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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. Fine v. MK-Ferguson Company et al., 99 F.3d 1538 (10th Cir. Nov. 6, 1996)

A divided 10th Circuit three judge panel affirmed a district court holding that a *qui tam* suit filed by a former government auditor was barred under FCA § 3730(e)(4). The majority found that the complaint was substantially identical to a government audit report that had been sent to a state without any restriction on dissemination, and that the relator was not an original source because he lacked the requisite direct and independent knowledge. The dissent argued that release of the report to the state did not constitute public disclosure under § 3730(e)(4). The court also upheld the denial of attorneys' fees to the defendants under § 3730(d)(4).

Four months after resigning from his supervisory auditing position with the Office of Inspector General (OIG) for the U.S. Department of Energy (DOE), Harold Fine filed a *qui tam* suit against MK-Ferguson Company and its subcontractor in connection with the remediation of residual mill tailings at a uranium mining site in Lakeview, Oregon. In accordance with the Uranium Mill Tailings Radiation Control Act, the DOE had entered into a cooperative remediation agreement with the State of Oregon for the cleanup of the Lakeview site under which the DOE was responsible for 90 percent of the cost of remediation and Oregon for the remaining 10 percent. The DOE then entered into a contract with MK-Ferguson as the prime contractor for the Lakeview project.

After beginning work on the site, MK-Ferguson claimed additional contract costs. However, Oregon questioned whether some of these new costs were allowable under the contract between the DOE and MK-Ferguson; the state conducted three separate audits and sent a report on the contested costs to the DOE. Oregon thereafter requested that the OIG perform an audit, which the OIG subcontracted to ADC, Ltd., an independent firm. ADC conducted the Lakeview audit and submitted a draft report to the OIG. The OIG then issued a final report and audit based on ADC's audit which identified certain unallowable costs. In May 1991, the DOE sent this final report to both Oregon and MK-Ferguson officials without placing any restrictions on its dissemination.

Fine was an Assistant Regional Manager, Western Division, for the OIG until July 1991. According to the 10th Circuit, he had no involvement in the DOE's initial investigation of the questioned costs and was "only marginally involved" in the Lakeview audit. Fine's involvement was limited to attending a pre-audit conference, authorizing ADC's work, and later "converting the ADC audit into layman's language." Each of Fine's allegations of wrongdoing in his subsequent *qui tam* suit (except for one ultimately dismissed with prejudice at Fine's request) was addressed by the OIG final report.

The district court concluded that the final report was a public disclosure under the FCA when sent to Oregon, and that Fine's complaint was based upon that report. The court further found that Fine was not an original source because he did not have "direct and independent knowledge" of the information on which his complaint was based. Fine appealed.

DOE Report Was Publicly Disclosed When Sent to Oregon Without Restriction

After affirming that the OIG's final report was "an administrative report specifically referenced in 31 U.S.C. § 3730(e)(4)(A)," the 10th Circuit addressed whether a public disclosure had occurred when the DOE sent the report to Oregon. Following its decision in U.S. ex rel. Ramseyer v. Century Healthcare Corporation et al., 90 F.3d 1514 (10th Cir. July 24, 1996), 7 TAF QR 1 (Oct. 1996), the court stated that "public disclosure occurs when the allegations or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to members of the public who are otherwise strangers to the fraud."

The court concluded that sending the final report to Oregon without restrictions on its public availability was "an affirmative disclosure constituting public disclosure" under the Act. According to the court, as a consequence of the DOE not having placed any restrictions on dissemination, "this disclosure is distinct from what might otherwise be deemed a private disclosure." Further, the court reasoned that Oregon was not a party to the questioned contracts and "was thus a stranger to the fraud like any other member of the public, with no disincentive to making the information public."

Dissent Rejects Majority's Public Disclosure Ruling

Commenting that "what Congress giveth, some of the courts seem to taketh away" and that "[j]udicial constructions should not overly limit" *qui tam*, a dissenting opinion disagreed with the majority's conclusion that the DOE report had been publicly disclosed within the meaning of § 3730(e)(4)(A). The dissent argued that the logic of Ramseyer — which concluded that the "mere accessibility" to a government report by the general public via a Freedom of Information Act request does not constitute a public disclosure — suggested that the "mere disclosure from a federal agency to a state agency" in the case at hand was not a public disclosure. The dissent reasoned that "[a]lthough the audit did not state any restrictions on its dissemination, there is no evidence that the state of Oregon took positive steps to release it to the public . . . ." Moreover, "[t]he mere fact that the state of Oregon has the audit report in a file cabinet somewhere" does not constitute an affirmative disclosure to the public. Rather, according to the dissent, the audit report was "at best only potentially in the public eye."

Moreover, the dissent argued that the majority was incorrect to characterize Oregon as "a stranger to the fraud." Rather, "Oregon had prior knowledge of the fraud and was not a stranger to the effects of the fraud." The dissent thus concluded: "As I believe *Ramseyer* supports the conclusion that the mere providing of an audit report to a state government, which has instigated the audit, does not constitute a public disclosure, I would allow Mr. Fine's *qui tam* suit to proceed."

Fine's Complaint Was "Based Upon" DOE Report

The 10th Circuit majority next turned to whether Fine's complaint was "based upon" the publicly disclosed DOE report. The court reaffirmed its holding in U.S. ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993), that "based upon" means "supported by" and the required inquiry is "whether the relator's complaint is 'substantially identical' to the allegations contained in the public disclosure." Comparing the DOE report with Fine's complaint, the court found substantial identity and therefore that the latter was "based upon" the former.

Fine argued that his complaint was not based upon the DOE report because his complaint contained allegations of fraud in specific trans-

actions not mentioned in the report, and because his complaint alleged fraud concerning only part of the costs found unallowable in the report. Rejecting Fine's argument, the appellate court reaffirmed its holding in Precision that the *qui tam* suit need not be based "solely" upon the public disclosure for the § 3730(e)(4) bar to apply. Moreover, the court stated that although Fine's allegations "are more narrow and specific in scope, they are substantially identical to and supported by the publicly disclosed allegations and transactions."

Fine also argued that his complaint constituted the first time "allegations" of fraud were made — that is, that the DOE report's conclusions, which were worded in terms of "unallowable" or "unreasonable" costs, did not constitute allegations of fraud. The court, however, found that the conclusions of the report were in fact substantially identical to the allegations in Fine's complaint. And, according to the court, the "semantic difference that . . . Fine first used the label 'false claims' is immaterial."

Fine Did Not Have "Direct and Independent Knowledge"

The court next ruled that Fine was not an original source under § 3730(e)(4)(B) because he did not have the requisite "direct and independent knowledge." Citing other courts' definitions of such knowledge as "not secondhand" and "unmediated by anything but [the relator's] own labor," the 10th Circuit rejected Fine's contention that his limited participation in the Lakeview audit qualified him as an original source.

The court reasoned that Fine "was not the individual actually performing the investigations on the Lakeview site" and "all the factual information in his Complaint came from ADC personnel and materials." That is, "Fine's allegations are derivative of the facts uncovered by the field auditors. He did not himself discover the allegedly fraudulent practices . . . . Fine has merely changed the labels 'unreasonable' and 'unallowable' costs from the final report and audit to 'false' and 'fraudulent' claims in his Complaint." The court thus concluded that "Fine's secondhand knowledge . . . is not 'direct and independent,' based as it is on the work of others."

Denial of Defendants' Motion for Attorneys' Fees Upheld

The 10th Circuit also upheld the district court's denial of the defendants' motions for attorneys' fees under FCA § 3730(d)(4), which provides for the award of attorneys' fees "if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The defendants argued that the court clearly lacked jurisdiction under § 3730(e)(4) and thus Fine's suit constituted frivolous and vexatious litigation, and that Fine had engaged in a pattern of vexatious litigation against a number of government contractors. The appellate court responded: "Although they are accumulating in number, decisions construing the [FCA] in the Tenth Circuit are not legion. That the district court lacked subject matter jurisdiction in this case was not clearly apparent under the holding in *Precision* or the decisions of the other circuits at the time."

U.S. ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. Nov. 6, 1996)

The 10th Circuit affirmed a district court holding that a *qui tam* suit filed by a former government auditor was barred under § 3730(e)(4). The court found that the action was substantially identical to a memorandum — which contained allegations and transactions set out in a government audit — that the relator had given to his representative in an unrelated age discrimination case.

Further, the court ruled that the relator lacked the direct and independent knowledge necessary to qualify as an original source.

Less than a month after resigning from his supervisory auditing position with the Office of Inspector General for the U.S. Department of Energy, Harold Fine filed a *qui tam* suit against Advanced Sciences, Inc. alleging submission of false claims for reimbursement of unallowable costs under various federal contracts from 1985 to 1991. Previously, Fine had sent a letter (dated March 20, 1990) to an Army contracting officer regarding Advanced Sciences' alleged submission of unallowable costs. Fine based this letter on information he gleaned from audit reports prepared by DOE field auditors. Subsequently, on April 9, 1990, Fine prepared a memorandum alleging that Advanced Sciences' submission of costs that were later questioned in a government audit as "unallowable" were in fact "false claims" because of the company's continuation of the practice. He sent this memorandum to the Investigations Division of the OIG and requested an investigation of Advanced Sciences.

According to the 10th Circuit, Fine's March 20 letter was unauthorized and led to the souring of relations between Fine and OIG management. Over the next year, Fine leveled various charges against the OIG including age discrimination and retaliation. In pursuing these charges, Fine met with Donald Sikora of the American Association of Retired Persons, Fine's designated representative for his age discrimination case. Fine gave Sikora both the March 20 letter and the April 9 memorandum. In addition, Fine sent the March 20 letter to Burt Mazer of the accounting firm Birnbaum & Associates to obtain Mazer's opinion on the reasonableness of sending the letter to the contracting officer.

The district court dismissed Fine's *qui tam* action, finding that Fine's disclosure of the March 20 letter and April 9 memorandum to Sikora, and of the March 20 letter to Mazer, constituted "public disclosure" under § 3730(e)(4)(A). The court ruled that Fine did not qualify as an original source under § 3730(e)(4)(B) because, as an auditor who collected and analyzed information produced by others, he did not have direct and independent knowledge of the information in his complaint. Fine appealed.

Memorandum Containing Allegations Set Out in Government Audit Triggered Bar

Fine argued that, in order for the § 3730(e)(4) bar to be triggered, the disclosure must have been made during or in one of the specified congressional or administrative hearings, audits, reports, or investigations. Rejecting this argument, the 10th Circuit ruled that the disclosed allegations merely must be derived from one of the sources listed in § 3730(e)(4)(A). The court explained: "That section defines the sources of allegations or transactions which trigger the bar but it does not define the only means by which public disclosure can occur."

The court found that Fine's April 9 memorandum specifically referenced allegations and transactions set out in an OIG audit and thus triggered the bar. Explicitly following its holding in U.S. ex rel. Fine v. MK-Ferguson Company et al., 99 F.3d 1538 (10th Cir. Nov. 6, 1996) (discussed above at page 1), the court considered it immaterial that the audit did not use the terms "allegations" or "transactions" and that Fine was the first to use the term "false claim." That the audit presented the defendant's claimed costs "in a questioning light" was sufficient to constitute allegations or transactions for purposes of § 3730(e)(4)(A).

Memorandum Was Made Public When Disclosed by Fine to AARP Representative

The court next found that the April 9 memorandum had been made public when Fine gave it to Sikora, his representative for his age discrimination claim. According to the 10th Circuit, "public disclosure occurs when the

allegations of fraud or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to members of the public who are otherwise strangers to the fraud." The court clarified that it is immaterial "how many people were informed of the alleged fraud by the disclosure. The proper inquiry is more limited: whether the disclosure of the allegations to any member of the public not previously informed has occurred." Noting that Sikora was not affiliated with either the OIG or Advanced Sciences and was previously unconnected with the alleged fraud, the court concluded that "Fine affirmatively released the allegations of fraud and fraudulent transactions into the public domain when he gave his April 9 memorandum to Sikora."

"Substantial Identity" Between Memorandum and Complaint

The court then ruled that Fine's complaint was "based upon" the April 9 memorandum because there was "substantial identity" between the two. In doing so, the court stated that the § 3730(e)(4) bar is triggered when the *qui tam* action "is even partly based upon" the public disclosure. The court pointed out that Fine admitted that "the costs specified in his April 9 memorandum provided the basis for the allegations in four paragraphs of his Complaint" and "his knowledge about the practices of Advanced Sciences came in part from the work papers of the audit."

Fine Not An Original Source Because He Lacked Requisite "Direct and Independent Knowledge"

Citing its decision in MK-Ferguson, the court found that Fine did not have the "direct and independent knowledge" necessary to qualify as an original source under § 3730(e)(4)(B). The court emphasized that Fine himself did not discover the alleged fraud but rather was the supervisor to whom the auditors reported: "In relation to the alleged fraud, Fine stands in largely the same position here that he did in *MK-Ferguson*: he learned of it through the discoveries of others."

Further, the court rejected Fine's argument that his investigation into the alleged fraud after leaving the OIG qualified him as an original source. As the court put it, "Fine's 'independent' investigation appears to consist of little more than some information provided to him by an anonymous source." In any event, according to 10th Circuit precedent, "investigations that are merely continuations of, or derived from, previous investigations are not sufficiently independent to satisfy the original source requirements." Here, Fine merely pursued information first learned from the work of the OIG auditors' investigation.

Concurrence Disagrees with Majority's Analysis Regarding "Public Disclosure" and "Based Upon"

A concurring opinion disagreed with the majority regarding what constitutes "public disclosure" and "based upon" under § 3730(e)(4)(A). First, according to the concurrence, Fine's disclosure of the April 9 memorandum to Sikora was not a "public disclosure." Emphasizing that the memorandum was given to Sikora in the context of his representation of Fine, and analogizing it to discussing a potential *qui tam* suit with one's lawyer, the concurrence concluded that "an employee's discussion of allegations of fraud with his representative in an age discrimination case, when such allegations may have led to his discharge, cannot amount to a public disclosure." On the other hand, the concurrence suggested that the disclosure of the March 20 letter to Mazer was a "public disclosure." It emphasized that Mazer, unlike Sikora, was not obligated to keep the allegations in the letter secret and had no fiduciary duty to Fine.

The concurrence also expressed "concern with the expansive definition of 'based upon' to

which our circuit has bound itself." It argued that the "based upon" definition adopted in U.S. ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993) — under which an action even partly based upon a public disclosure triggers the § 3730(e)(4) bar — "overly restricts *qui tam* jurisdiction and substantially thwarts the important goal of *qui tam* suits to uncover fraud against the government." According to the concurrence, "if a piece of information disclosed to a member of the public supports the complaint, but would not in and of itself provide the logical basis for that person to make allegations similar to those in the complaint, *qui tam* jurisdiction should ensue." However, even under this formulation, "Mr. Fine's complaint is 'based upon' the March 20 letter, which contained allegations that Advanced Sciences, Inc. had claimed unallowable costs."

Attorneys' Fees

U.S. ex rel. Fallon et al. v. Accudyne Corp. et al., 97 F.3d 937 (7th Cir. Oct. 3, 1996)

In a strongly worded opinion, the 7th Circuit rejected Accudyne Corp.'s attempt to avoid paying reasonable attorneys' fees it had agreed to pay in settling the merits of a *qui tam* suit. To support its position, Accudyne argued that the relators would not have prevailed on one of their counts had it been fully litigated. The appellate court characterized Accudyne's behavior as "outrageous." According to the court, Accudyne could not "demand the benefits of a favorable outcome in litigation without taking the risk of loss." Allowing Accudyne "to weasel out of a bargain" would undermine parties' incentives to settle and squander judicial resources. Thus, the 7th Circuit affirmed the district court's award to the relators of approximately $1.2 million in fees and costs.

This case was brought against Accudyne Corp., a defense contractor, by a group of *qui tam* plaintiffs that included a nonprofit environmental foundation and Accudyne employees. Count I of the complaint alleged that Accudyne knowingly failed to properly test certain electronic parts and supplied nonconforming products. Count II asserted that Accudyne falsely certified compliance with federal and state environmental requirements incorporated into the contract. The Government intervened as to Count I but allowed the relators to proceed on their own with Count II.

After two years of litigation which produced rulings on various threshold issues (*see* 1 TAF QR 6, 7 (Apr. 1995), 2 TAF QR 1 (July 1995)), both counts of the case were settled under one settlement agreement for $12 million. As part of the settlement, Accudyne agreed to pay the relators' reasonable attorneys' fees and costs in an amount to be determined by the court. Subsequently, the district court dismissed the case pursuant to the agreement and awarded the relators approximately $1.2 million in attorneys' fees and costs.

According to the 7th Circuit, Accudyne then took the "extraordinary" step of arguing that the attorneys' fees should only be nominal because the relators would have lost on Count II had it been fully litigated. To support its position, Accudyne asserted a litany of arguments, including lack of constitutionality, lack of standing, lack of provable injury, lack of a claim, and lack of jurisdiction. It also argued that the relators' attorneys' fees were excessive.

Defendant's Behavior "Outrageous"

The court flatly rejected all of Accudyne's arguments. Having already bargained away for valuable consideration its opportunity to obtain a decision on the merits, Accudyne was attempting to offer "its view of the merits as a reason to avoid paying the attorneys' fees it had agreed to pay." In

response, the court remarked, "A saying about having one's cake and eating it too comes to mind. (So does: 'That takes the cake!')" Noting that the "the district judge was not impressed" by any of Accudyne's arguments, the appellate court added, "We are impressed — impressed that Accudyne's behavior is outrageous."

According to the 7th Circuit, Accudyne could have settled only Count I and continued to litigate Count II, or it could have bargained for the relators to release their fees as part of the overall settlement. However, Accudyne did neither. It settled the entire case for a flat payment that was not apportioned between the counts. And it affirmatively promised to pay the relators' attorneys' fees and costs in an amount to be determined.

With respect to Accudyne's excessive fees argument, the 7th Circuit stated that this was a "big-stakes case with potentially difficult legal and factual issues." Noting that Accudyne had hired a "large and expensive law firm from Chicago," the court asserted that Accudyne could not "grouse that the relators also engaged out-of-town commercial litigators whose hourly rates are normal for commercial cases." Moreover, it is only the relators who are entitled to object to excessive compensation, "and the relators, who offered a bonus to induce counsel to accept a risky case from which they might have emerged empty-handed, are not complaining."

Res Judicata/Collateral Estoppel

U.S. v. Brekke et al., 97 F.3d 1043 (8th Cir. Oct. 4, 1996)

The 8th Circuit ruled that a prior False Claims Act suit was not punitive in nature and thus did not bar, under res judicata, a subsequent criminal prosecution arising from the same transaction. The appellate court also held that the settlement in the FCA action did not collaterally estop the Government from relitigating issues involved in that action.

In 1990, Brekke Construction, Inc., a corporation owned and controlled by Lauree Flaa Brekke and James Stanley Brekke, obtained a $350,000 bank loan and secured a guaranty for that loan from the Small Business Administration (SBA). The Brekkes subsequently defaulted on the loan, and the bank attempted to collect on the SBA's guaranty. The SBA then discovered that the Brekkes had made misrepresentations in applying for the guaranty. In June 1994, the SBA brought a civil suit under the FCA against the construction company and the Brekkes. In November 1994, the private parties settled with the SBA for $130,000.

In September 1995, a federal grand jury returned an indictment against the Brekkes in connection with the loan transaction charging them with, among other things, bank fraud and making false statements to a financial institution. Thereafter, the district court denied the Brekkes' motion to dismiss on collateral estoppel grounds but granted their motion to dismiss on res judicata grounds. The Government appealed.

FCA Treble Damages Provision Not Punitive

The 8th Circuit recognized that a civil action may preclude a later criminal prosecution if both actions are based on the same facts and both have punishment as their object. In this case, however, the appellate court found that the district court had erred in dismissing the indictment on res judicata grounds for two separate reasons. First, the 8th Circuit concluded that the civil suit and the criminal proceeding "involve different causes of action." According to the court, the civil and criminal actions "serve different societal interests and could not have been joined in the same lawsuit."

Moreover, the 8th Circuit found that, even assuming that the two cases involved the same cause of action, the district court's dismissal should be reversed because the earlier FCA case did not have punishment as its object. Citing U.S. v. Halper, 490 U.S. 435 (1989), the appellate court noted that the FCA's fixed penalty plus treble damages provision does no more than make the Government whole. Thus, the court held that the prior FCA recovery was compensatory rather than punitive in nature. For this reason, the court also ruled that a criminal action against the defendants would not violate the Double Jeopardy Clause.

Collateral Estoppel Not Applicable

With respect to collateral estoppel, the 8th Circuit noted that the defendants had not identified which factual issues they believed had been established in the civil FCA case, and that the SBA had not made any factual concessions in its settlement agreement with the defendants. Following the general rule that a consent judgment does not have issue-preclusive effect unless the parties clearly intended to foreclose a particular issue in future litigation, the appellate court affirmed the district court's denial of defendants' motion to dismiss on collateral estoppel grounds.

Section 3730(h) Retaliation Claims

Neal v. Honeywell et al., 942 F. Supp. 388 (N.D. Ill. Oct. 4, 1996)

An Illinois district court found that a plaintiff in a § 3730(h) action who had alleged multiple acts of retaliation, including threats and harassment, "put forth sufficient evidence that she was discriminated against as a direct result of [whistleblowing] to defeat summary judgment." However, the court ruled that the plaintiff could not pursue a claim for constructive discharge because the defendant company had offered her reasonable employment opportunities, which she chose to decline.

Judith Neal sued Honeywell, Inc. under FCA § 3730(h) for allegedly retaliating against her after she made an internal report regarding falsification of test data at Honeywell's Joliet Arsenal plant. Although Neal requested anonymity in her "hotline" call to a Honeywell legal department manager, the substance of Neal's call and her identity were revealed to several management level employees. Ultimately, Neal's identity as the whistleblower became known throughout the company. Moreover, Neal's immediate supervisor allegedly harassed her for blowing the whistle, and the production manager who had been implicated for allowing the false testing threatened that he would "get" Neal.

The district court found that a Honeywell internal investigation confirmed that the production manager had threatened Neal and that none of the upper level management made any effort to protect her from harassment or retaliation nor took any disciplinary action against the production manager. In fact, the production manager was transferred to another Honeywell facility, given responsibility for twice as many employees, and later received a raise. Neal also alleged that her immediate supervisor stripped her of virtually all her responsibilities and isolated her from co-workers. Finally, although Neal was offered positions at other Honeywell facilities, she declined and eventually left the company because she felt that she was being mistreated as a result of her hotline call.

Sufficient Evidence of Retaliation to Warrant Trial

In a detailed factual review, the court conclud-

ed that there was sufficient evidence to warrant trial on the following: whether Neal's boss retaliated against her by scolding her for her hotline call and by changing her job responsibilities and isolating her from co-workers; whether the production manager threatened to "get" Neal; whether various Honeywell personnel disclosed her identity as a whistleblower; whether Honeywell failed to adequately discipline the production manager who threatened her; and whether Honeywell failed to adequately offer Neal protection.

Constructive Discharge Claim Cannot Proceed

The court ruled, however, that as a matter of law Neal's claim for constructive discharge could not proceed. Two Honeywell facilities had offered Neal positions at the same salary she was earning in Joliet and involving job responsibilities appropriate to her education and experience. According to the court, Neal's only dissatisfaction with the offers was that they were not promotions. "Neal has made no contention 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."

U.S. ex rel. Friel et al. v. Morrison-Knudsen Services, Inc. et al., Order, No. CV-N-92-482-DWH (D. Nev. Sept. 30, 1996)

A § 3730(h) retaliation claim is subject to the six-year statute of limitations period set forth in FCA § 3731(b), according to a Nevada district court. The court found that, under the plain language of § 3731(b), the limitations period starts to run when the false claim, not the retaliatory act, occurs.

This case involved the alleged fraudulent misrepresentation of the amount of jet fuel delivered to the Government in the wake of fuel spills in the late 1980s. With respect to the relators' § 3730(h) retaliation claim, one defendant moved to dismiss arguing that the FCA's six-year limitations period at § 3731(b) does not apply to retaliation claims. Noting that other courts have differed on what limitations period applies to § 3730(h) claims, the district court concluded that the plain language of the FCA requires application of the § 3731(b) six-year limitations period, which begins to run when the false claim occurs. According to the court, nothing in the FCA indicates that actions brought under § 3730(h) should be treated differently from actions brought under other subsections of § 3730. Moreover, in response to a California district court's assertion that a literal interpretation of § 3730(b) could lead to "bizarre results," the Nevada court stated, "Though it is conceivable problems could arise from a literal reading of the statute, it is not the task of this court to fabricate unlikely hypotheticals in search of odd or absurd results."

Statute of Limitations

TS Infosystems, Inc. v. U.S., 36 Fed.Cl. 570 (US Fed.Cl. Oct. 8, 1996)

The minimum statute of limitations under the FCA is six years, and the three-year period triggered by government knowledge can only serve to enlarge that six-year period, the U.S. Court of Federal Claims ruled. The court went on to hold that the statute of limitations in the case at hand began to run on the date of the Government's final payment on the alleged false claim — which was within six years of when the Government asserted its FCA counterclaim.

On August 18, 1995, in a suit brought in the U.S. Court of Federal Claims by TS Infosystems, Inc. (TSI), the Government filed a

counterclaim pursuant to the FCA. TSI moved to dismiss the counterclaim on statute of limitations grounds.

Six Years is Minimum Limitations Period

TSI argued that the Government knew about the alleged fraud as a result of a December 1989 audit report and, therefore, the counterclaim should be barred for failure to fall within the three-year statute of limitations period set forth at FCA § 3731(b)(2). According to the court, however, this argument "assumes that such knowledge triggers a maximum time limit of three years. Six years, however, is the *minimum* statute of limitations period under the statute." TSI's contention to the contrary is not supported by any case law. Rather, "[t]he three-year period is designed to enlarge the time in which to bring a claim if a party does not learn of the fraud until years after the fraud was committed. It is not meant to curtail the period in which claims can be filed."

Six-Year Period Began to Run on Date of Final Payment

The court then addressed when the statute of limitations began to run. TSI argued that, at the latest, the statute of limitations began running when the company submitted its falsified budget to the Government on March 14, 1989. The court, however, held that the commission of the violation — which triggers the running of the statute of limitations — occurred "on the date of the Government's final payment on the false claim" (which was October 27, 1989). Thus, the Government's counterclaim fell within the six-year period and was not barred by the statute of limitations.

The court added that, in any event, it had the discretion to waive the six-year limitations period under the general equitable tolling doctrine, which "allows courts to mitigate the statute of limitations in the proper circumstances" (including fraudulent concealment).

Briefs Filed in Supreme Court Re: Hughes Aircraft Company v. U.S. ex rel. William Schumer

Hughes Aircraft Company and seven *amici* have filed briefs supporting reversal of the 9th Circuit's decision in U.S. ex rel. William Schumer v. Hughes Aircraft Company, 63 F.3d 1512 (9th Cir. 1995), 3 TAF QR 4 (Oct. 1995). The relator William Schumer and four *amici*, including Taxpayers Against Fraud, The False Claims Act Legal Center, have filed briefs urging affirmance of the circuit court decision. The Solicitor General of the U.S. Department of Justice also has filed an *amicus* brief supporting affirmance. Oral argument is slated for February 25, 1997, and a decision by the Supreme Court is expected before July 1997.

Short summaries of some of the arguments in each brief appear below. Contact information is provided at the end of each summary if you would like to obtain a copy of a particular brief.

BRIEF OF PETITIONER, HUGHES AIRCRAFT COMPANY

Retroactivity Issue

Hughes argues that because this case would have been barred outright had the 9th Circuit applied the 1943 "government knowledge" bar, the 1986 amendments which replaced the "government knowledge" bar with the "public disclosure" bar increased legal burdens on *qui tam* defendants. The burden is increased, Hughes elaborates, because "[e]nforcement of the law by private parties as well as by the Government is substantially more burdensome than enforcement by the Government alone." Hughes asserts that *qui tam* relators "lack the objective prosecutorial discretion of government law enforcement officials because they are driven not by the public interest, but by personal ill will or desire for profit." In short, according to Hughes, the 1986 amendments affected "the *substantive* legal rights of FCA defendants by broadening the universe of FCA plaintiffs" and should not, therefore, be applied to conduct occurring prior to the 1986 amendments.

"Public Disclosure" Issue

Hughes further argues that the 9th Circuit erred in holding that a government audit disclosed to certain Hughes employees was not a "public disclosure" under § 3730(e)(4)(A). According to Hughes, "[v]iewed in isolation, the term 'public disclosure' is susceptible to a range of plausible meanings, from disclosure to the *general* public to disclosure to *some member* of the public." The *qui tam* provisions, Hughes elaborates, "seek to encourage 'whistleblowers' to expose previously-undisclosed allegations of fraud, not to spawn 'parasitic' actions based on allegations already disclosed by the Government." A "public disclosure" within the meaning of the statute thus occurs, Hughes contends, "when the Government reveals allegations of wrongdoing to a member of the public who is a stranger to the fraud."

Injury to the Public Fisc Issue

Hughes also urges reversal of the 9th Circuit decision for "holding that noncompliance with accounting disclosure regulations can give rise to FCA liability even where the underlying account-

ing practices themselves do not." It argues that a "claim" is not "false" if the claimant is entitled to the money requested. Thus, it reasons, an alleged infraction of a contract, statute, or regulation that does not result in an inflated claim against the public fisc cannot give rise to FCA liability.

— Kenneth Starr, Kirkland & Ellis, 202/879-5000

BRIEF OF *AMICUS* AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. (AIAA)

Retroactivity Issue

AIAA argues that the 9th Circuit erred in holding that § 3730(e)(4) as amended should apply to conduct occurring prior to the 1986 amendments. According to AIAA, under the government information test that existed before the 1986 amendments, "Hughes became effectively immune from a *qui tam* action" when the Government became aware of alleged irregularities in Hughes' accounting system. Yet, under the amended § 3730(e)(4) provision Hughes cannot dispose of the *qui tam* case simply because of the Government's knowledge. Thus, AIAA argues, the amended law changes the legal consequences of Hughes' conduct. AIAA recognizes that the presumption against retroactive application does not apply to purely "jurisdictional" provisions, but argues that "it is the impact of a new law that controls, not its semantics."

"Public Disclosure" Issue

Characterizing the 9th Circuit's public disclosure holding as stemming from "psychological and sociological conclusions" about whether the disclosed allegations were more or less likely to be acted upon, AIAA argues that "[g]eneralizations about how an audience might react after hearing fraud allegations — keeping them confidential, disclosing them, or filing a *qui tam* lawsuit — do not illuminate their public or private character." AIAA also argues that there should not be any special rule for defense contractors. Instead, in its view, § 3730(e)(4) is properly construed to foreclose "certain parasitic" actions and to permit original sources to serve as *qui tam* plaintiffs.

— Mac Dunaway, Dunaway & Cross, 202/862-9700

BRIEF OF *AMICI* THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE AMERICAN HOSPITAL ASSOCIATION, AND THE AMERICAN MEDICAL ASSOCIATION (MEDICAL AND HOSPITAL INTEREST GROUPS)

"Public Disclosure" Issue

The Medical and Hospital Interest Groups argue that Congress designed § 3730(e)(4)(A) as a "quick trigger" threshold test to determine if a *qui tam* case warrants the more exacting determination of whether the relator is an "original source." According to these groups, the language of § 3730(e)(4)(A) does not limit the nature, form, or extent of the disclosure necessary for it to be "public." They claim that Congress intended the "public disclosure" language to apply whenever the allegations or transactions are disclosed outside the Government. They summarize their argument as follows: "This 'quick trigger' guarantees that whenever a parasitic suit is possible — that is, whenever there has been any form of public disclosure — only the true whistleblower, the 'original source,' may file the *qui tam* case."

Injury to the Public Fisc Issue

The Medical and Hospital Interest Groups argue that the FCA is not, and has never been, an all-purpose remedy for any type of regulatory violation. Instead, they claim that civil FCA liability attaches only when there has been financial loss to the Treasury. The civil penalties provided for by the Act "were designed not to penalize regulatory violations but as a form of 'rough justice' to remedy those situations where the financial loss is certain but difficult to calculate."

— John Boese, Fried, Frank, Harris, Shriver & Jacobson, 202/639-7000

BRIEF OF *AMICI* CHAMBER OF COMMERCE OF THE UNITED STATES, ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA (CHAMBER/EIA/NSIA/SCA)

Injury to the Public Fisc Issue

The Chamber/EIA/NSIA/SCA argue that the FCA has historically imposed liability only on conduct that may cause the Government financial injury. Their brief maintains that there was no false claim for money or property in this case since "[a]ll that occurred was that Hughes failed to file a timely Cost Accounting Standards Disclosure Statement as required by its contract and the applicable regulations." The *amici* call this failure a "run-of-the-mill violation" that "did not threaten or cause financial harm to the government" and conclude that the 9th Circuit's "unnatural interpretation" of the Act should be reversed.

— Clarence Kipps, Jr., Miller & Chevalier, 202/626-5800

BRIEF OF *AMICUS* FMC CORPORATION

Retroactivity Issue

FMC's brief focuses only on the retroactive application of the public disclosure bar. Calling the 9th Circuit's view "fanciful myth," the brief states: "Careful analysis shows that eliminating the Government knowledge defense for conduct that took place before the 1986 Amendments" did "in fact 'attach new legal consequences to events completed before its enactment,' because it impaired rights that contractors had when they acted and increased contractor's liability for past conduct." FMC also asks the Court to reverse Hyatt v. Northrop Corp., 80 F.3d 1425 (9th Cir. 1996), petition for cert. filed (U.S. July 2, 1996) (No. 96-17), or to direct the 9th Circuit to reconsider its holding which applies the amended § 3730(e)(4) provision to cases filed before the 1986 amendments.

— Allan Joseph, Rogers, Joseph, O'Donnell & Quinn, 415/956-2828

BRIEF OF *AMICUS* LOCKHEED MARTIN CORP.

Retroactivity Issue

Lockheed Martin's brief argues that § 3730(e)(4), as amended, removes the security provided contractors by the 1943 "government knowledge" bar and exposes contractors to expensive litigation and the risk of substantial liability. Proper application of the Supreme Court's decision in Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994), Lockheed Martin claims, precludes

applying the amended provision to this case because "it would 'increase a party's liability for past conduct' and 'impose new duties with respect to transactions already completed.'"

"Public Disclosure" Issue

Regarding application of the public disclosure bar, Lockheed Martin's brief attacks the 9th Circuit's holding as unsupported by the text of the FCA. It posits, instead, the theory that "Congress repealed the government knowledge bar in 1986 because it was concerned about the government possessing information but taking no action, i.e., conducting no investigation and taking no enforcement steps whatsoever." Lockheed Martin then proposes a test for when the public disclosure bar should properly come into play — when "the government commences an audit or investigation of allegations, no one other than the 'original source' of the allegations may bring a *qui tam* action." It also proposes that the bar be applied to "allegations that are disclosed outside the 'private' group of wrongdoers when such disclosure leads to a government audit or investigation."

— James Gallagher, McKenna & Cuneo, 213/688-1000

BRIEF OF *AMICUS* NORTHROP GRUMMAN CORP.

Retroactivity Issue

Northrop Grumman explains in its "Interest of *Amicus Curiae*" section that it currently has pending before the Court a petition for writ of *certiorari* raising a virtually identical issue concerning the retroactivity of the 1986 FCA Amendments. Its brief, therefore, focuses exclusively on whether the amended § 3730(e)(4) provision should be applied retroactively. Northrop argues that, according to the Court's decision in Landgraf, the public disclosure bar should not be applied retroactively because doing so would revive a barred cause of action, eliminate a defense, and increase Petitioner's liability. Further, the brief claims that the 9th Circuit's holding also significantly altered the Government's "pre-existing rights" under the FCA, to wit, "its right to 100% of the recovery based on allegations previously known to it."

— Brad Brian, Munger, Tolles & Olson, 213/683-9100

BRIEF OF *AMICUS* THE WASHINGTON LEGAL FOUNDATION (WLF)

"Public Disclosure" Issue

WLF argues that the public disclosure bar applies "when the subject of the fraud is revealed to any stranger to the fraud." It urges this "bright-line rule" so that courts can summarily dispose of issues arising under § 3730(e)(4).

Injury to the Public Fisc Issue

WLF's brief further argues that the constitutional case-or-controversy requirement of injury in fact, and the plain meaning of the statute, mandate that an FCA case be "based upon an actual or, in the case of an attempt, potential loss to the public fisc." It reasons that "[u]nder the statute, 'claim' is equated to an attempt to get payment; if a prohibited payment was impossible because the government suffered no loss, there is no 'claim.'"

— Stuart Gerson, Epstein Becker & Green, 202/861-0900

BRIEF OF RESPONDENT, WILLIAM SCHUMER

Retroactivity Issue

The 9th Circuit properly applied the amended § 3730(e)(4) jurisdictional language to this case, Respondent's brief argues, because that provision did not attach new legal consequences to events that occurred before its enactment. The 1986 FCA Amendments did not create a new cause of action, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim. Rather, according to Schumer, the impact of the amendments was to liberalize the conditions under which the federal courts can entertain FCA cases by one of the two kinds of plaintiffs the Act always empowered to bring suit. The provision at issue falls squarely within Landgraf's teaching that jurisdictional statutes are applicable once enacted, whether or not jurisdiction lay when the underlying conduct occurred. Thus, according to Schumer, the 1986 amendment to § 3730(e)(4) is precisely the kind of law that should be applied to all cases upon enactment.

"Public Disclosure" Issue

Schumer's brief further argues that the 9th Circuit was correct to hold that there had been no "public disclosure" in this case. According to the brief, "'public disclosure' connotes disclosure in a manner that opens the disclosed information to any and all members of the public." This interpretation, the brief claims, is compelled by settled canons of statutory construction requiring that the word "public" in § 3730(e)(4) be given operative effect rather than treating all disclosures as *ipso facto* public. Schumer further argues that this interpretation is compelled by the legislative history of the 1986 amendments which shows that the word "public" was added deliberately to provide a word of limitation ensuring that *qui tam* suits based upon "non-public" disclosure would not be barred. Moreover, to label as "public disclosures" those communications between the Government and its contractor regarding contract issues "strains the English language beyond the breaking point."

Injury to the Public Fisc Issue

Schumer's brief also contends that the FCA covers claims that are false or fraudulent in their own terms, like inflated claims, as well as those that contain false statements about a claimant's eligibility to receive a government payment. If a claimant cannot meet the Government's conditions for the receipt of federal funds, and deceives the Government as to its having met those conditions, the claimant has committed a fraud that is actionable under the FCA. Further, the brief argues that the FCA is violated even if the claimant proves *ex post* that "a truthfully informed Government would have made the same payment in any event." Schumer asserts that, in the instant case, even if Hughes' disclosure violation did not ultimately cause the Government to pay increased costs — a disputed issue at this stage of the proceedings — it is undisputed that Hughes was required, as a condition of contracting, to disclose its cost allocation system and that Hughes did not do so. According to Schumer: "Because the purpose of the Disclosure Statement requirement is to protect the public fisc in the long run, false Disclosure Statements lie at the very core of false statements that can form the predicate for FCA cases."

— David Silberman, Bredhoff & Kaiser, 202/833-9340

BRIEF OF *AMICUS* TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER (TAF)

"Public Disclosure" Issue

According to TAF's brief, the legislative history of the 1986 FCA Amendments shows that the *qui tam* provisions of the Act were amended in response to pervasive fraud against the Government and several weaknesses in the Government's fraud-fighting efforts. TAF argues that Congress envisioned that *qui tam* relators could substantially contribute to anti-fraud efforts by exposing and bringing forward evidence of fraud, activating and advancing cases to prosecution, and providing financial and human resources. In short, the brief concludes, Congress' primary aim in amending the Act was to bolster anti-fraud efforts by encouraging more private enforcement suits.

The brief analyzes the plain meaning of "public disclosure" under § 3730(e)(4) in the context of the statute as a whole and its purposes. It argues that a "public disclosure" requires an affirmative act of exposure to the people as a whole. The determination of whether a "public disclosure" has occurred, according to TAF, involves an objective analysis of both the means of disclosure and the audience that has received the disclosure. The first part of the inquiry examines whether the means by which a disclosure was made rendered it likely that it would reach the people as a whole. The second part of the inquiry examines whether the actual audience to which the disclosure was made constitutes the general public. Since the audits in question were never disseminated in a manner designed to reach the people as a whole, the brief concludes that the 9th Circuit's holding should be affirmed.

Injury to the Public Fisc Issue

TAF's brief also argues that the text of the statute, legislative history, and prior Supreme Court decisions make clear that proof of damage to the public fisc is not an element of an FCA violation. Further, the brief contends that submission of claims for payment while knowingly violating an explicit cost accounting disclosure requirement can form the basis for FCA liability.

— *Taxpayers Against Fraud, The False Claims Act Legal Center, 202/296-4826*

BRIEF OF *AMICUS* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA)

Injury to the Public Fisc Issue

NELA argues that the FCA's legislative history and judicial precedent clearly do not support the position of Petitioner and its *amici* regarding the degree of injury necessary for FCA liability. It points to numerous Supreme Court and lower court cases that belie the argument that damage to the Treasury is a required element of an FCA action. NELA also cites the legislative history of the 1986 amendments to support its contention that Congress envisioned FCA liability to attach even without depletion of the public fisc.

"Public Disclosure" Issue

NELA further argues that the plain language of § 3730(e)(4) means that a "public disclosure" is "'the action or an act of making known or visible' 'to the people as a whole.'" NELA notes that common usage of the phrase "pubic disclosure" references disclosures outside of a par-

ticular organization or group. Moreover, NELA argues, "Had Congress meant the phrase 'public disclosure' to mean anything other than making available to the general public, it could have easily used the words 'disclosure to any person.'" The plain language, coupled with the congressional goal of encouraging more private enforcement suits, leads NELA to the conclusion that the 9th Circuit's holding should be affirmed.

— James Helmer, Helmer, Lugbill, Martins & Neff, 513/421-2400

BRIEF OF *AMICUS* NATIONAL HEALTH LAW PROGRAM, INC. (NHELP)

The NHeLP brief points out the importance of the FCA to the integrity of Medicare, Medicaid, and other government-sponsored health care programs. It traces how congressional goals for the 1986 amendments have been realized through the amended Act's implementation by *qui tam* relators in different subject areas. In particular, it notes how susceptible the health care field is to fraudulent claims and how the FCA has been an effective litigation tool to combat those illegalities.

Injury to the Public Fisc Issue

NHeLP argues that the 9th Circuit correctly ruled that injury to the public fisc is not an essential element of an action under the FCA. Pointing to both Supreme Court precedent and the legislative history of the 1986 amendments, NHeLP maintains that proof of damages is not required under the Act. According to NHeLP, "[t]he submission of false or fraudulent claims to the Government by health care providers and contractors, even if not paid by the Government, erodes the integrity of Government-funded health care programs." When the quality of these programs is undermined, "the Government and its taxpayers ultimately bear the costs."

— William Blechman, Kenny Nachwalter Seymour Arnold Critchlow & Spector, 305/373-1000

BRIEF OF *AMICUS* PROJECT ON GOVERNMENT OVERSIGHT (POGO)

Injury to the Public Fisc Issue

POGO's brief argues that Cost Accounting Standards (CAS) disclosure violations create the potential for financial or monetary injury to the Government and that, in this case, Hughes' violation of the CAS disclosure requirement "denied the Government what it bargained for and created both potential and actual injury to the Government." According to POGO, the CAS Act is explicit that timely and accurate disclosure is an important "condition of contracting." As such, "there is no doubt that a knowing violation of the disclosure requirement is within the scope of the FCA." POGO argues that Congress imposed disclosure as a condition of contracting in order to protect the Government from various types of injury. "For example, contractors who violate the CAS disclosure requirement can position themselves to 'game the system' by waiting to take advantage of how certain costs and certain contracts eventually play out. Moreover, contractors who violate the CAS disclosure requirement may also cause the Government to expend additional audit resources."

The appendix of POGO's brief is its January 1997 study entitled "Funds Returned to the United States Government By Defense Contractors and the Health Care Industry Under

the False Claims Act, 1994-1996." The study contains a partial list of recent FCA recoveries from the defense and health care industries.

— Project on Government Oversight, 202/466-5539

BRIEF OF THE UNITED STATES SOLICITOR GENERAL

Retroactivity Issue

The Solicitor General's brief argues that application of the amended public disclosure bar is appropriate in this case because § 3730(e)(4) addresses the conduct of *qui tam* litigation rather than the primary conduct of persons who submit claims to the Government. Thus, under Landgraf, § 3730(e)(4) and its predecessor version speak to the power of the court rather than to the rights or obligations of the parties.

"Public Disclosure" Issue

The Solicitor General argues that the "public disclosure" bar is not applicable to this case. According to the Solicitor General, a "public disclosure" occurs "whenever allegations or transactions are revealed to any person outside the government other than the suspected wrongdoer, so long as that person is under no duty not to reveal the information to others." Thus, as applied to the facts at hand, there was no "public disclosure" because the audit reports at issue were not distributed beyond those employees specifically designated by Hughes to review them for the company. The Government argues that because the employees were viewing the documents on the company's behalf, the disclosures in question are properly regarded as having been made to the company — the suspected wrongdoer — and not to the employees as independent individuals.

Injury to the Public Fisc Issue

The Solicitor General's brief argues that pecuniary injury to the United States is not a requisite element of a cause of action for civil penalties under the FCA. It asserts that a claim is "false or fraudulent" under the Act whenever it misstates facts bearing on the claimant's entitlement to payment, regardless of whether the misstatement relates to the quality of the goods or services provided or the appropriateness of the price charged. The brief specifically discusses statutory and regulatory provisions for the Government's acquisition of goods and services that establish eligibility criteria beyond quality and price. Misrepresentation of compliance with these provisions is sufficient to render a claim "false or fraudulent" even when the injury to the Government is not naturally characterized as "pecuniary" in nature, according to the Solicitor General.

The Governments disagrees with Hughes on several points, responding that failure to provide accurate information regarding accounting methods is not a mere "technical" violation, and that the Government's payment of claims does not preclude any subsequent challenge to the allowability of costs.

— Office of the Solicitor General, U.S. Department of Justice, 202/514-2217

INTERVENTIONS AND SUITS FILED/UNSEALED

ALLEGATION: UNDERPAYMENT OF NATURAL GAS ROYALTIES

U.S. ex rel. Grynberg v. Alaska Pipeline Company et al. (D DC No. 95-725-TFH)

In October 1996, a *qui tam* suit was reported alleging that over 60 pipeline companies defrauded the Government of royalties for natural gas produced from federally owned or Indian properties. The lawsuit was filed by Jack Grynberg, a Denver engineer with interests in 800 oil and gas wells worldwide. The complaint challenges the companies' methods of measuring the heating content and volume of natural gas, which allegedly have caused widespread underpayments of appropriate royalties to the Government. DOJ has declined to intervene in the action, although the Interior Department is reportedly assisting Grynberg in the case. Representing the relator are Jeff Reiman of Reiman & Associates, P.C. (Denver, CO) and John Williams of Collier, Shannon, Rill & Scott (Washington, D.C.).

ALLEGATION: HEALTH INSURANCE DISCOUNTS NOT PASSED ON TO GOVERNMENT

U.S. ex rel. Foust and Gedrich v. Blue Cross and Blue Shield of the National Capital Area (D DC No. _)

In November 1996, DOJ announced that it intervened in a *qui tam* suit alleging that Blue Cross and Blue Shield of the National Capital Area (BCBSNCA) received discounts, refunds, and rebates from Washington, D.C. area hospitals but did not pass them on to certain employee associations and small federal agencies with which BCBSNCA had contracts to provide health insurance. The lawsuit was filed in 1993 by Steven Foust and Richard Gedrich, both former auditors with the Office of Personnel Management (OPM).

According to DOJ, by law OPM contracts for health insurance not only for employees of federal agencies but also for certain employee associations, including the National Treasury Employees Union, National Alliance of Postal and Federal Employees, Beneficial Association of Capital Employees, National Association of Postmasters of the United States, and the U.S. Secret Service Employee Association. Certain small agencies, however, contract directly with BCBSNCA for health insurance, including the Office of the Comptroller of the Currency, Office of Thrift Supervision, Corporation for National Service, and the Farm Credit Administration. (This case does not concern the Blue Cross and Blue Shield Service Benefit Plan offered to most employees in other federal agencies.)

The relators asserted claims against nearly 70 other Blue Cross and Blue Shield entities nationwide, alleging they did not return similar discounts to BCBSNCA, which in turn should have collected and forwarded those discounts to the Government under its contracts with the agencies and employee organizations named above. DOJ declined to pursue those claims, while joining in those against BCBSNCA arising from unreturned discounts from the Washington, D.C. area. The matter is being investigated by the OPM OIG. Assistant U.S. Attorney Susan Nyland of the District of Columbia is handling the case for the Government.

ALLEGATION: OVERCHARGING ON SUBWAY CONTRACT

U.S. ex rel. Buffington v. Shea-Kiewit-Kenny et al. (CD CA No. 95-CV-5250)

In November 1996, it was reported that a *qui tam* suit was unsealed alleging that a former subway contractor overcharged the Los Angeles

County Metropolitan Transportation Authority (MTA) $10 million by contract "low-balling" and using substandard materials. The suit, filed in 1995 by construction safety engineer Gary Buffington, alleges that Shea-Kiewit-Kenny (SKK) intentionally underestimated the cost of digging tunnels to win a contract and then submitted fraudulent change orders that increased the project's cost. SKK allegedly never planned to construct the tunnels according to specifications. This case is reportedly the second False Claims Act suit against an MTA contractor unsealed in 1996. The relator is represented by Louis J. Cohen (Encino, CA).

ALLEGATION: MEDICALLY UNNECESSARY EKG SERVICES AT NURSING HOMES

U.S. v. Transcor Incorporated and Sakson (ND IL No. 96C 7373)

In November 1996, DOJ announced that it has filed a lawsuit against Transcor Incorporated, an electrocardiogram (EKG) laboratory, and its owner, Hugo Sakson, for false claims in connection with EKG services performed at nursing homes in several midwestern and southern states. According to the lawsuit, Transcor billed the Government $1.6 million between 1994 and 1996 for 13,351 laboratory services that were either medically unnecessary or did not meet Medicare requirements for allowable billing. Company employees allegedly made sales calls to nursing homes and marketed Transcor service as a routine diagnostic EKG test. They gained access to the medical records of nursing home patients and then targeted certain patients for testing. As a result of its alleged misrepresentations to nursing home staffs, Transcor obtained permission to conduct unnecessary EKGs.

At the time Transcor started this practice in late 1994, the allowable Medicare charge for the EKG test was $15.91. The complaint alleges that in February 1995 Transcor began to present claims under a different test code, which allowed a Medicare charge of $245.45. The new code, however, required Transcor to be capable of doing the EKG test "on demand," which meant having equipment at nursing homes on a 24 hour a day basis, along with trained staff to perform the test at any time. The new code also required that providers have someone available 24 hours a day to receive the EKG test via the telephone and read the results. According to DOJ, Transcor submitted claims under the new code even though it was not capable of providing "on demand" EKG testing. Because of the huge volume of claims submitted under the new code, Medicare began investigating the company and, by late 1995, placed Transcor on 100 percent prepayment review. Independent medical necessity reviews found the EKG to be medically unnecessary in nearly 100 percent of the patients tested by Transcor. Handling the case for the Government are Assistant U.S. Attorneys Daniel May of the Northern District of Illinois and David Grise of the Eastern District of Kentucky.

ALLEGATION: NIH GRANT FRAUD/ IMPROPER SALE OF UNLICENSED DRUG/ MEDICARE KICKBACK VIOLATIONS

U.S. ex rel. Zissler v. Regents of the University of Minnesota (D MN No. 3-95-168)

In December 1996, DOJ announced that it has intervened in part in a *qui tam* suit alleging that the University of Minnesota falsely obtained and misused federal grants, received illegal Medicare payments, and earned millions of dollars for selling an unapproved drug. The suit was originally filed in 1995 by Dr. James Zissler, formerly a professor of microbiology in the school's Department of Medicine. According to

DOJ, the University of Minnesota receives over $100 million a year from the National Institutes of Health (NIH) alone.

The university allegedly submitted false claims and false statements when seeking funds in connection with at least 30 federal grants. These included $19.6 million in grants relating to the university's transplant program, which encompassed the ALG (antilymphocyte globulin) drug program and the cholesterol research program. (ALG is an immunosuppressive drug used after transplant surgery, particularly kidney transplants, to prevent the patient's body from rejecting the new organ.) According to the Government, the university did not exercise sufficient oversight or financial controls in handling grant funds or in the use of ALG. DOJ is asking the court to order the university to return millions of dollars in profit the university earned illegally by selling ALG, which was never licensed for commercial sale.

In addition to inflated amounts billed to numerous federal grants, DOJ alleges that the university sought Medicare reimbursement for unreimbursable drug charges, as well as received illegal payments through its home infusion referral arrangement with Caremark Inc. in violation of the Medicare Anti-Kickback Act. The relator's counsel is Gary A. Weissman (Minneapolis, MN). Representing the Government are Assistant U.S. Attorney Lynn A. Zentner and Alan E. Kleinburd, Marie-Therese Connolly, and Laurence Freedman of the DOJ Civil Division.

SETTLEMENTS

U.S. ex rel. Neargarder v. FMC Corporation (ND CA No. C 95-20231)

In October 1996, DOJ announced that FMC Corporation agreed to pay the Government **$13 million** to settle a *qui tam* suit alleging it falsely inflated the cost of military contracts to produce the Bradley Fighting Vehicle and the M113 tank. The lawsuit was filed by Robert Neargarder, a former manager at FMC's Ground Systems Division (GSD) in San Jose. According to the complaint, GSD inflated the amount it intended to spend on independent research and development (IR&D) and bid and proposal (B&P) projects in various documents submitted to the Army. The suit alleged that the Army, in relying on those false statements, agreed to reimburse GSD for a higher amount of IR&D and B&P expenditures than it would have if it had known GSD's true spending plans.

IR&D involves the cost of research and development of new technologies and products, while B&P are the costs companies incur in preparing bids and proposals for government contracts. During the years in question, the Government reimbursed companies for a negotiated percentage of their IR&D expenditures if the projects had some military relevance and also for a negotiated percentage of B&P costs. According to DOJ, a portion of FMC's inflated IR&D and B&P costs were included in the prices of its contracts for the Bradley Vehicle and the tanks. The relator's share was $2.86 million. Eric Havian and Stephen Meagher of Phillips & Cohen (San Francisco, CA) represented the relator. Assistant U.S. Attorney Joann Swanson represented the Government.

U.S. ex rel. Byrne v. Damon Clinical Laboratories-Michigan and Damon Corporation (D MA No. 95-10706-NG) (originally filed in 1993, ED MI)

U.S. ex rel. Dowden and Spear v. Damon Clinical Laboratories, Inc. (D MA No. 96-11911-NG) (originally filed in 1995, ND CA)

In October 1996, DOJ announced that Damon Clinical Laboratories, Inc. agreed to pay the Government **$83.7 million** to settle two *qui tam* suits alleging that Damon fraudulently billed Medicare for medically unnecessary tests that had not knowingly been ordered by doctors. The suits were filed respectively by Jeanne Byrne, a former Damon sales representative, and Kevin Spear and Jack Dowden, former sales personnel at a Damon competitor. Damon has also agreed to plead guilty to a one count criminal information charging conspiracy to defraud the Government. In connection with its plea, the company has agreed to pay a $35.3 million criminal fine, which represents the largest criminal fine ever recovered in a health care fraud prosecution. In addition to Medicare, false claims were also submitted to the Railroad Retirement Board, CHAMPUS, Office of Personnel Management, and 25 state Medicaid programs. As a result of its misconduct, Damon has reportedly been barred from participating in Medicare and certain other government health care programs. This case stems from the same *qui tam* complaint filed by Spear and Dowden against MetPath Inc., Corning Incorporated, and Unilab Corporation that led to an $11 million settlement in New Jersey last September. In 1993, Damon was purchased by Corning Clinical Laboratories, a division of Corning Incorporated.

According to DOJ, the civil settlement resolves allegations that Damon submitted false Medicare claims by bundling certain tests at various regional laboratories, including high density lipoprotein cholesterol (HDL) and low density lipoprotein cholesterol (LDL) tests. The settlement also resolves allegations that Damon improperly billed additional hemogram indices each time a complete blood count (CBC) was ordered by a physician.

DOJ stated that in 1988 and 1989 Medicare announced across-the-board fee reductions for laboratory services to control the growth of Medicare reimbursement for blood testing. The criminal information charged that in direct response Damon bundled the unnecessary tests to offset the rate reduction. Specifically, Damon bundled serum ferritin tests and serum iron tests with a basic blood chemistry panel as well as bundled apolipoproteins tests with a coronary risk profile. The ferritin and serum iron allegations involved a series of lab tests conducted on automated machines capable of performing a panel of chemistry tests on a single blood specimen. Medicare generally pays a flat fee for chemistry tests performed simultaneously on an automated machine, requiring only that the ordering physician believe that at least one of the tests was medically necessary. Pursuant to its bundling, however, Damon received both the flat fee and the extra test charge as if doctors had separately ordered those tests.

According to the information, in order to ensure that doctors did not complain about receiving the unnecessary tests, Damon gave those tests for free to physicians, made it difficult for doctors to order the profile without them, and did not disclose to physicians that it was going to bill Medicare approximately $17 for each unnecessary test. Accordingly, the number of ferritin and serum iron tests billed by Damon to Medicare annually skyrocketed. With regard to the coronary risk profile, as with the bundling of the ferritin and iron tests, doctors were misled with respect to ordering and billing, and the number of apolipoprotein tests increased significantly.

In its announcement, DOJ noted that Corning is one of the first labs to execute a corporate integrity agreement with HHS. The matter was investigated by the HHS OIG, FBI, Defense Criminal Investigative Service, and Medicaid Fraud Control Units. The total $119 million payment from Damon represents a recovery of treble damages. The relators' shares were $9 million and $1,466,430, the former amount awarded to Ms. Byrne and the latter to Messieurs Dowden and Spear. Ms. Byrne was represented by David Haron of Frank, Stefani and Haron (Troy, MI). Dowden and Spear were represented by Mitch Kreindler of Phillips & Cohen (Washington, D.C.). Representing the Government were Assistant U.S. Attorneys Michael Loucks, Mark Balthazard and Susan Winkler, and Laurence Freedman of the DOJ Civil Division.

U.S. v. Davis (ED MO No. 4:92CV001556)

In October 1996, a federal district court ordered Dr. Marlou Davis to pay **$4.1 million** in a False Claims Act suit alleging he improperly solicited prospective patients at nursing homes, supermarkets, shopping malls, and drug stores. According to the lawsuit, filed in 1992, Dr. Davis solicited elderly patients by luring them to "health fairs" with the promise that he could help them avoid heart disease and strokes. Davis, through his business called Doctors' Diagnostic, solicited at least 800 patients to come to his office for preventive testing — procedures specifically not covered by Medicare. Davis would then inflate the bill and submit it to

the federal program. According to the complaint, the doctor generally did not require his Medicare patients to pay the 20 percent copayment and misrepresented the actual charges for his services, resulting in overpayment of claims by the Government. Pursuant to Davis' scheme, Medicare was billed more than $1.1 million for medically unnecessary services. Assistant U.S. Attorney Claire Schenk handled the matter for the Government.

Regents of the University of California

In October 1996, the Regents of the University of California agreed to pay the Government **$2.7 million** to settle allegations relating to mismanagement of federal funds by Lawrence Livermore National Laboratory (LLNL). According to DOJ, the University of California operates LLNL under a management and operating contract with the Department of Energy to carry out research projects for DOE and other federal agencies under the authorization of DOE. The other agencies send their project funds through DOE to LLNL.

DOJ stated that the DOE OIG had requested an audit of the J-Division of LLNL's Applied Technology program within the Nonproliferation Arms Control and International Security Directorate. The audit and investigation disclosed that LLNL had mismanaged federal research and development funds from 1990 to 1993. The investigation, which focused on work conducted for outside agencies, revealed over $1 million in combined project costs for several project sponsors which had been charged to other sponsors, unauthorized loans made between unrelated project accounts, unused funds which LLNL failed to return to the funding agency after completion of the project, and a lack of supporting documentation for the transactions.

According to DOJ, since LLNL previously paid the Government $716,906 when the problem was first disclosed, a single payment of $2,001,385 will be made for the balance due. LLNL also absorbed $207,160 in audit and legal costs that would have otherwise been reimbursed by DOE. The matter was handled by Assistant U.S. Attorney Anne-Christine Massullo of the Northern District of California.

First American Health Care of Georgia, Inc.

In October 1996, DOJ announced that First American Health Care of Georgia, Inc., the nation's largest home health provider, and its new owner, Integrated Health Services, Inc. (IHS), agreed to pay the Government **$255 million** to settle allegations that the company overbilled and submitted fraudulent Medicare claims. The total includes $20 million to settle false claims liability, with the remainder treated as repayment of disputed amounts for Medicare services. First American allegedly billed for costs unrelated to the care of patients in their homes, including personal expenses of senior management, marketing and lobbying expenses. In a related criminal action, the company's two major principals, Jack and Margie Mills, were found guilty of defrauding Medicare. They are currently serving prison terms of 90 and 32 months respectively and have been excluded from further participation in Medicare.

According to DOJ, First American provided care to approximately 30,000 patients a day, about 94 percent of them Medicare beneficiaries. The company, which operated over 400 sites in more than 30 states, filed for bankruptcy protection earlier in 1996 in Georgia. Under a reorganization plan, First American merged with IHS, which agreed to pay the Government the settlement amount on First American's behalf. As part of the settlement agreement, a company-wide

compliance program will be implemented. The agreement further requires that First American and its subsidiaries act to dismiss with prejudice their pending claims related to Medicare, including the *qui tam* suit *U.S. ex rel. ABC Home Health Services, Inc. v. Aetna (SD GA No. CV294-167)*. The multi-agency government effort in this matter included HCFA, the HHS OIG, the U.S. Attorneys for the Northern and Southern Districts of Georgia, and the DOJ Civil Division.

U.S. ex rel. Hendricks v. Roche Biomedical Laboratories, Inc. (SD NY 93 Civ. 5644 (JSM))

U.S. ex rel. LaCorte v. Roche Biomedical Laboratories, Inc. (MD NC No. 2:96CV00417) (originally filed in 1993, ED LA)

U.S. ex rel. Downy v. National Health Laboratories, Inc. and Roche Biomedical, Inc. (its successor) d/b/a Laboratory Corporation of America et al. (D NM Civ. No. 96-0378)

U.S. ex rel. Zuccolo v. NHL/LabCorp of America et al. (ED VA Civ. No. 96-67-M)

In November 1996, Laboratory Corporation of America Holdings (LabCorp) agreed to pay the Government **$182 million** to settle several *qui tam* suits alleging that it submitted false claims for medically unnecessary laboratory tests to federal and state health care programs. In a related criminal matter, the San Diego Regional Laboratory of Allied Clinical Laboratories, Inc., a LabCorp subsidiary, pleaded guilty to submitting a false claim to Medicare and the California Medicaid program, and was fined $5 million. Allied will be excluded from participating in the programs as a result of its misconduct. The LabCorp agreement represents the largest *qui tam* settlement to date and, according to DOJ and HHS, the third largest settlement involving health care fraud in the history of the False Claims Act. LabCorp has also entered into a corporate integrity agreement with HHS. The *qui tam* cases were brought by Mary Downy, Geoffrey Zuccolo, and Doctors Andrew Hendricks and William St. John LaCorte. Dr. Hendricks' suit, filed in 1993, reportedly accounts for the largest portion of the settlement.

After a series of mergers, Allied, Roche Biomedical Laboratories, and National Health Laboratories now constitute LabCorp, the world's largest clinical lab company. According to the Government, the labs submitted false claims to Medicare, Medicaid, CHAMPUS, the Railroad Retirement Board, and the Federal Employees Health Benefits Program by improperly marketing certain cholesterol and other "add-on" tests that physicians did not need for treatment of patients. Medicare and Medicaid claims are allowed only for tests medically necessary for the treatment or diagnosis of a patient. Often, doctors were led to believe that there would be little or no additional cost for the extra tests or that they had no choice regarding ordering options. They were not aware that the labs then billed the government insurance programs a separate amount for the tests.

The investigation was conducted by the HHS OIG, FBI, Defense Criminal Investigative Service, Defense Contract Audit Agency, Office of Personnel Management, and state Medicaid Fraud Control Units. To date, recoveries resulting from a federal crackdown on independent clinical labs that began in 1993 exceed $360 million, according to HHS, and additional recoveries are expected in the near future.

Ms. Downy and Mr. Zuccolo will receive $388,965 and $625,400 respectively as the relator's share in their individual cases. The remaining relators' shares have not yet been reported. Dr. Hendricks was represented by Neil Getnick and Lesley Ann Skillen of Getnick & Getnick (New York, NY) and Mary Louise Cohen of Phillips & Cohen (Washington, D.C.). Dr. LaCorte's counsel was Normand Pizza of Brook, Pizza & Van Loon, L.L.P. Representing Mr. Zuccolo were Candace McCall and Quentin R. Corrie (Fairfax, VA). Ms. Downy was represented by James A. Branch, Jr. Representing the Government were Assistant U.S. Attorneys Richard Glaser, Jr. and Gill Beck of the Middle District of North Carolina, Carol Lam of the Southern District of California, David Koenigsberg of the Southern District of New York, Dara Corrigan of the District of Columbia, Paula Newett and Larry Gregg of the Eastern District of Virginia, Larry Selkowitz of the Middle District of Pennsylvania, Edwin Winstead of the District of New Mexico, Laurence Freedman of the DOJ Civil Division, and Karen Morrissette, Deputy Chief of the Fraud Section, Criminal Division.

Continental Grain Company

In November 1996, DOJ announced that Continental Grain Company agreed to pay the Government **$25 million** to resolve civil allegations against it and foreign-based affiliate Arab Finagrain Agri-Business Trading, Ltd. in connection with fraudulent sales of agricultural products to Iraq. In a related criminal matter, Arab Finagrain has pleaded guilty to a criminal information charging that it conspired to defraud the Department of Agriculture. The plea agreement requires Arab Finagrain to pay a $10 million fine. According to DOJ, the settlement, which involves complex international commercial transactions guaranteed by the United States, is one of the largest single recoveries in the history of the USDA. Arab Finagrain and certain of its affiliated companies further agreed to no longer participate, directly or indirectly, in any government-funded, guaranteed, or sponsored programs or transactions.

The criminal information charged that Arab Finagrain fraudulently participated, through Continental, in the USDA's Export Credit Guarantee Programs, known as the GSM Programs. Through the Programs, which are funded by the Commodity Credit Corporation, USDA provides payment guarantees to exporters which sell their goods on credit to importers in designated countries. The GSM Programs were established by USDA to expand foreign markets for domestic agricultural goods by reducing the risk of doing business with financial institutions in developing countries. According to the information, from 1987 through 1990 Arab Finagrain caused Continental to register for and obtain GSM export credit guarantees for sales of agricultural goods (protein concentrate and soybean meal) to Iraqi government agencies. Arab Finagrain, a U.K. company with offices in Geneva, and its joint venture partner used Continental to register these sales for the GSM guarantees because Arab Finagrain had no office or presence in the United States and was not eligible to participate in the federal program. The case was investigated by the USDA OIG. Representing the Government were Judith Rabinowitz and Laurie Oberembt of the DOJ Civil Division, and Nicole Healy and Clifford Rones of the Criminal Division.

U.S. ex rel. Aviles v. Spectra Laboratories, Inc. et al. (ND CA No. C-93-3492-CW)

In December 1996, Spectra Laboratories, Inc., a California clinical laboratory specializing in end stage renal disease (ESRD) testing, agreed to pay the Government **$10.1 million** to settle a *qui tam*

suit alleging that it improperly billed federal health insurance programs for tests on patients suffering from severe kidney failure. According to DOJ, Spectra fraudulently billed Medicare, the Railroad Retirement Board, CHAMPUS, and the Federal Employees Health Benefits Program for lab tests it had already been reimbursed for under a "composite rate" for standard ESRD services. The case was filed pro se by former lab manager Almario Aviles in 1993.

Spectra allegedly billed the programs without regard to certain coverage rules, such as the "50/50 rule" governing billing for tests performed in automated "panels" with other tests that are covered by the composite rate. The company also billed for medically unnecessary hepatitis BS antigen tests and used various marketing practices that may have improperly induced clients to order unnecessary tests. Spectra further improperly used a test ordering system, including a "Master Annual Prescription Form," to obtain orders for all current patients at a dialysis facility and future admissions for the coming year. According to the Government, this form generated inaccurate diagnostic information and resulted in claims for medically unnecessary tests.

As part of the settlement, Spectra has entered into a corporate integrity agreement which requires that it establish a procedure designed to promote the ordering of medically necessary tests on a patient-specific basis. The relator's share was 15 percent or $1.5 million. Representing the Government were Assistant U.S. Attorney Gail Killefer and James E. Ward IV of the DOJ Civil Division.

U.S. ex rel. Mayman v. Martin Marietta Corporation (D MD No. L91-1853)

In December 1996, Lockheed Martin Inc. agreed to pay the Government **$5.3 million** to settle a *qui tam* suit alleging that one of its predecessors, Martin Marietta Corporation, overcharged DOD by deliberately bidding low to win a contract, making up the shortfall by boosting research and development costs. The lawsuit was brought in 1991 by former Martin Marietta employee Jerry Mayman. The underbid contract concerned development of a supersonic low altitude target for missiles (SLAT). According to published reports, the matter relates back to a 1980s criminal scandal involving bribery and favoritism toward a group of contractors among high level Navy civilian officials. The case was investigated by the Defense Criminal Investigative Service and the Defense Contract Audit Agency. The relator's share was 15 percent or $795,000. Mr. Mayman's counsel was Robert Vogel (Washington, D.C.). Representing the Government were Assistant U.S. Attorney Rowann Nichols and Dodge Wells of the DOJ Civil Division.

U.S. ex rel. Woodward v. Teledyne Industries, Inc. (WD MO Civ. No. 91-3454-CV-S-4)

In December 1996, DOJ announced that Teledyne Industries, Inc. agreed to pay the Government $4.75 million to settle a *qui tam* suit alleging fraud in connection with an Air Force contract to overhaul and repair jet aircraft engines. The suit was filed in 1991 by former Teledyne employee Gerald Woodward. According to the lawsuit, from 1986 to 1990 Teledyne administered contracts to repair J-69 and J-89 military aircraft for about 15 Air Force bases. However, its accounting system was so lax that the company could not account for all of the aircraft parts, many of which disappeared. In addition, Teledyne allegedly altered and destroyed records pertaining to the missing parts. In a related criminal matter, Teledyne's director of materials pleaded guilty to a felony violation of making a false state-

ment. The Defense Criminal Investigative Service investigated the matter. The relator's share was $831,250. Mr. Woodward was represented by William H. McDonald of William H. McDonald & Associates (Springfield, MO). Representing the Government was Joel D. Hesch of the DOJ Civil Division.

Teledyne Industries, Inc.

In December 1996, DOJ announced that Teledyne Industries, Inc. agreed to pay the Government **$6.75 million** to settle allegations that the company failed to properly test aerospace wire and cable. Teledyne had previously reported under the DOD Voluntary Disclosure program that its operating division, Teledyne Thermatics, did not fully comply with all testing requirements in its contracts and subcontracts for the wire and cable. In addition, some of the wire did not meet the highest temperature rating requirements as specified. The Defense Logistics Agency administered the contracts with Thermatics. Teledyne has since sold its Thermatics division but retained primary liability for the matters disclosed to the DOD IG. The investigation was conducted by the Naval Criminal Investigative Service with the assistance of Army and Air Force investigative agencies and the Defense Criminal Investigative Service. Joel D. Hesch of the DOJ Civil Division handled the case for the Government.

Ohio Hospital Project

In December 1996, it was reported that eight northern Ohio hospitals agreed to pay the Government **$2.6 million** to resolve Medicare and Medicaid overbilling allegations pursuant to the "Ohio Hospital Project." The Project, which targets improper billing of outpatient tests by hospitals and independent laboratories, was initiated to identify facilities that "unbundle" blood tests when using automated equipment and then bill for each analysis separately or for an automated test as well as several of the analyses separately. To date, $6.6 million has been recovered from 17 northern Ohio hospitals, with about $15 million expected to be collected in total. Eighty other Ohio hospitals are reportedly participating in a voluntary disclosure program that enables them to negotiate a settlement. In response to the federal probe, the Ohio Hospital Association and American Hospital Association filed suit against the Government last October, maintaining that the Government did not advise hospitals of billing rules.

SPOTLIGHT

1996 YEAR IN REVIEW

Case Law Recap

PUBLIC DISCLOSURE BAR AND ORIGINAL SOURCE EXCEPTION

In 1996, there were fewer precedent setting decisions involving the public disclosure bar and original source exception at 31 U.S.C. § 3730(e)(4)(A)-(B) than there have been in recent years. However, the U.S. Supreme Court is currently considering a case that raises certain issues regarding application of the public disclosure provision, with oral argument scheduled for February 25, 1997. (*See* "Briefs Filed in Supreme Court Re: Hughes Aircraft Company v. U.S. ex rel. William Schumer" in LITIGATION DEVELOPMENTS above at page 11.)

Section 3730(e)(4)(A), broken down to its basic elements, forecloses those FCA actions that are:

1) "based upon,"
2) "the public disclosure,"
3) "of allegations or transactions,"
4) a) "in a criminal, civil, or administrative hearing,"
   b) "in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or"
   c) "from the news media," [means for public disclosure]
5) so long as neither the Attorney General nor an "original source" brought the action.

Following are summaries of how the courts addressed these various elements of the public disclosure provision in decisions rendered in 1996.

"BASED UPON"

Siller "derived from" definition is proper interpretation of "based upon"

Adopting the 4th Circuit's definition of "based upon" as meaning "derived from," a Pennsylvania district court held that a *qui tam* suit was not "based upon" earlier publicly disclosed litigation between the relator and the defendant. In U.S. ex rel. Kusner v. Osteopathic Medical Center of Philadelphia et al., 1996 WL 287259 (E.D. Pa. May 30, 1996), the court held that because the earlier litigation was based upon information the relator had obtained from private sources, the *qui tam* action was not "based upon" the public disclosure of the allegations

contained in that earlier suit. Instead, the *qui tam* action was "based upon" the information known to the relator before the earlier suit was filed.

"PUBLIC DISCLOSURE"

Government reports must be affirmatively disclosed to the public for there to be a "public disclosure"

The 10th Circuit held that a relator whose allegations were similar to findings made in a routine state audit report was not barred under § 3730(e)(4) because the report remained in government files and was never released to the public. In U.S. ex rel. Ramseyer v. Century Healthcare Corporation et al., 90 F.3d 1514 (10th Cir. July 24, 1996), consistent with decisions by the 9th Circuit and the D.C. Circuit, the 10th Circuit rejected the notion that theoretical or potential availability to the public can constitute a "public disclosure." For the bar to be triggered, the allegations or transactions underlying the suit must have been "affirmatively disclosed to the public," the appellate court ruled.

"Public disclosure" occurred when federal audit report was sent to a state agency without any restriction on dissemination

In a case involving a former government auditor, a divided 10th Circuit held that a "public disclosure" occurred when the Department of Energy (DOE) transmitted an audit report to a state agency without placing any restriction on the report's dissemination. In U.S. ex rel. Fine v. MK-Ferguson Company et al., 99 F.3d 1538 (10th Cir. Nov. 6, 1996), the court concluded that when the DOE sent an audit report to the State of Oregon without restrictions on its public availability, there was "an affirmative disclosure constituting public disclosure" under the Act. The dissent argued that the "mere disclosure from a federal agency to a state agency" in the case at hand was not a public disclosure, reasoning that "[a]lthough the audit did not state any restrictions on its dissemination, there is no evidence that the state of Oregon took positive steps to release it to the public . . . ." Moreover, "[t]he mere fact that the state of Oregon has the audit report in a file cabinet somewhere" does not constitute an affirmative disclosure to the public. Rather, according to the dissent, the audit report was "at best only potentially in the public eye." The dissent thus concluded: "As I believe Ramseyer supports the conclusion that the mere providing of an audit report to a state government, which has instigated the audit, does not constitute a public disclosure, I would allow Mr. Fine's *qui tam* suit to proceed."

"Public disclosure" occurred when audit information was disclosed by the relator to his representative in an unrelated employment action

In another split opinion on the issue of "public disclosure," the 10th Circuit in U.S. ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. Nov. 6, 1996), held that a "public disclosure" occurred when a former government auditor relator disclosed audit allegations to his (non-attorney) representative in an unrelated age discrimination case. According to the 10th Circuit, "public disclosure occurs when the allegations of fraud or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to members of the public who

are otherwise strangers to the fraud." The court clarified that it is immaterial "how many people were informed of the alleged fraud by the disclosure." A concurring opinion disagreed with the majority's analysis regarding what constitutes "public disclosure." Emphasizing that the information was disclosed in the context of obtaining representation for an age discrimination claim, and analogizing it to discussing a potential *qui tam* suit with one's lawyer, the concurrence concluded that "an employee's discussion of allegations of fraud with his representative in an age discrimination case, when such allegations may have led to his discharge, cannot amount to a public disclosure." On the other hand, the concurrence suggested that another disclosure made to a private accountant was a "public disclosure" since the accountant was not obligated to keep the allegations secret and had no fiduciary duty to the relator.

Information acquired by relator through FOIA was a "public disclosure"

In U.S. ex rel. Burns v. A.D. Roe Company, Inc. et al., 919 F. Supp. 255 (W.D. Ky. March 19, 1996), the district court dismissed a suit brought by a government employee who acquired his information through the Freedom of Information Act.

"ALLEGATIONS OR TRANSACTIONS"

Disclosures that reveal related information but not "allegations or transactions" do not trigger § 3730(e)(4) bar

In U.S. ex rel. Mikes v. Straus et al., 931 F. Supp. 248 (S.D.N.Y. June 26, 1996), the district court ruled that a *qui tam* suit alleging that several physicians submitted false claims to Medicare for medically unnecessary MRI tests was not barred under § 3730(e)(4) even though related information about referral payments for the tests was disclosed in earlier litigation between one of the defendants and another commercial party. The court found that the earlier litigation lacked any allegation of false or fraudulent claims knowingly filed with the Government. As the court explained, under § 3730(e)(4)(A) "jurisdiction hinges upon the public disclosure of 'allegations or transactions' occurring prior to a *qui tam* complaint, not the public disclosure of 'information' relating to the allegations." According to the court, "[i]t is the distinction between allegations and information that is crucial."

MEANS FOR PUBLIC DISCLOSURE

Memorandum that specifically referenced and contained allegations and transactions set out in government audit triggered bar

In U.S. ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. Nov. 6, 1996), the relator argued that public repetition of the contents or substance of a hearing, audit, report, or investigation is not a means of disclosure that can trigger the § 3730(e)(4) bar. Rejecting this argument, the 10th Circuit ruled that the disclosed allegations merely must be derived from one of the sources listed in § 3730(e)(4)(A). The court explained: "That section defines the sources of allegations or transactions which trigger the bar but it does not define the only means by which public disclosure can occur." The court found that the publicly disclosed memorandum specifically referenced and contained allegations and transactions set out in a government audit and thus triggered the bar.

Relators who learned of fraud from an employee of the defendant did not have sufficient "direct and independent knowledge" to be "original sources"

In a pro se case involving a public disclosure in a news article, the 9th Circuit affirmed dismissal because the relators could not meet the FCA's original source exception to the public disclosure bar. In U.S. ex rel. Devlin, Sidicane, and Kodman v. State of California et al., 84 F.3d 358 (9th Cir. May 24, 1996), the court found that the relators did not see the fraud with their own eyes or discover the information underlying the allegations through their own labor. Instead, they had merely learned of the fraud from an employee of the defendant. Because the relators' efforts added nothing of significance to the information obtained from the employee, the court held that the relators did not have sufficient "direct and independent knowledge" to satisfy the "original source" definition.

Former government audit supervisor did not have "direct and independent knowledge"

In U.S. ex rel. Fine v. MK-Ferguson Company et al., 99 F.3d 1538 (10th Cir. Nov. 6, 1996), the 10th Circuit ruled that a former government audit supervisor was not an original source under § 3730(e)(4)(B) because he did not have the requisite "direct and independent knowledge." Citing other courts' definitions of such knowledge as "not secondhand" and "unmediated by anything but [the relator's] own labor," the 10th Circuit rejected Fine's contention that his limited supervisory participation in the subject audit qualified him as an original source. The court reasoned that Fine "was not the individual actually performing the investigations" and "all the factual information in his Complaint" came from an independent contractor that had been tasked with the field audit. That is, "Fine's allegations are derivative of the facts uncovered by the field auditors. He did not himself discover the allegedly fraudulent practices . . . . Fine has merely changed the labels 'unreasonable' and 'unallowable' costs from the final report and audit to 'false' and 'fraudulent' claims in his Complaint." The court therefore concluded that "Fine's secondhand knowledge . . . is not 'direct and independent,' based as it is on the work of others" and that Fine did not add any value through his own efforts. The 10th Circuit made a similar finding in another case brought by the same relator. *See* U.S. ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. Nov. 6, 1996).

Relator, who was not an employee of the defendant, had observed enough to meet "direct" knowledge requirement

In a case involving a relator who was not employed by the defendant, but had witnessed the defendant's allegedly substandard work, the court found that the relator met the "direct and independent knowledge" portion of the original source definition. In U.S. ex rel. DeCarlo v. Kiewit/AFC Enterprises, Inc. et al., 937 F. Supp. 1039 (S.D.N.Y. Aug. 23, 1996), the defendant Kiewit argued that the relator De Carlo had tacitly admitted that he lacked the requisite "direct and independent knowledge" because his complaint was filed "on information and belief." Kiewit also argued that DeCarlo was not an original source because he neither worked for the company nor had any involvement in, or personal knowledge of, the company's submission of documents to the Government. The court disagreed, finding that DeCarlo claimed to have witnessed, among other things, Kiewit's failure to install safety measures and to give appropriate credits for unperformed work. Accordingly, the court found that DeCarlo had sufficient direct and independent knowledge to qualify as an original source.

Government employee was not an "original source" because he did not "voluntarily" provide information to the Government

In U.S. ex rel. Burns v. A.D. Roe Company, Inc. et al., 919 F. Supp. 255 (W.D. Ky. March 19, 1996), the court held that the relator's government employee status prevented him from satisfying the original source exception to the public disclosure bar. Following the reasoning of 1st and 9th Circuit decisions involving Inspector General auditors as relators, the court found that, as a representative of the Government, the relator was obligated to investigate and report fraud. According to the court, the relator therefore could not have "voluntarily provided the [fraud] information" to the Government because the nature of his employment compelled his actions.

9th Circuit continues to require relators to have had a hand in the public disclosure in order to meet the "original source" exception

Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir. Apr. 15, 1996), involved public disclosures in litigation that occurred prior to the *qui tam* suit. The 9th Circuit held that the relator failed to satisfy the "original source" exception as to certain allegations disclosed in that litigation, but did meet the exception as to others. What was determinative for the court was whether the relator's internal complaints were the basis for certain disclosures in the litigation. In those instances where the relator could not point to an internal complaint, the court held that the relator was not an original source because he had not had a hand in the public disclosure. As to those allegations for which the relator met the original source test, the court noted that the relator was just one of several employees who had lodged the same internal complaint. The court ruled that the original source test is met by "anyone who helped to report the allegation to the government or the media" because they have "indirectly helped to publicly disclose it."

CASES HELD TO BE WITHIN THE SCOPE OF THE FCA

In certain 1996 cases, courts were asked to determine whether the allegations of wrongdoing fit within the scope of the False Claims Act. Following are summaries of decisions in which the court ruled that the allegations could be the basis for FCA liability.

Noncompliance with environmental laws

A number of cases have been filed in the Southern District of Ohio involving the alleged dumping of bilge and other violations of the Clean Water Act (CWA). The courts have ruled that these cases state a proper cause of action under the FCA. In U.S. ex rel. Pickens v. Kanawha River Towing et al., 916 F. Supp. 702 (S.D. Ohio Jan. 23, 1996), the district court held that tugboat operators who allegedly violated the CWA while working on a government dam project could be liable under the FCA. In addition, the court found that the failure to keep records of environmental violations in order to avoid payment of CWA fines could constitute a "reverse false claim" under § 3729(a)(7) of the FCA.

Similarly, in U.S. ex rel. Stevens v. McGinnis, Inc. et al., Order, No. C-1-93-442 (S.D. Ohio Aug. 27, 1996), the relator alleged, among other things, reverse false claims arising from violations of the CWA by a contractor and a subcontractor delivering jet fuel to the Government. The relator claimed that the defendants made, used, or caused to be used false records or statements through their failures to record illegal bilge discharges in their vessel logs. The court determined that the

vessel logs were clearly records. Further, the vessel logs would be false records if an event or occurrence that would normally be noted in the record was omitted from it. And, according to the court, the FCA does not require that the false record be one that the defendant is under a legal obligation to maintain. Focusing on whether each of the contractors would normally record bilge discharges and whether the Government relied on such records, the court granted summary judgment for the subcontractor but denied summary judgment for the prime contractor.

The prime contractor defendant argued that there could be no basis for liability because its invoices contained no false statements, CWA compliance was not a material part of its contracts since payments were not contingent upon such compliance, and the invoices could not have had the purpose and effect of causing financial loss to the Government. Rejecting these arguments, the court found that a "contractor who knowingly fails to perform a material requirement of the contract, yet seeks or receives payment as if it had been fully performed without disclosing the nonperformance, has presented a false claim under § 3729(a)(1)."

Anti-kickback and self-referral violations

In U.S. ex rel. Pogue v. American Healthcorp, Inc. et al., 914 F. Supp. 1507 (M.D. Tenn. Jan. 5, 1996), the district court on reconsideration vacated its 1995 decision which held that a *qui tam* relator who alleged that Medicare providers knowingly violated federal anti-kickback and self-referral statutes failed to state a claim under the FCA. In the reconsideration decision, the court held that the FCA "clearly prohibits fraudulent acts even if they do not cause a loss to the government." Moreover, the court found that the relator alleged an FCA violation by claiming that the defendants concealed their illegal activities from the Government in an effort to induce the Government to pay Medicare claims it would not otherwise have paid. *But see* U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al., 938 F. Supp. 399 (S.D. Tex. July 22, 1996), below in "Cases Held To Be Outside the Scope of the FCA."

Notably, in both U.S. ex rel. Stevens v. McGinnis, Inc. et al. (discussed above in this section) and Pogue the courts rejected arguments that there is no FCA liability unless it can be established that the subject claims had the purpose and effect of causing financial loss to the Government. This is one of the issues currently before the Supreme Court in Hughes Aircraft Company v. U.S. ex rel. William Schumer. (*See* LITIGATION DEVELOPMENTS above at page 11.)

CASES HELD TO BE OUTSIDE THE SCOPE OF THE FCA

Regulatory noncompliance unrelated to federal funding

In U.S. ex rel. Hopper v. Anton et al., 91 F.3d 1261 (9th Cir. July 31, 1996), the 9th Circuit held that summary judgment was proper in a *qui tam* case alleging, without more, that a school district violated the Individuals with Disabilities Education Act (IDEA) by conducting special education evaluations of students without classroom teachers being present. According to the court, the school district's federal funding for special education was not conditioned on compliance with IDEA. Further, there was no evidence that the defendant made any false statements or certifications. Because the relator did not point to requests for payment by the school district that incorporated some knowing falsity, the case was not actionable under the FCA.

Anti-kickback and self-referral violations

In U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al., 938 F. Supp. 399 (S.D. Tex. July 22, 1996), the district court held that a *qui tam* action alleging that the defendants violated the FCA by billing for Medicare claims while violating anti-kickback and self-referral statutes failed to state a claim under the FCA. The district court's ruling is in direct conflict with U.S. ex rel. Pogue v. American Healthcorp, Inc. et al. (discussed above) and is currently on appeal before the 5th Circuit.

FALSITY OF CLAIM/KNOWLEDGE STANDARD

In Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir. Apr. 15, 1996), the 9th Circuit affirmed summary judgment regarding an allegation of improper cost allocation by the defendant Water Agency on a dam project. According to the court, the relator's evidence merely supported an inference that the allocation was imprecise but not that it was knowingly false. The issue of how precise and how current the cost allocation needed to be was a disputed legal issue within the Army Corps of Engineers. By taking advantage of a disputed legal question, the defendant acted neither in deliberate ignorance nor reckless disregard of the truth of the information, the court found. The evidence indicated that "the Water Agency did merely what the Corps bid it do." This did "not support a reasonable inference that the Water Agency caused the Corps to rely on such information as was before it to make the decisions it made," stated the court. Paraphrasing a previous holding, the court found that "'known to be false' does not mean incorrect as a matter of proper accounting methods, it means a lie."

In Izieh Abdelkhalik v. U.S., 1996 WL 41234 (N.D. Ill. Jan. 30, 1996), a district court held that a grocery store that had knowingly been involved in the exchange of food stamps for cash instead of food violated the FCA. The court ruled on summary judgment that the undisputed facts showed at least sufficient "reckless disregard" by the store to conclude that the store had "knowingly" submitted false claims. The store manager had testified that he sometimes left the cash register unlocked and unattended when "friends" or "gangs" were in the store. According to the court, had the manager followed the typical business practice of counting the money in the cash register at the end of the day, he would have been alerted that substantial sums of money were missing on the days that the food stamp violations occurred. This lack of supervision demonstrated at least "reckless disregard" with respect to certifying that the food stamps had been accepted in compliance with all program requirements.

RETROACTIVITY

In U.S. ex rel. Hyatt and King v. Northrop Corp., 80 F.3d 1425 (9th Cir. Apr. 11, 1996), a *qui tam* action filed prior to the 1986 FCA Amendments, the 9th Circuit held that the public disclosure provision at § 3730(e)(4) as amended in 1986 applied because it did not have "retroactive effect" on the defendant. The court reached a different conclusion with respect to whether the 1986 filing and service requirements under § 3730(b)(2) applied. Because these requirements would impose new duties on the relator with respect to a complaint already filed, the relator could not be held to those requirements. Finally, the 9th Circuit held that the relator's § 3730(h) retaliation claim would have "retroactive effect" and therefore had to be dismissed.

In short, the addition of § 3730(h) in 1986 created a new cause of action and thus imposed new duties on Northrop for actions already taken.

In U.S. ex rel. Colunga v. Hercules, Inc. et al., 929 F. Supp. 1418 (D. Utah May 24, 1996), the district court ruled that it was improper to retrospectively apply the § 3729(b) knowledge standard of the 1986 FCA Amendments to defendant conduct occurring before the 1986 amendments; rather, an actual knowledge standard should be applied. On the other hand, the court ruled that the 1986 § 3730(e)(4) public disclosure provision should apply to pre-1986 conduct.

The issue of whether the public disclosure provision at § 3730(e)(4) should apply to conduct occurring before the 1986 amendments is currently before the Supreme Court in Hughes Aircraft Company v. U.S. ex rel. William Schumer. (*See* LITIGATION DEVELOPMENTS above at page 11.)

STATUTE OF LIMITATIONS

In U.S. ex rel. Hyatt v. Northrop Corp. et al., 91 F.3d 1211 (9th Cir. July 26, 1996), the 9th Circuit held that the equitable tolling provision of the FCA's statute of limitations applies to a *qui tam* relator as well as to the Government. However, the limitations period for a *qui tam* relator is tolled only until the date that the relator (not the Government) knew or reasonably should have known of the facts material to the claim. According to the court, the Act requires a relator to bring his case within three years of when he knew of the violation, or within six years of when the violation occurred, whichever is later.

RELATOR RIGHTS AND LIMITATIONS

Prefiling releases of *qui tam* claims are unenforceable for public policy reasons

In U.S. ex rel. DeCarlo v. Kiewit/AFC Enterprises, Inc. et al., 937 F. Supp. 1039 (S.D.N.Y. Aug. 23, 1996), the district court held that public policy militates against enforcement of a broad release executed by a relator prior to the filing of his *qui tam* action. According to the court, the taxpayers' interest in recouping lost funds and the public interest in exposing fraudulent activity outweigh the interest in finalizing and settling litigation. Following the 9th Circuit's holding in U.S. ex rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir. 1995), 3 TAF QR 1 (Oct. 1995), cert. denied, 116 S. Ct. 2549 (1996), the court also found that the Government's failure to intervene does not change the public policy reasons for rendering the release unenforceable.

Relator may pursue claims declined by the Government

In U.S. ex rel. O'Keefe v. McDonnell Douglas Corp. 918 F. Supp. 1338 (E.D. Mo. Mar. 20, 1996), the court ordered the defendant to answer three of the relator's counts that the Government did not adopt when it intervened in the action. The court found that the FCA does not remove the relator from a case upon the Government's intervention, and that nothing in the FCA prevents the relator from pursuing his unadopted claims. Although the Government may petition the court to limit the relator's role in the litigation, it did not do so in this case.

QUI TAM FILING AND SEAL PROCEDURES

§ 3730(b)(2) does not require that an amended complaint be filed under seal

In U.S. ex rel. Mikes v. Straus et al., 931 F.Supp. 248 (S.D.N.Y. June 26, 1996), the court ruled that § 3730(b)(2) does not require the relator to file amendments to the complaint under seal or serve them upon the Government. The court agreed with the relator that requiring her amended complaint to be filed and served in accordance with § 3730(b)(2) was not necessary to "effectuate the intent of Congress in permitting the Government to review the matter in secret before intervening." The Government already had an opportunity to investigate the case while under seal and could intervene at a later date for good cause. Moreover, failing to file the amended complaint under seal did not prejudice the rights of the Government or defendant, nor establish a basis for dismissal. According to the court, the notification provision is a "mere procedural requirement of the exercise of the right created by the statute, not a jurisdictional requirement" that would compel dismissal of the action.

SECTION 3730(h) RETALIATION CLAIMS

A growing number of § 3730(h) retaliation cases have presented issues on appeal to the Circuit Courts. Following are summaries of the § 3730(h) issues addressed by the courts in 1996.

Relator need not bring an FCA action, or contemplate bringing an action, to have a claim under § 3730(h)

In Childree v. UAP/GA AG Chem, Inc. et al., 92 F.3d 1140 (11th Cir. Aug. 28, 1996), the 11th Circuit held that the anti-retaliation protections under § 3730(h) are available whenever an FCA action is a "distinct possibility." In this case, the plaintiff assisted in a matter that could have been an FCA case but was instead resolved through administrative action. The 11th Circuit ruled that the words "to be filed" in § 3730(h) do not require that an FCA case actually be filed. Instead, the court found that the protections are available when the filing of an FCA case by either a private individual or the Government is a "distinct possibility" at the time the employee engages in the protected activity. Further, an FCA case need never be filed or even contemplated by a relator or the Government for the provision to apply.

§ 3730(h) liability attaches only if the defendant is on notice that the plaintiff was acting in furtherance of an FCA action

In U.S. ex rel. Ramseyer v. Century Healthcare Corporation et al., 90 F.3d 1514 (10th Cir. July 24, 1996), the 10th Circuit held that, to state a claim under § 3730(h), the relator had to allege facts showing that her discharge resulted from her actions to further a *qui tam* suit. More specifically, Ramseyer had to establish that the "defendants had been put on notice that she was either taking action in furtherance of a *qui tam* action or assisting in a FCA action brought by the government." The court found that Ramseyer did not satisfy her burden of pleading facts to establish that the defendants were sufficiently on notice. She never suggested to defendants that she intended to utilize her complaints about program noncompliance in furtherance of an FCA action, nor did she suggest she was going to report the noncompliance to government officials or that she was contemplating her own *qui tam* action. Rather, her monitoring and reporting

activities "were exactly those she was required to undertake in fulfillment of her job duties," the court stated. Since Ramseyer never sought leave to further amend her pleadings, the appellate court affirmed dismissal of her § 3730(h) retaliatory discharge claim.

Where there was no nexus to the FCA, the relator was not engaged in activity protected by § 3730(h)

In U.S. ex rel. Hopper v. Anton et al., 91 F.3d 1261 (9th Cir. July 31, 1996), the 9th Circuit ruled that the relator was not engaged in protected activity under § 3730(h). In reviewing the relator's conduct, the court found that she was trying to get classroom teachers into special education evaluation sessions — not to remedy false claims. According to the court, because the relator's activity did not have any nexus to the FCA, she could not receive § 3730(h) protections. Further, the defendant was never given any indication that the relator was investigating the school district for defrauding the Federal Government.

Individual with reasonable basis for allegations may pursue a retaliation claim even if no actual FCA violation occurred

In Field v. F&B Manufacturing Co., 1996 WL 238917 (N.D. Ill. May 6, 1996), the district court ruled that a potential relator who was fired after alleging improper welding procedures by his employer could pursue a retaliation claim under § 3730(h), even if no actual FCA violation occurred. According to the court, the pivotal issue is whether the plaintiff had a reasonable basis for his allegations given the information he knew at the time he notified his employer of the allegations. Later investigations revealing the absence of fraud have no bearing on the § 3730(h) claim.

§ 3730(h) claim is subject to the FCA's six-year statute of limitations; the statute runs from when the false claim occurs

In U.S. ex rel. Friel et al. v. Morrison-Knudsen Services, Inc. et al., Order, No. CV-N-92-482-DWH (D. Nev. Sept. 30, 1996), the court held that a § 3730(h) retaliation claim is subject to the six-year statute of limitations period set out in § 3731(b). The court found that under the plain language of § 3731(b) the limitations period starts to run when the false claim, not the retaliatory act, occurs.

ACCESS TO DOCUMENTS

Self-critical analysis privilege does not apply to *qui tam* actions

In U.S. ex rel. Falsetti et al. v. Southern Bell Telephone and Telegraph Company, 915 F. Supp. 308 (N.D.Fla. Jan. 25, 1996), the court ruled that the defendant could not assert a "self-critical analysis" privilege to withhold certain discovery from the relators because such a privilege does not exist in a *qui tam* action.

Disclosure statement is subject to work product privilege but discoverable under undue hardship standard

In U.S. ex rel. O'Keefe v. McDonnell Douglas Corporation, 918 F. Supp. 1338 (E.D. Mo. Mar. 20, 1996), the court held that the relator's written disclosure statement required by FCA § 3730(b)(2)

was protected from discovery under the work product privilege because the statement was prepared in anticipation of litigation. However, the court further held that, because the defendant showed substantial need and undue hardship, the written disclosure had to be produced.

RULE 9(b)

Courts have become increasingly willing to dimiss *qui tam* actions that are not pled with particularity. Summarized below are three 1996 decisions in which certain allegations were dismissed pursuant to Rule 9(b), and one in which the court rejected dismissal.

In U.S. ex rel. Alexander v. Dyncorp, Inc. et al., 924 F. Supp. 292 (D.D.C. Apr. 30, 1996), the court dismissed certain allegations under Rule 9(b), finding that the relator's complaint failed to provide invoice numbers, the dates on which allegedly false invoices were submitted, the identity of employees responsible for the invoices, and any facts from which one could infer a knowing violation on the part of the defendants.

In U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al., 938 F. Supp. 399 (S.D. Tex. July 22, 1996), a case involving alleged violations of self-referral and anti-kickback laws, the court dismissed on Rule 9(b) grounds the relator's allegation that the defendants submitted claims to Medicare for unnecessary services. In support of this allegation, the complaint cited only a statistical study concluding that 40 percent of services rendered by physicians who had received financial inducements to refer patients were not medically necessary. According to the court, this portion of the complaint did not comply with Rule 9(b) because it did not specify any particular physicians, patients, or claims.

In U.S. ex rel. DeCarlo v. Kiewit/AFC Enterprises, Inc. et al., 937 F. Supp. 1039 (S.D.N.Y. Aug. 23, 1996), the court stated that Rule 9(b) applies to all allegations of fraud, including allegations under the FCA, and that it prohibits pleadings based on "information and belief" unless information is particularly within the defendant's knowledge. Since the relator's complaint here included 25 fraud-based allegations made on information and belief, and failed to refer to specific employees and particular payroll issues, the court dismissed the complaint without prejudice so that the relator could conform his pleading to Rule 9(b).

In U.S. ex rel. Pickens v. Kanawha River Towing et al., 916 F. Supp. 702 (S.D. Ohio Jan. 23, 1996), the court denied a motion to dismiss under Rule 9(b), finding that the complaint included "a description of the parties involved, the exact contract at issue, and the provision of the contract that pertains to the misconduct alleged and the approximate time of the misconduct. All of which provides the Defendants adequate notice of the alleged fraud."

SECTION 3732(a) JURISDICTION AND VENUE

Venue was proper where the defendants had a contract with a government installation within the judicial district

In U.S. ex rel. Pickens v. Kanawha River Towing et al., 916 F. Supp. 702 (S.D. Ohio Jan. 23, 1996), the defendants argued that venue was improper in the Southern District of Ohio under

FCA § 3732(a), which states that an "action under section 3730 may be brought in any judicial district in which the defendant, or in the case of multiple defendants, any one of the defendants can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." In particular, they asserted that they did not transact business in Ohio. The district court, however, found that "some" of the alleged FCA violations "occurred in part" within its judicial district. The defendants had a contract with the Army Corps of Engineers based in Cincinnati, and therefore any false certifications and claims for payment under that contract would have occurred in Cincinnati.

FCA jurisdiction was lacking where the foreign defendants had no contacts in the judicial district

In U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer Limited et al., 911 F. Supp. 130 (S.D.N.Y. Jan. 17, 1996), the district court dismissed an action against three foreign defendants for lack of jurisdiction under FCA § 3732(a) because none of the defendants resided, transacted business, could be found, or violated the FCA within the judicial district. According to the court, § 3732(a) is not only a venue provision but also a "geographically-limited grant of subject-matter jurisdiction."

PREEMPTION

Clean Water Act does not preempt the FCA

In U.S. ex rel. Pickens v. Kanawha River Towing et al., 916 F. Supp. 702 (S.D. Ohio Jan. 23, 1996), a case involving alleged violations of the Clean Water Act, the defendants argued that FCA claims were preempted "by the more specific remedial provisions of the CWA." In rejecting this argument, the district court asserted that federal law disfavors preemption of one federal law by another absent express preemptive intent. Moreover, according to the court, the Supreme Court case relied upon by the defendants stands only for the proposition that "implied preemption is only appropriate for purely remedial acts when the statute to be enforced provides its own specific and detailed remedies." The court asserted that the FCA "is not a purely remedial statute. It provides remedies for different conduct than the conduct covered by the CWA." Furthermore, the FCA provides for different relief (fraud damages and statutory penalties) than the CWA.

COUNTERCLAIMS

Counterclaims seeking contribution or indemnification are not allowed, but independent compulsory counterclaims can proceed separately from the *qui tam* case

In U.S. ex rel. Mikes v. Straus et al., 931 F. Supp. 248 (S.D.N.Y. June 26, 1996), the defendants raised counterclaims arguing that the relator was not entitled to a relator's share because of her alleged role in planning and initiating the fraud, that they were entitled to attor-

neys' fees under § 3730(g) (allowing reasonable attorneys' fees to prevailing defendants if the court finds the action to be clearly frivolous), and that the relator should be assessed punitive damages for attempting to extort money from the defendants. Disposing of the first counterclaim, the court found that § 3730(d)(3), authorizing a reduction in the relator share for having "planned and initiated" the FCA violation, conferred no right on the defendants to assert a counterclaim against the relator. Nor could the defendants attempt to reduce their liability by relying on this provision. As to the counterclaim for fees, the court ruled that it was procedurally improper because the defendants had not yet prevailed in the action. Finally, the counterclaim for punitive damages was dismissed for public policy reasons because it could chill potential relators from bringing cases under the Act. The court did find, however, that there was precedent for allowing the defendants' counterclaim for extortion. "[T]he modern trend does not support a ban on compulsory counterclaims which are based on damages which are 'independent' of the *qui tam* claim," stated the court. The court was persuaded by the approach taken in previous cases in which counterclaims for independent damages were allowed to go forward but in a separate trial from the *qui tam* action.

ATTORNEYS' FEES

Statutory attorneys' fees must be paid to the attorneys, not the relator

In U.S. ex rel. Virani v. Jerry Lewis Truck Parts & Equipment, Inc. et al., 89 F.3d 574 (9th Cir. July 10, 1996), the 9th Circuit ruled that statutory attorneys' fees awarded by the court must go to the relator's attorneys rather than to the relator himself. The appellate court found that the "client's right is really a power to obtain fees for his attorney." That is, only the relator has the power to demand that the defendant pay his attorneys' fees. However, once the relator exercises that power, the attorneys' right to the fees is vested, the defendant's duty to pay becomes fixed, and the fees must go to the attorneys rather than the client.

Defendant who settled merits of an FCA action could not avoid paying relators' attorneys' fees by arguing that the relators would not have prevailed in litigation

In U.S. ex rel. Fallon et al. v. Accudyne Corp. et al., 97 F.3d 937 (7th Cir. Oct. 3, 1996), the 7th Circuit rejected Accudyne's attempt to avoid paying approximately $1.2 million in attorneys' fees it had agreed to pay when it settled the merits of the *qui tam* suit. To support its position, Accudyne argued that the relators would not have prevailed on one of their counts had it been litigated. In a strongly worded opinion, the court characterized Accudyne's behavior as "outrageous." According to the court, allowing Accudyne "to weasel out of a bargain" would undermine parties' incentives to settle and squander judicial resources. As to Accudyne's argument that the fees were excessive, the court stated that this was a "big-stakes case with potentially difficult legal and factual issues." Noting that Accudyne had hired a "large and expensive law firm from Chicago," the court remarked that Accudyne could not "grouse that the relators also engaged out-of-town commercial litigators whose hourly rates are normal for commercial cases." Moreover, it is only the relators who are entitled to assert an objection to excessive compensation, "and the relators, who offered a bonus to induce counsel to accept a risky case from which they might have emerged empty-handed, are not complaining."

Top 1996 *Qui Tam* Recoveries

Company U.S. District Court	Allegations	Government Recovery	Relator Share
Laboratory Corporation of America Holdings SD NY MD NC D NM ED VA	False claims for medically unnecessary "add-on" tests submitted to Medicare, Medicaid, and CHAMPUS	$182 million	Andrew Hendricks William St. John LaCorte (shares not reported) Mary Downy $388,965 Geoffrey Zuccolo $625,400
Damon Clinical Laboratories, Inc. D MA D MA	Fraudulent billing of Medicare, Medicaid, and CHAMPUS by bundling medically unnecessary tests not knowingly ordered by doctors	$83.7 million	Jeanne Byrne $9 million Jack Dowden and Kevin Spear $1.46 million
FMC Corporation ND CA	Inflated military contracts including amounts for independent research and development (IR&D) and bid and proposal (B&P) projects	$13 million	Robert Neargarder $2.86 million
Corning Clinical Laboratories Inc. and Unilab Corporation (MetPath Inc.) D NJ	False billing of Medicare, Medicaid, and CHAMPUS for blood indices not ordered or medically necessary	$11 million	Kevin Spear and Jack Dowden $1.6 million
Spectra Laboratories, Inc. ND CA	Improper billing of Medicare, CHAMPUS, and FEHBP for end stage renal disease tests already reimbursed under composite rate	$10.1 million	Almario Aviles $1.5 million
Air Industries Corp. CD CA	Improperly tested and defective aircraft parts	$6.8 million	Dan McKay and Tony Danyal $1.53 million

Top 1996 *Qui Tam* Recoveries cont.

Company U.S. District Court	Allegations	Government Recovery	Relator Share
Medline Industries, Inc. ND IL	False invoices presented to Department of Veterans Affairs for products manufactured in non-designated countries	$6.4 million	Ralph Rybacki $1 million
Lockheed Martin Inc. (Martin Marietta Corporation) D MD	Overcharging DOD by underbidding contract, then boosting research and development costs	$5.3 million	Jerry Mayman $795,000
Ethyl Corporation and Ethyl Petroleum Additives, Inc. ED MO	False representations that additive packages met military standards	$4.75 million	Charles Duchek (share not reported)
Teledyne Industries, Inc. WD MO	Missing jet engine parts under Air Force repair contract, altering and destroying records	$4.75 million	Gerald Woodward $831,250
Hughes Aircraft Company, Inc. CD CA	Failure to perform tests on components used in military electronic equipment	$4.05 million	Margaret Goodearl, Ruth Aldred, and Taxpayers Against Fraud $891,000
Advanced Care Associates, Inc. ED PA	Falsification of documents concerning medical condition of Medicare beneficiaries, misrepresentations regarding charges and nature of lymphedema pumps	$4.03 million	Christopher Piacentile $604,500

Qui Tam Statistics

(as reported by DOJ in October 1996)

Record Recovery and Filings

Total *qui tam* recoveries exceed $1.45 billion* since the False Claims Act was amended in 1986. This past year saw the highest *qui tam* recovery to date — a $182 million medical laboratory settlement. According to DOJ, more than 1,550 *qui tam* cases have been brought since 1986, with a record 360 cases filed in fiscal year 1996.

FY 1987:	33 cases	FY 1992:	119 cases
FY 1988:	60 cases	FY 1993:	131 cases
FY 1989:	95 cases	FY 1994:	221 cases
FY 1990:	82 cases	FY 1995:	278 cases
FY 1991:	90 cases	FY 1996:	360 cases

DOJ reports that it has elected to pursue 225 *qui tam* cases. In these cases, the relators have been awarded about $200 million or 18% of the overall recovery where relator shares have been determined. Total recoveries in cases DOJ has declined to pursue are approximately $26 million. In these cases, the relators have been awarded a total of about 28.5% of the recovery.

DOJ records show that 545 *qui tam* cases are still under investigation.

HHS Increasingly Client Agency, With DOD Still Accounting for Large Portion

According to DOJ, DOD is the client agency in about 45% of the *qui tam* cases filed. However, DOD percentages of the total have decreased: Only 33% of the cases filed in fiscal year 1996 had DOD as the client agency. Of the *qui tam* cases still pending, approximately 80% involve DOD or HHS, and they are equally divided between the two.

DOD is the client agency as to about 2/3 of the dollars recovered in *qui tam* cases. HHS is the client agency as to 1/4 of the dollars, with other agencies accounting for the remainder.

** This figure includes settlements announced by the Government after DOJ's July 1996 report, which cited $1.13 billion in qui tam recoveries. (DOJ did not issue an updated recovery total as part of its October 1996 report.)*

TAF

Qui Tam Attorney Network

TAF has established an information network to assist counsel in their efforts to provide effective representation to *qui tam* plaintiffs. TAF both assists counsel with their individual cases and disseminates information about the False Claims Act and *qui tam* provisions. In support of this project, TAF maintains a comprehensive False Claims Act library and publishes the *False Claims Act and Qui Tam Quarterly Review*. Attorney network services are provided at no cost.

TAF activities that serve the *Qui Tam* Attorney Network include the following:

- *Responding to legal inquiries from qui tam counsel.* This assistance, provided by TAF staff attorneys, includes conducting limited research, forwarding relevant library materials, offering comments on drafts of pleadings, and consulting about the issue(s) involved. Counsel can also use this opportunity to request *amicus* brief submission by TAF.

- *Tracking similar facts or legal issues among cases around the country,* through direct contacts with counsel and otherwise, in order to monitor trends and identify *qui tam* attorneys with whom it may be useful to consult on a particular topic.

- *Maintaining a False Claims Act library of legal and news resources that is open to the public and qui tam counsel.* The library is the primary tool used by TAF staff attorneys to respond to inquiries.

- *Collecting from qui tam and government attorneys case-related materials such as complaints, briefs, and settlement agreements to help build TAF's library resources,* broaden and refine the coverage in TAF's publications, and reinforce case tracking.

- *Distributing to qui tam attorneys and others the False Claims Act and Qui Tam Quarterly Review* and other TAF publications to keep them apprised of developments in the field.

- *Identifying attorneys who have represented qui tam plaintiffs or are interested in doing so* in order that TAF may better serve the *qui tam* bar and relators.

For further information, please contact TAF Staff Attorney Gary W. Thompson. Submissions of case-related materials and suggestions for additional activities are welcome.

TAF

LIBRARY RESOURCES

As part of its information clearinghouse activities, TAF maintains a comprehensive library on the False Claims Act and *qui tam* provisions. In response to inquiries, TAF can provide limited copies of materials at no cost. The library is open to the public, by appointment, during regular business hours.

FALSE CLAIMS ACT & *QUI TAM* RESEARCH BINDERS

- Legal Topic

  The Legal Topic binders are designed to provide a research tool for the False Claims Act and *qui tam* provisions through a compilation of original and secondary source materials. The binders are divided into broad legal topics (e.g., Jurisdiction Under the *Qui Tam* Provisions), with each binder containing relevant judicial decisions, legal commentary, and pleadings. These materials are organized according to a Legal Topic Outline & Index, which is both an outline of the specific legal issues under the respective topic and an index to the documents within the binder.

- Violations & Case History

  The Violations & Case History binders contain summaries of factual allegations that have served as the basis for False Claims Act complaints (whether or not such suits have been successful). Also included are government settlements of potential liability under the Act that have occurred without the filing of a complaint. Where such information is available, the binders contain materials pertaining to case history and developments (e.g., complaints, disclosure statements, news articles, press releases, and settlement agreements).

  The binders are organized by the type of federal procurement or program (e.g., DOD Contracts, Medicare, and HUD) and further subdivided according to general types of activity allegedly giving rise to False Claims Act violations (e.g., mischarging or product substitution under DOD, and unnecessary services or upcoding under Medicare).

- Court Decisions

  All reported False Claims Act decisions as well as a substantial number of unpublished opinions. In addition, three tables of cases are available:

  (i) arranged by last name of defendant
  (ii) arranged by circuit
  (iii) arranged by last name of *qui tam* relator

- False Claims Act Background and Overview
- Legislative History
- Legislative Oversight
- DOJ Press Releases
- Whistleblowers and Whistleblowing: General Information
- False Claims Act Complaints Index
- False Claims Act Settlement Agreements Index

GENERAL RESOURCES

The TAF Library also contains various commercial and government publications on the False Claims Act, particular federal programs and contract areas, and contracting fraud generally. These publications include: (1) treatises, books, and monographs on the Act (e.g., *False Claims Act: Whistleblower Litigation*, Helmer, Lugbill, and Neff); (2) commercial reporters on federal programs (e.g., *CCH Medicare and Medicaid Guide*); and (3) IG and GAO reports.

DATABASE

TAF is in the process of completing a searchable database of False Claims Act cases for its library. Further details on this database will soon be available.

TAF welcomes the submission of original materials such as complaints, briefs, and settlement agreements, as well as suggestions for additional resources.

TAF NEWS

1996 FCA Amendments Tenth Anniversary Resources

- To mark the 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.

TAF On The Internet

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

  TAF was recently 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.

Previous Publications

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

Washington Lawyer Article

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

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.

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.

Acknowledgments

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