TAF

Vol. 10
July 1997

Taxpayers Against Fraud

False Claims Act and *Qui Tam* Quarterly Review

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The *False Claims Act and Qui Tam Quarterly Review* is published by 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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Supreme Court Ruling/ Retroactivity

Hughes Aircraft Company v. U.S. ex rel. Schumer, 1997 WL 321246 (U.S. June 16, 1997)

In a much anticipated opinion, the Supreme Court decided only the narrow threshold issue of retroactivity and left all other issues unaddressed. Reversing the 9th Circuit, the Court unanimously held that the 1986 FCA amendment permitting *qui tam* suits based on information in the Government's possession does not apply retroactively to *qui tam* suits regarding pre-1986 conduct. Therefore, the case at hand should have been dismissed, as required by the pre-1986 version of the Act. Because of this retroactivity holding, the Court expressed no opinion on the "public disclosure" and "harm to the public fisc" issues that also were presented.

The alleged false claims at issue in this 1989 *qui tam* case were submitted by Hughes Aircraft Company between 1982 and 1984. Before the 1986 amendments, the FCA barred *qui tam* suits "based on evidence or information the Government had when the action was brought." It was undisputed that this pre-1986 provision, if applicable, would bar the relator's claim at issue.

The 9th Circuit, however, held that the 1986 FCA amendment permitting suits based on information in the Government's possession — except when based on publicly disclosed information as set forth in § 3730(e)(4) — should be applied to pre-1986 conduct. U.S. ex rel. Schumer v. Hughes Aircraft Company, 63 F.3d 1512 (9th Cir. Aug. 22, 1995), 3 TAF QR 4 (Oct. 1995). Applying the Supreme Court's analysis in Landgraf v. USI Film Products, 511 U.S. 244 (1994), the circuit court reasoned that the amendment involved only the subject matter jurisdiction of courts to hear *qui tam* suits and did not affect the substantive liability of FCA defendants.

The 9th Circuit went on to hold that Schumer's action was not barred under the amended Act because there had not been a "public disclosure" under § 3730(e)(4). The circuit court also ruled that "the lack of a determination of actual harm from the [alleged violation] does not preclude a claim under the FCA." In October 1996, the Supreme Court granted Hughes' petition for certiorari "to consider whether the 1986 amendment is applicable to pre-1986 conduct and, if so, whether the Government's release of its audits to Hughes employees constituted a public disclosure bar under the 1986 amendment and whether harm to the public fisc is an essential element of a *qui tam* action under the amended Act."

Presumption Against Retroactivity

In a 9-0 opinion written by Justice Thomas, the Supreme Court emphasized that a "time-honored presumption" against retroactive legislation should be followed "unless Congress has clearly manifested its intent to the contrary." The Court found nothing that indicated a clear intent by Congress that the 1986 amendment be applied retroactively. Thus, according to the Court, under the analysis adopted in Landgraf, if the 1986 amendment has a "retroactive effect," then it is presumed not to apply to pre-1986 conduct.

Retroactive Effect Found

Schumer first argued that the 1986 amendment lacks retroactive effect because it does

not "impose new duties with respect to transactions already completed" since the FCA has always made it unlawful to knowingly submit false claims to the Government. The Court responded: "The same argument was made, and rejected, in Landgraf."

The Court then addressed Schumer's contention that the 1986 amendment does not "create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by even a single penny" and thus does not "increase a party's liability for past conduct." Rejecting that argument, the Court stated:

> While we acknowledge that the monetary liability faced by an FCA defendant is the same whether the action is brought by the Government or by a *qui tam* relator, the 1986 amendment eliminates a defense to a *qui tam* suit — prior disclosure to the Government — and therefore changes the substance of the existing cause of action for *qui tam* defendants by "attaching a new disability, in respect to transactions or considerations already past."

1986 Amendment Essentially Creates a New Cause of Action

Moreover, the Court disagreed with the proposition that the 1986 amendment does not "create a new cause of action," stating:

> The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. . . . In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.

Finally, the Court rejected Schumer's argument that the 1986 amendment is jurisdictional and therefore an exception to the Landgraf presumption against retroactivity. The Court explained:

> Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action . . . affect only where a suit may be brought, not whether it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among fora. Rather, it creates jurisdiction where none previously existed; it thus speaks not to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much the subject of our presumption against retroactivity as any other.

The Court thus held that the pre-1986 law applied and the case should have been dismissed. As such, the Court did not address the "public disclosure" and "harm to the public fisc" issues. The Court vacated the judgment below and remanded for further proceedings consistent with its opinion.

Editor's Note: A week after the release of the Schumer opinion, the Supreme Court also vacated the 9th Circuit's ruling in favor of the plaintiff in U.S. ex rel. Hyatt v. Northrop Corp., 80 F.3d 1425 (9th Cir. Apr. 11, 1996), 6 TAF QR 9 (July 1996), which also involved pre-1986 conduct. In Hyatt, the 9th Circuit had followed its holding in Schumer regarding retroactive application of

§ 3730(e)(4). Citing its Schumer holding, the Court vacated Hyatt and remanded the case for dismissal.

A transcript of the Schumer oral argument can be found on TAF's Internet site at http://www.taf.org. Short summaries of the briefs filed in Schumer can be found in the January 1997 issue of the TAF Quarterly Review. 8 TAF QR 11 (Jan. 1997).

Government Right to Object to Settlement

Bortner on behalf of U.S. v. Philips Electronics North America Corp. et al. v. U.S., 1997 WL 361932 (5th Cir. June 30, 1997)

In a *qui tam* suit in which the Government objected to the breadth of the release language of the settlement reached by the relator and the defendants, the 5th Circuit held that FCA § 3730(b)(1) expressly grants the Government an absolute veto power over settlements in *qui tam* actions. Differing from the 9th Circuit, the 5th Circuit ruled that the Government may exercise its right to object even if it has not intervened in the action. As such, the court vacated the $1 million settlement order and remanded the case to the district court.

According to relator Lloyd Bortner, Philips North America Corp. and Philips Electronics (collectively, Philips) illegally concealed from the Government a 1985 executive decision to withdraw from the U.S. market and to abandon their local U.S. dealers. The Government relied on Philips' continuing presence in the U.S. market when it bought and leased automation equipment worth millions of dollars. After failing to obtain permission from the court for a second extension of time to investigate, the Government declined to intervene in Bortner's *qui tam* case.

After nearly a year of discovery and two unsuccessful court-ordered efforts at mediation, Philips and Bortner reached a settlement three days into trial. The settlement called for a $1 million judgment against Philips, with Bortner receiving a 30 percent relator share and $300,000 in attorneys' fees. The Government objected to the settlement because of its release language which released the defendants for not only the asserted claims, but all claims "which could have been asserted by the parties in the action." The Government unsuccessfully attempted to convince Philips to accept a release only from claims actually stated in the final complaint.

Although the Government did not request permission to intervene for good cause under FCA § 3730(c)(3), it filed an objection with the court and, at a show-cause hearing, argued that § 3730(b)(1) gives it the authority to veto the settlement. The lower court rejected the Government's argument and approved the settlement. The Government filed a notice of appeal, again without moving to intervene.

Government Allowed to Appeal as a Non-Party

Because the Government had declined to intervene and assumed a "passive" status in the case, the 5th Circuit refused to recognize the Government as a party with standing to challenge the lower court's action as a matter of right. However, according to the appellate court, the Government satisfied the three-prong test for non-party appeals articulated in EEOC v. Louisiana Office of Community Services, 47 F.3d 1438 (5th Cir. 1995). First, the Government "actually participated in the proceedings below" by investigating and monitoring the case. Second, the "equities weigh[ed] in favor of hearing the appeal" because of "the good-faith argument that Congress has instructed the courts — including the courts of appeals — not to approve settlements when the

government doesn't consent." And third, the Government had a "personal stake in the outcome" because the broad settlement language might include the Government for claim-preclusion purposes.

5th Circuit Rejects 9th Circuit View in Killingsworth

Turning to the central issue in the case — i.e., whether the Government has veto power over settlements in *qui tam* suits — the 5th Circuit noted that the express language of the statute appears to grant this power. Under § 3730(b)(1) a *qui tam* suit "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." After reviewing several decisions that merely "flirted" with the issue, the 5th Circuit determined that only the 9th Circuit in U.S. ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994), has taken a definitive position. In Killingsworth, the 9th Circuit held that the "'the government's consent to dismissal is only required during the initial sixty-day (or extended) period in which the government may decide whether to [proceed with the action].'"

In Killingsworth, the 9th Circuit reviewed the legislative history of the FCA's 1986 amendments and found that "'Congress' intent to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government or later intervention for good cause, is fundamentally inconsistent with the asserted 'absolute' right of the government to block a settlement and force a private party to continue litigation.'" However, according to the 5th Circuit, even if the 9th Circuit gauged congressional intent accurately, "intentions alone cannot work a repeal of the last sentence of § 3730(b)(1)." While Congress amended many of the Act's other provisions, it did not eliminate this provision, which between 1863 and 1943 "served as the government's one opportunity to influence the litigation in case a relator proposed a settlement that might harm" the U.S. As such, the 5th Circuit found that Congress decided to combine its goal of strengthening the *qui tam* provisions with continuing its policy of "encouraging the government to monitor relators' actions and step in when a relator is not acting in the best interest of the public." In short, the 5th Circuit concluded:

> For more than 130 years, Congress has instructed courts to let the government stand on the sidelines and veto a voluntary settlement. It would take a serious conflict within the structure of the False Claims Act or a profound gap in the reasonableness of the provision for us to be able to justify ignoring this language. We can find neither.

According to the 5th Circuit, the Government's settlement veto power is not inconsistent with the relator's statutory right to control the action when the Government declines to intervene. Although § 3730(b)(4)(B) gives the relator the "right to conduct the action" if the Government declines, this does not necessarily include the exclusive right to negotiate a settlement. If a relator has devised strategy, executed discovery, and argued in court, then he has "conducted" the action, "even if the government frustrates his settlement efforts."

Finally, the 5th Circuit observed that, in *qui tam* litigation, "there is a danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States." Here, the court concluded, the Government had the discretion to decide that the $1 million settlement was not worth the cost of releasing Philips from further claims.

"Claim"/Knowledge Standard

U.S. v. Krizek et al., 111 F.3d 934 (D.C. Cir. May 2, 1997)

In a case involving upcoding, the D.C. Circuit found that each HCFA 1500 form the defendants submitted constituted a demand or request for money from the Government and thus a "claim" under the FCA. In reaching this conclusion, the appellate court rejected the Government's argument that each false CPT code entry constituted a "claim." The court also ruled that "reckless disregard" is a linear extension of "gross negligence" or "gross negligence-plus" — all of which satisfy the Act's knowledge requirement.

The Government's FCA suit against psychiatrist George Krizek and his wife, who maintained Dr. Krizek's billing records, alleged that they had submitted 8,002 false or unlawful requests for reimbursement to the Medicare and Medicaid programs. The complaint alleged two types of illegal claims: submitting claims for medically unnecessary services and "upcoding" reimbursement requests. The upcoding involved billing the Government for more extensive treatments than were provided by, for example, billing for a 45 to 50 minute psychotherapy session when only 20 to 30 minutes of services were rendered. The Government sought $245,392 in damages and civil penalties totaling $81 million ($10,000 for each of the 8,002 false CPT codes).

The district court conducted an initial trial on seven alleged false CPT code entries that the Government described as representative. The court found that the Government failed to establish that the Krizeks submitted claims for unnecessary services, and that it was a common and proper practice among psychiatrists to bill for time spent other than in face-to-face therapy sessions with patients. However, the court also found that the Krizeks' "seriously deficient" recordkeeping system resulted in their submitting claims with reckless disregard for the truth or falsity of the claims. For example, the court noted instances in which the Krizeks submitted claims for over 21 hours of patient treatment within a 24 hour period. The court ruled that this conduct violated the FCA.

After finding the Krizeks liable in the seven test cases, the district court established a mechanism for determining their total liability. The court concluded that, based on trial testimony, the Krizeks would be liable under the Act for every day in which claims were submitted in excess of nine patient-treatment hours in a single day and where the defendants could not establish that Dr. Krizek legitimately devoted the claimed amount of time to patient care on the day in question. With the parties' consent, the court left the calculation of total damages to a Special Master who determined that the Krizeks were liable for $47,105.39 in damages (trebled to $141,316.17) and civil penalties of $5,745,000 ($5,000 x 1,149 false code entries).

Thereafter, the district court issued a second opinion modifying its earlier findings. It adopted the Special Master's calculation of $47,105.39 as damages for unjust enrichment based on the nine hour presumption. For purposes of calculating the FCA penalties, it raised the nine hour benchmark to more than 24 hours. That is, the FCA was violated, according to the court, when the Krizeks submitted claims totaling more than 24 hours for a single 24 hour period without providing an explanation justifying claims made for services rendered around the clock. This occurred 11 times during the period in question, and the court assessed a $10,000 penalty for each such violation. Both parties appealed.

Each HCFA 1500 Form Submission Constitutes a "Claim"

The Krizeks' cross-appeal was based on several

grounds. Objecting to the district court's correlating the submission of a "claim" with the submission of a CPT code, they posited that each HCFA 1500 form submitted is a "claim." The D.C. Circuit agreed. Hearkening back to the Act's definition of a "claim" as a request or demand for money or property from the Government, and reviewing relevant case law, the appellate court found that the proper question is: "With what act did the defendant submit his demand or request and how many such acts were there?" In this case, the court found that the Krizeks made a request or demand every time they submitted a HCFA 1500 form. The CPT codes, it concluded, only explain how the medical provider computed that form's request or demand.

In reaching this conclusion, the appellate court rejected the Government's contention that it is unfair to leave medical practitioners with full authority to control their exposure under the Act by allowing them to simply structure their billings in a particular manner. Rather, countered the court, it would be unfair to permit the Government to receive what its complaint sought — an "astronomical" $81 million civil fine for actual damages of $245,392. Since the appellate court rejected the Government's theory of calculating the civil penalties, it declined to address the Krizeks' argument that those fines would be excessive under the Excessive Fines Clause.

The Krizeks also objected to the district court's use of a seven-case sample to determine liability. The D.C. Circuit, however, responded that the Krizeks' counsel had not only agreed to it, but had even proffered the concept. Thus, the Krizeks were bound by their counsel's actions.

"Gross Negligence-Plus" Satisfies Act's Knowledge Requirement

The Krizeks also challenged the district court's finding that "gross negligence-plus" satisfies the FCA's knowledge requirement. Having reviewed the Act's legislative history, the appellate court concluded that the "best reading of the Act defines reckless disregard as an extension of gross negligence." It also upheld the district court's determination that the Krizeks' conduct rose to the level of reckless disregard. Specifically, the appellate court noted that Mrs. Krizek made no effort to determine how much time Dr. Krizek spent with any particular patient and that Dr. Krizek failed to review the bills submitted on his behalf.

Government Given Second Chance to Introduce Evidence on Damages

The D.C. Circuit agreed with the Government that the district court's changing the benchmark from nine hours to 24 hours prejudiced prosecution of the Government's case. The Government had tailored its submission of evidence regarding damages to the nine hour benchmark and, therefore, did not introduce evidence that it might have submitted under the 24 hour benchmark. While the appellate court did not prohibit the district court from changing the benchmark, it ruled that the district court erred by doing so without allowing the parties to introduce additional evidence. The case was thus remanded for further proceedings.

Double Jeopardy

U.S. v. Peters, 110 F.3d 616 (8th Cir. Apr. 8, 1997)

The 8th Circuit ruled that an FCA judgment for $480,428 — in the face of $153,476 in damages to the Government — did not subject the defendant to double jeopardy for fraudulent acts for which he had been criminally convicted. The court found that the FCA judgment did not constitute "punishment" under the Supreme Court's Halper test.

Defendant Stanley Peters assisted a Nebraska public school district in securing federal funds for the removal of asbestos, and he designed and oversaw the resulting asbestos removal job. Peters was found to have conspired with certain subcontractors to submit claims for work not performed and for renovation not qualified for reimbursement, resulting in an overpayment by the Environmental Protection Agency of $153,476. He was sentenced to 24 months in prison and ordered to pay restitution for his part in the scheme.

The Government then secured a civil judgment against Peters under the FCA for $480,428 — representing three times the $153,476 in damages and $20,000 in fixed penalties. Peters argued that this was unconstitutional "punishment" for purposes of double jeopardy.

FCA Judgment Passes Halper Test

According to the 8th Circuit, under U.S. v. Halper, 490 U.S. 435 (1989), for Peters' double jeopardy defense to prevail "his civil penalty must be shown to bear 'no rational relation to the goal of compensating the Government for its loss.'" The circuit court first addressed the $460,428 treble damages component of the judgment and found that, like the pre-1986 double damages FCA provision at issue in Halper, the treble damages provision is "in the nature of rough remedial justice and therefore not punitive for double jeopardy purposes."

Turning to the $20,000 in fixed penalties, the 8th Circuit stated that under Halper "the most important question to be asked when considering whether a fixed penalty provision might give rise to a double jeopardy defense is how the total fixed penalties relate arithmetically to the total damages caused." In Halper, the Supreme Court found a ratio of 224:1 to be punitive. According to the 8th Circuit, the Court's language in Halper suggests that "a ratio of 100:1 would constitute punishment, and perhaps the same might be true of 10:1." In the case at hand, however, the ratio was "not only not high" but actually less than 1:1. Thus, the 8th Circuit held that the FCA judgment clearly did not subject Peters to double deopardy.

Preliminary Injunction

U.S. ex rel. Federal Equipment Co. v. Myers Systems, Inc., Unpublished Order, CA No. C-1-95-92 (S.D. Ohio March 31, 1997)

On a motion for preliminary injunction to prevent the *qui tam* defendant from dissipating its assets, an Ohio district court magistrate judge ruled that the four prongs of the preliminary injunction test were satisfied. Thus, the defendant's assets were frozen, except for a limited portion to be used to collect on accounts receivables.

The relator alleged that Myers Systems, Inc. (MS), then doing business as Alpha Technical Services, Inc. (Alpha), falsely certified on many of its price quotations submitted for government contract work that it was a "small business" when, in fact, it was not. According to the relator, Alpha did not qualify for small business "set aside" contracts under Small Business Administration regulations, and but for the false certifications Alpha would not have been awarded the set aside contracts. As a result, Alpha allegedly submitted false claims for payment upon being awarded the contracts and completing the work.

During these events Alpha was sold to Myers Industries, Inc. (MI), and Alpha's name changed to MS. Subsequently, MI elected to close MS and sell off its remaining assets. Pursuant to the sale, certain cash, accounts receivables, inventory, and business sale proceeds totaling $1,345,000 were held separately

by or otherwise due to MS. As part of its liquidation, MS sought to transfer the $1.3 million fund to its parent MI in order to repay certain debts owed to MI. In response, the relator filed a motion for a temporary restraining order (TRO) and preliminary injunction. The TRO was granted, and the parties agreed to have the preliminary injunction motion resolved by a U.S. magistrate judge.

Preliminary Injunction Prongs Satisfied

The court explained that it had earlier bifurcated the four preliminary injunction issues into two steps. First, it considered the issue of "irreparable harm." According to the court, the FCA is remedial and designed to provide restitution to the Government; thus, the threat of asset dissipation satisfied the "irreparable harm" prong. The court then considered the remaining three prongs of the preliminary injunction test — "the likelihood of plaintiff's success on the merits of its *qui tam* claims," "probability that granting the motion 'will cause substantial harm to others,'" and "whether the public interest will be advanced by the injunction's issuance."

The court found that all three remaining prongs also were satisfied. First, as to the likelihood of success on the merits, the court simply referred to the relator's Proposed Findings of Fact and Conclusions of Law. Next, the court found that "while MI may suffer some economic harm by not having access to the subject monies pending the outcome of the case, the harm is substantially less than that the plaintiff will suffer if those monies are permitted to be spent or transferred." Moreover, MI had other sources of income; therefore, the prejudice it would suffer would be "truly insubstantial." Finally, the public interest prong was satisfied because the public has a valid and reasonable interest in ensuring that adequate monies exist to satisfy civil judgments, especially in *qui tam* litigation where the Federal Government is the victim of the fraud.

Defendant Cannot Use Portion of Frozen Funds to Pay Attorneys' Fees

Subsequent to briefing on the issues above, MS sought to modify the preliminary injunction to permit the release of funds necessary to pay its reasonable business expenses, including attorneys' fees. The court agreed that some limited monies should be made available; however, those monies must be carefully scrutinized and limited in scope so as not to undermine the purpose of the preliminary injunction. Thus, the court ruled that MS could be given the discretion to spend monies directly related to collection of accounts receivables, since they could produce significant income. On the other hand, all other expenses, including MS' attorneys' fees and expenses, could not be paid from the frozen account.

DOJ Investigation

U.S. ex rel. Baggan v. DME Corporation, 1997 WL 305262 (D.D.C. May 27, 1997)

The Justice Department's investigation of a *qui tam* case is not a ministerial act that the Attorney General has a duty to perform in a specific way, according to a D.C. district court. Mandamus, therefore, does not lie against the Attorney General to compel a "diligent" investigation of a *qui tam* case during the seal period.

Relator Robert Baggan filed a writ of mandamus to compel the U.S. Attorney General to conduct a "diligent" investigation of alleged FCA violations by several defendants including former Secretary of Transportation Federico Pena. The matter arose in connection with

allegedly improper intervention in a Coast Guard contract by certain government officials. The district court stated that the Attorney General has broad discretion to determine which *qui tam* complaints deserve diligent investigation. Under the law, mandamus lies only with respect to the duty of an official to perform a ministerial act. Since the decision about the extent to which the Justice Department will investigate a relator's complaint is not ministerial, the court ruled that a writ of mandamus would not be issued.

SPOTLIGHT

The Government Investigator-Relator Relationship

Attorneys from TAF recently met with Special Agents of the Federal Bureau of Investigation to discuss common ground in enforcing the False Claims Act through qui tam litigation. The articles that follow reflect some of the discussion at that meeting.

The first piece, authored by Special Agents T. Clay Mason, FBI, and Larry D. Leonard, DCIS, summarizes the course of a qui tam case in which the relators' attorney, William Hardy, involved law enforcement officials from the beginning. The piece offers the Special Agents' perspective on why the relationship between the relators and law enforcement personnel worked well and how that relationship led to a successful outcome of the case.

The second piece is written by Hardy, who encouraged his clients to cooperate with Special Agents Mason and Leonard. Hardy outlines his experience representing qui tam relators and working with government investigative agents in several cases. He concludes that relators, their attorneys, government lawyers, and investigative agents would do well to pursue a spirit of cooperation in all their qui tam cases.

Following these two perspectives is a list of telephone numbers for FBI field offices. Inspector General contact information can be found online on IGnet at http://www.sbaonline.sba.gov/ignet/internal/igdir.html.

A Government Investigator Perspective

By Special Agent T. Clay Mason, FBI, and Special Agent Larry D. Leonard, DCIS

The Relators' Attorney Sought Government Input When The Complaint Was In Draft Form

On April 14, 1994, a preliminary draft *qui tam* action was presented to the attention of the United States Attorney's Office, Eastern District of Virginia (EDVA), and the Fraud Section, U.S. Department of Justice by the attorney for three relators. The three relators were all, at one time or another, employees of the defendant company, for purposes here, XYZ.[1] The relators alleged that XYZ, through the direction of its foreign parent corporation, was involved in a scheme to falsely certify that no commissions were paid

[1] The company name has been changed because, while the investigation in chief is complete against the helicopter company following its plea and settlement, several other spin-off investigations are still pending. Law enforcement agencies do not ordinarily comment on pending investigations.

on the sale of American-made helicopters to a foreign government. A contract signed November 30, 1993 had provided that four helicopters, spares, tools, and training would be furnished for a price of $48 million.

The contract was funded in part ($29 million) by the U.S. Government through the Foreign Military Financing (FMF) Program which is administered by the Defense Security Assistance Agency (DSAA), Department of Defense (DOD), the Pentagon, Arlington, Virginia. At that time, DSAA required American contractors obtaining FMF funding to certify as to what commissions had been paid, or were to be paid, and that no Foreign Corrupt Practices Act (FCPA) violations had been committed. The relators alleged that commissions totaling $9.8 million were hidden in the cost of the contract and that the money was intended, in part, for foreign military officials who were in a position to insure that XYZ was awarded the contract to manufacture the helicopters.

FBI and DCIS Special Agents Started Investigating Immediately

By April 19, 1994, Special Agents of the FBI and Defense Criminal Investigative Service (DCIS) had met with the prosecutors and commenced reviewing the draft complaint. Later that week, the relators' attorney met with the agents and delivered more documents from the relators. On Sunday, April 24, the first of the three relators was interviewed by the agents. The second and third relators were interviewed several weeks later near the site of the helicopter plant.[2] By that time only one of the relators was still employed by the subject company, and he agreed to fully cooperate with the investigators by consensually recording conversations with XYZ executives about the contract and hidden commission payments.

Significantly, a few weeks later, in June 1994, XYZ hosted executives from its foreign parent in meetings to determine a proposal price for an amendment to the contract to sell a fifth helicopter under the FMF program to the foreign government. From these meetings came recordings which ultimately sealed the fate of the company and led to one individual plea and one corporate plea with a global settlement (civil and criminal) by the company of $24.7 million in fines, restitution, and cost of investigation reimbursements.

Early Law Enforcement Involvement Was Crucial To A Successful Outcome

What led to this successful resolution? One of the primary reasons was the promptness with which the investigators were able to receive the draft complaint and act upon the allegations contained therein. In two short months, the Special Agents were

[2] The *qui tam* case was filed in United States District Court for the Eastern District of Virginia. Although XYZ was operating in another state, venue was established in the EDVA because the victim agency, DSAA, is headquartered in Arlington, VA.

able to take the allegations, interview all three relators, and enact a covert plan to substantiate their allegations. The substantiation, in large part via the recordings and documents provided from the meetings recorded by the relator in June, was irrefutable evidence of illegal activities that played a key role during subsequent plea negotiations with corporate counsel. Had the relators' attorney not contacted authorities so quickly, these meetings would not have been recorded and the case might not have proceeded so successfully.

Also, we know from experience that it is difficult to construct a covert investigation and have conspirators re-create conversations about past crimes, especially in the white collar crime arena. People normally are hesitant to speak about past actions of a criminal nature and also quickly grow suspicious of people who attempt to bring such topics into conversations. So, if possible, it is important to become involved covertly as soon as practicable, while the conspiracy is still forming, to make evidence gathering more effective. Furthermore, experience has also shown that traditional "paper trail" white collar cases are very complicated and difficult to present to a jury. "Tape cases," on the other hand, are more attractive to prosecutors and easier for juries to follow. Thus, time can really be of the essence in these matters where the fraudulent activity is ongoing. As an additional key point in this investigation, much of the early investigative activity was done prior to the actual filing of the *qui tam*!

Mutual Trust Highlighted The Relator-Investigator Relationship

There is also a direct correlation between the successful resolution of this case and the relationship between the investigators and relators during this investigation, and this relationship can be summed up by one word — trust. Their attorney was only present during one initial debriefing of one relator and he allowed the Special Agents free reign on the operational aspects of the case. This was invaluable insofar as dealing with the one relator who still worked at XYZ, because the agents were able to deal directly with him for scheduling meetings, recordings, and direction of the investigation. The relators were motivated witnesses who were encouraged by their attorney to cooperate fully. This spirit of cooperation and encouragement encompassed the entire investigation and never impeded the progress nor direction of the investigation. This lack of interference or insistence on results was extremely important to the investigators because the case was not resolved until February 1997.

The protracted time was due to a spin-off investigation into the foreign agent's dealings with other U.S. contractors, which is an open investigation. In the interim, the one relator had left employment with XYZ and the Special Agents had to create a way to continue receiving intelligence from XYZ, while still investigating the foreign agent. The path settled on was an approach in late 1994 to an XYZ employee who, under a grant of immunity, agreed to cooperate. Over the next two years, nearly 70 consensual recordings were made either by him or other parties, and all the while, the relators were relegated to a "wait and see" role. As the time approached for the covert stage to end, they remained very accommodating and cooperative, assisting civil DOJ in document prepa-

ration for court proceedings and in locating potential witnesses for the criminal side. As one would imagine, this was a stressful time for the relators as well as for the investigative team, but no complaints were voiced about delays. The relators and their attorney never interfered with nor objected to extension requests by the DOJ Civil Division. Thus the investigation was left to run its natural course in a covert stage without external pressures from the complainants about the duration of the case.

Another extremely important factor to the success of the investigation was the detail to which the complaint alleged criminal activity and documented specific acts on behalf of conspirators. The detail included references to meetings and other events that could be verified through subsequent investigation. The relators also kept detailed notes and records in the normal course of business which provided much of the substantiating documentation for the historical facts. Once the investigators became involved, the relator still employed at XYZ was able to provide specific, day-to-day information as the case progressed, and to record conversations. These conversations and information were later used to persuade other individuals to cooperate, to provide probable cause for affidavits for search warrants, and used in court documents filed in support of the settlement.

Paradigm For The Future?

While this article is not intended to establish a new procedure of notification to law enforcement in *qui tam* matters, it will hopefully raise issues of consideration for the practitioner to contemplate an earlier contact with the law enforcement community to provide every opportunity possible for something other than a "paper trail" investigation. Once people are on notice and corporate counsel has circled the wagons, it is much more difficult for investigators to gather the quality of evidence so often sought by way of a covert effort — tapes of the conspirators in their own voices speaking about the fraudulent activity. Therefore, whoever is notified — the FBI, an Inspector General's Office, or a United States Attorney's Office — the sooner is often the better.

Apparently in some government circles, relators are not the most sought after clients. However, the partnership arrangement in this instance was extremely beneficial to both the Government and the relators. It took a great deal of effort, restraint, and patience, but the Government received $24.7 million in civil and criminal recoveries, and the relators' share was $2.4 million (24% of the civil portion). This reimbursement represents a substantial percentage of the overall cost of the FMF allocation for the helicopters, and a fraudulent scheme was interrupted along the way ... the kind of case that government investigators consider an exciting opportunity and priority matter.

Special Agent T. Clay Mason, FBI, has worked on government fraud matters for over 10 years in the Washington Field Office, Northern Virginia Resident Agency. His telephone number is 703/762-3325.

Special Agent Larry D. Leonard, DCIS, has investigated Defense Department fraud for over 15 years and is currently assigned to DCIS' Mid-Atlantic Field Office. His telephone number is 703/604-8430.

A Relator Counsel Perspective

By William J. Hardy, Esq.

The article by Special Agents T. Clay Mason of the Federal Bureau of Investigation and Larry D. Leonard of the Defense Criminal Investigative Service makes two very good points about the relationship between federal agents and *qui tam* relators and their lawyers. To work successfully, the relators must be totally candid with the government agents. Indeed, they are required by 31 U.S.C. § 3730(b)(2) to disclose "substantially all material evidence and information" to the Government before they file their case. We all recognize that there is candor — and there is candor. Our view has been — and we advise our clients — that an essential component of the *qui tam* statute is public service. We try to emphasize that the disclosure of a fraud on the Government is their duty. In my experience, many relators are primarily motivated more by moral repugnance of the fraud than the lure of the potential reward. We have found that almost all of our clients have first considered filing a *qui tam* out of a sense of moral outrage. In fact, we've had three cases where the clients worked with agents for lengthy periods before they even knew a *qui tam* was available to them. In those instances, they learned about the *qui tam* potential from the agents themselves.

Once the relators accept their responsibility to be fully candid and start the interview process with the agents, the agents make their own assessment that the relators are living up to their responsibilities. The beneficial result is a relationship of trust.

The combination of candor and its reward — trust — in our experience is very powerful. We believe that once the agents come to trust the relator, the reverse occurs as well. This foundation is the basis for success.

As we said above, we don't think that relators do what they do primarily for the money. However, it has been our experience, also, that the government lawyers — unlike the agents — never develop the relationship of candor and trust which the agents and relators sometimes are able to accomplish. Almost invariably, the government lawyer will try to intervene between the agents and relators to act as a filter of information. We don't fully understand why the government lawyer wants to intervene between the person who knows most about the fraud and the ones who will have to do the leg work to investigate it but, invariably, they do.

The *qui tam* case Special Agents Mason and Leonard describe was unique because the government lawyers worked closely with relators, their counsel, and the agents. It was unique in our experience and is a tribute to the sophisticated and experienced lawyers, as well as the maturity and skill of the agents. The FBI and DCIS field offices and the United States Attorney's Office which handled the case are, perhaps, the most experienced and successful in the United States in dealing with Department of Defense

fraud. It was fortunate that these organizations handled this case. Other United States Attorneys could learn a valuable lesson from this case.

We hope that more such experiences will occur as the *qui tam* statute moves into its second decade.

William J. Hardy is a partner at the law firm of Kleinfeld, Kaplan and Becker in Washington, D.C. Before entering private practice, Mr. Hardy served as Litigation Branch Chief of the Criminal Fraud Section, United States Department of Justice, and as an Assistant United States Attorney for the District of Columbia.

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SAN DIEGO 619-565-1255
SAN FRANCISCO 415-553-7400
SAN JUAN 809-754-6000
SEATTLE 206-622-0460
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TAMPA 813-273-4566
WASHINGTON 703-762-3000

ALLEGATION: FALSE CUSTOMS RECORDS

U.S. ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc. et al. (CD CA No. CV 96-6765-HLH)

In April 1997, a *qui tam* suit was unsealed alleging U.S. Customs fraud. Reportedly the first major Customs case under the False Claims Act, the suit was brought by the American Textile Manufacturers Institute (ATMI). Among the named defendants are The Limited, Inc. and several of its retailing subsidiaries including Victoria's Secret, Abercrombie & Fitch, Lane Bryant, Structure, Express, and Lerner New York. According to the lawsuit, the companies knowingly purchased garments made in the People's Republic of China and filed false Customs records claiming the merchandise was made in Hong Kong. The alleged false claims concealed the defendants' obligation to pay duties and penalties for the imported merchandise. DOJ has declined to intervene in the action. Representing ATMI is Paul Cullen, Sr. of Cullen & O'Connell (Washington, D.C.).

ALLEGATION: INFLATED MILEAGE/FALSE EMERGENCY CHARGES AND FALSE RADIOLOGY CHARGES BY MEDICAL LABORATORY

U.S. v. Medicalab, Inc. et al. (D MA No. __)

In April 1997, DOJ announced that it has filed a False Claims Act lawsuit against Medicalab, Inc. and its owners, Richard Stonefield and William Gould, alleging improper Medicare claims in connection with inflated mileage numbers, false emergency charges, and false radiology charges for outpatients. According to DOJ, Medicare reimburses labs for miles traveled by trained personnel to collect blood samples, prorated by the number of specimens collected or drawn during a given trip. Medicalab and its owners, however, routinely inflated mileage, claiming round-trip mileage when one-way trips were taken, full mileage when both Medicare and non-Medicare specimens were collected, and full mileage for each of various stops made at different client facilities during a single trip.

In order to obtain inflated payments, Medicalab also allegedly claimed false emergency charges. The lab falsely represented that it was required to be open during non-business hours to perform tests when, in fact, the tests were performed during the regular work day. Medicalab further improperly billed Medicare for certain radiology services provided to inpatients at St. Luke's Hospital in Massachusetts, falsely representing that these services were for outpatients. In connection with the radiology misbilling, DOJ has settled separately with St. Luke's for $1.3 million. (*See* St. Luke's Hospital in SETTLEMENTS below.)

In its complaint, DOJ also seeks an accounting by Medicalab of all Medicare funds it received and disgorgement of profits from fraudulently obtained reimbursements. Representing the Government are Assistant U.S. Attorney Susan Winkler and Lawrence Freedman of the DOJ Civil Division.

ALLEGATION: DEFECTIVE ARMY HELICOPTER PARTS

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

In May 1997, DOJ announced that it intervened in a *qui tam* suit alleging that the Boeing Company provided the Army with helicopters containing defective parts. The suit was filed in 1995 by Brett Roby, a former quality assurance engineer at SPECO Corporation, a Boeing subcontractor. (The bankrupt SPECO previously

agreed to an allowed claim by the Government of $7.2 million to settle Roby's related *qui tam* allegations that it manufactured faulty transmission parts. *See* 9 TAF QR 32 (Apr. 1997).) According to DOJ, two gears failed in flight as a result of faulty manufacturing, causing the destruction of one newly remanufactured CH-47D Chinook helicopter in Saudi Arabia after about only 56 hours of operation in 1991, and another helicopter to be damaged at Fort Meade, Maryland in 1993. There were minor injuries associated with the crashes.

Boeing allegedly knew that engine transmission gears were poorly manufactured by one of its suppliers and did not meet contract specifications, but still sold the helicopters to the Army for years. According to DOJ, in warranties given to DOD, Boeing assured that the helicopters would be free from all defects in material and workmanship for the lesser of 200 hours of operation or 24 months. The Defense Criminal Investigative Service and Army Criminal Investigation Command investigated the matter. Mr. Roby is represented by James Helmer of Helmer, Lugbill, Martins & Neff (Cincinnati, OH). Representing the Government are Assistant U.S. Attorney Gerald Kaminski and Alan Kleinburd, Dennis Phillips, and Sara Winslow of the DOJ Civil Division.

ALLEGATION: OVERPRICING AIR FORCE SUBCONTRACTS FOR B-1B BOMBER

U.S. ex rel. Manier v. Textron Inc. d/b/a Avco Corporation also d/b/a Textron Aerostructures
(MD TN No. 3-95-0946)

In May 1997, DOJ announced that it intervened in a *qui tam* suit alleging that Textron Inc. fraudulently overpriced Air Force subcontracts for the manufacture of wings for the B-1B Bomber. The action was filed in 1995 by William Manier, a former employee of then Textron division Textron Aerostructures. According to the lawsuit, the company failed to disclose its true labor costs when negotiating the price of two subcontracts, resulting in overpricing of an Air Force contract for the production of the B-1B Bomber by millions of dollars. The Air Force Office of Special Investigations and Defense Criminal Investigative Service investigated the matter. Mr. Manier is represented by William Hardy of Kleinfeld, Kaplan and Becker (Washington, D.C.). Representing the Government are Assistant U.S. Attorney William Deneke and Stanley Alderson of the DOJ Civil Division.

American Ambulance and Oxygen Service

In March 1997, American Ambulance and Oxygen Service agreed to pay the Government **$1.475 million** to settle False Claims Act allegations that the company defrauded Medicare and Medicaid by submitting claims for ambulance transport for physician office visits. Medicare regulations generally prohibit reimbursement for such services. According to DOJ, the Baltimore company submitted claims falsely indicating that patients were being transported to a hospital and were bedridden or stretcher bound. Under the settlement agreement, American Ambulance will implement a corporate integrity program. Handling the matter for the Government was Assistant U.S. Attorney Kathleen McDermott of the District of Maryland.

U.S. ex rel. Roco v. New York University Medical Center (SD NY 93 Civ. 8012)

In April 1997, DOJ announced that New York University Medical Center agreed to pay the Government **$15.5 million** to settle a *qui tam* suit alleging that it submitted false information in connection with indirect costs associated with federally sponsored research grants and contracts. The suit was filed pro se in 1993 by Emmanuel Roco, a former Medical Center employee. The settlement represents the largest ever by a university for over-recovery of indirect costs associated with federally sponsored research.

According to DOJ, NYU Medical Center negotiated and obtained an inflated indirect cost rate by providing false information in several areas, including supplying dollar figures for voluntary cost sharing different from amounts reflected in Medical Center internal documents and consultants' reports, and submitting duplicate claims for the same utility costs in its research related indirect cost proposals and in hospital institutional cost reports submitted for Medicare reimbursement. Duplicate claims were also allegedly made for certain environmental services costs in separate indirect cost proposals submitted by NYU Medical Center and New York University. Other violations related to the inclusion of certain unallowable expenses involving entertainment and capital interest, overstatement of housekeeping expenses based on budgeted instead of actual costs, inconsistent allocation of the indirect and direct costs of certain activities and departments, and use of an outdated space survey which resulted in over-allocation of costs.

While the false submissions pertained to grants and other agreements for fiscal years 1984 through 1993, the settlement also resolves the Medical Center's indirect cost rate for fiscal years 1994 through 1997. According to DOJ, the settlement is unique insofar as it combines a multiple damage recovery under the False Claims Act with a rate negotiation that typically is handled by HHS' Division of Cost Allocation for a separate period of time. The relator's share was $1.56 million. Representing the Government were Assistant U.S. Attorneys Deborah Yeoh and David Koenigsberg.

U.S. ex rel. Dodson v. Blue Shield of California (ND CA C94-3626 EFL)

In April 1997, Blue Shield of California agreed to pay the Government **$12 million** to settle a *qui tam* suit alleging that it submitted false claims under its contract with HCFA to process and pay Medicare claims. The lawsuit was filed in 1994 by Weldon Dodson, a former employee of Blue Shield's Medicare division in Chico, California. According to DOJ, Blue Shield of California covered up claims processing errors

from HCFA auditors in order to obtain more favorable scores under a program for grading the carrier's claims processing capabilities. Blue Shield allegedly obstructed HCFA's efforts to review its performance by altering or discarding documents that would have disclosed errors, substituting backdated documents, and rigging purportedly random samples of files.

According to DOJ, in 1996 Blue Shield pled guilty in federal court in Sacramento to three felony counts of conspiracy and obstructing federal audits — the first criminal conviction of its kind against a Medicare contractor. Blue Shield paid a criminal fine of $1.5 million for its misconduct.

Blue Shield and the HHS OIG have agreed to a separate comprehensive corporate integrity agreement. The relator's share was 18 percent or $2.16 million. Mr. Dodson was represented by Robert Vogel (Washington, D.C.). Representing the Government was Assistant U.S. Attorney Gail Killefer.

St. Luke's Hospital

In April 1997, St. Luke's Hospital in Massachusetts agreed to pay the Government **$1.3 million** to settle Medicare double billing allegations in connection with certain radiology tests performed on inpatients. According to DOJ, St. Luke's contracted with Medicalab, Inc. to perform vascular ultrasounds at the hospital's Radiology Department, where physicians ordered diagnostic services for both inpatient and outpatient Medicare beneficiaries. While the cost of vascular ultrasounds to inpatients is reimbursed under Medicare Part A directly to the hospital through a predetermined payment amount based on the primary diagnosis for the patient's hospital stay, Medicalab submitted claims for all vascular ultrasounds performed at the hospital to Medicare Part B, which covers only outpatient services. St. Luke's allegedly caused Medicalab to submit false claims by ordering ultrasounds on hospital inpatients and not separately contracting with Medicalab to pay for those services. St. Luke's received the inpatient services at no charge and obtained payment for radiology costs which it did not incur.

In a separately filed complaint, DOJ is bringing a False Claims Act suit against Medicalab for the billing violations. *(See U.S. v. Medicalab, Inc. et al.* in INTERVENTIONS AND SUITS FILED/UNSEALED above.) As part of the St. Luke's settlement, the hospital has agreed to expand its current compliance program. The matter was handled by Assistant U.S. Attorney Susan Winkler of the District of Massachusetts.

Chemical Waste Management Inc.

In April 1997, DOJ announced that Chemical Waste Management Inc. agreed to pay the Government **$92,685** to settle allegations that the company failed to monitor air quality to protect workers at a Superfund site at the Moyer Landfill in Montgomery County, Pennsylvania. The settlement resolves ChemWaste's potential liability under the False Claims Act and Contract Disputes Act. According to DOJ, while doing remedial work at the site, ChemWaste did not monitor air quality as its safety plan required under a contract with the Army Corps of Engineers. In 1993, the Delaware company reported its conduct to DOD under the Voluntary Disclosure Program. Following its disclosure, ChemWaste paid $46,689 to the Army Corps of Engineers in a contract price adjustment. The matter was investigated by the Defense Criminal Investigative Service and the EPA OIG.

U.S. v. Franklin Laboratories, Inc. et al. (SD FL No. 96-0805)

In April 1997, DOJ announced that Franklin Laboratories, Inc. and its owner/officers, Carmen Alvarez and Hilda Mejuto-Diaz, agreed to pay the Government **$4.9 million** to settle a False Claims Act suit alleging that the clinical lab defrauded Medicare by submitting claims for blood and urine tests that were not medically necessary or were never performed. The company and officers have also agreed to a lifetime ban from further participation in any publicly funded health care program. According to the complaint, the Miami-based lab billed for numerous heavy metal and amino acid tests that were performed by other labs at a cost to Franklin Laboratories of about $400. Although the tests were generally unnecessary and the results generally not conveyed to the treating physician or patient, Franklin billed Medicare about $7,000 per patient (although a lesser amount was actually reimbursed). Assistant U.S. Attorney Mark Lavine represented the Government.

U.S. ex rel. Semtner v. Emergency Physicians Billing Services et al. (WD OK No. 94-617-(C))

In May 1997, DOJ announced that EmCare Inc., one of the nation's largest emergency physician staffing companies, agreed to pay the Federal Government and various states **$7.75 million** to settle a *qui tam* suit alleging that it overcharged Medicare, Medicaid, CHAMPUS, and the Federal Employees Health Benefits Program in connection with claims submitted by its billing company, Emergency Physicians Billing Services (EPBS). According to DOJ, the Oklahoma City billing company typically changed the codes of claims to reflect more expensive procedures than those actually performed and billed for services more extensive than those provided by EmCare physicians. DOJ is also pursuing recoveries against other defendants in the action as well as other customers of EPBS.

EmCare and the HHS OIG agreed separately to a corporate integrity program which requires that EmCare contract with an independent professional organization to review its billing policies and procedures on an annual basis. Assisting in the case were the HHS OIG, FBI, Defense Criminal Investigative Service, Program Integrity Branch of CHAMPUS, the OIG for the Office of Personnel Management, and various state Medicaid Fraud Control Units. The relator's share, awarded to the estate of Theresa Semtner, was approximately $1.5 million. The relator was represented by Cheryl Vaught of Vaught & Connor (Oklahoma City, OK) and Robert Vogel (Washington, D.C.). Representing the Government was Laurie Oberembt of the DOJ Civil Division.

U.S. ex rel. Wells v. Huntleigh Technology PLC et al. (D NJ No. 95-95)

In May 1997, Jalopy Shoppe Inc., doing business as Breathco/Mediserv Inc., and its president Jimmy Mehaffey agreed to pay the Government **$1.35 million** to settle a *qui tam* suit alleging that the Texas medical equipment dealer submitted false Medicare claims for lymphedema pumps and sleeves, which are used to reduce swelling of the limbs. The action was brought by Ronald Wells, a medical supplier from Coral Springs, Florida. According to DOJ, Mediserv misrepresented to Medicare the product it was selling in order to obtain inflated reimbursements. Specifically, it used a procedure code that is reserved for a high standard that the pumps did not meet. This settlement follows a related 1995 settlement in which the manufacturer, Huntleigh Technology PLC,

agreed to pay the Government $4.9 million to resolve Wells' *qui tam* allegations as against Huntleigh. *See* 3 TAF QR 32 (Oct. 1995).

In addition to its settlement payment, Mediserv agreed to implement a corporate integrity agreement. The relator's share was 18 percent or $243,000. Mr. Wells was represented by Neil Getnick and Lesley Ann Skillen of Getnick & Getnick (New York, NY). Representing the Government were Assistant U.S. Attorney Janet Nolan and Marlene Gibbons of the DOJ Civil Division.

U.S. ex rel. Smith, Bouse, Passmore, and IBEW Local 479 v. Industrial Construction Services, Inc. *(ED TX No. 1:95CV368)*

In June 1997, Industrial Construction Services, Inc. agreed to pay the Government **$100,000** to settle a *qui tam* suit alleging Davis-Bacon Act violations arising from a DOJ Bureau of Prisons contract. According to the complaint, the Colorado company submitted weekly certified payroll reports that falsely stated that the applicable prevailing wage rates were being paid as listed when in fact the persons listed as laborers were doing electricians' work, and persons were listed as apprentices when the apprentice program was a sham. The fraudulent misclassifications improperly lowered the cost of salary and benefits. The individual relators, who performed electrical work for the company, brought the suit in 1995.

The complaint stated that the Government was damaged in that, had the false statements not been made, the defendant would not have been awarded the contract, and/or would not have been paid the full contract amount, and/or would have had funds withheld pursuant to the Davis-Bacon Act. Included in the settlement terms are temporary debarment provisions for the company and its principals. The relators' share was 25 percent or $25,000. The relators' counsel was John Werner of Reaud, Morgan & Quinn, Inc. (Beaumont, TX). Assistant U.S. Attorney O. Kenneth Dodd represented the Government.

U.S. ex rel. Willis v. Hughes Aircraft Co. et al. *(SD MS No. 3:93-cv-693BN)*

U.S. ex rel. McDonald v. Hughes Aircraft Co. et al. *(SD MS No. 3:94-cv-4455LN)*

In June 1997, DOJ announced that Hughes Aircraft Company and Hughes Aircraft Mississippi Inc. agreed to pay the Government **$500,000** to settle two *qui tam* suits alleging the failure to properly test military components. The suits were filed by former Hughes employees Laird Willis and Danny McDonald. According to DOJ, Hughes did not properly test certain electronic components of Advanced Capacity Mark 48 torpedoes as required under a contract, and used flawed nonconforming fasteners under several other defense contracts. Mark 48 torpedoes, which are used by nearly all modern submarines, are the primary line of defense for submarine warfare. The investigation was conducted by the Defense Criminal Investigative Service and Naval Criminal Investigative Service. The relators' share was 20 percent or $100,000. Representing the relators was Adam Morel (Birmingham, AL). The Government was represented by Gregory Woods III of the DOJ Civil Division.

U.S. ex rel. Holden and Bunora v. Laboratory Corporation of America et al. *(SD FL No. 96-6272-CIV-ZLOCH)*

In June 1997, DOJ announced that Laboratory Corporation of America agreed to pay the

Government **$700,000** to settle a *qui tam* suit alleging that it overcharged Medicare for reimbursement of car mileage by phlebotomists who drove their personal vehicles to the residences of homebound or nursing home patients to draw blood samples. The suit was filed in 1996 by Chris Holden and Maryjane Bunora. According to DOJ, LabCorp — through Florida facilities formerly owned by its subsidiary, National Health Laboratories — defrauded Medicare by overstating the mileage of the phlebotomists. The investigation was conducted by the FBI and HHS OIG. The relators' share was 16 percent or $112,000. The relators were represented by Andrew Grosso (Washington, D.C.) and Antonia Hulme (North Palm Beach, FL). The Government was represented by Assistant U.S. Attorney Laurie Rucoba and James Ward IV of the DOJ Civil Division.

U.S. ex rel. Ros v. Holmes & Narver Services, Inc. et al. *(D MD No. S-95-2107)*

In June 1997, Holmes & Narver Services, Inc. and Holmes & Narver Construction Services, Inc. agreed to pay the Government **$690,000** to settle a *qui tam* suit alleging false claims in connection with a painting contract at Aberdeen Proving Ground, Maryland. The suit was brought in 1995 by Norman Ros, a former employee of C&T Painting, Inc., a subcontractor on the project. According to DOJ, Holmes & Narver entered into an Army contract for painting services at Aberdeen Proving Ground which required application of a base plus two coats of paint to selected residential and office buildings. However, the contractor failed to apply the required three coats, and its submission of records and invoices to obtain payments under the contract was false. The matter was investigated by the Army Criminal Investigation Division, Defense Criminal Investigative Service, and FBI. The relator's share was $124,200. The relator's counsel was Terry Kolp of Kolp & Associates, Inc. (Washington, D.C.). Representing the Government was Assistant U.S. Attorney Kathleen McDermott.

U.S. ex rel. Watt v. Fluor Daniel Corp. et al. *(SD OH No. C-1-93-852)*

In June 1997, Fluor Daniel Fernald, Inc. agreed to pay the Government **$3.7 million** to settle a *qui tam* suit alleging fraud in connection with a Department of Energy contract to clean up a former uranium processing plant. The settlement is reportedly the largest ever in a non-intervention *qui tam* case. The suit was brought in 1993 by William Watt, a former Fluor Daniel project control engineer. According to the lawsuit, the company fabricated financial and performance reports, mischarged materials, design work, labor, and administrative costs, charged for unapproved or unallowed expenses, and failed to satisfy government accounting regulations. Fluor Daniel further allegedly submitted false claims on behalf of other companies that teamed with its parent, Fluor Corp., to obtain the contract. The relator's share was 29 percent or $1.07 million. Mr. Watt was represented by Phyllis Brown of Copeland & Brown Co., LPA (Cincinnati, OH), W.B. Markovits of Markovits & Greiwe Co., LPA (Cincinnati, OH), and Stanley Chesley of Waite, Schneider, Bayless & Chesley (Cincinnati, OH).

U.S. v. Nalls *(SD FL No. __)*

In June 1997, DOJ announced that it obtained a **$4.29 million** False Claims Act judgment for Medicare fraud against Miami physician Douglas Nalls, who also has been permanently enjoined from the Medicare program, from dissipating his assets, and from disposing of any of

his business records. According to DOJ, many patients for whom Nalls submitted claims had neither heard of nor been treated by him. Nalls billed as much as $11,000 per patient for unnecessary neurological testing for almost every patient, along with a battery of other costly tests including echography, echocardiography, and arterial and venous studies.

According to DOJ, Nalls' license was revoked by the Florida Board of Medicine in 1995, and during hearings he admitted that he had earlier been convicted of multiple felony counts for child and sexual abuse in Maryland. After receiving a medical license in Washington, D.C., which was revoked once it was determined he had lied about his previous record, Nalls moved to Florida, reactivated his Florida license, and came to own the Ideal Country Place School & Clinic, Inc. in North Miami Beach. The case was investigated by the FBI and HHS OIG. Handling the matter for the Government was Assistant U.S. Attorney Mark Lavine.

U.S. v. Orem Medical Corp. et al. (D MD No. WMN-95-3909)

In June 1997, DOJ announced the entry of a Consent Judgment against Orem Medical Corporation and its president, Rodney Hyson, Sr., for **$3 million** to resolve a False Claims Act suit alleging false billings under a Department of Veterans Affairs medical supplies contract. According to DOJ, under the contract Orem was required to provide VA hospitals and other government agencies medical supplies at a discounted price. However, from 1989 to 1994, the defendants engaged in a systematic pattern of mischarging by submitting invoices for payment that reflected inflated prices and failed to give the Government its negotiated discount under the contract. The Judgment requires a permanent exclusion from government contracting and programs including Medicare and Medicaid. Consent Judgments acknowledging liability and imposing terms of exclusion were also entered against other individual defendants. DOJ stated that the Judgments are not dischargeable in any bankruptcy proceeding. The investigation was conducted by the VA OIG and FBI. Assistant U.S. Attorney Kathleen McDermott handled the case.

John Merendino, Sr., M.D. et al.

In June 1997, John Merendino, Sr., M.D. and his associated health care companies agreed to pay the Government **$3.1 million** to settle False Claims Act allegations of improper Medicare claims for physical therapy services rendered at seven nursing homes in Maryland, the District of Columbia, and Virginia. The services were provided by physical therapists employed by Medical Rehabilitation Support Services (now known as QRSS, Inc.), a company owned by Dr. Merendino, and the claims were prepared by Automated Billing Service, a billing company controlled by Merendino and owned by his spouse. According to DOJ, Medicare regulations governing the provision of services in nursing homes were violated by the failure of company physicians to supervise the physical therapy and to render services that reflected a professional service in the diagnosis or treatment of injury or illness. Physical therapy was improperly billed to Medicare as incident to a physician's service and supervision in that the physicians were not present at the nursing homes at all, or sometimes for only half the day. Furthermore, when present, they did not provide any physician service for the patient or document any service to support the claims for reimbursement.

According to DOJ, Dr. Merendino and his companies, while denying liability, acknowledged that the submission of claims was not

consistent with Medicare regulations. All of the health care companies have been permanently excluded from the Medicare and Medicaid programs. Conducting the investigation were the HHS OIG and FBI. Assistant U.S. Attorneys Kathleen McDermott and Brent Gurney of the District of Maryland handled the matter.

TAF NEWS

Qui Tam Practitioner Guide

- The *TAF Qui Tam Practitioner Guide: Evaluating and Filing a Case,* prepared by Staff Attorney Gary W. Thompson, is now available. This "how to" manual focuses on issues unique to *qui tam* litigation and includes sections on evaluating the merits and viability of a case, pre-filing and practical considerations, and preparing and filing the complaint. The *Practitioner Guide* can be obtained at no charge by contacting TAF by phone, fax, or mail.

Previous Publications

- Back issues of the *Quarterly Review,* including the "1996 Year In Review," are still available in hard copy as well as on TAF's Internet site.

TAF On The Internet

- TAF's Internet presence, designed to educate the public and legal community about the False Claims Act and *qui tam,* has been updated to highlight available resources and new developments in the field. Most recently, the site has been expanded to include information on the *Schumer* Supreme Court case. TAF's site is located at http://www.taf.org.

Quarterly Review Submissions

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

Tenth Anniversary Resources

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

Qui Tam Attorney Network

- TAF is continuing to build and facilitate an information network for *qui tam* attorneys. For an Attorney Network Application or a description of activities, please contact TAF.

FCA Library

- TAF has available in its library a variety of materials on the False Claims Act and *qui tam.* The library is open to the public, by appointment, during regular business hours. To schedule a visit or to inquire about TAF's resources, please contact our Legal Resources Administrator, Amy Wilken. Submissions of case-related materials such as complaints, disclosure statements, briefs, and settlement agreements are appreciated.

Acknowledgments

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