TAF July 1995

AXPAYERS AGAINST FRAUD

False Claims Act and *Qui Tam* Quarterly Review

INSIDE...

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

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

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

Taxpayers Against Fraud, The False Claims Act Legal Center
1250 Connecticut Avenue, NW Suite 401 Washington, DC 20036
Phone (202) 296-4826 Fax (202)296-4838
Internet: taf-info@taf.org or WWW: http://www.taf.org/taf

False Claims Involving Compliance with Environmental Laws/ Constitutionality of FCA

U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc., Memorandum and Order, No. 93-C-801-S (W.D.Wisc. June 19, 1995)

Environmental compliance provisions in government contracts may give rise to a False Claims Act (FCA) violation if the contractor knowingly fails to meet such requirements, according to a Wisconsin district court. The FCA may be violated in such cases even if the contractor has made no express false statement regarding its compliance and the noncompliance does not pose any risk of monetary damage to the Government.

This case was brought by a group of *qui tam* plaintiffs that included employees of Accudyne Corp. and a nonprofit environmental foundation. The plaintiffs asserted two independent claims relating to contracts between Accudyne Corp. and the U.S. for the production of military hardware: (1) that Accudyne knowingly supplied nonconforming parts and failed to properly test completed products (Claim I) and (2) that Accudyne knowingly failed to comply with environmental compliance provisions contained in its contracts (Claim II). Accudyne's contracts contained various clauses relating to the handling and disposal of hazardous material and compliance with Clean Air Act and Clean Water Act standards. The Government elected to intervene and proceed with Claim I but declined to intervene as to Claim II, which the relators chose to pursue independently. In denying (and granting in part) a number of dispositive motions filed by all parties in the case, the court addressed a variety of issues including the effect of alleged noncompliance with environmental requirements, the constitutionality of *qui tam*, and application of the FCA's public disclosure bar.

Accudyne's Alleged Noncompliance with Environmental Requirements

The district court rejected both relators' and defendants' summary judgment motions regarding the allegation that Accudyne violated the FCA by failing to comply with certain environmental requirements in its contracts. The court found that the contractual provisions speak for themselves, and that whether Accudyne acted in violation of those provisions involved facts in dispute.

Addressing the scope of Accudyne's certifications or representations of compliance, the court noted that an express false statement is not required in order to find liability under §3729(a)(1) of the FCA. As such, the court concluded that "a contractor who knowingly fails to perform a material requirement of its contract (or performs no services at all), yet seeks or receives payment as if it had fully performed without disclosing the nonperformance,has presented a false claim to the government and may be liable [under §3729(a)(1)]." In denying defendants' motion,the court ruled that the relators properly stated a claim under §3729(a)(1) by alleging that Accudyne knowingly failed to comply with the environmental provisions yet sought payment from the Government without disclosing its noncompliance.

The district court also rejected the defendants' argument that Claim II was not supportable because the U.S. was not exposed to any financial risk as a result of Accudyne's alleged failure to comply with the environmental compliance provisions. The court stated: "If such provisions are to have effect their knowing violation must have the potential to support FCA claims even though violations do not threaten a financial interest. Accordingly, courts have consistently held that damage to the financial interests of the government is not a prerequisite to an FCA claim."

The court also denied the relators' motion for summary judgment on Claim II, noting that both whether Accudyne breached the environmental requirements and its knowledge of any such breach were facts in dispute.

Constitutionality of Act Upheld

Defendants moved to dismiss Claim II on the grounds that the *qui tam* provisions are unconstitutional. Noting that the 2nd,6th,and 9th Circuits, along with numerous district courts, "have resoundingly rejected" similar constitutional challenges,the district court proceeded to reject each of the defendants' arguments.

Defendants argued that the relators lacked standing because the controversy was between the U.S. and the defendants and the relators had not suffered injury in fact. The court disagreed, finding that standing was not at issue since the real party in interest was the U.S., which simply assigned its right to sue to the relators. Further, since relators were advancing their own funds in prosecution of the suit and were entitled to receive a share of any recovery, there was "a direct and adversarial controversy" between relators and defendants.

Defendants also argued that *qui tam* violates separation of powers principles and, more specifically, the Appointments Clause of Article II and the provision of Article II, §3 commanding that the President "shall take care that the laws be faithfully executed." With respect to both provisions, the court found that, given the substantial control the Government retains over a relator's action, executive power is not improperly usurped and relators are not vested with sufficient authority to be deemed "officers of the United States."

Finally, citing a case which held that private attorneys appointed to be criminal prosecutors must be personally disinterested, defendants claimed that the due process clause is violated by permitting private citizens with an interest in the outcome of the proceeding to prosecute claims on behalf of the U.S. The court rejected this argument, noting that the cited authority involved criminal (not civil) prosecutions and did not suggest that appointing a prosecutor with an interest in the litigation's outcome rose to the level of a due process violation.

Public Disclosure Bar Does Not Apply

The court also rejected the defendants' argument that the §3730(e)(4) jurisdictional bar applied to Claim II. First, while certain facts were publicly disclosed within the meaning of the Act (e.g., that Accudyne had entered into the contracts at issue and that a lead fluoroborate spill had occurred at an Accudyne facility), others cited by the defendants were not.

Specifically, the court found that neither (1) notices of deficiencies and noncompliance which were sent to Accudyne by the Wisconsin Department of Natural Resources (DNR), nor (2) a DNR investigation which had been prompted by complaints from relator John Fallon, qualified as publicly disclosed information under §3730(e)(4). Observing that the noncompliance notices were not received, viewed, or disclosed by or to anyone other than Accudyne, the court stated that the mere creation of such a document by a state agency is not a public disclosure under the FCA. The court refused to extend the definition of public disclosure to include "documents which, though theoretically accessible by a member of the public through an appropriate administrative request for documents, were never the subject of publication or notification by the agency." Moreover, the DNR investigation was "even more clearly" outside of "the realm of publicly disclosed information." The investigation was not completed and documents containing the allegations in the complaint were not created prior to Fallon's filing of the suit.

With respect to the information that was publicly disclosed, the court necessarily addressed "whether that disclosure amounts to 'allegations or transactions' upon which the action is based." Applying the D.C. Circuit's formulation of §3730(e)(4)(A) in Springfield Terminal v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994), the district court concluded that, even "providing a liberal view as to that which was available to the public, it is clear that such information would not supply the allegations of fraud or the elements necessary to such an allegation." The essential elements of Claim II were the existence of the contract provisions requiring environmental compliance, the failure to so comply, and the submission of claims in such a way as to induce the Government to make payments believing there had been compliance. The publicly available information at most established that Accudyne entered into the government contracts and subsequently committed acts that rendered it noncompliant with environmental laws. Therefore, the relators were not precluded from bringing Claim II for lack of jurisdiction under §3730(e)(4).

The suit was settled later in June 1995. (See "*Qui Tam* Settlements and Judgments" below in this issue.)

Public Disclosure Bar and Original Source Exception

U.S. ex rel. Eitel v. Evergreen International Airlines Inc. et al., No. C94-1017Z (W.D.Wash. May 31, 1995)

A *qui tam* suit based upon allegations publicly disclosed by the media triggered the FCA's public disclosure bar according to a Washington district court. Because the relator played no part in the public disclosures, the court held that the "original source" exception did not apply and dismissed the suit for lack of subject matter jurisdiction.

In 1989, the relator Eitel worked for one month as a pilot trainee for Evergreen International Airlines, which had been awarded a two year contract with the U.S. Postal Service (USPS) to transport mail. Four years after voluntarily leaving the company, Eitel notified the Government of allegedly fraudulent acts by Evergreen. In 1994, Eitel filed his *qui tam* suit alleging that the defendants conspired in a fraudulent scheme by paying illegal gratuities to obtain two USPS contracts and inducing Postal Service officials to provide various types of preferential treatment.

The court singled out several newspaper articles that had previously questioned Evergreen's procurement of the contracts, including articles that were published prior to Eitel's employment with Evergreen. One of the articles summarized the findings of a USPS audit that was critical of the contractual arrangements and their amendments. Another questioned how Evergreen obtained one of the contracts when its bid exceeded that of five other finalists. The court concluded that Eitel's complaint essentially repeated the allegations contained in the USPS audit and newspaper reports.

According to the court, Eitel did not dispute that the factual allegations in his complaint were based on information already in the public domain. However, Eitel argued that his complaint supplied a previously undisclosed essential element of Evergreen's alleged fraud, i.e., its intent to defraud. The court rejected this contention, finding that "intent to defraud" is not a required element of a FCA violation. Instead, the Act requires only actual or constructive knowledge of the claim's falsity, which one can deduce from the public disclosures. The court also noted that, even if intent was a necessary element, Eitel presented no direct evidence of intent, and instead merely inferred intent from the publicly disclosed factual allegations.

In determining whether the "original source" exception applied, the court applied the Wang (U.S. ex rel. Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992)) "third prong" test requiring Eitel to have directly or indirectly assisted in the audit and media public disclosures. The court found that Eitel did not assist in the public disclosures.

U.S. ex rel. Barajas et al. v. Northrop Corporation, Memorandum Opinion and Order, No. CV 87-7288 KN (Kx) (C.D.Cal. May 9, 1995)

A relator who triggered a criminal investigation and subsequent indictment for false testing and false certification of a defective component was not jurisdictionally barred under §3730(e)(4) from pursuing the defective component claim, even though he learned specific information about the claim from public disclosures regarding the criminal investigation. The 9th Circuit had set aside the district court's prior holding that the relator's action was barred by §3730(e)(4) and directed the lower court to conduct a factual inquiry as to whether the Government discovered the fraud as a result of a criminal investigation prompted by the relator. On remand, the district court held that the relator played some part in the Government's discovery of the defective component fraud and was therefore an "original source" that could pursue the claim.

In January 1987 Barajas, a Northrop test technician, reported to the Government that Northrop had falsified test data on the Flight Data Transmitter (FDT), a critical component of the Air Launched Cruise Missile (ALCM) guidance system. A few weeks later, Barajas told the Government that test failures were occurring right after each unit was exposed to sub-zero temperatures. Barajas, along with a fellow employee, Meyers, filed a *qui tam* complaint in October 1987 alleging that Northrop had knowingly falsified testing of the FDTs and that the FDTs contained substandard components. Defective damping fluid, the specific cause of the failures, was not mentioned in the complaint.

After a lengthy investigation, in February 1989 the Government intervened in the suit, but only as to the false testing allegations. Simultaneously, the Government conducted a separate criminal investigation that resulted in a June 1989 indictment of Northrop for false testing and false certification of defective damping fluid. In August 1990, the Government dropped the defective parts allegations in exchange for Northrop pleading guilty to false testing, paying a $17 million criminal fine,and settling the civil claims for $8 million.

The 1990 settlement with Northrop did not include the *qui tam* allegations the Government chose not to join. In November 1990, Barajas filed an amended complaint that added damping fluid fraud allegations almost identical to the charges in the Government's criminal indictment. In December 1991, the court dismissed Barajas' severed claim, finding that Barajas had based his allegations on a "public disclosure" — the criminal indictment — and that he was not an "original source" because he had not provided the Government with specific information regarding the damping fluid prior to filing his complaint. On appeal, the 9th Circuit set aside the ruling and remanded the case with questions of fact for the district court.

Barajas is an "Original Source" If He "Played Some Part" in the Public Disclosure of the Damping Fluid Fraud Allegation

According to the 9th Circuit, the district court was required to determine whether the "government's disclosure of the damping fluid allegations was the result of a criminal investigation that was instigated as a consequence of the information Barajas provided to the government." If the discovery of the alleged fraud was "prompted by a source of information wholly independent of Barajas," then Barajas' allegations would trigger the public disclosure bar. Further, Barajas was "an 'original source' if he played some part, whether direct or indirect, in the 'public disclosure' of the damping fluid fraud." The 9th Circuit explained that the FCA's reference to "an original source," which suggests that more than one "original source" can bring suit, and §3730(d)(1), which provides a reduced share for suits "based primarily on the disclosures of specific information," indicate that permissible relators include those who provide "some of the information related to the claim even if the essential elements were already publicly disclosed."

The district court considered the "public disclosure" and "original source" factual questions posed by the 9th Circuit to be essentially the same. Both were answered by determining "whether the government's criminal investigation, which led to the source of the damping fluid allegations, was instigated in response to Barajas' disclosure or whether that discovery was prompted by a source of information wholly independent of Barajas." If Barajas' whistleblowing either directly or indirectly led to the government investigation, then Barajas was an "original source" and the public disclosure bar would not apply.

Barajas' Information Led to Discovery of Damping Fluid Fraud

The district court concluded that Barajas' information did, in fact, lead to the discovery of the damping fluid fraud. After the Government learned of Barajas' allegations regarding falsification of FDT test data, it initiated independent testing of the FDTs at two Air Force bases. The testing revealed that the damping fluid was prematurely freezing. According to the court, there was sufficient evidence in the record to establish the link between the Government's investigation of Barajas' false testing allegations and the freezing damping fluid discovery which "emerged" from that investigation.

The court rejected Northrop's contention that the Air Force's testing of FDTs had been routine since 1985 and any discovery of the damping fluid defect was independent of Barajas' information. To the contrary, the court concluded that the damping fluid problem was only discovered after the testing procedures were changed, and the change was initiated as a result of his information. According to the court, as long as Barajas' information led to the discovery of the fraud, then his action was not subject to the §3730(e)(4) public disclosure bar.

U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc., Memorandum and Order, No. 93-C-801-S (W.D.Wisc. June 19, 1995)

See "False Claims Involving Compliance with Environmental Laws/Constitutionality of FCA" above in this section.

Court of Federal Claims Jurisdiction

Stinson, Lyons & Bustamante, P.A. v. U.S., No. 93-771C (US FedCl May 8, 1995)

The U.S. Court of Federal Claims (COFC) ruled that it lacks jurisdiction to determine whether a *qui tam* relator qualifies as an "original source" within the meaning of the FCA. In this case, a district court had already dismissed the relator's case pursuant to the FCA's public disclosure bar. The COFC declined to hear the relator's claim to recover a share of the Government's $27 million settlement with the defendant which was obtained in an independent action.

On May 8, 1988, the law firm of Stinson, Lyons & Bustamante filed a *qui tam* suit against Provident Life and Accident Insurance Co.,alleging violations of the Medicare secondary payer laws. On January 12, 1989, the Government elected not to intervene in the suit. On April 5, 1989, the Government filed an alternate remedy complaint against Provident in the U.S. District Court for the District of Columbia,seeking declaratory and injunctive relief and damages. The Government thereafter reached a $27 million settlement with Provident.

Stinson's *qui tam* suit was originally filed in the Southern District of Florida, where subject matter jurisdiction was sustained, but then was transferred to the Eastern District of Tennessee. The Tennessee court reconsidered the Florida court's jurisdictional ruling and dismissed Stinson's claim with prejudice, holding that Stinson did not qualify as an "original source" of the publicly disclosed information upon which its suit was based.

Pending Stinson's appeal of the Tennessee court's dismissal, the parties settled the suit for an undisclosed amount. Provident agreed to reimburse Stinson for a portion of its costs and attorneys' fees, and Stinson agreed to dismiss with prejudice its FCA action, while reserving the right to share in the Government's recovery in an alternate remedy proceeding. The district court approved the settlement on June 25, 1992.

When the Government and Provident settled for $27 million, Stinson requested a share of between 10 and 25 percent of the proceeds. The Government, however, maintained that Stinson was not entitled to any share because it had failed to qualify as a *qui tam* relator. Accordingly, Stinson filed suit in the COFC seeking a statutory share of the $27 million recovery.

COFC Lacks Jurisdiction to Determine Entitlement Under FCA

Stinson argued that the COFC had jurisdiction under the Tucker Act, which grants jurisdiction to the COFC over any claim against the U.S. arising under a federal statute that can fairly be interpreted as mandating the payment of remedial compensation. Specifically, Stinson asserted that the Government was wrongfully withholding compensation to which it was entitled as a *qui tam* relator pursuant to the alternate remedy and relator's share provisions at 31 U.S.C. §3730(c)(5) and (d)(1).

The COFC found U.S. ex rel. LeBlanc v. Raytheon Co., 1995 WL 121594 (Fed. Cir. Mar. 23, 1995), to be applicable. In that case, the 1st Circuit had affirmed the district court's dismissal of the relator for lack of subject matter jurisdiction, finding that LeBlanc was not an "original source" of the publicly disclosed information upon which he relied in bringing his *qui tam* suit.

LeBlanc then filed suit in the COFC, alleging constitutional and statutory violations and seeking damages from the Government. He advanced two grounds for his damages claim: the Government's interference with his *qui tam* suit against Raytheon; and Tucker Act jurisdiction based on the FCA, which he argued confers a substantive right on relators to a share of any recovery from the defendant. The COFC dismissed all of LeBlanc's claims for lack of subject matter jurisdiction, and the Federal Circuit affirmed.

The Federal Circuit "firmly rejected" the jurisdictional argument made by LeBlanc and "similarly made here by Stinson." To prove damages against the U.S., LeBlanc had to show an entitlement to recover money under the FCA. However, the Federal Circuit held that the COFC does not have jurisdiction "to determine that LeBlanc had a valid *qui tam* suit under the [FCA]. . . because *qui tam* suits may only be heard in the district courts." Moreover, a district court had found that LeBlanc's suit was jurisdictionally barred under the FCA.

Likewise, the COFC reasoned, Stinson had to show an entitlement to money that the Government wrongfully denied. In order to prove such an entitlement and rebut the Government's motion to dismiss, Stinson had to demonstrate that it was an "original source" of the publicly disclosed information upon which its *qui tam* complaint was based. Even if no court had yet determined whether Stinson's *qui tam* action could survive the FCA's jurisdictional bar, the COFC had no authority to make such finding. According to the COFC, a federal district court must first determine the relator's entitlement to a FCA recovery before the relator can seek redress in the COFC.

Stinson Collaterally Estopped by District Court Finding

In this case the district court had already determined that Stinson's *qui tam* action was barred by §3730(e)(4). Accordingly, the COFC found Stinson collaterally estopped from challenging that ruling in another forum. The court concluded that, under the facts presented, "the FCA does not support Tucker Act jurisdiction in this court, and, on this basis, this court further holds that it lacks subject matter jurisdiction to adjudicate Stinson's claims."

Statute of Limitations

U.S. v. Rivera, 1995 U.S. App. LEXIS 13730 (1st Cir. June 6, 1995)

Reversing a judgment for nearly $2 million, the 1st Circuit ruled that the Government filed its FCA case approximately three months after the applicable six-year statute of limitations had run. According to the court, a claim was presented for purposes of triggering the FCA's statute of limitations when a private lender submitted an application to the Government for reimbursement of a federally insured loan, not when the defaulted loan was later formally assigned to the Government.

This case involved a fraud scheme carried out by two individuals in the late 1970s in connection with a $12.46 million mortgage loan for renovation and expansion of a hospital in Puerto Rico. The Department of Housing and Urban Development (HUD) insured the loan pursuant to the National Housing Act. In 1982, the defendants were both criminally convicted of conspiring to defraud the Government and making false statements in support of fraudulent claims. The defendants' fraud resulted in the private lender making an inflated claim to HUD for reimbursement on the defaulted federally insured loan. The lender applied for HUD reimbursement on July 17, 1979 and formally assigned the mortgage to HUD on October 26, 1979. The Government's FCA action was instituted on October 25, 1985. The district court granted summary judgment in favor of the Government, awarding it more than $1.9 million. Defendants appealed, arguing that the Government's civil action was filed too late.

"Claim" Presented When Demand for Money Was Made to Induce Payment

The main question before the 1st Circuit was at what point did the private lender's interest in federal reimbursement become a "claim" for FCA purposes and therefore trigger the Act's statute of limitations. The Government argued that a claim was not presented until October 26, 1979, when the lender, Merrill Lynch, formally assigned its mortgage on the property, thereby meeting a condition precedent to HUD's obligation to pay Merrill Lynch under the insurance contract. The court, however, found that a claim was made on July 17, 1979, when Merrill Lynch filed with HUD the detailed "Mortgagee's Application for Partial Settlement," which set forth specific financial information about the defaulted loan including the amount in default and the unpaid balance.

The 1st Circuit noted that in U.S. v. McNinch, 356 U.S. 595,599 (1958), and U.S. v. Neifert-White, 390 U.S. 228, 230 (1968), the Supreme Court had defined a "claim" under the FCA as a "demand for money" that is "made with the purpose and effect of inducing the Government immediately to part with money." The 1st Circuit instructed that, in deciding whether a given false statement is a claim or demand for payment, "a court should look to see if, within the payment scheme, the statement has the practical purpose and effect, and poses the attendant risk, of inducing wrongful payment."

According to the court, the contents of the July 17 application indicated that it was a "demand for money." In setting forth both the amount Merrill Lynch expected to receive and the method of payment, the application resembled an invoice, bill, or other demand for government money. The court explained: "The completed form can be read as essentially saying to HUD, 'We are owed this amount under the terms of our insurance contract'."

Moreover, the application's contents had the purpose and effect of inducing the Government to part with its money. Inflated because of the defendants' fraud, the figures in the application were what Merrill Lynch claimed to be owed. The document thus "created the risk that the government would, in reliance upon those figures, be induced to pay the 'fraudulent' amount."

The 1st Circuit rejected the Government's contention that a claim was not filed until the October, 1979 mortgage assignment was made. Instead, the court found that the assignment "merely transferred the mortgage to the government, in compliance with a condition to payment which had to be met, as a matter of course, in effectuating the July 17 claim." The assignment contained no dollar figures and did not purport to demand money.

Delay in Payment Does Not Negate Claim Under Act

The Government, citing U.S. v. McNinch, argued that a request for payment must cause an "immediate financial detriment" to the Government to constitute a "claim" under the FCA. The Government contended that the key factor is the legal effect of such a request, as specified under the terms of the contract. Because, under the terms of the insurance contract, submission of the July 17 application did not give rise to an instant unconditional obligation to pay Merrill Lynch, it was not a "claim" according to the Government.

The 1st Circuit rejected this argument, finding that the Government misread McNinch and that the FCA covers all claims that are made to induce the Government to part with money, not only claims that trigger the Government's legal obligation to pay. The court held that the July 17 application had the "practical effect of inducing payment in a sufficiently 'immediate' manner" to satisfy the Supreme Court's standard. The fact that payment was not literally "immediate" (with nearly six months lag time between the filing of the application and the transfer of funds) was not itself dispositive. Similar delay can occur in the Government's payment on an invoice or loan application, both clearly claims under the Act.

Government's Action Time Barred

Applying the six-year statute of limitations contained in the 1982 version of the FCA, the 1st Circuit held that the Government's action was barred. The Government had filed suit on October 25, 1985, more than six years after the July 17, 1979 false claim.

Section 3730(h) Retaliation Claims

U.S. ex rel. Mikes v. Strauss et al., Opinion and Order, No. 92 Civ. 2754 (WCC) (S.D.N.Y. June 20, 1995)

A *qui tam* plaintiff who alleged that her former physician employers submitted false Medicare charges and improperly fired her provided sufficient evidence to preclude summary judgment, a New York district court ruled. However, the court held that the employment claims,including the §3730(h) claim, were subject to an arbitration clause in the relator's employment agreement.

This *qui tam* case arose out of Mikes' employment with three doctors. Mikes claimed that while employed by the doctors she observed spirometry tests and MRIs performed excessively, unnecessarily, and improperly. She further alleged that the doctors performed the MRIs at facilities in which they had a financial interest and that paid them yearly "consulting fees." Mikes also claimed she challenged the doctors about their testing practices but her complaints were treated with indifference. Subsequently Mikes was notified that she was being terminated for failing to maintain proper hospital admitting privileges. Mikes alleged that her discharge was in response to her complaints about defendants' improper testing and fraudulent billing practices.

In a response to a series of defendant motions and instructions from the court, Mikes filed an amended complaint and an affidavit setting forth her allegations and supporting facts. After examining the complaint and affidavit,the court found that Mikes met her prima facie burden as to each liability theory and raised genuine issues of fact sufficient to defeat a summary judgment motion.

A Threat to File a *Qui Tam* Suit Not Necessary to State a Prima Facie §3730(h) Claim

In addressing whether Mikes set forth a prima facie retaliation case under §3730(h), the court outlined the three necessary elements as formulated in Robertson v. Bell Helicopter Textron Inc., 32 F.3d 948 (5th Cir. Sept 26,1994): (1) that the individual engaged in conduct protected under the statute; (2) that defendants were aware of the conduct; and (3) that the individual was terminated in retaliation for her conduct. In order to establish the first element, the court noted that it was not necessary to have actually filed suit under the FCA. According to the court, Mikes' observation of the misused tests, her investigation of individual patient histories indicating the tests were overutilized, and her confrontation with the defendants were protected conduct because they provided a reasonable basis for bringing a *qui tam* action.

On the question of defendant knowledge, the court declined to interpret Robertson as establishing a bright line rule that an employee must expressly accuse the employer of defrauding the Government or threaten a *qui tam* action. Rather, the court broadly interpreted Robertson as formulating a "notice rule." That is, an employee must produce sufficient facts from which a reasonable jury could conclude that the employer discharged the employee because it had reason to believe, based upon her activities, that the employee was contemplating a *qui tam* action. In the view of the court, to insist upon an express or implied threat to sue was a wholly unrealistic standard in the employment context, since any employee lodging such threats could "scarcely expect a long and happy tenure."

According to the court, Mikes' actions were easily distinguished from those in Robertson, where the employee's job required that he look into the billing practices of the company. Mikes openly complained to one of the doctors about the misuse of the tests and informed him that he could not charge the tests to Medicare. In addition,she inspected his private files and accused him of overutilization. Furthermore, the doctor allegedly became enraged with Mikes over her inspections. Taking these activities as a whole, the court found that a reasonable jury could conclude that the defendants knew Mikes was investigating their billing in contemplation of a *qui tam* suit.

In considering the third element, that the defendants terminated the plaintiff because of her protected conduct, the court reasoned that Mikes had raised an issue of fact regarding the actual reason for the firing. Although the defendants argued that numerous valid reasons for her firing existed, the court ruled that the defendants must "prove affirmatively by a preponderance of the evidence that the same decision would have been made even if plaintiff had not engaged in protected activity." Although the stated reason for the firing was, among other things, Mikes' failure to obtain admitting privileges at one particular hospital, her application for privileges was pending at the time of her termination and she had obtained privileges at all other relevant hospitals. Consequently, the court ruled that Mikes had sufficiently called into question the defendants' stated reason for her termination so as to preclude summary judgment.

Mikes' *Qui Tam* Complaint Not Covered by Employment Agreement's Arbitration Clause

The defendants had requested that all issues not dismissed by the court,including the *qui tam* claim, be submitted to arbitration since Mikes' employment contract included an arbitration clause. Without difficulty, the court concluded that Mikes' *qui tam* claim was clearly outside the scope of her employment agreement and thus not covered by the arbitration clause. The agreement related solely to the terms of her employment, and the *qui tam* claim did not touch upon employment status. Mikes, according to the court, could have brought the suit even if she had not been an employee. Furthermore, the Government is the real party in interest in a *qui tam* suit. Since the Government was not a party to the employment agreement, it could not be bound by its terms.

Mikes' Retaliation Claim Must Be Resolved Through Arbitration

The court distinguished the retaliatory discharge claim from the *qui tam* claim as involving issues surrounding the terms and conditions of employment which were contained in the employment agreement. The court reasoned that, in the context of statutory causes of action,the general policy is to give effect to arbitration agreements unless Congress demonstrates a contrary intent. Applying this test, the court found that neither the express language nor the legislative history of §3730(h) addressed its amenability to arbitration.

Additionally, the court rejected Mikes' contention that the FCA's express public purposes were in direct conflict with private dispute resolution. Mikes had argued that, given the overall deterrent role of the statute, the arbitrability of the *qui tam* action and retaliatory discharge claim were necessarily linked. The court, however, distinguished §3730(h) from the *qui tam* claim, finding §3730(h) to be primarily remedial in nature. According to the court, the purpose of providing a remedy to an employee terminated for whistleblowing was in no way inhibited by arbitration since arbitration still offered Mikes a forum in which to fully vindicate her claim.

Scope of Liability

U.S. v. Village of Island Park et al., *1995 U.S. Dist. LEXIS 6938 (E.D.N.Y. May 17, 1995)*

A New York municipal village whose employees steered federal housing subsidies to friends and relatives with the effect of excluding minorities and subverting minority participation goals was found liable for filing false claims. The district court held that the entire amount of federal funds paid out to the Village was the appropriate measure of damages and that civil penalties applied to each monthly mortgage subsidy claim.

This case involved the administration of a federal housing program by the Village of Island Park, New York (the Village) between 1979 and 1983. Rather than allow homes financed by the Department of Housing and Urban Development (HUD) to be obtained on a first-come, first-served basis after public announcement as required by federal law, the Village pre-selected certain individuals, including friends and relatives, for receipt of the housing. These individuals filed application letters before the housing program was publicly announced, and the Village stamped the letters as arriving the first morning after the announcement. Further, while the Village had agreed to promote minority participation in the housing program, it acted in a manner that excluded minority recipients. As a result, the Village caused the Government to pay out approximately $650,000 in federal Community Development Block Grant (CDBG) funds, as well as an undetermined amount of mortgage subsidies, that were not put to their proper use. The Government's suit named the Village as a corporate entity and certain Village officials.

Village Liable for Acts of Clerk Who Illegally Administered HUD Program

The case was before the district court on a motion for summary judgment. Addressing the Village's liability for the acts of its program administrator (the Village Clerk), the court followed FCA precedent regarding the applicability of respondeat superior. Prior case law had established that a corporation is vicariously liable for acts "committed by an employee of a corporation who is acting within the scope of his authority and, at least in part, for the employer's benefit," or if the employee "acted with apparent authority, even if the acts do not benefit the corporation at all."

The court found that the administration of HUD funds was within the scope of the Village Clerk's duties, that the Village Clerk performed the acts upon which the Government based its claim during regular business hours, and that the Village was actively involved in the housing program and took credit for how it was administered. The Village produced no evidence that it or any of its officers contested the clerk's illegal acts. Therefore, the court concluded that the clerk's acts could provide the basis for the Village's FCA liability under principles of respondeat superior.

The Village's Fraudulent Course of Conduct Triggers Liability Under the False Claims Act

In what it acknowledged was a broad reading of the FCA, the court held that the "fraudulent scheme" for administering the federally funded housing program constituted the type of conduct the FCA was intended to reach. Here the purchasers were chosen in violation of the conditions on which the program was approved, including the condition that selections be made on a first-come, first-served basis and the condition that a diligent good faith effort be made to comply with affirmative minority marketing goals. Those goals were subverted by the prevention of any non-white qualified Village applicants from obtaining homes. The court concluded that finding this scheme to be a violation of the FCA was consistent with other courts' broad reading of the Act.

In addition to the Village's liability for its fraudulent scheme, the court predicated a finding of liability on numerous false statements made by the Village in participating in the housing program. One of the program participation agreements signed by the Village explicitly prohibited racial discrimination. Furthermore, the Village Clerk, among other things, falsely stated in a letter to HUD that the Village had used a first-come, first-served selection method.

Fraudulent Conduct and Statements Became "Claims" When Innocent Mortgagee Submitted Claims for Mortgage Subsidies

The Village's fraudulent course of conduct resulted in HUD-subsidized mortgages. When the lender innocently submitted claims to HUD for payment on those mortgages, "the fraudulent course of conduct pursuant to which the mortgages were approved emerge in 'full vigor' and become part of those claims, which therefore constitute false claims within the meaning of the Act." Additionally, according to the court, a separate basis for FCA liability existed with respect to each monthly mortgage subsidy claim submitted by the lender.

Government Knowledge of Falsity Not a Defense

The district court joined a growing list of courts to find that government knowledge of a claim's falsity does not automatically bar an action under the FCA. Applying <u>U.S. ex rel. Hagood v. Sonoma County Water Agency</u>, 929 F.2d 1416 (9th Cir. Apr. 2,1991),the court held that government knowledge of falsity is not necessarily a defense but can be relevant to show the defendant did not submit the claim with actual or constructive knowledge. In this case, the court concluded that it was undisputed that the Village knowingly caused false claims to be submitted. In addition, the reason the Government continued to pay mortgage subsidies after it became aware of the Village's fraudulent scheme was that it was already contractually bound to make such payments.

Finally, the court granted the motion for summary judgment against the Village but found facts in dispute as to whether certain individual defendants were part of a conspiracy to submit false claims.

Retroactivity

Ruling on the same day, the 9th Circuit and a California district court decided in separate cases that the pre-1986 provision barring *qui tam* cases based upon information in the Government's possession did not apply even though the defendant conduct occurred prior to the enactment of the 1986 amendments to the FCA. In examining whether the less restrictive amended law should govern, both courts applied the "retroactivity" test established in <u>Landgraf v. USI Film Products</u>, 114 S.Ct. 1483 (1994). Under <u>Landgraf</u>, the first step of analysis involves an examination of the statutory language and legislative history to determine whether Congress prescribed the proper reach of the statute. If no such prescription is found, the analysis focuses on whether the particular amended provision will have "retroactive effect," that is, impair substantive rights existing at the time of the conduct, increase liability for past conduct, or impose new duties upon completed transactions. If there is such an effect, there is a presumption against retroactive application. With reference to the FCA's amended jurisdictional bar, both courts found there was no prohibited "retroactive effect" in applying the amended law to *qui tam* cases involving pre-1986 conduct.

<u>U.S. ex rel. Anderson v. Northern Telecom, Inc.</u>, 1995 U.S. App. LEXIS 8969 (9th Cir. Apr. 20, 1995)

A relator who in 1988 notified the Government prior to filing a *qui tam* suit regarding fraud that allegedly occurred before 1986 should not have been barred by the pre-1986 government notice jurisdictional provision, according to the 9th Circuit. Because the relator acted after the 1986 jurisdictional amendment and the amendment changed the consequences of his conduct only (not the defendant's), application of the amended law was proper.

In 1988, Anderson told the FBI that Northern Telecom had knowingly sold defective digital telecommunications switching systems to the U.S. Army. In 1990, Anderson filed his *qui tam* suit. The Government chose not to intervene. Most of the switches at issue were delivered and paid for prior to 1986. The district court dismissed the claims regarding these switches pursuant to the pre-1986 FCA provision that barred *qui tam* actions when the Government was already aware of the fraud.

Amended Jurisdictional Bar Only Affects the Relator and Does Not Change the Legal Consequences of Defendant's Conduct

Under the pre-1986 law, Anderson's suit was barred because the Government had notice of the claims before the suit was filed, and there was no "original source" exception. Therefore, the appellate court had to determine whether the lower court correctly applied the prior law rather than the 1986 version. The 9th Circuit adopted the Supreme Court's Landgraf test and concentrated its inquiry on the "conduct that would be affected by the law."

The 9th Circuit noted that, if a statute changes legal consequences of conduct that occurs after the law goes into effect, it operates prospectively and there is no issue of retroactivity; that is, there is no "retroactive effect." In this case,the 1986 changes to the jurisdictional provision did not alter the legal consequences of the defendant's pre-1986 conduct. Clearly, at that time Northern Telecom did not have the right to submit a false claim; if it did so, it "became liable and remained liable to the government and potential *qui tam* relators." With the more relaxed jurisdictional provisions enacted in 1986, Congress had only changed the consequences of the relator's conduct. Because in this case the relator's notification and filing of suit occurred after the 1986 amendments went into effect, the 9th Circuit concluded that the district court must apply the 1986 public disclosure bar and original source exception, not the pre-1986 government notice bar.

FCA is Targeted at Lies, Not Innocent Mistakes or Mere Negligence

On another issue, the 9th Circuit affirmed the dismissal of one of Anderson's claims regarding alleged defective switches because he failed to produce sufficient evidence to support an inference of fraud. The court stated that a FCA claim must show a "knowing presentation of what is known to be false," and distinguished this from "innocent mistakes or mere negligence." In short, the FCA does not address error but targets "lies."

The court summarized the course of events regarding this claim as one in which the "switch was installed, it had bugs, the bugs were fixed," after which Northern Telecom billed the Army and was paid. Anderson's only evidence was that the switches did not work properly when installed. The Army saw there was a problem, and, after the Army complained, Northern Telecom worked to fix the switches. It was not until after the Army accepted the fixed switches that Northern Telecom submitted claims for payment. Therefore, according to the court, there was no evidence of a "knowing presentation" of a false claim.

U.S. ex rel. Newsham and Bloem v. Lockheed Missiles and Space Company, Inc., Order Granting in Part and Denying in Part Lockheed's Motion for Reconsideration, CA No. C 92-20591 JW (N.D.Cal. Apr. 20, 1995)

In a decision addressing the applicability of several of the 1986 FCA amendments, a California district court ruled that the amendments regarding jurisdiction, statute of limitations, attorneys' fees, relator's share, and burden of proof apply to a case involving alleged fraud that occurred prior to 1986. On the other hand, the 1986 amendments to the knowledge standard and damages and penalties provisions do not apply to the pre-1986 conduct.

The relators in this case had discovered the alleged fraud in 1984, notified the Defense Contract Audit Agency (DCAA), and later filed a *qui tam* suit in 1988. The case was before the district court on Lockheed's motion for reconsideration of a 1989 ruling by a district judge that the 1986 amendments

sworn and/or reported that defendants failed to conduct proper examinations. Moreover, defendants have acknowledged that they have been paid for thousands of examinations, vastly expanding the universe of possible fraudulent activity." The Government also sought intervention because during discovery the defendants had raised certain privileges that the Government maintained would not be applicable against the U.S.

Unable to identify case law interpreting "good cause," the court relied upon legislative history to support intervention in this instance. The court cited the 1986 Senate Report statement that §3730(c)(3) provides the Government with the option of intervening after an initial declination in "situations where new and significant evidence is found" which "escalate[s] the magnitude or complexity of the fraud."

Expanded Discovery Not Unduly Prejudicial to Defendants

The defendants opposed the Government's intervention based on an argument that it might subject them to broader discovery. The court responded that, absent a showing of undue prejudice, the broadening of discovery is generally not a basis for denying intervention. In this case, intervention would not unduly prejudice the defendants because it would not result in duplicative discovery or undue delay; the action was in its initial stages and discovery had only recently begun.

Standing To Challenge Government Settlement

U.S. ex rel. Papazian and Hanna v. American Products Industries, Inc., dba Paramount Citrus et al., 1995 U.S. App. LEXIS 14267 (9th Cir. June 9, 1995)

Relators who filed a *qui tam* action after reading about a fraud settlement in the newspaper did not have standing to challenge the settlement, even though the relators had notified the Government of the defendants' fraud in the first place. The 9th Circuit upheld the dismissal of the *qui tam* complaint on the grounds that DOJ regulations delegating the authority to compromise claims do not create a right of action for private parties to challenge the validity of settlement agreements.

In April 1991, Papazian and Hanna met with a Defense Criminal Investigative Service (DCIS) agent to discuss allegations that the defendants were selling adulterated juice products to the Government. In September 1991, the U.S. Attorney's Office accepted the case for criminal prosecution. According to the 9th Circuit's review of the record, the DCIS agent learned in April 1992 that Papazian and Hanna were planning to file a *qui tam* suit; however, the agent did not have any discussions with them regarding the proper time to file, nor did he make any representations that the Government would give them a chance to file their *qui tam* suit before it filed its own civil suit. In June 1992, the Government reached two settlement agreements, with Paramount for $6 million and with an individual defendant for $900,000. Papazian and Hanna read about the settlements in the newspaper and subsequently filed a *qui tam* suit against the parties the Government had settled with and an additional defendant not part of the settlement agreements.

District Court Dismisses Settled Claims

The Government argued for dismissal of the settled claims because Papazian and Hanna failed to file their *qui tam* suit prior to the Government's settlement and therefore had no statutory vehicle for seeking a share of the settlement proceeds. The relators, in turn, argued that the Government had defrauded them by promising them a chance to file their *qui tam* suit first. In ordering a partial dismissal, the district court concluded that the FCA does not require the Government to assist potential relators in filing their complaints and found that the Government had made no false representations to Papazian and Hanna.

Papazian and Hanna then argued that the settlement agreements were void because they had not been properly authorized under DOJ regulations. Without ruling on whether the relators had standing to challenge whether DOJ regulations had been met, the district court concluded that the settlement agreements were properly authorized.

DOJ Regulations Do Not Create Right of Action for Relators to Challenge Validity of Settlement Agreements

In affirming the lower court dismissal, the 9th Circuit rejected relators' argument that DOJ's internal regulations regarding settlement authority permitted them to challenge the settlement agreements. The court noted numerous reasons why these regulations fall into the category of "rules of agency organization, procedure, or practice" — so-called "interpretive rules" — as opposed to those having the "force and effect of law." Because they are merely interpretive rules, the DOJ regulations "do not create a private right of action for private parties to challenge DOJ contracts."

The 9th Circuit further found that the single exception to this general rule did not apply here. The Government may be estopped from voiding a contract where a contracting party reasonably relies on an authorizing regulation to his detriment. However, in this case the relators were not contracting parties, but instead strangers to the contract. Moreover, they had not reasonably relied to their detriment on the regulations. While the relators alleged detrimental reliance on misrepresentations by the Government, this allegation was without basis according to the district court and, in any event, was not relevant to establishing the relators' standing to challenge the settlement agreements.

Relator's Share of Undisclosed Government Settlement

<u>U.S. ex rel. Neher, as Personal Representative of the Estate of Arthur P. Williams v. NEC Corp.</u>, No. 92-2854 (11th Cir. Apr. 28, 1995)

In a strongly worded opinion, the 11th Circuit held that the relator, a former government employee, was entitled to a share of the Government's undisclosed $34 million settlement with the defendant, where the Government had not intervened in the *qui tam* lawsuit and failed to notify either the relator or the court about the settlement, as required by the FCA. The appellate court concluded that the Government's settlement with NEC Corp. constituted an election to intervene in the lawsuit and that the estate of the deceased relator was entitled to 15 percent of the settlement.

Procedural History

The 11th Circuit reviewed in detail and emphasized the pertinence of the matter's "lengthy" procedural history. In March 1989, Williams, a former government employee, filed a *qui tam* suit alleging that NEC had engaged in bid rigging and fraudulently obtained thirty-six government contracts for telecommunications services at U.S.military bases in Japan. The Government did not initially intervene in the lawsuit. Instead, it filed a motion to dismiss Williams, alleging that he was not a proper relator because his suit was based on information obtained during his government employment. The district court granted the motion, and Williams appealed.

While the appeal to the 11th Circuit was pending and the case was still under seal, the Government publicly revealed the existence of Williams' lawsuit, and NEC learned of the fraud allegations. Attorneys for NEC then approached the Government, and on May 20, 1991 the Government entered into a $34 million settlement agreement with the company. The agreement granted NEC a release of all claims arising out of the company's bidding for the telecommunications services in Japan. The Government settled without seeking approval from either the district court or the 11th Circuit and without giving Williams notice or any opportunity to be heard as to the settlement's reasonableness.

First learning about the settlement from media reports, on May 21 Williams filed an emergency motion with the 11th Circuit to enjoin the

Government from entering into a final settlement agreement with NEC. In opposing the emergency motion, the Government "unequivocally" represented to the court that the settlement would not affect any rights Williams had to a share of the recovery.

On May 29,1991, the 11th Circuit reversed the district court's dismissal of Williams' complaint and remanded for further proceedings. The 11th Circuit held that the FCA does not contain a general prohibition against government employees filing *qui tam* suits and that the §3730(e)(4) public disclosure bar did not apply to Williams' lawsuit. That same day, the appellate court also denied Williams' emergency motion to stop the settlement.

Following remand to the district court, Williams filed a motion for his statutory share of the settlement, asking for 30 percent of the $34 million pursuant to §3730(d). The Government presented two alternative arguments in opposing Williams' motion. First, the Government contended that Williams had no right to a statutory share because the district court had dismissed Williams' complaint before the settlement with NEC was concluded. Second, the Government moved for the imposition of a constructive trust on any funds to which Williams was statutorily entitled under the theory that Williams had improperly denied his employer, the Government, of material knowledge regarding NEC's fraud and then used that knowledge to his own advantage in the *qui tam* lawsuit.

While this motion was pending, Williams, who had cancer and was in failing health, sought to preserve his testimony through deposition. The Government "vehemently" opposed his request,and the district court ruled for the Government. Williams also moved for an evidentiary hearing to determine his entitlement to a share of the settlement. The district court denied this motion, as well as Williams' request for reconsideration. Williams then filed this second appeal to the 11th Circuit.

While this appeal was pending, Williams died. The Government moved to dismiss the appeal as moot, arguing that the action did not survive the relator's death. Williams' estate opposed dismissal and moved for the substitution of his personal representative, Joanne Neher, as plaintiff-appellant. In December 1993, the 11th Circuit ruled that a *qui tam* lawsuit survives a relator's death, and it permitted Neher's substitution.

Intervention and Settlement Provisions Violated by Government

Reviewing the statutory framework, the 11th Circuit stated that, once a *qui tam* suit is filed, the Government has sixty days to choose one of only two options: to intervene and proceed with the action, or to decline intervention. If the Government elects the former, it may control the prosecution of the case, subject to the relator's right to continue as a party and to obtain a hearing and court approval regarding any settlement or dismissal of the action. Under this scenario, the relator's share is 15 to 25 percent of the recovery. On the other hand,if the Government chooses to decline, the relator has the right to conduct the action subject to the Government's right to intervene at a later date upon a showing of good cause, and the relator is entitled to 25 to 30 percent of the recovery.

In this case,the court found: "The government has from the beginning flagrantly and repeatedly violated the provisions of the statute." First, the Government failed either to intervene or notify the court of its declination to do so within sixty days of its receipt of the complaint, and,"[w]ithout undertaking either of these authorized alternatives, the government succeeded in having Williams' complaint erroneously dismissed on a jurisdictional issue." Second, "in flagrant disregard of the statute," the Government did not seek leave of court to intervene or make a showing of good cause before settling with NEC. Third, the Government failed either to notify Williams of the settlement or to seek court approval for it. "In settling with NEC, the government brazenly ignored both Williams' right to a hearing and the statutory prerequisite of court authorization."

Williams Has Statutory Right to Share of Settlement

The Government argued that the court did not have jurisdiction to award Williams a statutory share of the settlement because the Government was not a "party" to the action. The Government further argued that Williams had no entitlement because the facts of the case did not fall into either of the *qui tam* recovery provisions set out in §3730(d). That is, (d)(1) was inapplicable because the Government did not "proceed[ ] with [the] action," and (d)(2) was inapplicable because Williams did not "collect[ ] the civil penalty and damages." Also, the Government maintained that its settlement with NEC was not a settlement of Williams' *qui tam* action — Williams had not established that the agreement covered the claims raised in his complaint.

The 11th Circuit characterized the Government's arguments as "specious" and as an attempt "to take advantage of its blatant violations of the statute." The court held that the Government's settlement with NEC constituted an election to intervene in the lawsuit and proceed with the action within the meaning of the FCA. Further, the settlement effectively terminated the lawsuit, except for the determination of Williams' statutory share under §3730(d)(1) of between 15 and 25 percent (as well as attorneys' fees and expenses).

The court went on to hold that Williams was entitled to 15 percent of the $34 million settlement. While noting that the district court generally determines the relator's exact percentage, the 11th Circuit concluded that it should determine the relator's share on the record before it "[i]n light of Williams' death and the government's 'head in the sand' arbitrariness in opposing Williams' efforts to preserve his testimony."

Government's Constructive Trust Argument Rejected

Finally, the 11th Circuit flatly rejected the Government's call for the imposition of a constructive trust on Williams' statutory share. The court noted the definition of a constructive trust as a relationship to property subjecting the title holder to an equitable duty to convey it to another where his retention of the property would be wrongful and constitute unjust enrichment. In this case, the court found: "Neither Williams, the decedent, nor his estate, have, have had, or will have any fund of money or any other type of property to which the government has any claim." Rather, the Government had possession of the $34 million in settlement funds against which Williams' estate had a statutory claim.

Access to Sealed Documents Submitted by the Government

U.S. ex rel. Pentagen Technologies International v. CACI International, Inc. et al., 1995 WL 241942 (S.D.N.Y. Apr. 16, 1995)

Materials submitted by the Government in camera during the initial seal period will be made public absent a showing of good cause, according to a New York district court. The court rejected a government motion to keep all records filed by the Government under seal, including documents supporting requests for extensions of the sixty day seal period. The Government had declined to intervene in the case and offered no justification for keeping the documents sealed. The *qui tam* relator opposed the Government's motion.

The court noted that maintaining the seal on certain documents would be justified if there were a showing that release of the materials would interfere with an ongoing criminal investigation. However, in this case the Government supplied no argument as to how disclosure would be harmful. After reviewing the sealed materials, the court concluded that the documents at issue described routine general investigation procedures and would not implicate specific people or provide any substantive details. Denying the Government's motion, the court stated: "Given Congress' clear mandate that *qui tam* relators be able to effectively bring civil suits under the FCA, it follows that once the government has decided it will not intervene, it should not be able to handicap the relator's action by keeping materials under seal without some showing of good cause or ample justification."

Improper IR&D Billing

<u>U.S. ex rel. Mayman v. Martin Marietta Corporation</u>, Memorandum and Order, No. MJG-91-1853 (D.Md. Apr. 26, 1995); Memorandum and Order (D.Md. May 16, 1995)

Billing research to Independent Research and Development (IR&D) that was already required under a separate contract can be the basis for FCA liability, according to the Maryland District Court. In so ruling, the court denied Martin Marietta's motion to dismiss, which argued that the company had in good faith determined that it could bill certain research specified in one of its contracts to IR&D and that it had informed the Government of its intent to do so. According to the court: (1) the research at issue was clearly required by Martin Marietta's existing contract and could not be billed to IR&D, and (2) any notification by the company did not estop the Government from claiming the FCA was violated. In a separate ruling, the court held that Martin Marietta waived its attorney client privilege when it informed the Government during settlement negotiations that it had relied on legal advice regarding its IR&D billing.

In 1984, the U.S. Navy contracted with Martin Marietta to design and build a full-scale model of a fake missile, the Supersonic Low Altitude Target (SLAT), for use in testing missile defense systems. In 1991, Mayman filed this *qui tam* suit, and in 1994 the Government elected to intervene. The Government's amended complaint alleged that Martin Marietta intentionally underbid the SLAT project, planning to bill $30.3 million of SLAT work to IR&D in order to cover the anticipated shortfall. IR&D refers to general research funded by the Government to support cutting edge research that is "not sponsored by, or required in the performance of" a specific, existing contract. Each year, the Government negotiates advance agreements with contractors to perform IR&D up to certain monetary limits.

The Government alleged that Martin Marietta billed six tasks to IR&D that were already part of the SLAT contract, set up the six IR&D projects prior to being awarded the SLAT contract for the specific purpose of billing SLAT work to IR&D, and would not have pursued the IR&D tasks if it had not received the SLAT contract. Martin Marietta filed a 12(b)(6) motion to dismiss arguing, in part, that the company could not be held liable because the applicable regulations are confusing and the Government was aware of Martin Marietta's billing practice.

Regulatory Confusion Argument Rejected

Martin Marietta claimed that the relevant federal regulations are so confusing that the company cannot be held liable under the FCA; specifically, contractors often do not know whether to bill research to the contract itself or to IR&D. The company claimed that it had made a good faith determination that it was proper to bill certain SLAT research to IR&D because that research had potential applicability to future contracts.

While conceding that some gray areas in the regulations may result in confusion and honest mistakes by government contractors, the court asserted that the allegations in this case do not fall into any gray area. It was undisputed that the six tasks at issue were required under the SLAT contract. Martin Marietta claimed that the tasks were also relevant to other contracts and, under federal accounting regulations, must therefore be charged to indirect costs and not to any one contract. However, the court noted that Martin Marietta had no current contract other than SLAT which called for this work. Under the circumstances, the court concluded: "When applied to a task required by one contract but with <u>potential</u> benefit to other <u>future</u> contracts, Martin Marietta's position does not appear reasonable."

Company's Notice to Government Does Not Estop FCA Suit

Martin Marietta argued that it had informed the Government of its intent to bill the SLAT work to

IR&D and that the Government was therefore estopped from claiming fraud under the FCA. The court rejected this contention, stating that "a government officer cannot authorize a contractor to violate federal regulations."

The court noted that, in theory, Martin Marietta's discussions with the Government might have modified the contract such that the contract no longer "required" the tasks and the contractor could arguably then bill those tasks to IR&D. However, the court cautioned that it was unclear whether the written contract would support this argument and the extent and nature of Martin Marietta's notice to the Government raised disputed factual issues.

According to the court, Martin Marietta's notice might also negate any contention that the company intended to deceive the Government. However, such finding would be irrelevant for purposes of establishing a civil FCA violation since deception is not an element. Therefore, "[a] contractor who tells a government contracting officer that a claim is false still violates the statute when the false claim is submitted."

Relator May Participate Only With Regard to FCA Counts

The court agreed with Martin Marietta that the relator could participate only with regard to the FCA counts and had no standing as to the other counts (breach of contract and common law) brought by the Government. The court stated that the alternate remedy provision at 31 U.S.C. §3730(c)(5), cited by the relator, "permits continued recovery by the relator if the Government chooses to pursue the false claim in another forum. However, it does not cover additional counts raised by the Government as part of an action in the same forum in which the [FCA] counts are brought." The court noted that, in practice, the restriction on the relator's participation might not have any procedural effect because of the overlapping nature of the FCA counts and the other counts.

Separate Opinion Holds that Martin Marietta Waived Attorney-Client Privilege

In a separate opinion, issued on May 16, 1995, the district court held that Martin Marietta had waived its attorney-client privilege covering all contemporaneous in-house counsel advice regarding the use of the IR&D funds for SLAT-related work when, during settlement negotiations, a letter to the Government from Martin Marietta stated that the company believed such use was proper based on "contemporaneous" legal advice. The court relied on a 1988 Fourth Circuit decision (also involving Martin Marietta) which held that the disclosure of otherwise confidential information during a settlement conference can waive the attorney-client privilege, and such a disclosure to any party can waive the privilege as to all parties.

In this case, the district court ruled that waiver can occur even when the disclosing party does not quote from the otherwise protected communication; a summary, paraphrase, or clear reference to the substance of the communication is sufficient to waive the privilege. The court interpreted the earlier Fourth Circuit ruling as mandating a broad subject matter waiver. Thus, it concluded that Martin Marietta had waived its privilege with respect to all advice of counsel given while the company was claiming SLAT work as IR&D.

Medicare Intermediary Reimbursement Determinations

U.S. v. Blue Cross/Blue Shield of Alabama, Order, No. CV93-P-01508-S (N.D.Ala. April 28, 1995)

An Alabama district court held that Section 405(h) of the Social Security Act jurisdictionally barred a *qui tam* lawsuit alleging that a fiscal intermediary for Medicare Part A reimbursed hospitals for certain expenses that were not reimbursable under the Medicare program.

The relator, Frank Body, was a former senior auditor for Blue Cross/Blue Shield of Alabama (BCBSA). As a fiscal intermediary for the Health Care Financing Administration (HCFA), BCBSA reviewed Medicare Part A hospital cost reports to determine whether the costs were "reasonable and necessary" and issued Medicare payments to providers based on these audits. While employed by BCBSA, Body determined that certain interest expenses in hospital cost reports were not "reasonable and necessary" and therefore should be disallowed. BCBSA reversed Body's determination, thereby allowing Medicare reimbursement. Body subsequently filed a *qui tam* action charging BCBSA with making, or causing to be made, false claims.

Social Security Act Bars FCA Claim that Resembles a Benefits Dispute

Citing Wilkins v. Sullivan, 715 F.2d 282, 287 (7th Cir. 1989), for the proposition that "42 U.S.C. section 405(h) provides that any 'claim arising under' the Medicare program must be brought exclusively under section 405(g)," the district court asserted that judicial review is not permissible of claims "arising under or inextricably intertwined with a determination of benefits under Medicare." Further, in Bodimetric Health Services, Inc. v. Aetna Life and Casualty, 903 F.2d 480 (7th Cir. 1990), the 7th Circuit found that "challenges to the amount of benefits to be paid under Medicare arise under the Act and are not subject to judicial review, while challenges to the regulatory scheme under which the amount of benefits is calculated do not arise under the Act and are subject to judicial review."

In Bodimetric v. Aetna, the provider Bodimetric had alleged that Aetna, as fiscal intermediary, improperly denied certain reimbursement claims made by Bodimetric under the Medicare Act. The 7th Circuit held that the statute's exclusive review mechanism barred Bodimetric from seeking relief in federal court. In the case at hand, the district court found that it did not have subject matter jurisdiction "because Relator's Complaint more closely resembles a determination of benefits dispute with an officer or employee of the United States."

The district court recognized that Bodimetric did not involve a challenge of an intermediary's actions under the FCA, but stated that neither side had cited "controlling precedent that directly addresses the ability of a Relator to pursue relief under the [FCA] against a fiscal intermediary for allegedly making false or fraudulent reimbursement determinations in light of Section 405(h)." The court suggested that such a FCA action may be maintainable "to the extent the complaint sought redress for payments that were false — payment for phantom services and the like — because such payments would not arise under the Medicare Act." However, the court found that the complaint here was "significantly distinct." The relator did not allege that BCBSA did not actually make benefit determinations or that the providers were reimbursed for services not actually performed; rather, he "disputes the substance of BCBSA's reimbursement determinations as an officer or employee of the United States."

The district court rejected the relator's argument that the FCA contained an independent grant of subject matter jurisdiction. The court concluded that it lacked subject matter jurisdiction "by operation of Section 405(h) under the facts of this case and in the absence of an independent grant of jurisdiction."

Fiscal Intermediary Still Accountable

The court noted that "precluding judicial review of BCBSA's actions as a fiscal intermediary under the [FCA] does not by any measure mean that BCBSA is completely unaccountable in its role as fiscal intermediary." For example, HCFA may review BCBSA's performance, and the Department of Health and Human Services can terminate its contract with BCBSA. Lastly, without explanation, the court suggested that "it would appear that 28 U.S.C. Section 1345 [granting district courts original jurisdiction of all civil actions commenced by the U.S., except as otherwise provided by Act of Congress] would confer a district court with subject matter jurisdiction over a [FCA] complaint directly commenced by the United States Government pursuant to 31 U.S.C. Section 3730(a), even in the context of a dispute over a fiscal intermediary's reimbursement determinations."

Filed Rate Doctrine

U.S. ex rel. Falsetti et al. v. Southern Bell Telephone, Order Denying Defendant's Motion for Partial Summary Judgment, No. 91-40267-WS (N.D.Fla. Apr. 7, 1995)

The "filed rate doctrine," which renders published rates unassailable by ratepayers in certain regulated industries, does not bar a *qui tam* action against a telephone company, according to a Florida district court. The court denied Southern Bell's motion for partial summary judgment, ruling that the filed rate doctrine "has no application where, as here, the relators seek nothing more than vindication of the Government's right not to be presented with false or fraudulent claims for payment."

Frank Falsetti and Nancy D'Alessio, both former employees of Southern Bell, alleged that the company falsified records regarding phone services for which the Government was billed. As a result, according to the relators, Southern Bell submitted inflated bills and/or insufficient refunds to the Government.

Southern Bell argued that the filed rate doctrine barred the action because the billing at issue involved regulated and published rates. The filed rate doctrine emerges from a line of cases applying the Interstate Commerce Act to regulated industries. Application of the doctrine is premised on the statute's prohibition against charging or receiving rates different from the rates filed with, and approved by, a governing regulatory agency. The doctrine protects against judicial intervention in a uniform rate-making process that was specifically assigned to a regulatory agency. Southern Bell, whose telephone services are regulated by the Florida Public Service Commission (FPSC), argued that the *qui tam* case improperly intruded upon the exclusive jurisdiction of the FPSC.

The district court rejected the telephone company's argument, noting that the company's filed rates were not at issue:

"If the relators are able to prove what they allege, that Southern Bell knowingly submitted bills to the government for services that were not, in fact, rendered, damages — if any — will be determined by comparing the amounts the government should have paid had the records been truthful with the amounts the government did pay as a result of the falsified records. This calculation does not require, nor do the relators ask, that the court review the rates on file with the FPSC. There has been no suggestion that the government — for whatever reason — ought to have paid something other than the filed rates for the services they received from Southern Bell. All ratepayers, including the government, will continue to be subject to the same filed rates no matter the outcome of this case."

Defense Secretary's Participation in Regulatory Proceeding Does Not Compromise Action Under the Act

In a separate argument, Southern Bell also contended that the Government had compromised and settled the claims by participating in a FPSC settlement. The court noted that while Southern Bell was engaged in a variety of proceedings before the FPSC which were ultimately settled, the U.S. Department of Justice was not in any manner involved in those proceedings. While the Secretary of Defense had intervened in one of the FPSC proceedings, the court found that such intervention had nothing to do with claims under the FCA. Moreover, there was no evidence to suggest that the Defense Secretary had authority to assume the exclusive right of the Attorney General to release a party from liability under the Act.

U.S. ex rel. Rabushka v. Crane and CF&I Steel Corp. (ED MO No. 91-420-C-7)

In June 1995, it was reported that the U.S. Supreme Court declined to review an 8th Circuit decision holding that the §3730(e)(4) public disclosure bar did not apply in this case. Rabushka had alleged that Crane defrauded the U.S. by spinning off its CF&I Steel Corp. subsidiary in an effort to avoid pension obligations. CF&I did not disclose the full extent of its pension liabilities to the Pension Benefit Guaranty Corporation (PBGC). After the company went bankrupt, PBGC had to take over CF&I's pension fund, which was underfunded by $270 million. By declining to review the case, the Supreme Court let stand the 8th Circuit's holding that the public disclosure of CF&I's pension fund problems in newspapers and by corporate counsel at meetings did not constitute "allegations or transactions" of fraud within the meaning of the public disclosure bar because the disclosed information did not expose the essential elements of the fraud. Rex Carr of Carr, Korein, Tillery, Kunin, Montry & Glass (St. Louis, MO) represented the relator.

U.S. ex rel. Eitel v. Evergreen International Airlines, Inc. et al. (WD WA No. C94-1017Z)

In April 1995, in an issue of first impression, a Washington district court ruled that the U.S. Postal Service is a federal agency protected by the FCA. Although other FCA cases have involved false claims against the Postal Service, this particular issue was apparently not litigated in those cases. Eitel had filed his suit in 1994 alleging that the defendants conspired in a fraudulent scheme to overcharge the Postal Service by more than $50 million. The relator was represented by Steve W. Berman and Jeffrey T. Sprung of Hagens & Berman (Seattle, WA).

The case was subsequently dismissed on public disclosure grounds. (See "False Claims Act and *Qui Tam* Decisions" above in this issue.)

U.S. ex rel. Pitt and Ferguson v. FD Services, Inc.; Fluor Daniel, Inc. (D SC No. 94-2496)

For the first time since enactment of the 1986 False Claims Amendments Act, DOJ formally presented its position that the *qui tam* provisions are constitutional. In DOJ's April 1995 brief filed with the 4th Circuit, the Attorney General explicitly rejected the contrary view advanced by an Assistant Attorney General in a 1989 memorandum relied upon by the defendants. The Attorney General's position comports with the unanimous view of the federal courts that have considered the constitutionality issue, including the 9th, 6th, and 2nd Circuits. The relators had sued FD Services and its parent, Fluor Daniel, Inc., for fraud in contracts to repair Navy facilities in Charleston, South Carolina following Hurricane Hugo. The Government declined to intervene in the suit. Although several of the counts as well as defendant Fluor Daniel, Inc. were dismissed by the district court, in May 1994 a jury found that FD Services had filed four false claims and awarded $2 million to the Government. The Government was represented by Douglas Letter, Appellate Litigation Counsel; and Michael Robinson, Attorney, Appellate Staff, DOJ Civil Division.

Fighting Fraud: The Next Frontier

Former Government Lawyers Answer Qui Tam's Call

A new breed of former government lawyers have turned to *qui tam* as a natural extension of their prosecutorial work. Their path is unusual, as government attorneys have typically looked to the private defense bar when making a career move. In particular, the resources and economic security of large corporate firms have proved difficult to pass up. Yet as the experiences of those who have undertaken relator representation indicate, with careful planning and a bit of daring, a private *qui tam* practice can be an attractive option as well.

A former Assistant U.S. Attorney in Baltimore, Christopher Mead decided to apply his skills as a white collar criminal prosecutor to private practice. Mead currently handles plaintiff *qui tam* cases at the Washington, D.C. firm of London & Mead, and appreciates the opportunity to represent relators. "It's a chance to do right. You can feel good about the work you can do." For the former AUSA, the practical advantages are obvious: "In terms of dealing with the Government, being a *qui tam* lawyer is far better than being a defense lawyer."

Like Mead, Eric Havian and Stephen Meagher also chose to pursue a *qui tam* practice after leaving their prosecutor posts in the San Francisco U.S. Attorney's Office last year. With their background in defense procurement and health care, knowledge of fraud proceedings, and professional contacts, together the two were well situated to open the west coast branch of the *qui tam* firm Phillips & Cohen.

By most accounts, the move to *qui tam* does not reflect so much discontent with the Government as a desire to try something new. According to Havian and Meagher, over time working as a prosecutor can become increasingly routine. Says Havian: "You win a lot. After a while, you feel the job is second nature." This sense of already having been down the same road, coupled with the bureaucratic and financial constraints of government service, conspire to raise the question: Where do I go from here?

A mix of professional and philosophical considerations can shape the decision. For Havian, "After working all those years as a prosecutor on the affirmative side where you're driving the action, to turn around and work on the defense side of a civil case seemed too passive a role, or maybe actively obstructionist." Having methodically ruled out alternatives, he arrived at *qui tam*, which would allow him to continue the kind of work he had been doing amidst new demands in the private sector.

To be sure, opportunities will exist so long as fraud is rampant. According to the Department of Justice, in fiscal year 1994 alone *qui tam* actions accounted for $378 million, or more than one third of the Government's overall recoveries from civil fraud settlements and judgments. That figure more than doubles the previous year's total.

For *qui tam* lawyers, the chance to venture into new territory holds much appeal. In addition to notorious Defense Department and Medicare violations, there is the challenge of exposing fraud in areas receiving less attention such as education,scientific research, housing, transportation, emergency relief, customs, agriculture, FDA, and the environment. Beyond the variety, attorneys are drawn to the potential impact of private initiatives. As William Hardy, former Branch Chief of the Criminal Fraud Section at DOJ, observes, "If you look at the best cases being filed in the area of white collar crime,many are derived from *qui tam* cases."

Instant Credibility ... and Frustrations

While *qui tam* seems a natural fit for former government litigators experienced in fraud cases,the transition is not without its frustrations. Former criminal prosecutors, for example, miss access to potent investigative resources such as search warrants and grand jury subpoenas. As Christopher Mead laments,"I no longer have the fear of God behind me."

Stephen Meagher echoes that sentiment, remarking that while "it's tempting to think of yourself as an Assistant, ... there's a limit to what you can do. You've lost a fair amount of authority." Now Meagher must persuade rather than take direct action. Almost nostalgically, he describes the temptation of considering himself "one of the team" working to advance the Government's interests. Yet notwithstanding allied interests, there is sometimes a notable change in perception on the part of government lawyers toward their former colleagues. Says Meagher: "People in the Justice Department treat you once you have left with an added level of suspicion. There's a certain sense of having left the fold."

On balance, however, the inevitable kinks in the transition are offset by the insights afforded by prior government service. In such a novel area, the substantive and procedural expertise gained from directing government fraud litigation can position former prosecutors as among the most well suited to undertake *qui tam* actions.

The benefits are certainly apparent to Janet Goldstein, who served as a federal prosecutor in Los Angeles for ten years before moving to a *qui tam* practice in 1989. According to Goldstein, who now has her own *qui tam* law office and consulting practice in Maryland, "You have instant credibility with clients as a former prosecutor who's actually done cases for the Government." Goldstein finds she has greater credibility with former government colleagues as well. In keeping with the False Claims Act's design of a partnership between private and public attorneys, she thinks she has had more input in government prosecutions than if she had not handled fraud cases in the U.S. Attorney's Office. As Goldstein explains: "I know how to elicit information that's helpful to the prosecution. A person who was never a criminal prosecutor would not play such a major role." Still,like other former government lawyers, she cites the frustrations of no longer "calling all the shots, knowing all the information, and making all the decisions."

Robert Vogel, a solo practitioner in Washington, D.C. and former trial attorney in the Fraud Section of the DOJ Civil Division Commercial Litigation Branch, points to the advantages of entering the field having already screened hundreds of False Claims Act cases. "Basically, I knew how to tell a good one from a bad one, and I knew the issues.... Most people don't, and they're headed for real trouble."

William Hardy, who represents both *qui tam* plaintiffs and defendants at Washington, D.C.'s Kleinfeld, Kaplan and Becker, also stresses the fundamentals. "The important thing is to write a good complaint and relator statement so people understand what is at issue. The benefit I can bring is that I can write something that they'll understand." For the longtime prosecutor, old habits die hard. "My complaints look like indictments," Hardy warns.

In the opinion of Stephen Meagher, "The main thing is to understand what it takes to persuade the Government to take a case." As a former AUSA, Meagher is familiar with the evidence and elements required. He also has found that he is more alert to probable defenses.

Indeed, Eric Havian notes the importance of identifying any holes in the case when working with the government lawyers. Acknowledging the shift in roles, Havian is careful to add: "We want to give the benefit of what we know and at the same time not suggest that we run the case. ... We want to suggest to them: 'We were sitting where you were not long ago. We can help you.'" In his experience, "When you approach them that way, generally you get a good response."

Relations between *qui tam* counsel and the Justice Department can at times be tense, however. Having litigated some of the most protracted actions involving defense contractors, Janet Goldstein has witnessed the strain. Says Goldstein: "I didn't anticipate the hostility I've encountered from some DOJ lawyers to some *qui tam* plaintiff lawyers. That was a surprise, that there would be rivalry and hostility and a desire to exclude *qui tam* attorneys as much as possible as opposed to include." Even in the best of relationships, she recognizes the "peculiar dynamic" of *qui tam* litigation whereby private attorneys, working side by side with government lawyers, can ultimately share in the award.

While attitudes may be changing as the Justice Department experiences more productive partnerships and successful *qui tam* actions, some observers find it puzzling that the former government attorneys have been viewed in a guarded fashion. According to Goldstein, given the risks and incentives that govern a *qui tam* practice, experienced lawyers are likely to bring only the strongest cases and will work to develop them as fully as possible. From the larger perspective, she adds, this is good for the Government and good for the taxpayer.

Virtue and Risk

Though repeatedly under fire from defendants, the amended False Claims Act has withstood both legal and legislative attacks. And as the rise in successful actions indicates, *qui tam* is taking hold with the public.

Yet despite the success stories, the realities of a *qui tam* practice are not to be assumed lightly. There can be a disquieting lack of control, both in process and outcome. As Robert Vogel underscores: "You can almost take nothing for granted. Litigation is very risky at all times." In particular, Vogel has been "absolutely floored" by certain court opinions in the intricate area of public disclosure.

As has been often demonstrated, *qui tam* litigation can be fierce, lengthy, and expensive. Whether a suit will develop into a consuming multi-year struggle is difficult to predict at the outset. And the nature of contingency fee arrangements brings its own pressures. From the standpoint of Chris Mead, who is new to the field, "The payoff and pipeline is years away." Throughout the transition and thereafter, the threshold matter of how even to attract cases can weigh heavily.

Given all the variables and corresponding uncertainty, leaving the Government to pursue *qui tam* exclusively is in many instances not feasible. It may therefore be necessary at first to incorporate *qui tam* as part of a broader practice, either in one's own office or as a member of a firm. As Bill Hardy wryly advises, "It's a good idea to have different ways of accumulating money."

Accordingly, Rob Vogel offers those considering the move to private *qui tam* practice the same advice he gives to clients: "Don't depend on it. It may or may not happen." Even after five years as a solo practitioner and some major False Claims Act recoveries, Vogel candidly admits, "Whether a client walks into your door or someone else's is a matter of luck."

Nevertheless, Mead and his fellow relator counsel welcome "all the benefits and virtues" of *qui tam*. Along with the professional challenges, the personal satisfaction is a large draw. As Janet Goldstein describes: "If you can make a go of it, it's an incredibly rewarding field. You feel like you're wearing a good guy hat representing people who are there to do the right thing. You can change their lives."

At the very least, as Stephen Meagher tells, "It's an adventure."

U.S. v. Pratt & Whitney Group of United Technologies Corporation Inc. **(SD FL No. __)**

In April 1995, the Government filed suit against Pratt & Whitney Group of United Technologies Corporation Inc. for conspiring with former Israeli Air Force Brigadier General Rami Dotan to fraudulently use $10 million in U.S. military aid for unauthorized purposes. According to the Government, $4.4 million was improperly diverted to shell companies, with hundreds of thousands of dollars going into the personal bank accounts of two of the Brigadier General's associates. Pratt & Whitney's LAVI aircraft engine contract with Israel was financed under DOD's Foreign Military Sales Credit Program.

According to DOJ, Pratt & Whitney, Dotan, and his associates entered into a secret side deal to use the $10 million as "play money" for the Israeli Air Force. When the Israeli Government amended and reinstated the engine contract in 1988 after canceling the LAVI aircraft program the year before, Pratt & Whitney falsely represented in its contract with Israel that there were no such side deals. To collect the money, the contractor falsified purchase orders and invoices for engine work that had not been performed. DOJ further alleged that Pratt & Whitney paid some of the set aside money to two U.S. companies created to funnel funds to an Israeli subcontractor for work that would not have been eligible for U.S. financing.

U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer Limited et al. **(SD NY 94 Civ. 3521)**

In April 1995, DOJ intervened in this *qui tam* suit alleging $20 million in overcharges for labor and material costs relating to wing slot seals for F-111 and B1-B aircraft. As part of the ten year scheme, Dowty Woodville Polymer Limited allegedly submitted fraudulent proposals and certifications to the Air Force. The company is a subsidiary of the British engineering and aerospace group TI. The relator, a former business manager at Dowty Woodville Polymer, filed the suit in 1994. Assistant U.S. Attorney Gideon A. Schor is handling the case for the Government.

U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al. **(D MN No. 3-94-1622)**

In May 1995, a *qui tam* suit against the Allina Health System Corp., two of its hospitals (Unity and Mercy), St. Cloud Hospital, and more than two dozen anesthesiologists was unsealed. The lawsuit, filed in December 1994 by the Minnesota Association of Nurse Anesthetists, alleges that, with the knowledge and assistance of the defendant hospitals, the defendant anesthesiologists have billed Medicare for services which they either did not perform or which did not qualify for reimbursement. Specifically, the anesthesiologists have routinely billed Medicare for personal performance of procedures in which they were not continuously involved or present. Further, they have billed for medical direction of procedures despite not participating in the most demanding procedures of the anesthesia plan, not being physically present and available for emergencies, or not being in the operating room or the hospital for a portion of the procedure. The complaint alleges that as many as 28,000 false or fraudulent claims were submitted over six years and seeks more than $280 million in penalties, damages, and costs. The Government has declined intervention in this action.

U.S. v. Motion Medical, Inc. and Wood **(SD OH No. C2-95-529) and *U.S. v. Freedom Medical, Inc. et al.* (SD OH No. C2-95-530)**

In May 1995, the Government filed suit against Motion Medical, Inc. and Freedom Medical, Inc., alleging fraudulent billing for durable medical equipment. According to the complaints, the companies billed for equipment that was not ordered by a physician, was not medically necessary, was in excess of patients' needs, was billed and not delivered, and for which there was no obligation to pay. The lawsuits were filed on behalf of CHAMPUS, the Mail Handlers Benefit Plan, and the Government Employees Health Association. Assistant U.S. Attorney Mark T. D'Alessandro is handling the cases.

As part of a coordinated effort between the Southern District of Ohio Health Care Task Force and the Federal Trade Commission, the FTC also filed suit in Columbus,Ohio and Charleston, South Carolina to stop the defendants' fraudulent marketing practices. Motions for temporary restraining orders were granted. According to the FTC, the cases mark the first time the Commission has brought charges against entities for victimizing consumers in order to commit a fraud against health insurers.

U.S. ex rel. Roy v. Anthony et al. **(SD OH No. C-1-93-0559)**

In March 1995, nine physicians and their medical imaging corporations agreed to pay the Government **$1.52 million** to settle this *qui tam* suit with relator Sheila Roy. The lawsuit alleged improper Medicare and Medicaid referrals to diagnostic firms in which the doctors had a financial interest. Ms. Roy, a former employee at one of the defendant firms, filed the suit in 1993. The Government did not intervene in the action. The relator's share was 29 percent or $440,800. James Helmer, Ann Lugbill, and Paul Martins of Helmer, Lugbill, Martins & Neff (Cincinnati, OH) represented the relator.

U.S. ex rel. Schenherr v. U.S. HomeCare Corporation **(D MD No. S-93-3720)**

In April 1995, U.S. HomeCare Corporation agreed to pay **$650,000** to settle this *qui tam* suit with the Government and relator Tina Schenherr. Ms. Schenherr brought the suit in 1993, alleging the submission of false Medicare claims. The Government's investigation focused on the NY-based firm's Miami operations, and revealed that company records from May 1993 to October 1993 contained forged nurses' signatures, false medical information, and canned nursing notes. U.S. HomeCare was allegedly aware that its documentation was inadequate but still submitted claims for reimbursement. Ms. Schenherr is a former manager in the company's Fort Lauderdale office. The relator's share was 19 percent or $123,500. Robert L. Vogel (Washington, D.C.) was the relator's counsel. The Government was represented by Assistant U.S. Attorney Kathleen McDermott and Sara Strauss of the DOJ Civil Division.

U.S. ex rel. Brooks v. Pineville Community Hospital Association, Inc. et al. **(ED KY No. 92-286)**

In April 1995, Pineville Community Hospital Association, Inc. and two doctors agreed to pay **$2.5 million** to settle this *qui tam* suit with the Government and relator J. Hilton Brooks. The lawsuit alleged fraudulent billing over a ten year period for work never performed. According to an audit report, clerks used rubber stamps of doctors' signatures, and physicians billed as hospital visits work actually performed by nurses. The report also stated that doctors billed for hospital admissions services performed by emergency room physicians. Dr. Brooks filed the suit in 1992 while on staff at Pineville Hospital. The Government did not initially join in the case, but intervened in April of 1995 just prior to settlement. The settlement was described as the largest in the history of Kentucky's Medicaid program.

As part of the settlement, Pineville agreed to conduct a training program for employees in Medicare and Medicaid reimbursement and billing. The relator's share was 25 percent. Dr. Brooks was represented by Thomas W. Miller (Lexington, KY). Assistant U.S. Attorney David P. Grise and DOJ Trial Attorney Patricia L. Hanower represented the Government.

U.S. ex rel. Murphy and McMahon v. Henry M. Jackson Foundation **(D MD No. __)**

In April 1995, DOJ announced that the Henry M. Jackson Foundation for the Advancement of Military Medicine will pay the Government **$45,920** to settle this *qui tam* suit. Murphy, a former Foundation employee, and McMahon, who formerly worked for the National Institutes of Health, alleged in their 1994 suit that the Foundation charged the Government for labor, training, and research costs that were not covered under its contract with NIH for radiology services. The Foundation was created by Congress in 1983 to carry out medical research and education projects in cooperation with the Uniformed Services University.

U.S. ex rel. Thornton v. Science Applications International Corporation, AlliedSignal Technical Services Corporation, and Lloyd Electric Company Inc.

In May 1995, DOJ announced that three government contractors will pay a total of **$230,000** to settle allegations that they improperly tested electrical cables installed at a U.S. Treasury facility under construction in Fort Worth, Texas. According to DOJ, the settlement will resolve a *qui tam* suit filed by Peter Thornton, a former employee of Science Applications International Corporation (SAIC), the prime contractor on the project. Along with SAIC, two subcontractors were included in the suit for allegedly falsifying the testing of certain power cables during construction of the Western Currency Production Facility.

U.S. ex rel. Fletcher v. Metpath, Inc. (D MD No. N-93-1069)

In May 1995, Corning Clinical Laboratories Inc., f/k/a Metpath Inc., a wholly-owned subsidiary of Corning Life Sciences Inc., agreed to pay the Government **$8.6 million** to settle this *qui tam* suit brought by Terry Fletcher in 1993. Metpath, one of the country's largest clinical laboratories, allegedly submitted false claims for laboratory tests not performed to Medicare, Medicaid, and other federally-assisted programs. The relator was formerly a service representative at Metpath's Rockville, MD lab.

According to the Government's investigation, Metpath systematically billed for certain laboratory tests that were not completely or successfully performed because of insufficient, deficient or inadequate samples, or invalid or unreliable test results. The billing practices allegedly occurred at nine regional labs from 1988 to 1993 and were known to management officials since 1992. The relator's share was $1.29 million. J. Stephen Simms of Greber & Simms and Robin Page West (Baltimore, MD) represented the relator. Assistant U.S. Attorney Kathleen McDermott handled the case for the Government.

U.S. ex rel. Berge v. The Board of Trustees of the University of Alabama et al. (D MD No. N-93-158)

In May 1995, a federal judge in Baltimore ordered the University of Alabama to pay the Government **$1.66 million** for false claims in connection with research grants from the National Institutes of Health. A jury had found that the University and three of its scientists violated the False Claims Act. The *qui tam* relator, Dr. Pamela Berge, alleged that the researchers submitted grant proposals and progress reports to NIH in which they falsely represented research proposals, data, methodologies, results, and work product as their own. In fact, the work was done by Berge while pursuing her doctorate at Alabama. The Government did not intervene in the action. The relator's share was reportedly 30 percent or $498,000. Alexander Bok of Dangel & Fine (Boston, MA) represented the relator.

U.S. ex rel. Coffman v. SMTEK, Inc. et al. (CD CA No. 934051 WMB (Sx))

In May 1995, DOJ announced that SMTEK, Inc. paid **$200,000** to settle this *qui tam* suit with the Government and relator David Coffman. The aerospace company allegedly falsely stated it could test space station components when it did not have that capability. After receiving a $10 million subcontract in 1990 from the National Aeronautics and Space Administration, SMTEK said it would have to incur additional costs to develop the necessary capability. The Government absorbed the costs. Mr. Coffman is a former employee of SMTEK. The relator's share was $35,000. The relator was represented by Noble and Pommer, PLC (Ventura, CA). The Government was represented by Stanley E. Alderson of the DOJ Civil Division.

U.S. ex rel. Siller v. Becton Dickinson & Co. (D MD No. S-91-33)

In June 1995, Becton Dickinson & Co. agreed to pay **$3.3 million** to settle this *qui tam* suit with the Government and relator David Siller. Becton Dickinson allegedly overcharged the Department of Veterans Affairs for medical equipment to be used for microbiological tests. Although required to disclose accurate, current, and complete information about prices and discounts given to commercial customers, the company failed to tell the Government it had granted discounts higher than those disclosed during contract negotiations. Mr. Siller, an employee of Scientific Supply Inc., a former distributor of Becton Dickinson products, originally filed the suit in 1991. The relator's share was 17 percent or $561,000. Robert L. Vogel (Washington, D.C.) represented the relator. Michael C. Theis of the DOJ Civil Division represented the Government.

U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc. (WD WI No. 93-C-801-S)

In June 1995, Alliant Techsystems, Inc. agreed to pay the Government **$12 million** to settle this *qui tam* suit brought by five individuals and the Atlantic States Legal Foundation, a nonprofit environmental foundation. The lawsuit involved a $34 million contract between the U.S. Army and Accudyne Corp., now owned by Alliant, for the production of electronic parts for the Modular Pack Mine System. The relators alleged that Accudyne knowingly presented false pricing information and made false representations, certifications, and claims regarding environmental compliance required under the contract.

While the relators independently pursued the environmental violations on behalf of the Government, DOJ intervened in the relators' lawsuit with respect to other allegations that Accudyne knowingly supplied nonconforming parts and failed to properly test completed products. Most of the individual relators were maintenance employees at Accudyne. The relators' share was 22 percent or $2.64 million. The Law Office of Bradley Scott Weiss and the firm Spiegel & McDiarmid (Washington, D.C.) represented the relators. The Government was represented by Assistant U.S. Attorney Mark A. Cameli and Patricia L. Hanower, Rosemary A. Filou, and Steve Y. Koh of the DOJ Civil Division.

Harris Corp.

In April 1995, DOJ announced that Harris Corp. agreed to pay the Government **$1.5 million** to settle allegations it overestimated labor costs in connection with Navy spare parts contracts. The settlement resolves a government suit filed in 1990 alleging that Harris' Government Systems Support Division (GSSD), now dissolved, made false statements and claims by overstating labor costs of manufacturing spare parts for the Navy's Hybrid Test Systems and Tailored Mini-Vast Systems. According to DOJ, GSSD submitted false TINA certifications during the contract negotiations.

Richardson Electronics, Ltd.

In May 1995, Richardson Electronics, Ltd. agreed to pay the Government **$4.7 million** to settle a potential lawsuit under the False Claims Act. The Illinois firm allegedly falsely stated it could manufacture parts for military night vision equipment used in tanks when it lacked the expertise, and passed off another company's equipment as its own in getting manufacturing approval. According to DOJ, Richardson built and furnished 10,000 night vision image converter tubes to the Government, all of which were nonconforming and defective. When tested upon receipt at military depots, the equipment was discovered to be deficient and was never installed in the tanks. The Government was represented by John A. Kolar of the DOJ Civil Division.

Caremark Inc.

In June 1995, DOJ announced that Caremark Inc., a subsidiary of Caremark International, agreed to pay **$161 million** in a criminal and civil settlement for kickbacks and fraud in its home infusion, oncology, hemophilia, and human growth hormone businesses. Caremark will plead guilty to charges that it defrauded the Government by making improper payments to induce doctors and other professionals to refer patients to the company. According to DOJ, the recovery is one of the largest ever obtained in a health care fraud case. Sara Strauss of the DOJ Civil Division represented the Government in the settlement.

On the civil side, Caremark agreed to pay approximately $81.75 million to resolve claims relating to improper inducements for referrals, submission of inflated bills to state Medicaid programs,and waiver of copayments. Caremark has further agreed in principle to pay about $45 million to the states for their share of Medicaid and other health care programs. Additionally, the company will pay $3.5 million in penalties for failing to keep accurate records at its pharmacies as required by the Controlled Substances Act.

Caremark also will pay $29 million in criminal fines in connection with informations filed in Minnesota and Ohio, and will contribute $2 million to the Public Health Service to be used for HIV/AIDS treatment for young people.

According to DOJ, Caremark has sold its home infusion business and canceled contracts with doctors and other referral sources. As part of the settlement, Caremark's remaining businesses will participate in a "corporate integrity plan" to ensure future compliance. While the agreements resolve Caremark's criminal and civil liability, the Government is continuing to investigate former officers and employees as well as doctors and others who were paid to refer business to the company.

Harris Corp.

In June 1995, Harris Corp. agreed to forego as much as **$1.6 million** in federal payments to settle allegations that it improperly obtained confidential information to win a communications system contract from the Federal Emergency Management Agency. According to DOJ, Harris employees received information from a FEMA employee relating to the agency's criteria for evaluating bids. This information allegedly gave Harris a competitive advantage in securing the contract. The settlement resolves the company's potential liability under the False Claims Act. Harris will release its right to receive $613,000 currently due, and an additional amount that could be as much as $1 million that would have become due,under the FEMA contract. The Government was represented by Steve Y. Koh of the DOJ Civil Division.

FCA NOTES

Health Care Anti-Fraud Project Announced

- In May the Clinton Administration announced "Operation Restore Trust," a five state anti-fraud project targeting abuses associated with home health agencies, nursing homes,and durable medical equipment suppliers. The project states — New York, Florida, Illinois, Texas, and California — account for nearly 40 percent of all Medicare and Medicaid beneficiaries. The initiative will include financial audits, criminal investigations and referrals, civil and administrative sanction and recovery actions, surveys and inspections of long-term care facilities, a voluntary disclosure program, special fraud alerts, and a fraud hotline.

  Along with DOJ, the HHS Office of Inspector General, HCFA, and the Administration on Aging will be involved in the effort. An interdisciplinary team will be composed of federal and state personnel as well as private sector representatives. Money generated from anti-fraud activities will be placed into a Health Care Fraud Control Reinvestment Fund to support further enforcement.

HHS Voluntary Disclosure Guidelines Issued

- Inspector General June Gibbs Brown has established guidelines for HHS' 2-year pilot voluntary disclosure program, to be launched as part of "Operation Restore Trust." Under the five state voluntary plan, companies can come forward with evidence of fraud or problems within their organizations in consideration for possible reduced penalties. In June the program was reportedly expanded to cover hospice care facilities as well as corporate providers in the home health, nursing home, and durable medical equipment industries. The voluntary disclosure guidelines cover: (1) eligibility and criteria for admission; (2) application and acceptance into the program; (3) the company's internal investigation and government verification; and (4) OIG administrative remedies and the company's integrity compliance program.

TAF NEWS

Previous Publications Available

- Copies of TAF's *April 1995 Quarterly Review* and *1994 Year in Review* are still available at no cost. Requests can be made by phone or mail.

TAF on the Internet

- TAF has initiated an on-line service on the Global Internet designed to educate the public and legal community about *qui tam*. The Internet presence features information about the organization, frequently asked questions about *qui tam*, statistics,and an on-line version of the law. Look for an expanded presence in the coming months, including TAF publications. TAF's site is located at WWW: http://www.taf.org/taf or via e-mail at taf-info@taf.org.

Library Resources

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

Qui Tam Attorney Network

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

Quarterly Review Submissions

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