provisions
- Statistical Trends
- Case Highlights Since 1986
- New Areas of Application

Copies of the Tenth Anniversary Report can be obtained by contacting TAF.

TENTH ANNIVERSARY
1986 FCA AMENDMENTS



Tenth Anniversary Video

TAF has produced a short educational video highlighting the effectiveness of the False Claims Act Amendments of 1986. The video features commentary from whistleblowers, government officials, and key legislators and includes first-hand accounts of relators' experiences under the *qui tam* provisions.

Copies of the video can be obtained by contacting TAF.

TENTH ANNIVERSARY
1986 FCA AMENDMENTS

THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT

TAF recently commissioned a study to analyze the economic impact of the 1986 Amendments to the False Claims Act over the past decade and into the future. The research and analysis was conducted by William L. Stringer, Senior Lecturer in Economics and Finance, Fels Center of Government at the University of Pennsylvania. Mr. Stringer is also President of The Kalorama Consulting Group, Inc., a public policy research firm headquartered in Washington, D.C., and formerly served as Chief Economist for the U.S. Senate Budget Committee. Printed below is the study's executive summary.

EXECUTIVE SUMMARY

This paper examines the economic impact of the 1986 Amendments to the False Claims Act. The impacts examined are: (1) the additional cost savings by the US Government both currently and in the future, and (2) the deterrent effect of the Act's Amendments. To structure some insight into magnitudes of cost savings and deterrence resulting from the 1986 Amendments, the following are developed and analyzed: (1) an estimate of total fraud perpetrated against the US Government; (2) data relating to the number and amount of recoveries under the Act; (3) a theory for identifying the components of deterrence; and (4) a simulation of deterrence using a variety of plausible assumptions.

Among the conclusions reached in this paper are:

1. Total fraud recoveries since the 1986 Amendments can be expected to exceed $24 billion by FY 2006, with $21 billion of that amount coming in the next decade.
2. *Qui tam* recoveries are expected to equal between about $6.9 billion and $9.3 billion over the next ten years.
3. Deterrence of fraud due to the 1986 Amendments for their first ten years of existence (1986-1996) is estimated as between $147.9 billion and $295.8 billion, and for their second ten years of existence (1996-2006) is estimated as between $240.2 billion (23% of the fraud projected to be committed over that period) and $480.3 billion (46% of the fraud projected to be committed over that period), even assuming a conservative estimate of deterrent effect.
4. Deterrence of fraud due to the *qui tam* provisions of the amended Act for their first ten years of existence (1986-1996) is estimated as between $35.6 billion and $71.3 billion, and for their second ten years of existence (1996-2006) is estimated as between $105.1 billion and $210.1 billion, even assuming a conservative estimate of deterrent effect.

Copies of the complete study are available from TAF.

TENTH ANNIVERSARY
1986 FCA AMENDMENTS

Hughes Aircraft Co. v. U.S. ex rel. Schumer

In September 1996, DOJ submitted an *amicus* brief opposing the multi-issue petition for certiorari filed by Hughes Aircraft Company (Hughes) for review of the 9th Circuit decision in U.S. ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995), 3 TAF QR 4 (Oct. 1995). According to DOJ, the 9th Circuit ruled correctly on all of the issues Hughes has presented for Supreme Court review.

First, DOJ agrees with the 9th Circuit's application of the current version of the FCA's jurisdictional bar to alleged violations that occurred before the Act's 1986 amendments became law. DOJ asserts that no irreconcilable circuit conflict exists on this issue. Moreover, the question will quickly become moot because, as of October 27, 1996, the FCA's statute of limitations will bar any new cases involving claims arising before the 1986 amendments became law.

Second, DOJ contends that the 9th Circuit correctly held that the disclosure of government audits to Hughes' own employees did not constitute a "public disclosure." Hughes argued that review of this issue was warranted to resolve a conflict between the 9th Circuit's decision and that of the 2nd Circuit in U.S. ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992) (holding that government investigators' disclosure of fraud to company employees during execution of search warrant constitutes "public disclosure"). DOJ maintains, however, that the two decisions are reconcilable. According to DOJ, "[t]he question whether information revealed to a corporate defendant's employees is the subject of a 'public disclosure' cannot appropriately be resolved on the basis of a per se rule. Rather, the application of the jurisdictional bar depends upon the circumstances under which the information is revealed, including the employee's freedom (or lack thereof) to transmit the information to the general public." DOJ states that in this case it is aware of no evidence suggesting that the reports were divulged to any Hughes employees other than those designated to receive them by Hughes management. As such, DOJ contends that the 9th Circuit was reasonable to conclude that the limited dissemination of the reports was insufficient to place them in the public domain.

On an additional public disclosure issue, DOJ also sides with the 9th Circuit's decision that a document which is potentially accessible under the Freedom of Information Act (FOIA) is not a public disclosure. There is no conflict on this issue, according to DOJ, because no court has suggested that an agency record can be deemed the subject of a public disclosure "simply because a court concludes that a hypothetical FOIA request would result in release of the document."

Citing legislative history and case law, DOJ also agrees with the 9th Circuit's rejection of Hughes' argument that injury to the public fisc is an essential element of a cause of action under the FCA. And finally, noting that all courts that have considered the question have uniformly rejected the constitutional challenges advanced by Hughes, DOJ addresses each of the company's constitutional arguments. That is, DOJ responds that *qui tam* suits are consistent with the Article III "case or controversy" requirement, that *qui tam* relators are not "Officers of the United States" whose selection is governed by the Appointments Clause, and that the *qui tam* provisions do not violate separation of powers principles.

As the Quarterly Review was going to press, TAF learned that on October 15 the Supreme Court declined certiorari on the constitutionality issue. However, the Court agreed to hear all other issues presented. The case is expected to be argued in early 1997.

U.S. v. Metzinger et al. (ED PA No. CIV. A. 94-7520)

In July 1996, a Pennsylvania district court denied various defendant motions in an FCA case brought against two consultants who advise hospitals on billing procedures and Medicare reimbursement. Eleven hospital clients are also named as defendants. According to the lawsuit, the consultants devised and implemented a scheme whereby improper coding methods — including "upcoding," "unbundling," and "rebundling" — were used to increase the hospitals' Medicare reimbursements. The court found that the Government's amended complaint should not be dismissed for lack of personal jurisdiction, improper joinder of defendants under Rule 20(a), failure to plead fraud with particularity under Rule 9(b), or failure to state a claim upon which relief may be granted under Rule 12(b)(6). The court further found that a more definitive statement was not warranted under Rule 12(e) and that a transfer of venue was not proper. In September, the court denied another defendant's motion to dismiss for insufficient service of process, failure to reasonably notify the defendant of the particular claims against it, lack of personal jurisdiction, improper venue, forum non conveniens, failure to state a claim upon which relief may be granted, and failure to plead fraud with particularity.

SmithKline Beecham PLC

In September 1996, SmithKline Beecham PLC was reportedly near an agreement to pay the Government over $300 million to resolve allegations that it falsely billed Medicare for blood tests performed by its clinical laboratories. The settlement, which would be one of the largest ever in the health care fraud area, involves billings for tests that were not medically necessary and that in some cases may not have been ordered by a physician. According to published reports, the Government has been investigating whether physicians wanted or even were aware they were ordering all the tests included in the lab analysis when sending patients for standard blood work. The Laboratory Corporation of America has also been cited as expected to settle similar misbilling allegations by the end of the year.

ALLEGATION: FOOD STAMP FRAUD

***U.S. v. Salti et al.* (ND OH No. 96CV1065)**

In May 1996, DOJ announced that it has filed a lawsuit against Mike Salti, Sr., Mike Salti, Jr., and others alleging false claims in connection with illegally redeemed food stamps. As part of their scheme, the defendants acquired "discounted" food stamps and established a network of stores whose controlling ownership they concealed. The complaint maintains that they made false representations to the Government that food stamps redeemed by their stores were accepted only in exchange for eligible food when, in fact, they were not.

According to the Government, the Saltis transferred food stamps among the stores to conceal the magnitude of the trafficking, and they further devised a mechanism whereby those stores authorized to redeem food stamps could remain authorized even after they had been disqualified from the federal program. The complaint stated that each food stamp coupon which the defendants were involved in redeeming is a claim presented for payment under the False Claims Act.

Also in connection with this matter, a nine count indictment was unsealed charging the Saltis with a criminal conspiracy which trafficked in $24 million worth of food stamps and generated illegal profits. DOJ cited, among other offenses, trafficking in Department of Agriculture Special Supplemental Food Program for Women, Infants, and Children (WIC) coupons and international money laundering. Joining in the investigation were the Department of Agriculture OIG, the IRS Criminal Investigation Division, the Customs Service, INS, and the Secret Service. The criminal matter is being handled by Assistant U.S. Attorney Gregory Sasse and the civil case by Assistant U.S. Attorneys Richard Blake and Alex Rokakis.

ALLEGATION: MEDICARE KICKBACK/ SELF-REFERRAL VIOLATIONS

***U.S. ex rel. Parker v. Apria Healthcare Group, Inc. et al.* (ND GA No. 1 95-CV-2142)**

In July 1996, DOJ intervened in part in a *qui tam* suit alleging that Apria Healthcare Group, Inc., Georgia Lung Associates P.C., and a doctor defrauded Medicare and Medicaid in connection with kickbacks for patient referrals involving home health care services and medical equipment. Apria is reportedly one of the nation's largest home health providers. The action was brought in 1995 by former Apria Atlanta branch manager Mark Parker. According to the suit, the kickbacks were disguised as "consulting fees," yet little consulting was performed while referrals steadily increased. The relator is represented by C. Wilson DuBose, Timothy Kratz, and Mike Bothwell of Schnader, Harrison, Segal & Lewis (Atlanta, GA). Representing the Government are Assistant U.S. Attorney Daniel Caldwell and Laurie Oberembt of the DOJ Civil Division.

ALLEGATION: SAFETY VIOLATIONS AT PSYCHIATRIC HOSPITAL

***U.S. ex rel. Aranda and DeWitt v. Community Psychiatric Centers of Oklahoma, Inc.* (WD OK No. 94-608-A)**

In July 1996, DOJ filed an amended complaint in a *qui tam* suit alleging that a hospital subsidiary of Community Psychiatric Centers of Oklahoma, Inc. (CPCO) defrauded Medicare, Medicaid, and CHAMPUS by submitting bills for care of children and adolescents who were exposed to an unreasonably unsafe and harmful environment during their hospital stay. The complaint alleges that each time CPC Southwind Hospital submitted a bill seeking reimbursement for treatment of these patients, it was representing to the Government implicitly, and to the federally insured patients expressly, that the hospital was a "safe environment." DOJ stated that such representations were knowingly false and thus actionable under the False Claims Act. According to the lawsuit, children and adolescents engaged in consensual and nonconsensual sexual behavior without adequate response or monitoring by the hospital. Although the hospital was frequently told by its own staff that the environment was unsafe, it continued to admit young patients and bill the Government.

The lawsuit was originally brought by Lisa Aranda and Gayle DeWitt in 1994 and was joined by the Government the following year. Ms. Aranda is a former nurse at CPC Southwind, where two of Dewitt's children have also worked. Billing violations cited involved services that were not provided or were performed by inappropriate personnel. CPCO allegedly improperly altered medical records to pass state and federal hospital inspections as well as billed twice for the same treatment.

ALLEGATION: UNNECESSARY CARE AT PSYCHIATRIC HOSPITAL

U.S. ex rel. Mettevelis and Rowan v. Charter Hospital of St. Louis, Inc., dba Charter Hospital Orlando South, and Charter Behavioral Health Systems, Inc. *(MD FL No. 94-1170-CV-ORL-22)*

In August 1996, DOJ filed an amended complaint in a *qui tam* suit alleging that Charter Hospital Orlando South improperly admitted elderly patients with brain disorders such as Alzheimer's Disease and charged Medicare, Medicaid, and CHAMPUS for unnecessary care. The lawsuit was filed in 1994 by former Charter employees Francine Mettevelis and Rhea Rowan, and the Government joined the action the following year. According to the complaint, the psychiatric hospital admitted hundreds of elderly demented patients, primarily from nursing homes and assisted living facilities, despite knowing that these patients did not need acute in-patient psychiatric treatment. To the extent any of these patients may have needed such care, Charter hospitalized them longer than necessary. Further, Charter allowed many of these patients to admit themselves voluntarily to the hospital, often after they had been transported there against their will, despite knowing that they were incapable of making willful decisions concerning their admissions. Specifically, the complaint alleges that Charter used deceit to secure patient signatures on voluntary admission forms. In addition, Charter falsified medical records to reflect that these elderly patients were improving during their hospital stays and had attended therapy sessions. The case is being investigated by the Defense Criminal Investigative Service and the FBI. The relators' counsel is Donald Petersen (Orlando, FL). Assistant U.S. Attorney Karen Gable and Scott Dahl and Mitchell Lazris of the DOJ Civil Division are representing the Government.

ALLEGATION: DEFECTIVE PRICING AND MISCHARGING ON NAVIGATION SYSTEM CONTRACT

U.S. ex rel. Campbell v. Lockheed Martin et al. *(MD FL Nos. 95-549 and 95-1287)*

A federal judge in Orlando has reportedly denied the Government's sixth request for an extension of time in which to decide whether to intervene in two *qui tam* cases filed by Albert Campbell against Lockheed Martin and its predecessor Martin Marietta. Up until the ruling, the Government had been granted almost 14 months to review the sealed allegations. With its motion for a further extension, DOJ also requested a partial lifting of the statutory seal so that it could discuss Campbell's allegations with Lockheed Martin.

According to the lawsuits, the companies defrauded the Government out of at least $147 million. One of the cases alleges that they withheld accurate cost and pricing data during negotiations with the Air Force and subsequent performance of a contract concerning the Low Altitude Navigation and Targeting Infrared for Night (LANTIRN) system, a navigation and missile targeting system. The defendants allegedly disguised the inflated price through false billings and double billings.

The second case maintains that the defendants mischarged the Government a total of more than $100 million in connection with the LANTIRN system. Those mischarges allegedly occurred when the defendants sought payment at accelerated rates and withheld accurate cost and pricing data. The relator's counsel is Andrew Grosso (Washington, D.C.).

ALLEGATION: GSL AND PELL GRANT FRAUD INVOLVING VOCATIONAL SCHOOLS

U.S. ex rel. Sikalis v. Ronald G. Thomas et al. (D MD No. AMD 95-1181)

In September 1996, DOJ intervened in a *qui tam* suit alleging that the owners of the Ron Thomas Schools of Barbering and Cosmetology made false statements and certifications that their vocational schools met all statutory and regulatory requirements to participate in financial assistance programs administered by the Department of Education. According to the lawsuit, false claims were submitted under the Guaranteed Student Loan and Pell Grant programs. The suit was filed in 1995 by Thomas Sikalis in conjunction with Taxpayers Against Fraud, The False Claims Act Legal Center. Mr. Sikalis is formerly an employee of the Ron Thomas Schools. The court has granted a government motion to stay the *qui tam* action pending disposition of a related criminal case in which the individual defendants have been indicted for mail and wire fraud.

According to the *qui tam* complaint, the defendants falsified time cards, attendance records, and academic records to make it appear as though students were attending classes and maintaining satisfactory progress. Program violations cited include failure to require adequate documentation of student eligibility, failure to ensure that students had the ability to benefit from the educational programs offered, and concealment of the high dropout and default rates of students. The relator's counsel is Christopher Mead of London & Mead (Washington, D.C.). Assistant U.S. Attorney Kathleen McDermott is representing the Government.

U.S. v. Health Careers, Inc. et al. (ED PA No. 93-4222)

In April 1996, Health Careers, Inc. (HCI) agreed to pay the Government **$12 million** to settle FCA allegations in connection with the transportation of Medicare beneficiaries. According to the complaint, HCI submitted improper billings for ambulance services to Medicare from 1987 to 1991 for patients who were transported in passenger vans, for patients who were transported to doctors' offices or clinics, for patients who were transported in groups in the same vehicle, and for patients whose medical condition did not require transportation by ambulance. Medicare regulations did not permit reimbursement for those services. The alleged fraudulent scheme involved thousands of claims submitted to the federal insurance program.

Also included in the settlement was HCI's agreement that it would release all claims to any sums held in escrow by Pennsylvania Blue Shield for a division of HCI called Greater Philadelphia Ambulance Service (GPAS). Under the agreement, no more claims will be filed on behalf of GPAS or HCI with any Medicare or Medicaid carrier or fiscal intermediary for the United States. The Government was represented by Assistant U.S. Attorney Marilyn May and Philip Shaikun of the DOJ Civil Division.

Ohio Hospital Project

In June 1996, Riverside Hospital, Warren General Hospital, Wood County Hospital, Providence Hospital, and Doctors Hospital agreed to pay the Government a total of **$2.3 million** to resolve False Claims Act allegations pursuant to the "Ohio Hospital Project." The Project targets improper billing of outpatient laboratory tests to Medicare and Medicaid by hospitals and independent laboratories. According to DOJ, tentative agreements have also been reached with six other hospitals totaling over $2 million.

The Ohio Hospital Project was initiated to identify facilities that "unbundle" blood tests when using automated equipment and then bill either for each analysis separately or for an automated test as well as several of the analyses separately. (Because most blood chemistry tests processed from a sample are run on an automated machine which can analyze many factors in a single operation, hospitals and laboratories typically establish standard profiles which doctors can order.) According to DOJ, 75 hospitals in the Northern District of Ohio are participating in the Project's voluntary disclosure program whereby the U.S. Attorney's Office recommends that claims arising from laboratory unbundling be resolved for twice the actual overpayment absent other aggravating factors. Total Project recoveries are expected to exceed $15 million in the Northern District.

Under the settlement compliance provisions, the hospital or laboratory must review and, where appropriate, revise its billing system for outpatient lab services, and a written policy must also be distributed to all employees involved in Medicare and Medicaid billing. Further, the State's audit costs are to be paid by the hospitals. Assistant U.S. Attorneys James Bickett, Alex Rokakis, and Richard Blake are handling the unbundling cases.

U.S. ex rel. Croley v. IMO Industries, Inc., Varo, Inc. et al. (ND TX No. 3-95-CV-0607J)

In July 1996, Varo, Inc., a subsidiary of Imo Industries, Inc., agreed to pay the Government **$2 million** to settle a *qui tam* suit alleging that Varo, its Ni-Tec division, and Optic Electronic Corporation delivered to the Army components for night vision equipment that did not meet reliability and testing contract requirements. The suit was filed in 1995 by Richard Croley, Jr., a former employee of Ni-Tec. At issue were image intensifier tubes used in the Army's night vision goggles and aviator's night vision imaging systems. The goggles provide enhanced imagery so the wearer can perform such tasks as driving, weapon firing, short range surveillance, map reading, vehicle maintenance, and medical aid. The aviator's night vision imaging system is used by helicopter pilots to help vision during low level flights. According to the Government, the firms submitted false quality control reports to the Army, including failure analysis reports and product assurance and test reports. More than 1,000 image intensifier tubes were recalled and retested, and nonconforming tubes were replaced with those that met military specifications. The case was investigated by the FBI and the Defense Criminal Investigative Service. The relator was represented by John Ross of Thompson, Coe, Cousins & Irons (Dallas, TX). Dennis Phillips of the DOJ Civil Division represented the Government.

U.S. ex rel. McCabe and Spreng v. Schwartz, Barr & Silver, M.D.'s, P.C. et al. (D DC 95-0094)

In July 1996, Schwartz, Barr & Silver, P.C. (SBS) and certain SBS doctors agreed to pay the Government **$278,800** to settle a *qui tam* case alleging overcharges to the Medicare program. The allegations included billing for chemotherapy treatment even though the treatment was provided by nurses rather than by SBS doctors and no doctors were present at the hospital when the nurses saw the patients. The case was filed in 1995 by John McCabe and Cynthia Spreng. The relators were represented by Daniel Grove and Ken Brody of Keck, Mahin & Cate (Washington, D.C.). The Government was represented by Assistant U.S. Attorneys Cynthia Schnedar and Dara Corrigan.

Holiday Builders

In July 1996, DOJ announced that Leon Douglas Dense, doing business as Holiday Builders, agreed to pay the Government **$525,000** to settle False Claims Act allegations in connection with the construction of Holiday Park Gardens, a low income housing project receiving federal assistance from the Rural Housing Service (RHS), formerly known as Farmers Home Administration. The subsidized construction program is administered by the U.S. Department of Agriculture. As part of the settlement, Dense agreed that the annual audits of projects subsidized by RHS will be conducted by an RHS approved accounting firm other than that which previously conducted such reviews. Oregon Assistant U.S. Attorney Neil Evans handled the case for the Government.

Park Medical Center

In July 1996, DOJ announced that Park Medical Center agreed to pay the Government **$1.45 million** to settle allegations that it billed Medicare and Medicaid for geriatric psychiatric services that were not reasonable or necessary. According to the Southern Ohio Health Care Fraud Task Force, most patients of the hospital's former Senior Treatment Enrichment Program were residents of local nursing homes who were transported to the hospital daily for the program. Park billed Medicare for 20 group psychotherapy sessions per patient per week, whether or not the diagnosis warranted such frequent treatment. The Government maintained that many of the sessions did not constitute active psychotherapy but rather were similar to adult day care, which is not covered by Medicare or Medicaid. Further, many patients were suffering from such disorders as Alzheimer's Disease or dementia, which prevented them from benefiting from treatment. Park, a for-profit hospital and subsidiary of Quorum Health Group, Inc. in Tennessee, also agreed to submit an acceptable corporate compliance plan in the event it reinstitutes an outpatient psychiatric program of any kind. Columbus Assistant U.S. Attorney Mark D'Alessandro handled the matter for the Government.

Infotec Development Corporation

In July 1996, Infotec Development Corporation and its chief executive officer agreed to pay a total of **$1.3 million** to the Government to settle False Claims Act allegations of overcharging on a computer supply contract. According to DOJ, Infotec and the Air Force entered into an agreement for the provision of computer hardware, software, and related goods and services under the "NETCAP" (networking capabilities) contract. Under the contract, Infotec acted primarily as a middleman, purchasing equipment from vendors which it transferred to the Government at a specified markup. According to the Government, Infotec made false statements and misrepresentations by claiming improper amounts on its invoices, and it overcharged for subcontracted work. The company failed to pass on discounts that were obtained for computer hardware and software and overcharged the Government for shipping and labor costs. Further, the company failed to provide the minimum required labor and instead retained subcontractors to do part of the work it should have completed itself.

According to DOJ, Infotec has entered into merger discussions with a subsidiary of Pacer Development, Inc., and the new company (to be known as Pacer Infotec) has agreed to honor the settlement. The case was investigated by the Air Force Office of Special Investigations, the Naval Investigative Service, the Defense Criminal Investigative Service, the FBI, and the Defense Contract Audit Agency. Massachusetts Assistant U.S. Attorney Thomas Kanwit handled the matter for the Government.

U.S. ex rel. Tadlock and Tappan v. The Austin Company (CD CA CV-95-3565)

In August 1996, The Austin Company agreed to pay the Government **$4 million** to settle a *qui tam* suit alleging that it submitted inflated proposals and invoices on contracts for designing federal facilities to cover the costs of its employee pension plan. According to DOJ, the Cleveland architectural and engineering firm added direct labor costs to contracts to cover contributions to its employee benefit plan, even continuing the practice after it no longer made contributions (because the plan was changed to one that was fully funded). Among the buildings Austin designed for the Government were post office facilities, Army supply depots, and Air Force facilities. The suit was filed in 1995 by former Austin employees R. Jerry Tadlock and William Tappan. The relators' share was 20 percent or $800,000. The relators' counsel was Dean Francis Pace of Pace and Rose (Los Angeles, CA). Richard Vartain of the DOJ Civil Division represented the Government.

Thomas Jefferson University and the Jefferson Faculty Foundation / PATH Initiative

In August 1996, Thomas Jefferson University and the Jefferson Faculty Foundation agreed to pay the Government **$12 million** to settle False Claims Act Medicare misbilling allegations. Jefferson is the first institution to participate in the HHS OIG "PATH" (Physicians at Teaching

Hospitals) program. Under the nationwide initiative, physician group practices affiliated with teaching hospitals are encouraged to examine their Medicare Part B billings by participating in a review pursuant to an OIG protocol. Jefferson's violations involved allegedly inadequate documentation and billings by attending physicians for services involving residents, as well as misbilling related to the level of services provided by attending physicians. In addition to the settlement payment, Jefferson has agreed to continue implementation of a corporate compliance plan, including a training program to ensure proper billing. The Jefferson settlement follows a $30 million False Claims Act settlement by the Clinical Practices of the University of Pennsylvania last December for similar violations. Representing the Government were Philadelphia Assistant U.S. Attorneys James Sheehan, Susan Dein Bricklin, and Margaret Hutchinson.

U.S. ex rel. Goodearl, Aldred, and Taxpayers Against Fraud v. Hughes Aircraft Company, Inc. *(CD CA CV 90-2716)*

In September 1996, Hughes Aircraft Company, Inc. agreed to pay the Government **$4.05 million** to settle a *qui tam* suit alleging that it failed to perform certain tests on components used in advanced electronic equipment such as radar units for military aircraft and missile guidance units. The suit was filed in 1990 by former Hughes supervisors Margaret Goodearl and Ruth Aldred and the public interest organization Taxpayers Against Fraud. According to the lawsuit, Hughes did not perform certain environmental screening tests on microcircuits (known as hybrids) that it manufactured and shipped. Approximately 75 programs involving all branches of the military were affected, including the Navy's F-14, F-18, and A6E aircraft, the Air Force's F-15 aircraft, the AAM-RAM and Phoenix missile programs, and the Army's M-1 tank. In a related criminal case, Hughes was convicted in 1993 and fined $3.5 million.

The *qui tam* suit alleged that Hughes employees were instructed to omit tests, to shorten required procedures, to pass hybrids that had failed tests, to perform unauthorized and undocumented rework on hybrids that had failed tests, and to falsify the documents accompanying each piece through the manufacturing process to show that the tests had been properly conducted. The matter was investigated by the Air Force Office of Special Investigations and the Defense Criminal Investigative Service. The relators' share was 22 percent or $891,000. The relators were represented by Mary Louise Cohen and Linda Popejoy of Phillips & Cohen (Washington, D.C.); Marron, Reid & Sheehy (San Francisco, CA); and Osborn Maledon (Phoenix, AZ). The Government was represented by Vincent Terlep, Jr. of the DOJ Civil Division.

U.S. ex rel. Spear and Dowden v. MetPath Inc., Corning Inc., and Unilab Corp. *(D NJ No. 95-2379)*

In September 1996, Corning Clinical Laboratories Inc., formerly known as MetPath Inc. and a wholly-owned subsidiary of Corning Life Sciences Inc., and Unilab Corporation agreed to pay the Government **$11 million** to settle a *qui tam* suit alleging that they submitted false claims to Medicare, Medicaid, and CHAMPUS by billing for certain blood indices that were not ordered or medically necessary. The settlement focused on the national clinical labs' regional operations in California, Colorado, Connecticut, Florida, Michigan, Missouri, and Georgia. According to the Government, certain labs currently owned by Corning and Unilab billed for additional "hemogram indices" whenever a doctor ordered a Complete Blood Count (CBC) or a Retic Count. The lawsuit was originally filed in the Northern District of California in 1995 and later transferred to the District of New Jersey. The relators, Kevin Spear and C. Jack Dowden, are former employees of MetWest Inc., a former subsidiary of MetPath that operated the California labs.

Under the settlement agreement, Corning will pay about $7 million and Unilab $4 million. Joining in the investigation were the HHS OIG, the Railroad Retirement Board, the Defense Criminal Investigative Service, and the Office of Personnel Management. The relators' share was approximately $1.6 million. The relators were represented by Mary Louise Cohen and Mitchell Kreindler of Phillips & Cohen (Washington, D.C.). Representing the Government were Larry Freedman of the DOJ Civil Division, New Jersey Assistant U.S. Attorney Janet Nolan, Massachusetts Assistant U.S. Attorney Susan Winkler, and Washington, D.C. Assistant U.S. Attorney Dara Corrigan.

TAF NEWS

1986 FCA Amendments Tenth Anniversary Resources

- To mark the anniversary of passage of the 1986 FCA Amendments, TAF has available a variety of new resources including a Tenth Anniversary Report, an Assessment of Economic Impact, and an educational video highlighting the effectiveness of the Act. These materials, available at no charge, can be obtained by contacting TAF 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*, 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 WWW:http://www.taf.org or via e-mail at taf-info@taf.org.

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). If you want to discuss a potential article, please contact Associate Director Alan Shusterman.

Washington Lawyer Article

- The September/October 1996 issue of the DC Bar magazine includes a feature article on *qui tam* by TAF Senior Staff Attorney Priscilla Budeiri. Copies of the article are available from TAF.

Previous Publications

- Back issues of the *Quarterly Review*, including the "1995 Year In Review," are still available. Requests can be made by phone, fax, or mail.

Library Resources

- TAF has available in its library numerous 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.

Acknowledgments

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