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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.*

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Public Disclosure Bar and Original Source Exception

U.S. ex rel. Findley v. FPC-Boron Employees' Club et al., 105 F.3d 675 (D.C. Cir. Jan. 24, 1997)

In affirming dismissal of a *qui tam* action disputing the legality of prison employees' clubs retaining vending machine income, the D.C. Circuit weighed in on the "based upon" and "original source" aspects of the "public disclosure" bar at FCA § 3730(e)(4). The court rejected the 4th Circuit's interpretation of "based upon" as meaning "derived from" and instead aligned itself with those circuits that view "based upon" as meaning that the suit's allegations are "substantially similar to" publicly disclosed allegations or transactions. With respect to "original source," the court agreed with the 4th Circuit that an original source need not have provided information to the entity that made the public disclosure. However, the court adopted yet a new twist on "original source." According to the D.C. Circuit, to qualify as an "original source," a relator must have direct and independent knowledge of the information on which the publicly disclosed allegations are based and must have provided that information to the Government before the public disclosure occurred.

The lawsuit alleged that government employees' clubs that earned revenue from vending services on federal property violated the FCA by retaining monies owed to the Government. The relators, D.J. Findley and Paul Lazerson, learned of the circumstances underlying this case while attending a conference to discuss a Bureau of Prisons (BOP) request for proposals to service certain vending machines. At the conference, they received a solicitation for services from the FPC-Boron Employees' Club concerning vending machines operated by that organization on a BOP facility. The Employees' Club's machines are located in employee and visitor lounge areas. The BOP pays for the utilities used to operate the machines, but, under the terms of a BOP Program Statement, the Employees' Club retains 85 to 100 percent of the machines' profits.

Findley and Lazerson bid unsuccessfully for the contract to service the Employees' Club's vending machines and subsequently filed bid protests regarding the propriety of the Employees' Club procuring such services. Thereafter, Findley and Lazerson filed a *qui tam* suit against all employees' clubs of the BOP and Department of Justice that earn revenue from vending services on federal property. The suit alleged that the vending machine revenue is illegally used to fund social events and recreational junkets for federal employees. The Government declined to intervene.

The district court dismissed the complaint for lack of subject matter jurisdiction. It cited three "public sources" that it found constituted "public disclosures" under the Act: a 1952 Comptroller General Opinion which questioned the legality of postal employees' clubs retaining vending revenue; the legislative history of the Randolph-Sheppard Act (RSA) which granted blind vendors priority in operating vending machines on federal property; and a Federal Circuit case that dealt with whether vending revenue secured at military exchanges is exempt from the RSA. The district court concluded that before the filing of the action, enough information was in the public domain to reveal the allegation that government employees are improperly maintaining vending machines on federal property. According to the court, "[b]ecause the information that relators bring has been a subject of discussion in

Congress, in the GAO, and in the Federal courts over the past forty years, as well as appearing in publicly available BOP documents, relators cannot be considered to possess the 'independent knowledge' necessary to be an 'original source.'"

Findley appealed the dismissal arguing principally that he did not learn of the Employees' Clubs' false claims from publicly disclosed allegations or transactions, that his complaint alleged different transactions and allegations than those in the public domain, and that he met the original source exception.

Siller "Derived From" Definition of "Based Upon" Rejected

Since the district court found sufficient information in the public domain regarding the facts underlying the allegations or transactions of Findley's complaint, the appellate court focused on Findley's arguments that: (1) because he never heard of the various "public" reports, his complaint could not have been "based upon" them; and (2) the allegations and transactions that he uncovered were different from anything that was publicly disclosed.

The D.C. Circuit rejected the 4th Circuit's "derived from" analysis in U.S. ex rel. Siller v. Becton Dickinson, 21 F.3d 1339 (4th Cir.), cert. denied, 115 S. Ct. 316 (1994), claiming that it renders the original source exception to the public disclosure bar "largely superfluous."

The court then analyzed judicial interpretations of the 1943 bar that precluded *qui tam* suits "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." It concluded that a case was barred under the 1943 version of the statute whenever "the evidence and information in possession of the United States at the time the FCA suit was brought was sufficient to enable it to adequately investigate the case and to make a decision whether to prosecute." The D.C. Circuit extrapolated that this interpretation of the entire 1943 bar also represented the courts' interpretation of the phrase "based upon."

With respect to the legislative history of the 1986 amendments, the appellate court concluded that Congress intended to change the "focus of the jurisdictional bar from evidence of fraud inside the government's overcrowded file cabinets to fraud already exposed in the public domain." In doing so, the court found "no support either in the language or the legislative history of the 1986 amendments . . . that in making this alteration Congress intended to change the established meaning of 'based upon.'"

Applying this analysis, the D.C. Circuit held that Findley's complaint was barred by § 3730(e)(4)(A). Like the district court it found that the 1952 Comptroller General Opinion, the legislative history of the Randolph-Sheppard Act, and the Federal Circuit opinion constituted "public disclosures" under the FCA.

Next, the court analyzed Findley's contention that his complaint addressed different "allegations or transactions" than those already in the public domain. The court applied the test set forth in its earlier decision, U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994), that "*qui tam* suits are limited to those in which the relator has contributed significant independent information." Disagreeing with Findley, the court concluded that "[e]ach of the public disclosures that we rely on raises the specter of 'foul play' by acknowledging the questionable legality of permitting federal employees to use federal facilities for the provision of vending services and retaining revenue from such services." The court found that the public disclosures specifically identified the nature of the alleged fraud as well as the federal employee actors engaged in the allegedly illegal activity. According to the court, the only new material Findley added was the identity of particular employees' clubs

engaged in the previously documented generic practice. This, the court concluded, was "at best collateral information" which did not introduce elements of new, wrongful transactions.

The court also rejected Findley's argument that his complaint contained new theories of legal liability, that is, violations of various other federal regulations and criminal laws. According to the court, new legal theories of liability do not alter the fact that material elements of the violations have already been publicly disclosed.

New Interpretation of "Original Source"

In analyzing whether the original source exception applied, the D.C. Circuit found other circuits' interpretations of the provision wanting. Specifically, the court rejected the 2nd and 9th Circuits' construction which adds a requirement that the relator must have had a hand in the specific public disclosure.

The court also disagreed with the 4th Circuit's interpretation which essentially reflects the wording of "original source" definition at § 3730(e)(4)(B). The D.C. Circuit acknowledged that, standing on its own, subparagraph (B) suggests that an original source need only have direct and independent knowledge of the allegations in the *qui tam* complaint. However, focusing on subparagraph (A) of § 3730(e)(4), the court noted that the original source exception is limited to one who is an "original source of the information." According to the D.C. Circuit, the 4th Circuit's approach is not acceptable because it "fails to harmonize subparagraph (B) with subparagraph (A), each of which we find to be a necessary component of the exception."

Citing its prior decision in Springfield, the D.C. Circuit defined "information" in subparagraph (A) as "any essential element of the fraud transaction." Turning to subparagraph (B)'s requirement that an original source have "direct and independent knowledge of the information on which the allegations are based," the court defined "direct" as first-hand knowledge and "independent" as information known by the relator not depending or relying on the public disclosure. The court further found that "the allegations" in subparagraph (B) "can only mean those allegations publicly disclosed, since those are the only allegations mentioned at all in section 3730(e)(4)." The court summarized its definition of an "original source" as "a relator with direct and independent knowledge of 'the information [i.e., any essential element of the fraud transaction] on which the [publicly disclosed] allegations are based . . . .'" The court found that Findley could not meet this definition because "however much direct and independent knowledge he may have of the information in his complaint, he does not have direct and independent knowledge of the information on which the publicly disclosed allegations are based."

From that point, and without extensive explanation, the court further required that to be an "original source" a relator must voluntarily provide the Government with the information, not just prior to filing suit (as stated in § 3730(e)(4)(B)), but prior to any public disclosure of such information. Because Findley stated that he was unaware of the public disclosures and only learned of the practices many years after the public disclosures, the court ruled that Findley "had no knowledge of any of the essential elements of the publicly disclosed fraudulent transactions prior to their public disclosure" and therefore was not an "original source."

U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al., Memorandum Opinion and Order, Civ. No. 4-96-734 (D. Minn. Mar. 3, 1997)

A *qui tam* suit alleging fraudulent anesthesiology billing was not jurisdictionally barred

since it was not "based upon" a public disclosure, according to a Minnesota district court. Adopting the 4th Circuit's Siller "derived from" definition of "based upon," the court found that the relators, who had previously filed an antitrust complaint with similar allegations against some of the same defendants, did not "use" that complaint in order to "create" the *qui tam* action. Rather, the *qui tam* suit, as well as the antitrust complaint, was based upon the relators' own knowledge of the alleged fraud. However, the court dismissed the suit without prejudice for failure to satisfy Rule 9(b).

Minnesota Association of Nurse Anesthetists (MANA), an association of professional certified registered nurse anesthetists (CRNAs), filed this *qui tam* action in December 1994 against various hospitals, administrators, anesthesiology practice groups, and medical doctor anesthesiologists (MDAs). The relators alleged that the defendants fraudulently billed Medicare for services that the MDAs did not perform or that did not qualify for reimbursement. Prior to filing this action, the relators filed a 16 count antitrust complaint against some of the same defendants. The Government declined to intervene in the *qui tam* suit.

Alleged Disclosure Did Not Reveal Essential Elements of the Fraud Under Springfield "Allegations or Transactions" Test

In determining whether the § 3730(e)(4)(A) bar was triggered, the district court examined four alleged public disclosures. First, the court found that an audit letter sent to the defendant hospitals by Travelers Insurance Company, the Medicare Part B carrier, did not sufficiently "elucidate the 'essential elements' of the fraudulent transaction so as to place the fraud in the public domain." Thus, the court concluded that it did not constitute a public disclosure under the "allegations or transactions" test (i.e., X + Y = Z) set forth in U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994). The court did not address whether the Travelers letter constituted an enumerated means under § 3730(e)(4)(A).

According to the court, the letter mistakenly concluded that the CRNAs were improperly billing for services that the MDAs had personally performed, whereas the *qui tam* suit alleged that the MDAs had billed for services that they had not personally performed. In short, the letter alleged a different perpetrator than that alleged by the relators. Thus, at most the letter identified one half of the fraudulent equation, i.e., "X" — fraudulent billing. It did not reveal "Y" — the defrauding party or how the fraud occurred — much less "Z" — the alleged fraud scheme. Accordingly, the court found that the Travelers letter did not constitute a public disclosure under the Act.

Discovery Material Must Actually Be Made Public To Be "Publicly Disclosed"

The court next considered whether the relators' allegations were publicly disclosed in a notebook belonging to a MANA member who had recorded cases where he believed MDAs submitted fraudulent bills. The defendants argued that this notebook should have been produced in discovery in the antitrust litigation, and had it been produced it would have been a public disclosure. The court rejected this contention, holding that "discovery material must actually have been made public to be 'publicly disclosed.'" Here, discovery in the antitrust case did not even begin until after the *qui tam* suit was filed. Thus, the notebook did not constitute a public disclosure.

Siller "Derived From" Test Followed in Interpreting "Based Upon"

After summarily concluding that the allegations of fraud were publicly disclosed in the antitrust complaint and subsequent news articles, the court addressed whether the *qui tam* complaint was "based upon" the information

in the antitrust complaint and news articles. First, the court outlined the split between the 4th Circuit's "derived from" test in U.S. ex rel. Siller v. Becton Dickinson, 21 F.3d 1339 (4th Cir.), cert. denied, 115 S. Ct. 316 (1994), and the "same as" or "supported by" test followed in several other circuits. The court emphasized U.S. ex rel. Findley v. FPC-Boron Employees'Club et al., 105 F.3d 675 (D.C. Cir. 1997) (discussed directly above at page 1), where the D.C. Circuit concluded that the Siller "derived from" definition was "inappropriate in light of the structure of the entire [FCA]."

However, the district court found the reasoning in Siller "preferable" to the rationale of Findley. Specifically, the court found that "'derived from' was logically closer to 'based upon'than 'supported by.'" Moreover, the "execution of the definition 'supported by' to mean 'same as' or 'similarly situated'" is "difficult to reconcile with the plain meaning of the term 'based upon.'" The district court concluded that "based upon" could mean "derived from" or even "supported by" but could not mean "same." The court offered the following illustration: "'[B]ased upon' means that X is used in order to formulate Y. If Y can completely exist independently of X then Y is not 'based upon' X." In non-algebraic terms, the court found that the relators did not "use" the antitrust complaint "to create" the *qui tam* complaint; rather, both complaints were based upon the relators' own knowledge of the fraud obtained prior to filing either complaint.

"Derived From" is Consistent with Purposes of Act

The district court found that its interpretation of "based upon" is consistent with the fundamental policies of the FCA. According to the court, the FCA's goals are to encourage private citizens to come forward and expose fraud while preventing "opportunistic" suits by persons "who became aware of fraud but played no part in exposing it." A relator whose case does not rely on a previous public disclosure is not "opportunistic" and need not be barred, according to the court.

Filing Provision is Satisfied When Government is Given Sufficient Information to Conduct an Investigation and Make Its Intervention Decision

The defendants also did not convince the court that the relators had failed to satisfy the filing procedures under § 3730(b)(2). The defendants argued that the relators' disclosures to the Government did not contain information about each of the defendants. The court, however, noted that the statutory scheme seems to inherently contemplate that new information — such as the addition of claims or defendants — may arise as the case progresses. According to the court, "the statute does not call for all the information to be disclosed. Rather, according to the statute, a relator need only furnish 'substantially all' the information in their possession."

Moreover, if a relator adds new claims or defendants, the Government can still intervene at a later date for good cause under § 3730(c)(3). According to the court, a disclosure that does not recite every defendant but still gives the Government sufficient information to conduct an investigation satisfies the goal of § 3730(b)(2), which is to allow the Government an opportunity to evaluate the case and make an intervention decision. Here, the relators provided a statement of material evidence that described the type of fraud alleged, even if not every defendant was specifically named. The court found that, because the relators' statement provided the Government an opportunity to conduct an adequate investigation and determine whether or not to intervene, the relators had complied with § 3730(b)(2).

Relators Must Provide Representative Examples of the Fraud To Satisfy Rule 9(b)

Finally, the district court agreed with the defendants that the relators' complaint lacked sufficient specificity to comply with Rule 9(b). While the complaint sketched the general fraudulent scheme allegedly employed by the defendants, it did not provide any example that "names a specific anesthesiologist on an exact date at a particular hospital with reference to either the procedure, patient or bill." Although the relators were not required to recite specifics for all 28,000 allegedly fraudulent transactions, they did have to provide some "representative examples of the fraud which detail the specifics of who, where, and when." Accordingly, the court dismissed the complaint without prejudice, allowing leave to file an amended complaint.

Public Disclosure Bar/ Davis-Bacon Act Violations

U.S. ex rel. I.B.E.W., AFL-CIO, Local Union No. 217 et al. v. G.E. Chen Construction, Inc. et al., 1997 WL 85413 (N.D. Cal. Jan. 29, 1997)

In order for the public disclosure bar to apply, the alleged disclosure must occur in one of the enumerated means in § 3730(e)(4)(A), a California district court held. The alleged disclosures in this case — certified payroll records obtained under state law, and private correspondence — did not qualify as disclosures in or from one of the Act's enumerated means. The court also ruled that the relators' allegations regarding employee classifications under the Davis-Bacon Act were within the sole jurisdiction of the Department of Labor. However, the court held that it had jurisdiction to hear the remaining allegations that were not dependent on a determination of the proper classification of workers.

The relators, a carpenters' union local and several individuals, brought this *qui tam* suit alleging a variety of false claims and false records in connection with federally funded Airport Noise Insulation Project contracts. Specifically, the relators alleged that the defendants misclassified workers under the Davis-Bacon Act and also failed to pay workers properly, underreported hours, misreported wages paid to workers, and otherwise lied to the Government. The defendants moved to dismiss the union from the suit, arguing that there had been a public disclosure and that the union was not an original source.

§ 3730(e)(4)(A) Enumerated Means Are Exclusive Types of Disclosure that Trigger the Public Disclosure Bar

Inferring from other 9th Circuit rulings that the appellate court would interpret the FCA narrowly, the district court found that, for the public disclosure bar to be invoked, the disclosure must have occurred in one of the enumerated means in § 3730(e)(4)(A). Thus, the court agreed with the 11th Circuit's decision in U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991), that these enumerated means are "exclusive" and not simply examples of the types of disclosures that could trigger the bar. As such, the court found that the union's obtaining the defendants' certified payroll records through a provision of the California Labor Code was not a disclosure through one of the Act's enumerated means and, therefore, did not trigger the bar.

Exchange of Private Letters Does Not Constitute a Public Disclosure

The district court also found that an exchange of letters between the union and the City and County of San Francisco did not constitute a public disclosure. Citing 9th and 7th Circuit precedent, the court simply stated that "private letters do not constitute a public disclosure within the meaning of the statute." Because

there were no public disclosures, the court found it unnecessary to reach the issue of whether the union was an "original source" under the Act.

Allegations of Misclassification of Workers Under Davis-Bacon Act Must Initially Be Resolved by Department of Labor

As to subject matter jurisdiction over the claims of the suit, the court held that it had jurisdiction as to some claims but not as to others. Citing U.S. ex rel. Windsor v. DynCorp. Inc., 895 F. Supp. 844 (E.D. Va. 1995), 3 TAF QR 23 (Oct. 1995), the court ruled that it lacked jurisdiction to decide the relators' claims that the defendants misclassified employees under the Davis-Bacon Act. According to the court, such disputes regarding misclassification must be resolved by the Department of Labor applying its complex classification regulations. However, the court dismissed the misclassification claims without prejudice, leaving open the question as to "whether the relators could bring FCA claims based on misclassification after they have exhausted the Department of Labor's remedies."

Court Has Jurisdiction Over Allegations Not Dependent on Department of Labor Classification Regulations

On the other hand, the court held that it had jurisdiction over allegations not dependent on a determination of proper worker classification. That is, the court maintained jurisdiction over allegations where the "falsity" of the claim did not depend on the interpretation and application of the classification regulations. These included allegations that the defendants misreported the wages paid to workers, underreported hours worked, failed to pay overtime, failed to issue paychecks, directed workers to lie to government inspectors, and prepared false payroll certifications.

Prefiling Release of *Qui Tam* Claim

U.S. ex rel. Hall v. Teledyne Wah Chang Albany, 1997 WL 121153 (9th Cir. Mar. 19, 1997)

The 9th Circuit ruled that a relator who executed a general release with his former employer to settle a state law employment action was barred from bringing a subsequent *qui tam* action. Although in a previous case the 9th Circuit had found that a similar release entered into without the Government's knowledge or consent was unenforceable as against public policy, the court enforced the release in this case because the Government had investigated the relator's allegations of fraud prior to the settlement and release and concluded that no fraud had occurred. The court ruled that, under these circumstances, the public interests underlying FCA enforcement by private citizens did not outweigh the public interest in encouraging settlement of private disputes.

Relator Christopher Hall, a Teledyne engineer, became concerned in 1990 that Teledyne was falsely certifying that it was conforming with contract specifications regarding the heating of nuclear tubeshells to prevent corrosion. After first conveying his concerns to Teledyne management, Hall notified and then filed a complaint with the Nuclear Regulatory Commission (NRC) in January 1991. However, the NRC found that the tubeshells were in accordance with contract specifications.

Subsequently, Teledyne allegedly fabricated deficiencies in Hall's job performance and placed him on probation. In response, Hall filed a complaint with the Department of Labor (DOL) alleging retaliation for whistleblowing about nuclear safety problems. DOL agreed with Hall that Teledyne had discriminated against him based on protected activity.

Notwithstanding DOL's findings, Teledyne fired Hall in July 1991. Hall then sued Teledyne under state law alleging, among other counts, termination for whistleblowing. In that suit, Hall included allegations that Teledyne had defrauded the Government by falsely representing that the tubeshells were heated to specifications. Hall and Teledyne settled the state suit and entered into a broadly worded general mutual release in December 1993.

In October 1994, Hall filed a *qui tam* action based on the same allegations that he had previously made in the state action. The Government declined to intervene. The district court then dismissed the suit on summary judgment concluding that, because the Government knew of and had investigated Hall's allegations prior to the release, the public interest in encouraging settlement of private disputes outweighed the public interest in permitting FCA cases to go forward. Less than a month later, the 9th Circuit held in U.S. ex rel. Green v. Northrop, 59 F.3d 953 (9th Cir. 1995), 3 TAF QR 1 (Oct. 1995), that "prefiling releases of *qui tam* claims, when entered into without the United States'knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." Hall appealed the district court dismissal arguing that, in light of Green, the release was unenforceable.

Enforcing Releases When Government Has No Knowledge of Allegations Undermines FCA Objectives

The 9th Circuit upheld the district court's dismissal of Hall's claim, finding that the rationale underlying Green did not apply in this case. The appellate court's refusal to enforce the release in Green turned on the primacy of the public interests underlying the FCA's *qui tam* provisions. According to the court, the central purpose of the *qui tam* provisions is "'to set up incentives to supplement government enforcement' of the Act." Thus, a relator who brings a successful claim will receive a share of the recovery in the case. As such, found the court, the effect of enforcing releases when the Government is not aware of the wrongdoing would be to encourage relators to settle privately and release their claims, thereby retaining 100 percent of the recovery, rather than bringing the information to the Government and keeping at most 30 percent.

Public Policy Concerns Not Present When Government Has Already Investigated and Found No Basis for Allegations

The appellate court further explained that its decision in Green turned on the public interest in learning about fraud against the Government, and that the Government had not been aware of Green's allegations prior to the settlement and release of the state claim. The court stated, "In fact, we deemed the question of the government's lack of knowledge 'critical.'" The court reasoned that if the "prevailing legal rule were that prefiling releases entered into without the government's consent or knowledge were enforceable," then in all likelihood "Green would have never filed his *qui tam* suit in the first place."

However, in the case at hand, the court found that the Government had known about Hall's allegations of false certifications prior to the release. Thus, the public interest in having information brought forward that the Government would not otherwise obtain was not implicated. Moreover, the public interest in the use of *qui tam* suits to supplement federal enforcement was also not harmed because the Government had already investigated the allegations against Teledyne and concluded that the tubeshells were manufactured in accordance with specifications. As such, there were no overriding federal concerns that would justify upsetting the general policy in favor of encouraging parties to settle disputes.

Accordingly, the 9th Circuit ruled that the district court had properly granted summary judgment in favor of Teledyne. The appellate court also clarified that, since the Government was not a party to the release, the Government could still pursue a claim against Teledyne.

11th Amendment/Scientific Misconduct

U.S. ex rel. Berge v. The Board of Trustees of the University of Alabama et al., 104 F.3d 1453 (4th Cir. Jan. 22, 1997)

In a *qui tam* suit brought by a former graduate student against a state university and university medical researchers and professors, the 4th Circuit ruled that states do not have 11th Amendment sovereign immunity against False Claims Act suits. However, the appellate court went on to reverse a jury verdict in favor of the relator. According to the court, the alleged false statements at issue were not false or material.

Pamela Berge was a visiting graduate student at the University of Alabama at Birmingham (UAB) for seven months in 1987. At UAB, she worked with certain internationally recognized scientists who had been studying cytomegalovirus (CMV) for well over a decade. This research was funded largely by a grant from the National Institutes of Health (NIH) which was renewable every five years. Berge did her dissertation on CMV.

According to the 4th Circuit, Berge's *qui tam* suit against UAB and four UAB researchers was based on alleged false statements made to NIH by UAB in annual progress reports under its grant. In particular, Berge alleged that (1) UAB misled NIH in grant year 11 regarding the amount of data that had been computerized, (2) UAB had included an abstract of Berge's work in year 12 without mentioning her name, thereby overstating UAB's competence and progress, (3) in years 13 and 14, although including Berge's name, UAB had "submerged" her research so that serious questions about one of UAB's key theses would not be noticed, and (4) in year 15 UAB misled NIH by including abstracts of a UAB doctoral candidate's work which plagiarized Berge's work. Berge also sued the individual defendants for conversion of intellectual property.

After a ten day trial, the jury returned a verdict in favor of Berge, assessing damages against UAB in the amount of $550,000, which was trebled to $1.65 million pursuant to FCA § 3729(a). The district court awarded Berge 30 percent of the recovery, the maximum relator share provided for under the Act. The jury also found the individual defendants liable for conversion and imposed both compensatory and punitive damages. Without opinion, the district court denied the defendants'motions for judgment as a matter of law.

11th Amendment Sovereign Immunity Does Not Apply in FCA Context

On appeal, the defendants and various *amici* raised, among other things, issues regarding 11th Amendment sovereign immunity — in light of the Supreme Court decision in Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) — and *qui tam* relator standing. Recognizing that it was the first court to address the 11th Amendment in the context of the FCA post-Seminole, the 4th Circuit affirmed its holding in U.S. ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr., 961 F.2d 46 (4th Cir. 1992), finding no 11th Amendment immunity.

According to the 4th Circuit, Seminole's relevant holding is that Congress must use unequivocal statutory language to abrogate states' sovereign immunity in suits brought by

and for private parties. However, "this is a non-issue in the [FCA] context. There is simply no question of abrogation of immunity here. Seminole certainly left intact what is beyond purview: that the federal government may sue states in federal court." And, as the court previously held in Milam, "the United States is the real party in interest in any [FCA] suit, even where it permits a *qui tam* relator to pursue the action on its behalf."

OIG Report Recommending No Action is Not Evidence of No Injury in Fact

After affirming a relator's general standing as the Government's representative, the 4th Circuit rejected an *amicus* argument that Berge lacked standing in this case because the Government suffered no injury in fact. This argument relied on a Department of Health and Human Services Office of Inspector General (OIG) report recommending no action with regard to Berge's *qui tam* allegations. First, the court noted that the OIG report was primarily concerned with possible criminal violations, "which would put the Government to a higher burden of proof than in a civil action as here." More importantly, according to the court, "the plain language of the Act clearly anticipates that even after the Attorney General has 'diligently' investigated . . . the Government will not necessarily pursue all meritorious claims." The OIG report was not an admission that the Government suffered no injury but rather "a cost-benefit analysis. Here the Government surmised . . . that the costs of proceeding on Berge's claims outweighed the anticipated benefits."

Alleged False Statements Found Neither False nor Material

Turning to the merits of the case, the 4th Circuit analyzed each of the alleged false statements with respect to materiality and falsity. As an initial matter, the court held that in the FCA context "the determination of materiality, although partaking of the character of a mixed question of fact and law, is one for the courts." Furthermore, the materiality of a false statement turns on whether it "has a natural tendency to influence agency action or is capable of influencing agency action."

Reversing the jury verdict in its entirety, the appellate court found: "UAB did not mislead NIH about the extent of computerization"; the omission of Berge's name from the abstract "cannot possibly be material" since "NIH did not even require the inclusion of her name, or anyone else's," and in any event the use of the abstract was "perfectly proper" and thus did not even constitute a false statement; Berge's allegation regarding the submergence of her work was "inexplicable"; and there was no plagiarism by the UAB doctoral candidate and thus no false statement by UAB.

The court concluded:

> In addition to this allegation by allegation analysis that demonstrates the lack of materiality, as well as the lack of falsity, of the statements, we also decide that no reasonable jury could possibly conclude that a multi-million dollar grant, continually renewed over a period of more than a decade, undertaken by three internationally-respected scientists . . . would be reduced or eliminated due to UAB's lack of expertise in an area that could only be bolstered by the work of an unknown graduate student . . . . The hubris of any graduate student to think that such grants depends on the results of her work is beyond belief. That is not the way Big Science works.

The 4th Circuit also reversed the jury's verdict with respect to Berge's conversion claim, finding that it was preempted by federal copyright law.

Editor's Note: In this case, TAF submitted an amicus brief on behalf of the relator regarding the amenability of states to FCA suits and the applicability of the FCA to scientific misconduct cases. Copies of the brief are available from TAF upon request.

Seal Provision

U.S. ex rel. Costa and Thornburg v. Baker & Taylor, Inc. et al., 1997 WL 97325 (N.D. Cal. Jan. 16, 1997)

In a *qui tam* case under seal for more than 19 months, a California district court denied further extension of the seal period because the Justice Department failed to show "a single cogent reason" to maintain the seal. Highlighting the FCA's legislative history, the court stated that the "good cause" requirement for seal extensions "is a substantive one, which the government can only satisfy by stating a convincing rationale for continuing the seal." In this case, the court found that the Government had "utterly failed to meet that burden."

The relators filed this case against Baker & Taylor (B&T) on June 1, 1995 under both the federal FCA and California's FCA. The complaint alleged that B&T engaged in a practice of fraudulently overcharging institutional customers, including federally funded libraries, for books. On August 21, 1995, the court granted the Government's first request for a six month extension of time to make its intervention determination. The court granted two more six month extensions on March 1, 1996 and August 6, 1996. On December 10, 1996, the relators moved to lift the seal to make a limited disclosure to relator Costa's employer, the City of Richmond, Virginia. In response to this motion, the court issued an order to show cause why the seal should not be lifted in its entirety and the complaint served on the defendants.

Government Must Show "Good Cause" To Extend Seal Period Beyond 60 Days

The court reviewed the legislative history of the FCA to gain insight into the seal period. It determined that the Senate Report viewed the 60 day period as providing the Government with adequate review time in the vast majority of cases. As such, "good cause" for an extension would not be established merely upon a showing that the Government was overburdened and had not had an opportunity to review the complaint. The court also noted that, while a pending criminal investigation may often establish "good cause" for one extension, the mere existence of a criminal investigation does not eliminate the need for careful judicial scrutiny of the Government's subsequent requests for extensions.

The court also concluded that there is nothing in the statute or legislative history to suggest that it should disregard the interests of defendants and the public in evaluating the Government's requests for extensions of the statutory seal period. Defendants, according to the court, have a legitimate interest in building their defense while the evidence is still fresh. The public, in turn, has a right to monitor the activities of government agencies and the courts. In addition, inasmuch as the violations alleged in this case concerned federal, state, and local agencies across the country that are still buying books without the benefit of the information developed by the case, this is the type of action that the public may wish to follow.

According to the court, the Government's response to the order to show cause indicated that the Government was engaged in substantial discovery. The Government disclosed that each of the defendants had been served with a subpoena, investigative interviews had been conducted with current and former B&T employees, and government personnel had been criss-crossing the country to conduct interviews and audits. The Government fur-

ther stated that it was engaged in settlement negotiations with B&T. According to the court, the defendants "are apparently discussing the settlement of a case without knowing with certainty the allegations leveled against them." While the Government and the relators suggested that keeping the complaint under seal served defendants'interests by avoiding unflattering publicity, the court stated that it was "not, however, convinced that defendants' current state of ignorance is a blissful one."

Government Failed To Show "Good Cause"

The court found no merit to the Government's arguments for another extension. First, the Government argued that it had not yet had sufficient opportunity to decide whether or not to intervene. The court recalled the Senate Report's statement that 60 days provides an adequate period of time in most cases, and then pointed out that the Government had had nine times that period in this case. The court noted that the State of California demonstrated greater candor than the Federal Government by admitting that it had determined long ago that the complaint's accusations had merit and that it was now seeking information only about the scope of damages.

Second, the court found no merit to the Government's claim that lifting the seal would interfere with the related criminal investigation. Given the subpoenas to each of the defendants and the numerous interviews of employees, the court concluded that "[t]he proposition that defendants are currently unaware of the investigation or its general nature, therefore, defies reason." Regarding the Government's claim that discovery by the defendants in the civil case might hamper the criminal investigation, the court stated that the Government could obtain a limitation on discovery under FCA § 3730(c)(4) if it could establish that discovery would interfere with the criminal investigation.

Third, while the court recognized that the existence of criminal proceedings might cause the civil case to proceed more slowly than normal, it concluded that Congress anticipated these difficulties and made the accommodations it deemed appropriate. Congress did not include an indefinite period during which the case would remain under seal as one of those accommodations.

Finally, the Government argued that lifting the seal would decrease the value of settling to the defendants since the Government then would not be able to offer them the benefit of never having the allegations made public. The court replied that the more significant settlement advantage currently enjoyed by the Government might really be making the defendants guess about the case filed against them. The court concluded that Congress did not enact the seal provision to give the Government an extra bargaining chip in settlement negotiations. It also stated that secret settlements would "utterly frustrate the public's interest in monitoring the workings of government."

Accordingly, the court found that, because the Government had not articulated a "single cogent reason to maintain the seal," there was insufficient "good cause" to extend the seal. The court noted with regret that the previous seal extensions had been granted with "a less searching inquiry regarding good cause than is appropriate." It ordered the Government to make its intervention decision no later than January 31, 1997 and further ordered the clerk to unseal the case on the same date. The court also granted relator Costa permission to divulge information about the case to his employer as of the date of the order.

Editor's Note: The Government subsequently elected to intervene in the case. See INTERVENTIONS AND SUITS FILED/UNSEALED below in this issue.

Government Communications with Defendant Employees

U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 1997 WL 106717 (E.D. Mo. March 10, 1997)

A federal district court rebuffed Justice Department attempts to exempt its attorneys from Missouri's rules of professional responsibility regarding *ex parte* contacts, labeling "disappointing" and "alarming" the Department's arguments that the state's ethical rules were superseded by DOJ regulations. The issue arose in the context of a *qui tam* case in which the Government intervened and sought information about mischarging from current and former employees of the defendant. While holding that the state's rules of professional responsibility applied, the court held that DOJ could make *ex parte* contacts with current employees who are merely "fact witnesses." The court also found that the rules permit *ex parte* contacts with unrepresented former employees, but ordered DOJ to make information obtained from such contacts available to the defendant, subject to work product limitations.

The key discovery motion before the district court was the defendant's request for a protective order (1) barring the Government from contacting its current employees *ex parte* about the subject matter of the litigation, (2) requiring the Government to give the defendant ten days notice before contacting any former employee concerning the subject matter of the action, (3) requiring the Government to provide the defendant with a list of all employees it had contacted *ex parte* since intervening in the *qui tam* action, (4) requiring the Government to provide the defendant with all information obtained from its employees, and (5) barring the Government from using any documents or information obtained through *ex parte* contacts. The *ex parte* contacts at issue involved a questionnaire that the Defense Criminal Investigative Service sent to the defendant's current and former employees. The questionnaire asked whether the employees had ever engaged in mischarging of labor and, if so, at whose direction. Mischarging allegations are central to the *qui tam* case.

Government May Not Make *Ex Parte* Contact with Defendant's Current Employees Involved in the Mischarging

Defendant McDonnell Douglas argued that the Government's *ex parte* contacts violated Missouri Supreme Court Rule 4-4.2, which states that "a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." According to the comment to the rule, when an organization is involved, a lawyer is prohibited from communicating with a person with managerial responsibility in the organization, and with any other person whose act or omission may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission by the organization.

In response, the Government first argued that Rule 4-4.2 does not encompass all employees whose conduct may be imputed to the organization. However, the court rejected the Government's position as inconsistent with the plain language of the rule and comment. The court found that, under the FCA, the defendant may be held liable for the acts or omissions of its current employees who were involved in the alleged mischarging. Accordingly, the court ruled that the Government may not make *ex parte* contact with defendant's current employees who were allegedly involved in the wrongdoing.

The court noted, however, that some current employees may be only "fact witnesses" (i.e.,

they hold factual information about what they observed others doing). As such, the court found that these employees would not be considered "parties" under Rule 4-4.2. As a result, the court ruled that the Government may make *ex parte* contact with employee "fact witnesses."

Contacts Were Not "Authorized by Law"

Citing Rule 4-4.2's exception for *ex parte* communications which are "authorized by law," the Government contended that its actions were authorized by both the FCA at § 3730(a) (which requires the Attorney General to investigate FCA violations diligently) and DOJ regulations at 28 C.F.R. part 77. The court rejected this argument, finding that, because the FCA does not clearly express an intention to supersede the traditional responsibility of the states to set the standards by which lawyers are to conduct themselves, the FCA does not supersede Rule 4-4.2.

The DOJ regulation cited, 28 C.F.R. part 77, sets forth standards to govern communications by DOJ attorneys with represented persons. Within that regulation is an assertion that communications in accordance with the regulation are intended to constitute communications that are "authorized by law" within the meaning of Rule 4.2 of the ABA Model Rules of Professional Conduct as well as analogous state and local federal court rules. The regulation also states that it is "intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government."

DOJ Cannot Exempt Its Attorneys from State Ethical Rules

The court, however, concluded that DOJ lacked statutory authority to issue regulations exempting its attorneys from the requirements of state ethical rules. The court cited the section of the Department of Justice Appropriation Authorization Act that requires all DOJ attorneys to be licensed to practice law under the laws of a state, territory, or the District of Columbia. The court also noted a similar 9th Circuit case in which the appellate court found that the general statutes cited by DOJ did not authorize prosecutors to communicate with represented individuals in a manner beyond what was permitted by California law. Finally, noting the "long history of state regulation of the legal profession," the court declined "to read the general statutes cited by the DOJ as authority for displacing state ethical rules."

The court characterized DOJ's attempt to exempt its attorneys from longstanding and universally applied ethical rules as "disappointing" and "alarming." It concluded: "As the nation's litigator, the Department and its attorneys must be held accountable to the same court-adopted ethical rules that govern all other lawyers."

Ex Parte Contact with Former Employees Not Represented by Counsel is Permitted, With Limits

Regarding former employees, the court agreed with the Government that Rule 4-4.2 does not prohibit all *ex parte* contacts but only as to former employees who are represented by counsel. However, because former employees may subject an organization to liability, the court agreed with the defendant that some limits should be placed on the Government's access to them. Thus, the court ruled that the Government could contact former employees of the defendant *ex parte*, but would have to maintain a list of the names of those contacted and the dates contacted. The court also required that the Government preserve statements, notes, and answers to questionnaires obtained as a result of these contacts so that the defendant could review the lists and notes, subject to work product limitations.

The court granted the defendant's request for an order that the Government provide it with a list of all employees it had already contacted *ex*

parte in the case, and with all information obtained from those contacts. The court, however, denied the defendant's request to prohibit the Government from using the information it had obtained through the *ex parte* contacts at trial, finding that any advantage the Government may have gained from those contacts would be vitiated when the defendant received the information about the contacts.

Survivorship of Deceased Relator's Suit

U.S. ex rel. Semtner v. Medical Consultants, Inc. et al., 1997 WL 82094 (W.D. Okla. Feb. 24, 1997)

A *qui tam* action survives the relator's death, and a personal representative of the relator's estate can proceed with the case, an Oklahoma district court ruled. Finding that under the traditional survivorship tests the relator's claims were neither "penal" nor "remedial," the court held that "the only rational characterization of the relator's claims must be derived from the underlying claim of the government." Since the remedial nature of the Government's claim was not contested, the court found that the relator's claims survive her death and a representative may be substituted.

In 1994, Theresa Semtner filed a *qui tam* suit against various health care companies alleging fraudulent billing of emergency room services. In 1995, the Government elected to intervene. Semtner died in 1996, and her sister, the designated personal representative of the estate, filed a motion to substitute for the relator in the *qui tam* suit. The central issue before the court was whether the *qui tam* suit survived the relator's death.

At the outset, the parties agreed that whether an action survives the death of a plaintiff is a question of federal common law unless a statute directly addresses the issue. Federal courts generally recognize that claims characterized as "penal" abate, while claims characterized as "remedial" survive. According to the court, to determine whether a statute is remedial or penal, one must examine the language of the statute and its legislative history in light of the three factors enunciated in Murphy v. Household Fin. Corp., 560 F.2d 206 (6th Cir. 1977): "(1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered."

Under Murphy Analysis, *Qui Tam* Actions Are Neither Remedial nor Penal

Upon applying these factors to the case at hand and keeping in mind the 11th Circuit's opinion in U.S. ex rel. Neher v. NEC Corp., 11 F.3d 136 (11th Cir. 1994), the district court concluded that "the relator's stake in the action cannot be characterized rationally as either penal or remedial." For instance, applying the first two Murphy factors, the court agreed with the defendants that the FCA is not intended to remedy harms to the relator, but stated that this fact did not prove "that the relator's right to recover is a penal action against the defendants." In fact, according to the court, the 11th Circuit in Neher found that the relator's award is intended to be compensation for personal harms suffered by the relator, including stress or loss of work. Additionally, Neher found that the relator was being compensated for "the substantial time and expense involved in bringing a *qui tam* action."

However, according to this court, Congress' concern with damages suffered by relators only came in the context of providing incentives to citizens to counter the "conspiracy of silence"

that was allowing fraud to go unchecked. The *qui tam* award is unrelated to the damage a relator may incur through stress or loss of employment, the court found. In fact, the FCA specifically addresses this type of injury to the relator through the § 3730(h) retaliation provision, a remedy separate and apart from any *qui tam* award.

Regarding the third Murphy factor, and in response to the defendants' contention that the relator share would be "disproportionate" to her harm, the district court concluded that applying that test to the relator's role was forced. Congress was not concerned with the relator's damages but rather with the Government's, the court reiterated. Furthermore, Congress passed the 1986 amendments as an "incentive to have individuals come forward with information and prosecute claims which might not be initially efficient for the government to pursue." Thus, the court concluded that, while the FCA is not remedial in terms of the third factor, it was also clear that the presence of the relator did not make the statute penal.

Relator is Mechanism of Enforcement — Neither Remedial nor Penal

According to the court, the defendants as well as the 11th Circuit appeared to assume that all actions are necessarily either remedial or penal, and if an action is not remedial then it is by definition penal (and vice versa). However, the court refused to accept this assumption as to the role of the relator. The Murphy analysis of the relator was "an artificial attempt to place a square peg into a round hole," the court stated. Rather, as the legislative history and structure of the *qui tam* provisions indicate, the relator is a "mechanism of enforcement." In short, "*[q]ui tam* is not a cause of action, it is a means of pursuing the government's cause of action."

Allowing *Qui Tam* Actions To Survive Fulfills Purposes of FCA

According to the court, if it were to find that the role of the relator was penal rather than derivative or remedial, it would be forced to dismiss certain actions in which the Government declined. Such a result would run counter to Congress'desire to have *qui tam* actions provide additional resources to the Government's prosecution efforts — this lack of resources being "perhaps the most serious problem plaguing effective enforcement." Moreover, the court found that Congress clearly wanted to remedy this problem by creating incentives for individuals to ferret out and pursue claims regardless of the Government's involvement. Following the defendants' approach would require the court to dismiss actions in which the relator dies even though a personal representative is ready to step in and prosecute the action in furtherance of Congress' goals.

Furthermore, the Government's intervention in this case did not dictate a different result. According to the court, Congress not only wanted to provide incentives for relators to prosecute actions on their own, but also wanted relators to act as overseers of actions which the Government joins. Thus, it created several provisions that give relators rights in suits in which the Government intervenes. "Congress believed the participation of private plaintiffs at all phases of the litigation would lead to a greater number of recoveries for the Government and possibly in higher amounts — the ultimate goals of the 1986 amendments." As such, it was entirely consistent with these purposes that the "relator's role is neither penal nor remedial, but derivative of the remedial claims of the government and thereby survives the death of the relator."

Attorneys' Fees/Settlement Proceeds

U.S. ex rel. Gibeault et al. v. Texas Instruments Corp. et al., 104 F.3d 276 (9th Cir. Jan. 3, 1997)

The 9th Circuit upheld a district court finding that certain settlement funds that had been labeled as legal fees by the parties instead represented proceeds of the *qui tam* action, a share of which therefore belonged to the Government. The appellate court ruled that the relators' law firm was liable for the Government's share, even though the firm had transferred the funds at issue to its clients.

The Government declined to intervene in this *qui tam* action, and Texas Instruments ultimately agreed to settle with the relators for $300,000. The entire amount was labeled as legal fees by the parties and paid to the relators' attorneys, who in turn gave $124,500 to the relators. The district court, however, found that the $124,500 represented proceeds of the action, not legal fees, and held the relators and their attorneys liable for the Government's share.

Law Firm Jointly and Severally Liable with Relators for Government's Share

The 9th Circuit reaffirmed its holding in U.S. ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994), that district courts are empowered to ensure that the Government receives its proper share of a *qui tam* settlement even when the Government has not intervened in the action. Here, the appellate court found that the district court was not clearly erroneous in finding that the funds turned over to the relators by their attorneys were in fact proceeds of the case; moreover, the lower court had the authority to restructure the settlement to secure the Government's share.

The relators' law firm challenged the district court's authority to hold it jointly and severally liable with the relators for the Government's share. The 9th Circuit curtly responded that, having received funds belonging to the Government, the firm "was responsible for turning the money over to its rightful owner. It could not divest itself of that responsibility by transferring funds to its clients."

Section 3730(h) Retaliation Claims

Neal v. Honeywell, Inc. et al., Memorandum Opinion and Order, No. 93 C 1143 (N.D. Ill. Feb. 3, 1997)

On reconsideration, an Illinois district court ruled that the plaintiff could pursue her claim for constructive discharge under FCA § 3730(h). In an earlier decision, the court had ruled that the plaintiff could not pursue the constructive discharge claim because the defendant had offered her reasonable employment opportunities which she chose to decline.

Judith Neal's § 3730(h) suit alleges that her employer Honeywell, Inc. retaliated against, harassed, and constructively discharged her for blowing the whistle on the falsification of ballistic test results at Honeywell's Joliet Arsenal Plant. Denying Honeywell's motion for summary judgment, in October 1996 the district court found that Neal had presented sufficient evidence of retaliation and harassment to take those issues to trial. *See* Neal v. Honeywell, Inc. et al., 942 F. Supp. 388 (N.D. Ill. Oct. 4, 1996), 8 TAF QR 8 (Jan. 1997). On the other hand, the court ruled that Neal's constructive discharge claim failed as a matter of law because the evidence showed that two Honeywell facilities had offered Neal positions at the same salary she was earning at Joliet and involving job responsibilities appropriate to her educa-

tion and experience. It was undisputed that Neal had rejected these offers because they were not promotions, and the court emphasized that she had not argued "either that the offers were so miserably inadequate that no reasonable employee would have accepted them or that she would have received a promotion at this time but for her hotline call."

Additional Evidence Shows Inadequacy of Lateral Job Offers

The court, however, welcomed a motion to reconsider from Neal since the parties did not have the opportunity to brief the constructive discharge issue on Honeywell's motion for summary judgment. In its February 1997 reconsideration opinion, the court stated that Neal had "accepted that potential invitation with alacrity, identifying additional evidence as to the inadequacy of the lateral job offers and as to her expectation of promotion."

Neal presented evidence that she had a reasonable expectation of receiving a promotion within two years of being hired. Just before her second anniversary with Honeywell, she made her hotline call to report the alleged test data falsification. Following that call, she was harassed for blowing the whistle. "In that context," the court found, Neal's decision to leave Joliet "was a reasonable one."

Before leaving Honeywell altogether, Neal interviewed for positions with other Honeywell facilities and received the two lateral position offers. According to the court, "[t]hose offers must be viewed against the backdrop of Neal's evidence suggesting that if she had not blown the whistle and had remained at Joliet, she would have received a promotion." The court stated the applicable standard as follows: "whether a reasonable person would have perceived any such lateral transfer, without Honeywell holding out a like prospect of promotion, as a dead end." The court concluded that "a reasonable factfinder could find that Neal (also reasonably) had perceived her situation as a promising career that had come to a grinding halt because of her whistleblowing."

Failure To Promote Can Constitute Constructive Discharge

The court rejected Honeywell's contention that the failure to promote cannot form the basis of a constructive discharge claim. According to the court, in the context of Title VII the failure to promote, accompanied by aggravating circumstances, supports a constructive discharge claim. And "Neal has met that test (which provides guidance regarding, though not directly applicable to, a False Claims Act case): In addition to her evidence that Honeywell failed to promote her, she has presented evidence that she was harassed, that threats were made against her . . . ."

In conclusion, the court instructed: "It is time that this long-pending action — including the constructive discharge issue — is submitted to a factfinder for decision, and . . . the parties will be expected to identify what needs to be done to accomplish that quickly." The court's statement suggests that, four years after its filing, Neal's § 3730(h) case may at last be heard on the merits.

Investigators As *Qui Tam* Relators

By Charles Tiefer and Michael Blumenfeld

Is there a place for the "investigator" to become a *qui tam* relator? The term "investigator" in the context of this article is meant to refer to someone who takes a potential clue to where fraud may exist and uncovers evidence establishing False Claims Act violations. An investigator may be someone who combines experience in a particular type of government contracting or program with an ability to analyze relevant documents and question potential witnesses. But an investigator would not necessarily be an insider or a participant in the fraud. And an investigator's initial suspicions may arise from a piece of information that is public.

Can such an investigator bring a *qui tam* case? Defendants, who doggedly attempt to narrow the pool of eligible relators, would likely argue that such an investigator does not have the right to maintain a *qui tam* action. They would likely raise the "public disclosure" bar of 31 U.S.C. § 3730(e)(4)(A) and argue that such investigators do not fit their narrow definition of "whistleblowers." While the term "whistleblower" is not contained in the False Claims Act, defendants have argued that Congress only intended for "whistleblowers" to bring *qui tam* actions. Defendants have then tried to limit "whistleblowers" to only those individuals who denounce the fraud from a position close to or within the fraudulent enterprise — and only those individuals who somehow manage to file suit before any aspect of the fraud scheme has leaked beyond the insiders.

By trying to require relators to fit their overly restrictive definition of "whistleblowers," defendants attempt to shift the focus away from Congress' overall goal in enacting the 1986 Amendments to the False Claims Act. The legislative history shows that, first and foremost, Congress wanted more reporting and prosecution of fraud against the Government. Whether that effort came from insiders, participants, or investigators, Congress made no distinction. Moreover, to the extent that Congress was appealing to "whistleblowers," there is nothing to suggest that Congress intended to limit *qui tam* to the subset of "whistleblowers" defendants suggest. That is, a "whistleblower" is "a person who reports or informs on a wrongdoer." *Webster's New World Dictionary*, 3d College Ed., 1994. Thus, any person who is willing to step forward and file a *qui tam* action would be, by definition, a whistleblower.

Several strong arguments support the role of investigators as relators, showing that the "public disclosure" barrier cannot be invoked across-the-board against investigators' suits. First, the plain wording and evident intent of the *qui tam* statute of today, as

compared with the previous statutory language, support investigators as relators. From 1943 to 1986, the old version of the *qui tam* statute used as its threshold barrier a "government information" standard. In the old version, the threshold barrier provided that "[t]he court shall have no jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States . . . ."

When Congress enacted the 1986 False Claims Act Amendments, it dramatically changed the barrier's wording and intent. Now, instead of asking what knowledge rested somewhere in the "possession of the United States," the standard is whether there has been a "public disclosure" of "allegations or transactions" in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."

The quintessential situation where this distinction makes a major difference concerns when the Government's files contain useful clues, but there has been no public disclosure of a fraud. There may not have been any government investigation, effective inspection of what the Government obtained, or audit of the contractor's cost records. Or, there may well have been a government investigation, inspection, or audit that spotted some suspicious indications, but failed to find the key elements of fraud and did not produce a filed complaint or any other enforcement action. Those clues in the Government's files likely would have raised the 1943-1986 "government information" barrier but do not fit the wording of the post-1986 "public disclosure" barrier, for when the Government does not investigate or ends its investigation in a quiet dead end, the fraudulent "allegations or transactions" are not publicly disclosed.

The legislative history shows Congress very much desired that *qui tam* relators bring cases where the Government had such dead end files, and this was not limited to insider-whistleblowers.[1] The Senate Report on the 1986 Amendments cites as "perhaps the most serious problem plaguing effective enforcement" the "lack of resources on the part of Federal enforcement agencies." S. Rep. No. 345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5266, at 5272. That report notes that "with current budgetary constraints, it is unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase." The Senate Judiciary Committee explained that its hearings had documented how "Federal auditors, investigators, and attorneys are forced to make 'screening' decisions based on resource factors."

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1 As the House's Deputy General Counsel at the time of the 1986 Amendments, Professor Tiefer personally recalls how Congressional committee oversight investigations would commonly examine the files of closed government investigations, and conduct hearings showing instances of alleged fraud which the Department of Justice had declined to pursue.

Certainly the report reflects the expectation that insider employees and participants would be among those who would come forth to sue. However, the Senate Judiciary Report also makes clear that another major way the amended statute would bolster the fight against fraud would be to enlist relators to supplement the limited investigative and litigative resources of the Government. The Judiciary Committee report dwelt on the "resource mismatch," in the absence of such relator help, expressed in the testimony of the Department of Defense Inspector General "who said that in far too many instances the Government's enforcement team is overmatched by the legal teams major contractors retain." *Id.* at 5273, citing testimony in Committee hearings.

Appellate decisions in suits by non-insiders or participants have seemed to rule in different ways on their right to maintain *qui tam* suits. In a striking example, one judge, Judge Wald of the D.C. Circuit, has herself authored a contrasting pair of opinions on how the "public disclosure" barrier applies to such suits. One Judge Wald decision dismisses such a suit; the other overrules the defendant's invocation of the "public disclosure" barrier to allow the relator to proceed. *Compare* United States ex rel. Findley v. FPC-Boron Employees'Club, 105 F.3d 675 (D.C. Cir. 1997) (affirming dismissal on "public disclosure" grounds of suit by non-insider "investigators") with United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) (vacating dismissal and remanding for non-insider's case to proceed).

Judge Wald's two opinions, particularly her opinion upholding the non-insider relator in Quinn, examine the old 1943-1986 version of the law (with its government information barrier) to focus on what the Government had in terms of "information or evidence." Then, those opinions contrast that with how the post-1986 version (with its public disclosure barrier) is worded instead to focus on what the public disclosure encompasses in terms of whole "allegations or transactions."

Zeroing in on this contrast between items of "information or evidence," and whole "allegations or transactions," Judge Wald created what may be called the New Math of the public disclosure bar. She presented the equation of "X + Y = Z, [where] Z represents the allegation of fraud and X and Y represent its essential elements." In Quinn, the court found that the Government and even the public had access to information about the fraud contained in the defendant's pay vouchers and telephone records that had come out in discovery in prior litigation. Those documents were only "X," i.e., records with evidence or information about the fraud, but not enough to make out a whole allegation of fraud.

As the judge concluded, "[i]n order to disclose the fraudulent transaction publicly, the [whole] combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed." In other words, the public disclosure bar does not block a suit, say, by an investigator just because records from which the investigator starts are in the Government's files or even on the public

record, so long as essential aspects, labeled "Y," and the whole fraud, labeled "Z," have not been publicly revealed.

The investigator's right to sue draws further support from a second, distinct part of the 1986 Amendments that similarly reflects Congress' encouragement of investigators as relators. In several aspects of the award-level section of the 1986 statute, Congress' concept of the relator showed possibilities for greater diversity in relators than defendants wish. In this section, it is provided that when the Government takes over a *qui tam* suit, the relator's share of the proceeds is from 15 to 25 percent, "depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d). The same section provides a lower share, up to 10 percent of the proceeds, when the action is one which the court finds to be based primarily on certain disclosures. In those cases, the court is to determine the share "taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation."

The award-level section shows that Congress viewed relators more as a diverse orchestra, with different parts to suit every talent, not as a group of identical whistle-blowing instruments. Quoting that section's words, some relators' "contribution" might be less in "extent" or different in "role" from others. Terms like "extent," "primarily," "role of the person," and "substantially contributed" show that Congress welcomed a variety of relators who could bring a variety of contributions and would have their awards adjusted accordingly.

As a separate line of reasoning, often an investigator fits the "original source" exception to the public disclosure bar. Congress' statutory definition at 31 U.S.C. § 3730(e)(4)(B) does not make the term "original" synonymous with "originating." Instead, Congress' definition in terms of "direct and independent knowledge" seems to view "original" as meaning one who comes up with something new and fresh, like an "original" thinker who makes an "original" contribution. This suggests an independent thinker whose efforts add value to the case.

For example, the press might often report general suspicions about a government contractor. Only the first interviewee to talk to the first reporter would be the "originator" of the suspicion. Yet the publishing of the suspicions might accomplish little and in no way reveal a fraud's recognizable outlines. An investigator might start with the unpromising public report of suspicions and pursue some original approach, unearthing kinds of records previously hidden and unexamined, and unveiling the fraudulent aspect of the contract which no one else had previously divined. That investigator might soundly stake his or her claim on having obtained, from those previously buried records, "direct and independent knowledge." This would satisfy the "original source" definition in that the relator's original contribution and independent knowledge were not prefigured by whatever was previously "publicly disclosed."

Defendants will undoubtedly continue to make vigorous arguments in opposition to most relators, and particularly those who are non-insiders. They will likely apply to the investigator the all-purpose pejorative label of "parasite." Unfortunately, defendants have hung that label on every type of relator other than those with the purest pedigree of insider status. That term should instead apply only to the kind of relators discussed in the 1943 Supreme Court case Marcus v. Hess, namely, "copy-cat" relators who did nothing but take criminal indictments and copy them as civil suits.

Defendants' arguments fail to recognize the simple truth which drove the 1986 Amendments, that is, the existence of massive fraud that the Government's investigation and litigation force cannot remedy on its own. Congress enacted the amended statute because it considered such unremedied fraud unacceptable.

The amended Act gives both the courts and the Government an array of tools for responding differently to different relators, showing the lack of need for an overarching barrier against investigators as relators. The Government can take over a case or even move to dismiss a case where it does not wish to have a particular investigator-relator control or continue the case. Or, the court can reduce the award of an investigator-relator whose case is based primarily on certain disclosures. Those government and judicial tools flexibly respond to particularized arguments regarding particular investigator-relators. In contrast, the arguments of defendants to distort the "public disclosure" barrier into an all-encompassing shield simply reward the most skilled defrauders.

Our modern equivalents of the Government's Inspector Lestrade cannot on their own, or even with the help of just insiders, crack all the cases of fraud on the Government. If the modern equivalents of Sherlock Holmes can be enlisted, let them be put to work, through the *qui tam* mechanism, for the taxpayers.

Charles Tiefer is Associate Professor at the University of Baltimore Law School, teaching its course in government contracts. As Solicitor and Deputy General Counsel of the U.S. House of Representatives from 1984 to 1995, he represented the House in cases upholding the constitutionality of the 1986 Amendments to the False Claims Act. He is the author of Congressional Practice and Procedure (Greenwood Press 1989) and The Semi-Sovereign Presidency (Westview Press 1994).

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

U.S. ex rel. Walle v. Martin Marietta Corporation (ED LA No. CIV. A. 92-3677)

In January 1997, a Louisiana district court denied Martin Marietta's summary judgment motions seeking dismissal of former employee Eric Walle's *qui tam* claims. 1997 WL 4566 (E.D. La. Jan. 6, 1997). Walle alleges that Martin Marietta submitted false claims to NASA in two ways — one involving payroll mischarging between different projects to make it appear that cost management was under control on all projects, the other involving reporting false achievements on a particular computer project. According to the court, the alleged misconduct does not "involve overstating amounts due for goods or services." Rather, "[b]oth categories of false claims involve the reporting of false accomplishments which allegedly supported greater Award Fees than actually merited." The court ruled that, while there is no requirement of actual damages for FCA liability, "there is a requirement that the false claim be a material misrepresentation." The court stated that "whether the alleged false claims were material will turn on how the Award Fees were calculated and what information was considered important in determining award fees." In denying summary judgment, the court found genuine issues of material fact regarding both categories of false claims.

Hughes Aircraft Company v. U.S. ex rel. William Schumer (No. 95-1340)

On February 25, 1997, the U.S. Supreme Court heard oral argument regarding the 9th Circuit's decision in U.S. ex rel. Schumer v. Hughes Aircraft Company, 63 F.3d 1512 (9th Cir. 1995), 3 TAF QR 4 (Oct. 1995). Among the issues presented were retroactivity, the public disclosure bar, and injury to the public fisc. Representing the Petititioner, Hughes Aircraft, was Kenneth W. Starr of Kirkland & Ellis (Washington, D.C.). Representing the Respondent, William Schumer, was Laurence Gold of Bredhoff & Kaiser (Washington, D.C.). Representing the United States, as *amicus curiae* supporting the Respondent, was Seth P. Waxman, Deputy Solicitor General, Department of Justice.

Editor's Note: A transcript of the oral argument can be found on TAF's Internet site at http://www.taf.org.

ALLEGATION: MISAPPLICATION OF NIH GRANT FUNDS

U.S. v. The University of Chicago and Wied, M.D. (ND IL 96C 5814)

A False Claims Act lawsuit against the University of Chicago and a former medical professor alleging the misappropriation of federal funds granted for cancer research has been reported. According to the suit, the University and Dr. George Wied, a former professor of obstetrics, gynecology, and pathology, misapplied $850,539 in NIH grant funds for salaries, computer maintenance, telephone charges, and equipment. The Government's complaint cites false statements and claims in connection with the initial and subsequent grant applications and federal cash transactions reports.

In 1986, the University received a seven year NIH grant to design and implement a computer-based system to aid cytopathology laboratories in the diagnosis of cervical cancer. Dr. Wied was the principal investigator for the project. In 1991, the Dean of the University of Chicago Medical School notified NIH that an internal audit showed that the salaries of one or more University employees might have been improperly charged against Dr. Wied's grant. According to the complaint, the audit report documented numerous instances of the misapplication of funds. The case was investigated by the HHS OIG. Representing the Government is Assistant U.S. Attorney Linda Wawzenski.

ALLEGATION: FRAUDULENT BILLING BY PATHOLOGISTS AND CLINICAL LABORATORY

U.S. v. Doctors Pathology Services, Inc. et al. (ED AK No. LR-C-96-999)

In December 1996, DOJ announced that it has filed a False Claims Act lawsuit alleging that five Arkansas pathologists and two Michigan corporations that provided consulting and management services conspired to defraud Medicare and Medicaid in connection with billings for laboratory tests. According to the complaint, the doctors, as owners and operators of Doctors Pathology Services, Inc., submitted over 168,819 fraudulent claims. Beginning in 1988 and continuing until the lab was sold to Corning Labs in 1995, the doctors allegedly submitted double bills, claims for tests performed at one time on a multichannel analyzer as though each test had been performed individually, and bills for medically unnecessary tests. The Government maintains that the fraudulent practices continued despite repeated warnings from authorities, and that Doctors Pathology Services made certain false statements including that the simultaneous multichannel tests were performed individually on manual equipment. The investigation was conducted by members of the Federal Health Care Task Force including special agents from the HHS OIG, FBI, and IRS. Handling the case for the Government is Assistant U.S. Attorney A. Doug Chavis.

ALLEGATION: ILLEGAL TRANSFERS AND MISUSE OF MILITARY AIRCRAFT INTENDED FOR FIREFIGHTING

U.S. ex rel. Eitel v. Reagan et al. (D OR No. 94-425-JO)

In January 1997, it was reported that DOJ, in an unusual move, intervened in a *qui tam* suit that had already been dismissed on "public disclosure" grounds and was on appeal. Filed in 1994, the *qui tam* suit alleges that several aviation contractors defrauded the Government of millions of dollars in military aircraft in connection with Forest Service firefighting contracts and an exchange of military planes for planes of purportedly historic value to be dis-

played in federal museums. The relator, Gary Eitel, is an aviation consultant and pilot. Investigators reportedly have been examining how surplus military equipment meant for firefighting efforts ended up with private parties and in foreign countries. A related criminal case is pending in Tucson. DOJ previously declined to join in the civil action, which was dismissed by the district court in Portland and on appeal to the 9th Circuit. Before the circuit court heard the appeal, DOJ filed papers indicating that it intended to intervene for good cause. As a result, the case will be returned to the district court. Mr. Eitel is represented by Steve Berman and Jeff Sprung of Hagens & Berman (Seattle, WA).

ALLEGATION: UNNECESSARY PSYCHIATRIC SERVICES FOR NURSING HOME PATIENTS/ UNPERFORMED SERVICES

U.S. v. Royal Geropsychiatric Services Inc. et al. (ND OH No. __)

In January 1997, DOJ announced that it has filed a False Claims Act lawsuit against Royal Geropsychiatric Services Inc. alleging over $1.1 million in improper claims for psychiatric services to nursing home patients. Among the other named defendants are individual physicians. The services were either medically unnecessary or never performed, according to DOJ. False claims were allegedly submitted to the Federal Government and State of Ohio for specialized interactive medical psychotherapy sessions on more than 15,000 occasions. Interactive medical psychotherapy involves a physician using physical aids (e.g., flash cards) and non-verbal techniques to communicate with patients who cannot communicate verbally or understand ordinary adult language. Royal allegedly instead performed "Med Checks," which include reviewing patients' medical records, with little or no psychotherapy provided. The Government's reimbursement for interactive psychotherapy is about double the amount reimbursed for Med Checks.

Royal also allegedly filed false claims for non-interactive psychotherapy services on more than 38,000 occasions. With such services, no special physical aids are used to communicate with the patient, who has the ability to communicate verbally with the therapist. According to DOJ, some of Royal's claims for non-interactive psychotherapy sessions were medically unnecessary because the patients suffered from severe dementia or other ailments. In many instances, Royal billed for psychotherapy without the required authorization and against the wishes of family members.

Seeking a higher rate of reimbursement, Royal further overcharged for psychotherapy performed by social workers, fraudulently representing that it was performed or personally supervised by licensed physicians. According to DOJ, individual physicians working for Royal sometimes billed for 60 hours of services for one day. The suit also alleges that Royal falsely represented to the Government that it had reviewed hospital records for nursing home patients. Royal failed to provide any documentation to support its claims as required and regularly double billed for the unsupported services as well. The matter was investigated by the HHS OIG and FBI. Assistant U.S. Attorney Richard Blake is handling the case for the Government.

ALLEGATION: OVERCHARGING LIBRARIES FOR BOOKS

U.S. ex rel. Costa and Thornburg v. Baker & Taylor, Inc. et al. (ND CA No. 95-1825-VRW)

In February 1997, DOJ announced that it intervened in a *qui tam* suit alleging false claims in connection with federally and state funded purchases of books from Baker & Taylor, the nation's largest book distributor. The action was filed in 1995 by Robert Costa, the Head Librarian for Richmond, Virginia, and Ronald Thornburg, a former Baker & Taylor sales representative. According to the lawsuit, Baker & Taylor entered into contracts with public libraries, schools, and federal libraries to sell books designated as "trade" books at specified discounts from the publisher's retail price, but then failed to provide the discounts. The company allegedly misclassified certain trade books as "non-trade" books and programmed its computers to systematically defraud library and academic customers.

Baker & Taylor was formerly a division of W.R. Grace & Co., which sold it to The Carlyle Group in 1992. It is estimated that over 90 percent of U.S. public libraries order books through Baker & Taylor and that public libraries spend over $444 million annually in domestic book purchases. Representing the relators are Eric Havian, Stephen Meagher, and Peter Chatfield of Phillips & Cohen (San Francisco, CA; Washington, D.C.).

ALLEGATION: IMPROPER INTERVENTION IN COAST GUARD CONTRACT BY CABINET OFFICIAL/INFLATED COSTS

U.S. ex rel. Baggan v. Pena et al. (D DC No. __)

In February 1997, it was reported that DOJ declined to join in a *qui tam* suit alleging that then Transportation Secretary Federico Pena improperly intervened in a Coast Guard contract. According to the lawsuit, Pena and other officials sought to restore a contract to a Fort Lauderdale company after termination for nonperformance. The contract involved developing a helicopter maintenance simulator. Pena allegedly met with the company's owner and then exerted pressure on Coast Guard officials to restore the deal. According to the Government, however, Pena had no involvement in the contract. The lawsuit, reportedly filed in 1996 by former Coast Guard cost analyst Robert Baggan, also cited inflated costs. The matter became public at Pena's confirmation hearing for the Secretary of Energy post.

ALLEGATION: MISUSE OF CRIME FUNDS BY CITY GOVERNMENT

U.S. ex rel. Settlemire v. The Government of the District of Columbia and Corporation Counsel of the District of Columbia (D DC No. 1:96CV00568)

In March 1997, a *qui tam* suit was unsealed alleging that the District of Columbia misused federal funds intended to finance additional police officers under the Drug Emergency Officers Act. According to the lawsuit, the District submitted false records and claims indicating that it used the funds for proper purposes and that the unexpended balance of the payments was carried forward to be used in future years for purposes of the Act. The lawsuit further alleges misrepresentations as to the city's meeting threshold requirements concerning the number of officers paid from non-Act funds. DOJ has declined to join in the action, which was filed in 1996 by Earl Settlemire, a former police department budget supervisor. The relator is represented by Pamela Bethel, Barbara Nicastro, and Joyce Mayers of Bethel & Nicastro (Washington, D.C.).

Horizon/CMS Healthcare Corporation

In December 1996, Horizon/CMS Healthcare Corporation, an Albuquerque-based national provider of nursing care and rehabilitation services, agreed to pay the Government $4.6 million to settle False Claims Act allegations that the company improperly billed Medicare and Medicaid for supplies. This payment is in addition to the more than $1.1 million that Horizon returned to the programs last April for improper billing.

According to DOJ, in 1994 Horizon acquired the Greenery Rehabilitation Group skilled nursing facilities located in Connecticut, North Carolina, Louisiana, and Massachusetts. Believing that Greenery, under prior management, had failed to bill Medicare and Medicaid for certain supplies, Horizon initiated a retroactive billing program. Horizon's billing and accounting personnel allegedly had no medical background and received inadequate supervision from medical personnel, resulting in grossly inflated billings. While collecting the information needed to bill for the supplies and then preparing the bills, Horizon misused and misinterpreted records, causing it to bill for multiple supplies which had never been used, such as tracheostomy tubes and catheters. According to the Government, having submitted retroactive reimbursement requests, Horizon later resubmitted some claims after they had been rejected.

Horizon undertook an internal investigation after learning that this matter was under federal investigation and, in April 1996, returned the amounts it determined it had been improperly paid by the Government. According to DOJ, the additional $4.6 million resolves all claims concerning this retroactive billing program. Horizon also has agreed to a comprehensive corporate compliance plan designed to ensure that all future Medicare and Medicaid billings are reviewed by personnel with clinical training who can more readily spot improper practices. The probe was conducted by the HHS OIG and FBI. Assistant U.S. Attorney Edwin Winstead of the District of New Mexico and Laurie Oberembt of the DOJ Civil Division handled the case for the Government.

U.S. ex rel. Bauer v. General Electric Co. (SD OH No. C-1-94-0680)

In January 1997, the General Electric Company agreed to pay the Government $950,000 to settle a *qui tam* suit alleging that GE misrepresented that it had conducted certain test procedures on circuit boards for aircraft engine controls. GE allegedly sold hundreds of aircraft engines with engine control circuit boards that had not undergone required ionic cleanliness, electrostatic discharge, and solder purity procedures. Carl Bauer, a former company employee, filed the lawsuit in 1994. DOJ declined to intervene in the action. According to the Government, GE previously notified DOD of the false representations under the Voluntary Disclosure Program. The relator's share was 28.5 percent or $270,750. Mr. Bauer's counsel was James Helmer of Helmer, Lugbill, Martins & Neff (Cincinnati, OH).

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

In February 1997, DOJ announced that one of the nation's largest suppliers of durable medical equipment and three health care providers agreed to pay the Government more than $2 million to settle a *qui tam* suit alleging that they defrauded Medicare through improper kickbacks and patient referrals. The case was filed in 1995 by former Apria Atlanta branch

manager Mark Parker. Apria Healthcare Group, Inc., a home health care provider that supplies pulmonary equipment, will pay $1.65 million, and Georgia Lung Associates (GLA), a group of four physicians, will pay $346,000. Paso del Norte Health Foundation of El Paso, Texas (f/k/a Providence Memorial Hospital) and Physicians Pharmacy Inc. of Georgia will pay $24,000. According to DOJ, Apria entered into sham consulting contracts with GLA and other physicians in order to induce referrals. GLA allegedly referred Medicare patients to Apria for oxygen supplies, Paso del Norte provided referrals to Apria in exchange for compensation, and Physicians Pharmacy allegedly received referrals from GLA based on a financial interest held by a GLA physician.

Apria agreed separately to a corporate integrity agreement which requires that it establish a confidential disclosure program enabling employees to report inappropriate practices. The case was investigated by the HHS OIG and FBI. The relator's share was approximately $454,839. The relator's counsel was Mike Bothwell (Roswell, GA). Representing the Government were Assistant U.S. Attorney Daniel Caldwell and Laurie Oberembt of the DOJ Civil Division.

U.S. ex rel. Prendergast and Silveira v. Meris Laboratories, Inc. et al. (ND CA No. C-93-20549 JW)

In February 1997, Meris Laboratories, Inc. agreed to pay the Government $5.2 million to settle a *qui tam* suit alleging that it defrauded Medicare and Medi-Cal, the California Medicaid program, by improperly billing for various laboratory tests. The suit was filed by Janice Prendergast and Julia Silveira in 1993. According to DOJ, Meris routinely added medically unnecessary HDL cholesterol and serum iron tests to panels it performed on automated machines, then billed the Government separately for the tests, which physicians had not specifically ordered. Meris also routinely billed for additional complete blood count (CBC) indices that were neither ordered by physicians nor medically necessary. The additional indices, which are generated automatically by lab machinery at no extra cost, are merely manipulations of the results of other tests already included in a CBC and are rarely medically justified, according to DOJ. Besides the settlement payment, Meris agreed separately to a corporate compliance agreement. The relators' share was 15 percent or $781,050. The relators' counsel was Alan Nudelman (Los Gatos, CA). Representing the Government were Assistant U.S. Attorney Joann Swanson and James Ward IV of the DOJ Civil Division.

U.S. ex rel. Tribble, Trimmer and Buffington v. American Eurocopter Corporation (ED VA No. 96-1305A)

In February 1997, it was reported that American Eurocopter, Inc. (AEC) of Dallas and its French parent companies, Eurocopter International (ECI) and Eurocopter France, agreed to pay the Government $10 million to settle a *qui tam* suit and $12 million in criminal fines in connection with the sale of five search and rescue helicopters to Israel. Three former AEC employees brought the suit in 1994. The purchase was funded in part through a government program encouraging overseas weapons sales in support of State Department foreign policies. The program reimburses the buyer according to the percentage of the aircraft made in the United States. AEC reportedly indicated that the value of the U.S.-made content of the helicopters was $36 million when, in fact, the amount was much lower. The overcharges were used to pay illegal

commissions to, among others, an Israeli citizen who helped coordinate the sale. An Israeli admiral reportedly was an ultimate recipient of the illegal payments.

In connection with this matter, AEC's president, an Israeli commission agent, and ECI's international sales manager have been indicted for fraud and money laundering, and AEC has pleaded guilty to fraud charges. The case was investigated by the FBI and the Defense Criminal Investigative Service. The relators' share was 24 percent or $2.4 million. The relators were represented by William Hardy of Kleinfeld, Kaplan and Becker (Washington, D.C.). The Government was represented by Assistant U.S. Attorney Gerard Mene and Carolyn Mark of the DOJ Civil Division.

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

In February 1997, DOJ announced that Community Psychiatric Centers of Oklahoma, Inc. (CPCO) agreed to pay the Government $750,000 to settle a *qui tam* suit alleging that a hospital subsidiary, CPC Southwind, treated children in an unsafe and harmful environment and then billed Medicaid for services. The lawsuit was filed by Lisa Aranda and Gayle DeWitt in 1994. Ms. Aranda is a former nurse at CPC Southwind, where Dewitt's children also have worked. According to DOJ, although the hospital was frequently notified by its own staff about the conditions, it continued to admit children and bill the Government. Allegations included consensual and nonconsensual sexual behavior among young patients without adequate response or monitoring by the hospital. The federal district court earlier rejected the hospital's motion to dismiss the case, holding that the matter was actionable under the False Claims Act. CPCO closed CPC Southwind last December. The relators' share was 20 percent or $150,000. The Government was represented by Scott Dahl and Daniel Anderson of the DOJ Civil Division.

U.S. ex rel. Merena v. SmithKline Beecham Corporation (ED PA No. 93-CV-5974)

U.S. ex rel. Robinson and Grossenbacher v. SmithKline Beecham Clinical Laboratories, Inc. (ED PA No. 95-CV-6953) (originally filed in 1993, WD TX)

U.S. ex rel. Spear, Dowden and Berkeley Community Law Center v. SmithKline Beecham Clinical Laboratories (ED PA No. 95-6551) (originally filed in 1995, ND CA)

In February 1997, DOJ announced that SmithKline Beecham Clinical Laboratories, Inc. (SBCL) agreed to pay the Government $325 million to settle three *qui tam* suits alleging that the company defrauded Medicare, Medicaid, CHAMPUS, the Railroad Retirement Board, and the Federal Employees Health Benefits Program. Allegations centered on add-on tests, tests not performed, code jamming, kickbacks, and additional indices. The SmithKline payment is the largest *qui tam* settlement to date and one of the two largest civil health care fraud settlements ever reached by the Government. Robert Merena, a former SBCL employee with responsibility for systems and data management who had access to all billing data, filed his suit in 1993. Dr. Charles Robinson, Jr. was the medical director of SBCL's laboratory in San Antonio, and Dowden and Spear worked as sales personnel at SBCL competitors. The settlement does not resolve potential criminal charges against SBCL or any individuals.

SBCL, headquartered in Collegeville, Pennsylvania, is a subsidiary of SmithKline Beecham, plc, a British medical products and services firm. According to DOJ, SBCL, which provided certain standard profiles to ordering physicians, sought to increase profits per transaction by performing additional tests that were not necessary or ordered. SBCL further billed for tests not actually performed, often due to insufficient specimen amount or other technical problems, and also engaged in code jamming. That is, when a physician ordered a screening test, SBCL would "jam" or insert a diagnosis code without knowing whether it applied.

With respect to a complete blood count (CBC), which is the second most common lab test ordered, SBCL allegedly provided and billed for certain additional test results even when they were not ordered by the physician. SBCL also billed Medicare a second time for end stage renal disease tests for which it had already been paid by kidney dialysis centers. Medicare was further billed for testing that was not used for diagnosis or treatment.

In order to attract a physician's Medicare business, SBCL allegedly provided inducements such as free or below-cost testing for tests billed directly to the physician; free computers, fax machines, and refrigerators; placement of an SBCL employee in physicians' offices; and payment of "rent" to physicians. Under Medicare, it is prohibited to provide anything of value to a physician in order to induce a referral.

The SmithKline settlement brings the total amount recovered by recent federal laboratory enforcement initiatives (Operation LabScam) to over $800 million. In addition to the settlement payment, SBCL will undertake a comprehensive compliance program to be monitored by the HHS OIG. As part of the settlement announcement, a model compliance plan for clinical laboratories was issued by the OIG. Joining in the investigation were the FBI, Postal Inspection Service, Defense Criminal Investigative Service, Inspectors General of the Railroad Retirement Board and Office of Personnel Management, and over 40 state Medicaid Fraud Control Units (MFCUs). Representing the Government were Assistant U.S. Attorney James Sheehan of the Eastern District of Pennsylvania, Assistant U.S. Attorney Dara Corrigan of the District of Columbia, David Waterbury of the Washington State MFCU, Carolyn McElroy of the Maryland MFCU, and Laurence Freedman of the DOJ Civil Division. Mr. Merena was represented by Marc Raspanti and David Laigaie of Miller, Alfano & Raspanti (Philadelphia, PA). Representing Robinson and Grossenbacher were John Clark and Rand Riklin of Goode, Casseb & Jones (San Antonio, TX). John Phillips and Mary Louise Cohen of Phillips & Cohen (San Francisco, CA; Washington, D.C.) represented Spear, Dowden, and the Berkeley Community Law Center.

Dillingham Construction Pacific Ltd. et al.

In February 1997, DOJ announced that two companies and one of their owners agreed to pay the Government $1 million to settle allegations that they failed to properly test welds in the piping system for a chemical weapons disposal plant in the Pacific Ocean. The plant, located about 800 miles southwest of Honolulu, was shut down in 1991 so that the welds could be retested and repaired. The settlement resolves potential claims under the False Claims Act against Dillingham Construction Pacific Ltd., d/b/a Hawaiian Dredging & Construction Company, Finlay Testing Laboratories Inc., and the owner of Finlay Laboratories. An investiga-

tion by the Defense Criminal Investigative Service revealed false certifications that certain process piping welds for the construction of the Johnston Atoll Chemical Agent Disposal System satisfied all applicable contract specifications. Handling the matter for the Government were Assistant U.S. Attorney Rachel Moriyama of the District of Hawaii and Marlene Gibbons of the DOJ Civil Division.

U.S. ex rel. Roby v. SPECO Corporation and The Boeing Company (SD OH No. C-1-95-375)

In March 1997, DOJ announced that SPECO Corporation, an Ohio company that has filed for bankruptcy under Chapter 11, agreed to an allowed claim by the Government of $7.2 million to settle *qui tam* allegations that it manufactured faulty transmission parts for Army helicopters. Due to the bankruptcy, the Government expects to receive only about $840,000 for its allowed claim. According to DOJ, two gears made by SPECO failed in flight as a result of defective manufacturing, causing one CH-47D Chinook helicopter to be destroyed in Saudi Arabia in 1991 and another to be damaged at Fort Meade, Maryland in 1993. DOJ stated that there were minor injuries associated with the crashes. The CH-47D Chinook is the military's medium tactical heavy-lift transport helicopter. The lawsuit was brought in 1995 by Brett Roby, a former SPECO quality assurance engineer. The SPECO settlement does not resolve the suit against Boeing.

SPECO filed for bankruptcy in 1995 and has liquidated its assets for distribution to creditors. The U.S. Bankruptcy Court has approved the settlement. According to DOJ, SPECO has also agreed to provide DOD with inventory and intellectual property to settle claims for excess costs relating to unperformed military contracts. The case was investigated by the Defense Criminal Investigative Service and the Army Criminal Investigation Command. The relator's share was 23 percent. Mr. Roby was represented by James Helmer and Ann Lugbill of Helmer, Lugbill, Martins & Neff (Cincinnati, OH). Dennis Phillips of the DOJ Civil Division represented the Government.

U.S. ex rel. Riccio v. Lesley College (D MA No. __)

In March 1997, Lesley College reportedly agreed to pay the Government $475,000 to settle a *qui tam* suit alleging that it defrauded the Air Force in connection with a program of weekend courses at Warren Air Force Base in Cheyenne, Wyoming. The complaint alleged that Lesley falsely inflated the amount of actual classroom contact time. According to the lawsuit, although the program was contracted as an intense weekend format, faculty members routinely arrived late and left early. The action was brought by a former Lesley administrator, David Riccio. Mr. Riccio was represented by Dan Small of Butters, Brazilian & Small (Boston, MA).

TAF NEWS

Qui Tam Practitioner Guide

- TAF is pleased to introduce an important new resource for the *qui tam* bar — the *TAF Qui Tam Practitioner Guide: Evaluating and Filing a Case*, prepared by Staff Attorney Gary W. Thompson. This "how to" manual focuses on issues unique to *qui tam* litigation and includes sections on evaluating the merits and viability of a case, pre-filing and practical considerations, and preparing and filing the complaint. The *Practitioner Guide* also includes a concise Case Evaluation and Filing Checklist. Copies will be available by May 15.

Expanded Internet Site

- TAF's Internet site, designed to educate the public and legal community about the False Claims Act and *qui tam*, has been updated to highlight available resources and recent developments in the field. TAF's site is located at http://www.taf.org.

  TAF was spotlighted on NBC's NIGHTLY NEWS Internet site (nightlynews.msnbc.com) in conjunction with the network's "Fleecing of America" series. The December "Fleecing" piece featured *qui tam* relators and TAF Executive Director Lisa Hovelson.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). If you would like to discuss a potential article, please contact Associate Director Alan Shusterman.

Tenth Anniversary Resources

- To mark the tenth anniversary 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.

Previous Publications

- Back issues of the *Quarterly Review*, including the "1996 Year In Review," are still available. Requests can be made by phone, fax, or mail.

Qui Tam Attorney Network

- TAF is continuing to build and facilitate an information network for *qui tam* attorneys. For further details, please contact TAF Staff Attorney Gary W. Thompson.

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, disclosure statements, briefs, and settlement agreements are appreciated.

Acknowledgments

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