TAF
Vol. 12
January 1998

TAXPAYERS AGAINST FRAUD

False Claims Act and *Qui Tam* Quarterly Review

YEAR END ISSUE

INSIDE...

1 **FALSE CLAIMS ACT AND *QUI TAM* DECISIONS**

Constitutionality of FCA
U.S. ex rel. Riley v. St. Luke's Episcopal Hospital (S.D. Tex. Oct. 21, 1997) . . . . .p. 1

Public Disclosure Bar and Original Source Exception
U.S. ex rel. Stone v. AmWest Savings Association (N.D. Tex. Oct. 2, 1997) . . . . .p. 2

U.S. ex rel. Wercinski et al. v. International Business Machines Corporation (S.D. Tex. Oct. 9, 1997) . . . . .p. 4

Anti-Kickback and Self-Referral Violations
U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al. (5th Cir. Oct. 23, 1997) . . . . .p. 5

Section 3729(a)(7) Reverse False Claims
U.S. ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc. et al. (S.D. Ohio Nov. 13, 1997) . . . . .p. 6

U.S. v. Q International Courier, Inc. et al. (8th Cir. Dec. 22, 1997) . . . . .p. 8

CIT Jurisdiction
U.S. ex rel. Felton and Phillips USA, Inc. v. Allflex USA, Inc. (CIT Dec.3,1997) . .p. 10

Falsity of Claim/Regulatory Noncompliance
U.S. ex rel. Joslin v. Community Home Health of Maryland, Inc. (D. Md. Nov. 17, 1997) . . . . .p. 11

State Entities as FCA Defendants
U.S. ex rel. Foulds v. Texas Tech University et al. (N.D. Tex. Oct. 3, 1997) . . . . .p. 11

Section 3730(h) Retaliation Claims
Latham v. Navapache Healthcare Association et al. (D. Ariz. Sept. 29, 1997) . . . . .p. 13

U.S. ex rel. Foulds v. Texas Tech University et al. (N.D. Tex. Oct. 3, 1997) . . . . .p. 14

Rule 9(b)
U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al. (D. Minn. Sept. 24, 1997) . . . .p. 14

U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al. (5th Cir. Oct. 23, 1997) . . . . .p. 15

Res Judicata
In Re Schimmels (9th Cir. Oct. 14, 1997) . . . . .p. 15

18 **INTERVENTIONS AND SUITS FILED/UNSEALED**

21 **SETTLEMENTS**

28 **SPOTLIGHT**

1997 YEAR IN REVIEW

CASE LAW RECAP. . . . . *p. 28*

TOP *QUI TAM* RECOVERIES . . *p. 40*

QUI TAM STATISTICS. . . . . *p. 41*

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

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

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

Taxpayers Against Fraud
The False Claims Act Legal Center

Board of Directors
Peter Budetti, Chairman
Leonard Jacoby
Robert Wolfe
Roger Gould
Gregory Lawler

Professional Staff
Lisa Hovelson, Executive Director
Alan Shusterman, Associate Director
Priscilla Budeiri, Senior Staff Attorney
Abbe Goldstein, Staff Attorney
Gary W. Thompson, Staff Attorney
Amy Wilken, Legal Resources Attorney
Anthony Shalita, Office Administrator
Martha Guadamuz, Receptionist
Donna Hines, Administrative Assistant

Taxpayers Against Fraud, The False Claims Act Legal Center
1220 19th Street, NW Suite 501 Washington, DC 20036
Phone (202) 296-4826 Fax (202) 296-4838
Internet: http://www.taf.org

Copyright © 1998 Taxpayers Against Fraud, The False Claims Act Legal Center. All Rights Reserved.

Constitutionality of FCA

***U.S. ex rel. Riley v. St. Luke's Episcopal Hospital*, 1997 WL 679105 (S.D. Tex. Oct. 21, 1997)**

In a decision running counter to the decisions of three circuit courts and countless district courts around the country that have considered the issue, a Texas district court ruled that the *qui tam* provisions under the False Claims Act are unconstitutional. Despite ample precedent to the contrary, the judge in this case held that Congress cannot "confer standing upon a *qui tam* plaintiff who has suffered no cognizable injury under Article III of the Constitution . . . consistent with principles of 'separation of powers.'"

After briefly summarizing the history of the FCA, the district court began its analysis with a description of the constitutional requirements for standing, quoting the three elements of standing under Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992):

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely" as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

In addition to these minimum requirements, the court found that "prudential requirements also bear on standing." Thus, according to the court, a plaintiff must "assert his own legal rights and interests and not those of third parties," and the plaintiff's complaint must fall "within the 'zone of interests' protected by the statute in question."

"Byproducts" of Litigation that Provide Relator with Personal Stake Do Not Meet "Injury in Fact" Requirement

The district court centered its decision around its critique and rejection of the 9th Circuit's analysis and holding in U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993), upholding the constitutionality of the *qui tam* provisions primarily on the basis of an assignment theory. First, the district court rejected the Kelly court's finding that, in addition to the Government as "the real party in interest" meeting the injury requirement, the relator also met it by having a personal stake in the outcome of the suit. While the Kelly court found that the relator must "fund the prosecution of the suit," is eligible to receive "a sizeable bounty if he prevails," and "may be liable for costs if the suit is found to be frivolous," the district court rejected these as merely "byproducts" of the litigation that fail to evidence injury in fact.

Assignment Theory Rejected

The district court also found that the "assignment theory" that assumes Congress assigned the Government's interest and injury to *qui tam* relators fails for three reasons. First, there was "no indication in the statute that Congress was attempting to bestow a contract right to recover damages on the *qui tam* plaintiffs, who were not even identified at the time of passage, and are not identifiable until they themselves initiate a suit." Second, to effectively assign a contract right, "'the owner of that right must

manifest an intention to make a *present* transfer of the right *without further action* by the owner or by the obligor.'" However, according to the court, Congress does not own the right to prosecute fraud cases. Under the separation of powers doctrine, "Congress is *powerless* to distribute *powers* that it does not have." Moreover, common law does not recognize assignment in the future as effective. There must be a "present transfer of an existing right." Third, allowing relators to litigate on behalf of the Government "would effectively permit Congress to circumvent . . . standing requirements by merely passing a statute assigning a governmental cause of action to an individual." The court found that, in light of standing being an integral part of our system of separated powers, Congress should not be allowed to legislatively circumvent Article III standing requirements.

Statutory Right Does Not Eliminate Need for "Injury in Fact"

The district court also rejected the holding, in other FCA precedent upholding constitutionality, that "Congress simply extended Article III standing to [relators] under the statute" by creating a legal interest in the statute and conferring the standing to assert it. According to the court, the Supreme Court has rejected the notion that a statutory right eliminates the need for an "injury in fact." Injury in fact is not a prudential requirement that can be discarded by passage of legislation, and the Article III inquiry cannot turn on the source of the asserted right.

Reliance on Favorable Supreme Court Statements and Long History of FCA Rejected

Additionally, the district court discounted Supreme Court dicta presumably approving of *qui tam* litigation, finding that it predated the "Court's modern conception of standing." However, the court failed to substantively address the Supreme Court's statement in Lujan to the effect that it would find constitutional "the unusual case for which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit." Rather, the court simply dismissed it as nonprecedential because FCA *qui tam* standing was not before the Court in Lujan.

Finally, the district court rejected any resort to the long history of the *qui tam* mechanism as proof of its constitutionality. According to the court, "Article III's requirements are clear, and are not to be avoided by courts eager to uphold the constitutionality of congressional enactments."

In short, the district court concluded that the relator suffered no injury in fact nor did she show any "causal" link between an injury (even if there were one) and the conduct complained of. Further, "Congress cannot statutorily assign the Executive's future interest in pursuing a particular fraud claim to an unnamed theoretical plaintiff." Otherwise, Congress would "circumvent Article III standing requirements, which are essential to the principle of a limited judicial role under our separation of powers."

Editor's Note: The relator, Joyce Riley, has appealed to the Fifth Circuit Court of Appeals. As of the date this publication went to press, no briefing schedule had been set.

Public Disclosure Bar and Original Source Exception

***U.S. ex rel. Stone v. AmWest Savings Association*, Memorandum and Order, No. 3:96-CV-0549-G (N.D. Tex. Oct. 2, 1997)**

Setting forth a new ruling on an "original source" issue,a Texas district court found that,

because the relator had obtained immunity from criminal prosecution in return for making statements to the Government in its criminal fraud investigation of the defendant, he did not "voluntarily" provide his false claims information to the Government in accordance with FCA § 3730(e)(4)(B).

The *qui tam* case at hand arose out of the savings and loan crisis of the late 1980's and was preceded by a series of events and litigation involving AmWest Savings Association (AmWest), the Federal Savings and Loan Insurance Corporation (FSLIC), and the relator Clay Stone. AmWest had acquired the assets and liabilities of several failed S&L institutions from the FSLIC. As part of the sale, AmWest and the FSLIC entered into an Assistance Agreement which guaranteed payment to AmWest for certain losses and expenses relating to certain assets. The FSLIC and AmWest became involved in a dispute regarding those assets and eventually resorted to litigation in the U.S. Claims Court over the proper scope and application of the Assistance Agreement.

Stone, President and CEO of AmWest subsidiaries, was involved in litigation with AmWest regarding whether he was engaged in self-dealing or whether he was fired for "whistleblowing." The Government conducted a criminal investigation of AmWest's business activities during which Stone was allegedly granted immunity for testifying about questionable business activities he observed and undertook while employed by AmWest. Thereafter, in December 1992, he filed his *qui tam* suit alleging false claims by AmWest in connection with the Assistance Agreement. The Government declined to intervene in June 1995.

Suit Barred Under Both § 3730(e)(3) and § 3730(e)(4)

First, the district court found that FCA § 3730(e)(3) barred the *qui tam* action because it was "based upon allegations or transactions which are the subject of" previous government litigation (the Claims Court litigation between AmWest and FSLIC). Alternatively, the court found that the suit was barred under § 3730(e)(4) because the previous litigation involving AmWest and FSLIC involved public disclosures, and the relator's suit was "based upon" the public disclosures because it was "substantially similar to those in the public domain." Turning to the "original source" exception the court readily found that Stone's knowledge was direct and independent because of his time spent working at AmWest. However, the court ruled that he did not "voluntarily" provide his information to the Government.

Statements Provided in Exchange for Immunity Are Not "Voluntary"

Regarding the "voluntarily" standard, the district court extended prior restrictive definitions to new heights. Following U.S. ex rel. Fine v. Chevron, U.S.A., Inc., 72 F.3d 740 (9th Cir. 1995) (en banc), 4 TAF QR 7 (Jan. 1996), and U.S. ex rel. Barth v. Ridgedale Electric, Inc., 44 F.3d 699 (8th Cir. 1995), 1 TAF QR 2 (Apr. 1995), the court defined "voluntary" as "uncompensated" or "unsolicited" rather than "uncompelled." The court further stated that to qualify as an original source the relator "must prove that his disclosure was made 'of [his] own free will without valuable consideration . . . [or] without any present legal obligation . . . or any such obligation that can accrue from the existing state of affairs.'"

Applying this test the court ruled that Stone's disclosures were not "voluntarily" provided to the Government and thus he did not qualify as an original source. According to the court, Stone did not report the fraud while still in the employ of AmWest. Rather, he made his disclosures seven months after leaving AmWest and in return received immunity from criminal prosecution. Likening this case to Barth,

where the relator responded to questions in an interview initiated by government investigators, the court found that Stone had not come forward "voluntarily." Moreover, the court concluded that he had already obtained valuable consideration in the form of criminal immunity so "'[t]he government has no further need to rouse him from slumber and embolden him to perform.'"

***U.S. ex rel. Wercinski et al. v. International Business Machines Corporation*, 1997 WL 688015 (S.D. Tex. Oct. 9, 1997)**

A Texas district court dismissed a *qui tam* suit brought by two federal government auditors as jurisdictionally barred under § 3730(e)(4). The court found that the fraudulent transactions as well as the allegations of fraud had been publicly disclosed on several occasions, the relators' complaint was "supported by" these public disclosures, and the relators did not meet either of the "original source" requirements.

In the early 1990's, relators Robert Wercinski and Emil Kuropata, both Defense Contract Audit Agency (DCAA) auditors, participated in an audit of defendant International Business Machines Corporation (IBM) to determine whether IBM had overcharged the Department of Defense (DOD) and National Aeronautics and Space Administration (NASA) by recovering costs of leasing space in a building it already owned. During the audit they came to suspect that IBM may have defrauded the Government, and they reported this to their supervisors. After DCAA, the NASA Office of Inspector General, and the Department of Justice failed to take action in response to the auditors' allegations,the auditors filed a *qui tam* suit against IBM in 1995.

Material Elements of the Fraud Were Disclosed

Rejecting the relators' argument that the public disclosures cited by IBM had not revealed all material elements of the alleged fraud as required under § 3730(e)(4)(A), the district court found that "information exposing both the fraudulent transaction and the allegation of fraud have been publicly disclosed on several different occasions." In fact, "the very essence of the fraud charges against IBM — that IBM had billed the government for leasing space in an office building it owned — was specifically mentioned" by both Congressman John Dingell in a 1994 congressional hearing and DCAA assistant director Michael Thibault in a newspaper article. Moreover, "details of IBM's alleged wrongdoing" were contained in a DCAA audit report.

"Based Upon" Means "Supported By"

The court next addressed the relators' contention that their complaint was not "based upon" publicly disclosed information but rather on data discovered during their audit. After noting that the 5th Circuit has not yet expressly defined the meaning of "based upon" in § 3730(e)(4)(A), the court determined that "it appears that the Fifth Circuit has, at least implicitly, adopted the Precision court's interpretation" — that is, that "based upon" means "supported by." Consistent with this, the district court rejected the 4th Circuit's "derived from" definition of "based upon."

The court found that "without question" the allegations in the relators' complaint had a "substantial identity" with or were "supported by" the earlier publicly disclosed allegations; accordingly, the complaint was "based upon" those public disclosures.

Government Auditors Not Original Sources

Turning to the § 3730(e)(4)(B) "original source" exception, the relators argued that they had firsthand knowledge of the fraud necessary to satisfy the "direct and independent knowledge" requirement. The court disagreed,

emphasizing that the relators "did not, at least initially, obtain knowledge of IBM's unlawful billing practices through their own labor, but rather learned it secondhand from Butler, [the DCAA auditor] who prepared the original audit report." Moreover, "no new evidence was obtained by Kuropata or Wercinski in their follow-up audits nor did they make any significant contribution to the exposure of fraud."

In any event, the district court found that the relators' disclosure to the Government of information regarding the alleged fraudulent conduct was not "voluntary" within the meaning of § 3730(e)(4)(B). The court followed U.S. ex rel. Fine v. Chevron, U.S.A., Inc. et al., 72 F.3d 740 (9th Cir. 1995) (en banc), 4 TAF QR 7 (Jan. 1996) — holding that "government employees, such as Relators, under duty to disclose and report any wrongdoing, could not also 'voluntarily' . . . disclose such information to . . . the government."

Anti-Kickback and Self-Referral Violations

U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al., 125 F.3d 899 (5th Cir. Oct. 23, 1997)

The 5th Circuit reversed a lower court dismissal of a *qui tam* action alleging that the defendants violated the FCA by billing Medicare while violating the Medicare anti-kickback statute and Stark self-referral laws. According to the appellate court, a claimant submits a false or fraudulent claim when falsely certifying compliance with a statute or regulation where the Government has conditioned payment upon such certification.

Relator James Thompson, M.D., alleged that Columbia/HCA Healthcare Corporation and certain affiliated entities created incentive arrangements and provided financial inducements to physicians for patient referrals in violation of the anti-kickback statute and self-referral laws. According to the district court, Thompson's allegations that the defendants submitted Medicare claims for services rendered in violation of these laws were not sufficient to state a claim for relief under the FCA; moreover, his allegations that the defendants falsely certified compliance with these laws in annual cost reports were likewise insufficient. U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al., 938 F. Supp. 399 (S.D. Tex. 1996), 7 TAF QR 11 (Oct. 1996).

Allegations of Anti-Kickback and Stark Violations Sufficient to State Claim Under FCA

The 5th Circuit agreed with the lower court that claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA. However, relying on U.S. ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996), 7 TAF QR 8 (Oct. 1996), the appellate court stated that, where the Government has conditioned payment upon a certification of compliance with a statute or regulation, a claimant who falsely certified such compliance does submit a false or fraudulent claim. The court found that in the instant case "Thompson fairly alleged that the government's payment of Medicare claims is conditioned upon certification of compliance with the laws and regulations regarding the provision of health care services, including the anti-kickback statute and the Stark laws, and that defendants submitted false claims by falsely certifying that the services identified in their annual cost reports were rendered in compliance with such laws."

The appellate court stated that it was unable to determine on the record whether, as Columbia/HCA argued, compliance certifications in annual cost reports are actually not a

prerequisite to payment of Medicare claims. Thus, the court denied defendants' 12(b)(6) motions as they relate to this issue and remanded to the district court for further factfinding.

The 5th Circuit also instructed the lower court to address Thompson's contention that claims for services rendered in violation of the Stark laws are, in and of themselves, false or fraudulent under the FCA. This contention, which the lower court did not specifically consider in its dismissal,is based on provisions in the Stark laws expressly prohibiting payment for services rendered in violation of their terms.

Thompson's Allegations Regarding Unnecessary Services Do Not Satisfy Rule 9(b)

Turning to Thompson's allegation that "[i]n reasonable probability, based on statistical studies performed by the Government and others" approximately 40 percent of claims submitted for services rendered in violation of the anti-kickback and Stark laws were for services not medically necessary, the 5th Circuit affirmed the lower court's dismissal on Rule 9(b) grounds. The appellate court rejected Thompson's argument that he met the relaxed Rule 9(b) standard applicable when, as here, the facts relating to the fraud are peculiarly within the defendant's knowledge.

According to the court, while fraud may be pled on information and belief under such circumstances,the complaint must set forth a factual basis for such belief. Thompson, however, did not provide any factual basis for his belief that the defendants submitted claims for medically unnecessary services other than his reference to statistical studies, and these studies do not directly implicate the defendants. In short, Thompson's allegations "amount to nothing more than speculation" and thus fail to satisfy Rule 9(b).

Section 3729(a)(7) Reverse False Claims

***U.S. ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc. et al.*, Opinion and Order, No. C2-97-776 (S.D. Ohio Nov. 13, 1997)**

Dismissing a *qui tam* case for failure to state a claim, an Ohio district court ruled that FCA § 3729(a)(7), the "reverse false claim" provision, did not apply to importers that allegedly falsely represented to U.S. Customs officials that they did not violate various customs laws restricting the importation of garments from China. According to the court, "a person who violates a statute or regulation that subjects that person to a possible monetary fine or forfeiture of property and who then makes a false statement to conceal that offense" is not liable under the FCA for "having concealed the existence of an 'obligation' to the government by means of a false statement." The court found that the reverse false claim provision does not reach so broadly.

American Textile Manufacturers Institute, Inc. (ATMI), the national trade association of the domestic textile industry, filed a *qui tam* suit against a number of corporations and individuals who import manufactured textile goods. According ATMI, the defendants arranged for or knew that certain clothing actually manufactured in the People's Republic of China (China) was labeled as though it was manufactured in Hong Kong or Macau. Upon importation into the U.S. the defendants submitted false "entry documents" to U.S. Customs officials in order to conceal the true "country of origin" of the garments and their false labeling, thereby avoiding certain quotas placed on importation of garments from China. Moreover, these actions were in violation of various customs laws or regulations that impose fines or forfeitures for the false impor-

tation and labeling of merchandise and for false representations to Customs.

ATMI alleged that by falsifying the entry documents, the defendants "concealed" an "obligation" to pay a monetary penalty to the United States, thus violating the "reverse false claim" provision. Under § 3729(a)(7) a person is liable for a reverse false claim when he "knowingly makes,uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

In ruling on the defendants' Rule 12(b)(6) motion to dismiss, the primary question addressed by the district court was "whether a person who violates some statute or regulation that subjects that person to a possible monetary fine or forfeiture of property and who then makes a false statement to conceal that offense is liable under the FCA for having concealed the existence of an 'obligation' by means of a false statement." The court answered in the negative.

Court Finds that "Reverse False Claim" Provision Is Focused on Pre-Existing Contractual Relationships

According to the court, the reverse false claim provision was enacted in order to remedy the type of fraud that occurs when, despite no claim for payment being presented, there is an underpayment of funds to the Government. Pre-1986 case law was not uniform on the question of whether the Act applied to such circumstances. Thus, Congress in passing § 3729(a)(7) sought to codify the principle that a reverse false claim is actionable.

Referring to "obligation" as the key word in § 3729(a)(7), the court found that the term is susceptible to a range of meanings depending upon context. According to the court, "obligation" could refer only to a pre-existing right to payment based on clear contractual language or a court judgment. Or, more loosely construed, "obligation" could mean "any set of circumstances under which the Government could conceivably make a demand for payment by the alleged obligor, regardless of the legal basis for that demand." As a result, the court resorted to legislative history and the "decisional landscape" to determine the most likely sense in which Congress intended the word "obligation."

The court noted that the legislative history is silent on whether the new subsection (a)(7) was intended to reach situations involving a possible obligation to pay the Government fines or other penalties that could be imposed for a violation of some specific statute or regulation. Two of the pre-1986 decisions cited in the 1986 Senate Report section explaining the purpose of § 3729(a)(7) involved pre-existing contractual obligations to pay the Government money that, through false reporting, were reduced or eliminated. But the Report also highlighted cases involving income tax evasion and suggested that, but for the FCA's specific exemption for tax claims, such conduct would be actionable as a reverse false claim. The court, however, distinguished specific statutory or regulatory violations that could result in penalties from the Internal Revenue Code, which imposes a present, ongoing obligation on all citizens to pay taxes due to the Government.

Relator's Theory of Liability Was Unlimited and Beyond Scope of FCA

Finding that the few reverse false claims decisions which directly or indirectly address the issue reach opposite conclusions, the district court then examined the line of cases addressing whether regulatory or statutory violations constitute violations of the FCA under §§ 3729(a)(1) or (a)(2). Emphasizing both the reach of those cases but also a concern over

extending the Act too far, the court found that under ATMI's theory of liability the reverse false claim provision would easily apply to those cases. For example, in anti-kickback cases, had the defendants disclosed truthfully that they were in violation of the anti-kickback laws, the Government would have been able to pursue civil and criminal penalties. Those penalties, under ATMI's theory, would be "obligations" that were "concealed" by the false claims submitted to the Government.

Thus, the court concluded that ATMI's theory was unlimited and beyond the scope of the Act intended by Congress. Otherwise, the FCA would be "transformed into something it was not intended to be — namely, a vehicle for allowing . . . a suit for money damages whenever someone falsely states to the government that some unlawful act did not occur." At least in the context of (a)(1) or (a)(2), the existence of a "claim for payment" is a limiting factor on the FCA's reach, stated the court. Conversely, (a)(7) does not depend upon the presentation of a claim for payment. The court continued:

> Thus, if Congress intended any limitations at all on the extent to which the FCA captures false statements made to the government when no claim for payment is presented, such limitations may be found either by construing strictly certain statutory language, such as the word "obligation," . . . or by finding that the language chosen by Congress, even if not strictly limited to a legal obligation owed to the government, was not intended to apply to each and every statement which might conceal from the government the existence of criminal or civil violations to which monetary penalties might attach. The Court makes this latter finding.

To illustrate its concern, the court highlighted numerous examples of federal regulations with everyday record keeping requirements that subject businesses to potential fines for non-compliance. According to the court, under the relator's theory of liability, any time a business violated one of these regulations and then falsely represented otherwise it would be subject to FCA liability. However, the FCA is not intended "to be some super enforcement tool with a private right of action for the imposition of some new and additional penalty." Rather, the legislative history suggests that Congress was focused only on cases where a pre-existing obligation to the Government exists and the defendant reduces or eliminates the "obligation" through a false statement.

The court concluded that no principled way exists to distinguish the case at bar from the everyday business transaction hypotheticals set forth. The importation of goods is another everyday business activity governed by specific statutes and regulations with record keeping requirements subjecting the violator to a possible fine. According to the court, if the FCA reaches the importation transactions, it reaches every other regulatory violation that is concealed through false statements to the Government. However, the "language of § 3729(a)(7) is not so broad as to encompass every statutory or regulatory violation which might lead the United States to attempt to assess a fine or other type of monetary penalty against the violator."

***U.S. v. Q International Courier, Inc. et al.*, 1997 WL 781218 (8th Cir. Dec. 22, 1997)**

Although a mail courier firm may have violated certain statutes and regulations, the Government failed to demonstrate that the defendants owed an "obligation" to pay domestic postage rates on letters remailed to the United States from a foreign country; thus, they did not violate the § 3729(a)(7) "reverse false claim" provision, the 8th Circuit ruled.

According to the court, an FCA defendant "must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness," and no such "duty" existed in this case.

The Government brought suit under the FCA against Q International Courier, Inc. (Quick), a mail courier firm that arranges for the delivery of large numbers of letters, as well as certain officers and employees of Quick. The Government alleged that Quick violated the "reverse false claim" provision by engaging in an activity known as "ABA remail" — that is, Quick allegedly transferred bulk mail from the United States (A) to Barbados (B) in order to remail the letters individually back into the United States (A). At that time the United States Postal Service (USPS) rate for domestic mail was twenty-nine cents per ounce; however, the USPS charged the Barbadian postal service as little as one-tenth of that amount for first-class delivery of mail throughout the U.S. Therefore, the Barbadian postal service charged significantly less than the twenty-nine cent rate to deliver mail from Barbados to the U.S. Thus, by engaging in the "ABA remail" practice Quick realized substantial postage cost savings for its customers. As such, the Government alleged that Quick owed an "obligation" to the U.S. for the full domestic postage rate for each letter and that Quick attempted to reduce this "obligation" through false statements or records.

"Reverse False Claim" Provision Only Covers Existing Legal Duty

According to the 8th Circuit, in order to recover under the "reverse false claim" provision, the Government must show that it was "owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used." A potential liability does not constitute an obligation, stated the court. Rather, "a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness." This interpretation is in accord with the FCA's legislative history, which referred to "money owed" when explaining § 3729(a)(7). The court found that Congress' use of the "certain, indicative, past tense" shows that Congress meant for the FCA to reach only "existing legal duties to pay or deliver property."

While acknowledging that there was no contract with Quick, the Government pointed to various statutes and regulations to establish that Quick owed a duty to pay full domestic postage rate for each piece of mail sent through Barbados. While agreeing that Quick may well have violated the cited statutes and regulations, the court found that those provisions did not "create a legal duty for the defendants to pay domestic postage." For instance, one regulation cited by the Government merely released the USPS from an obligation to deliver mail sent by U.S. residents from certain foreign locations if the domestic postage rate was not paid. It did not, according to the court, impose an obligation on anyone to pay a certain postage.

The court also rejected the Government's contention that the Private Express Statutes, which forbid the private carriage of letters, imposed a legal duty to pay postage. According to the court, while those statutes allow for civil and criminal penalties against violators, those penalties are unrelated to the postage amount and "a potential penalty, on its own, does not create a common-law debt." Further, "[a] debt, and thus an obligation under the meaning of the [FCA] must be for a fixed sum that is immediately due." These regulations did "not create an immediate duty to pay a specific sum."

In short, none of the regulations cited by the Government established a duty by Quick to pay money or property that it sought to avoid

by using false records or statements. As such, the court affirmed the district court's grant of summary judgment in favor of the defendants.

CIT Jurisdiction

***U.S. ex rel. Felton and Phillips USA, Inc. v. Allflex USA, Inc.*, 1997 WL 784650 (CIT Dec. 3, 1997)**

The Court of International Trade (CIT) declined to assert jurisdiction over a *qui tam* action, finding such jurisdiction impermissible because a *qui tam* action is not "commenced by the United States" as required by the statute governing CIT jurisdiction. As such, the CIT ordered the case transferred back to the district court from which it originated.

Relators Alan Felton and Phillips USA, Inc. filed a *qui tam* action in federal district court against Allflex USA, Inc. in 1995 alleging that Allflex violated the FCA by avoiding payment of certain customs duties. According to the relators, Allflex falsely classified veterinary syringes, which are subject to duty, as agricultural implements, which are not subject to duty. The Government declined to intervene and the relators pursued the case on their own.

In 1996 the district court ruled that it did not have subject matter jurisdiction because the case involved customs fraud and was thus within the exclusive jurisdiction of the Court of International Trade (CIT). The district court then granted the relators' motion to transfer the case to the CIT.

The relators then argued that the CIT should transfer the case back to the district court because FCA cases are within the exclusive jurisdiction of the district courts. Moreover, the relators and the Government argued that the case did not fall within the CIT's jurisdiction.

The CIT found that it was bound by the Federal Circuit's ruling in LeBlanc v. United States, 50 F.3d 1025 (Fed. Cir. 1995), that FCA cases are within the exclusive jurisdiction of the district courts. Moreover, the court found that, even if this ruling were not binding, the CIT had no jurisdiction over the case under 28 U.S.C. § 1582 because under that statute an action must be "commenced by the United States" to fall within CIT jurisdiction.

Under FCA's Plain Language, Relators — Not the Government — "Commence" *Qui Tam* Actions

According to the court, the FCA indicates that a *qui tam* action is brought by a person for and in the name of the Government, and not by the Government. Moreover, the FCA provision allowing the Government to "proceed" with the action without being bound by the acts of the relator evidences the lack of government control over the private party "and, thus, the initial filing of the suit." In addition, in setting forth the relator share award, the statute indicates that the relator is responsible for having "brought" the suit, wording that the court found equivalent to "commence" in § 1582. Finally, the statute repeatedly refers to the relator as the person "initiating the action." Thus, the court concluded that the language of the FCA amply demonstrates that it is the relator who "commences" a *qui tam* action.

The CIT rejected the defendant's argument that cases holding that the Government is the "real party in interest" in *qui tam* actions dictates the conclusion that the Government "commenced" the *qui tam* suit for purposes of CIT jurisdiction. According to the court, those cases also recognize the private party's interests, which provide the incentive for relators to bring actions in the first place. And the Government's position as the real party in interest is not inconsistent with a *qui tam* suit being "commenced" by another party.

Falsity of Claim/Regulatory Noncompliance

***U.S. ex rel. Joslin v. Community Home Health of Maryland, Inc.*, 1997 WL 721886 (D. Md. Nov. 17, 1997)**

A Maryland district court dismissed on summary judgment a *qui tam* action alleging noncompliance with state licensing requirements for home health care facilities, finding that the state laws had not in fact been violated. Moreover, the relator failed to show that such violations, even if they had occurred, triggered FCA liability.

Michael Joslin's *qui tam* suit alleged that home health care provider Community Home Health of Maryland and two affiliated entities violated the FCA by certifying compliance with Maryland licensure laws and submitting Medicare claims while not actually in compliance. The Government declined to intervene. Subsequent to the district court's denial of various motions to dismiss and summary judgment motions, the parties entered into a stipulation of facts and filed cross-motions for summary judgment. The court granted summary judgment for the defendants.

No Violation of Maryland Health Care Licensure Law Found

According to the court, the alleged misconduct occurred "against the changing backdrop of Maryland's health care licensure laws." An exhaustive analysis by the court concluded that the defendants actually had not violated Maryland law in any of the various ways alleged by the relator.

Summary Judgment Also Appropriate on Other Grounds

In any event, stated the court, the relator failed to show that any such violation of state law triggers liability under the FCA. Form HCFA-1450, which the defendants used to submit Medicare bills for reimbursement, includes no certification of compliance with state law. And, declining to follow Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994), aff'd, 57 F.3d 1084 (Fed. Cir. 1995), the court rejected the relator's contention that submitting bills to the Government constituted an "implied certification" of compliance. Moreover, "[e]ven if the Court were to follow Ab-Tech and hold that Defendants' billings created an implied certification . . . Relator has failed to meet his burden on summary judgment of proving that payment of federal Medicare funds is conditioned upon certification with compliance with state laws and regulations."

Lastly, the court declared that "summary judgment for Defendants is also appropriate because Relator offers no evidence of Defendants' knowledge of the false statements."

State Entities as FCA Defendants

***U.S. ex rel. Foulds v. Texas Tech University et al.*, 1997 WL 631729 (N.D. Tex. Oct. 3, 1997)**

State institutions are not immune from either *qui tam* suits or suits under § 3730(h), a Texas district court held. According to the court, the Eleventh Amendment does not apply to *qui tam* cases because the Federal Government is the real party in interest. The Eleventh Amendment also does not apply to suits under § 3730(h) because it would be the Government that would suffer the greatest harm if recourse under the anti-retaliation provision were eviscerated. The court further concluded that a state institution is a "person" under the FCA and, therefore, may be named as a defendant.

Relator Carol Rae Cooper Foulds was a physician and dermatology resident employed by

the dermatology clinic at the Texas Tech University Health Sciences Center School of Medicine. Her duties required her to examine, make diagnoses for, and prescribe treatment for patients admitted to the University Medical Center. These duties were supposed to be performed under the supervision of staff physicians. Foulds' complaint, however, alleged that residents performed those duties without any supervision by staff physicians; in fact, staff physicians were not even in the clinic most of the times those services were provided. The staff physicians allegedly signed off on the patient charts and Medicare/Medicaid billing forms certifying that they had personally performed or supervised the services when, in fact, they had not. According to Foulds, departments other than the dermatology department followed the same practice resulting in a total of more than $21 million in government overpayments. As a result of bringing these allegations to the attention of Texas Tech and the Health Sciences Center, Foulds allegedly experienced retaliation. The Government declined to intervene in her case.

Texas Tech and the Health Sciences Center moved to dismiss Foulds' complaint under Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6). They based their motions on three theories. First, the relator's suit is precluded by the doctrine of state sovereign immunity under the 11th Amendment. Second, the "real party in interest" exception to sovereign immunity in *qui tam* cases is unavailable for claims under § 3730(h). And, third, a state is not a "person" for purposes of the FCA.

States Do Not Enjoy Sovereign Immunity from *Qui Tam* Suits Because Federal Government is Real Party in Interest

The district court first addressed the issue of 11th Amendment sovereign immunity. Citing Supreme Court cases, it determined that there is no 11th Amendment immunity when the Federal Government sues a state or state agency. The court then isolated the critical issue before it as whether a state or state agency enjoys immunity when the Government declines to intervene in a *qui tam* case. Following the 4th Circuit's lead, as the 5th Circuit in Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997), indicated that it would, the court then ruled that the Government is the real party in interest in all *qui tam* cases — whether or not it elects to intervene in the case. As such, the 11th Amendment does not bar *qui tam* litigation.

Also following the real party in interest reasoning, the district court further determined that the Supreme Court's recent holding in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), has no bearing on the case. Thus, it need not determine whether Congress' intent to abrogate states' immunity was unmistakably clear, or whether Congress acted pursuant to a valid exercise of power.

Suits Under § 3730(h) Also Not Precluded by Eleventh Amendment

Next, the district court addressed the defendants' contention that the 11th Amendment precludes suits under § 3730(h). Defendants argued that there is no injury to the Government in § 3730(h) retaliation claims and, therefore, states maintain their immunity from suit. The court, however, determined that the issue needed to be decided in light of the rationale behind the FCA.

Citing 5th Circuit precedent, the court stated that the purpose behind the Act and § 3730(h) is to discourage fraud against the Government and encourage those with knowledge of fraud to come forward. Thus, if the Government is the real party in interest, there is no logical reason why sovereign immunity should prevent a relator from utilizing § 3730(h) when a state or state agency is the defendant. According to the court,

if § 3730(h) is eviscerated, then the Government is the one that will suffer the greatest harm because whistleblowers will be discouraged from coming forward for fear of retaliation. Therefore, concluded the court, the 11th Amendment does not preclude claims under § 3730(h).

State is a "Person" Within Meaning of FCA

Lastly, the court addressed whether a state is a "person" within the meaning of the FCA. It reasoned that it would be illogical under its previous sovereign immunity rulings to find that a state or state agency is not a "person" under the Act. The court again adopted the 4th Circuit's ruling that the Government is the real party in interest, and it stated that it would not let the defendants reassert their sovereign immunity arguments "through the back door."

Section 3730(h) Retaliation Claims

***Latham v. Navapache Healthcare Association et al.*, Order, CIV 96-2547-PHX-EHC (D. Ariz. Sept. 29, 1997)**

An Arizona district court dismissed an FCA § 3730(h) suit on res judicata grounds where the defendants were the same as in a previously dismissed *qui tam* action brought by the same plaintiff. Moreover, the court ruled that a remaining defendant who had not been named in the previous action was not the plaintiff's "employer" and thus could not be held liable under § 3730(h).

In January 1996, Dr. Bruce Latham filed a *qui tam* action against Brim Healthcare, Inc. (Brim), Roundup Memorial Hospital Association (Roundup), and Dr. Samuel Boor (Boor) in the District of Montana (the Montana action). In October 1996 that action was dismissed with prejudice under Rule 9(b) for failure to allege fraud with sufficient particularity. A month later Latham filed a § 3730(h) suit in the District of Arizona against the previously named *qui tam* defendants as well as Navapache Regional Memorial Center (Navapache), a hospital managed by Brim which at one time granted and later denied Dr. Latham staff privileges.

Res Judicata Bars § 3730(h) Suit Against Defendants from Dismissed *Qui Tam* Action

Brim, Roundup, and Boor argued that res judicata barred Latham's suit against them because he had the opportunity to raise the § 3730(h) claim in the Montana action. Res judicata applies when (1) the parties are identical in both cases, (2) the same cause of action is involved, (3) the prior judgment was rendered by a court of competent jurisdiction, and (4) there was a final judgment on the merits. After stating that the latter two requirements were met here because the Montana action was dismissed with prejudice by a district court, the Arizona court addressed Latham's contentions regarding the first two requirements.

The court rejected Latham's argument that the "identical parties" requirement was not met because the Montana action was brought by Latham as a relator on behalf of the Government whereas the instant suit was brought on behalf of himself personally. And the court also rejected the argument that the *qui tam* action and the § 3730(h) suit arose from different facts. According to the court, the factual allegations in the two complaints were "nearly identical" — both stated that the defendants engaged in Medicare fraud, that Latham confronted the defendants about their conduct and reported them, and that Latham was subsequently harassed, threatened, and ultimately fired for his actions.

Furthermore, the court emphasized that Latham was aware of the defendants' retalia-

tion at the time he filed the Montana action and could have included a § 3730(h) claim in that action. Thus, the inclusion in the instant suit of certain defendant conduct not cited in the Montana action (including an allegation that the defendants attempted to blackball Latham from the medical profession) was "insufficient to avoid res judicata."

Hospital Was Not Plaintiff's "Employer" and Thus Not Covered by § 3730(h)

Res judicata did not prevent Latham from suing defendant Navapache since Navapache was not a party in the Montana action. Nevertheless, the district court granted summary judgment in favor of Navapache because Navapache was not Latham's "employer" and thus could not be held liable under § 3730(h).

Section 3730(h) states: "Any employee who is discharged . . . harassed, or in any other manner discriminated against in the terms of conditions of employment by his or her employer . . . shall be entitled to all relief necessary to make the employee whole." The FCA does not define the terms "employer" or "employee." According to the district court, the Supreme Court has held that these terms "describe the conventional master-servant relationship as understood by common law agency doctrine."

Accordingly, the district court relied on the following in finding that Navapache was not Latham's employer: Latham was a paid employee of White Mountain Family Practice; on the other hand, Latham did not allege that Navapache ever paid him any compensation, had any direct control over his actions, or entered into any employment contract for his services; in fact, Navapache's only affiliation with Latham was that it granted him temporary staff privileges so that he could use the hospital's facilities; and Arizona courts have held that a hospital is not an employer merely because it has granted medical staff privileges.

U.S. ex rel. Foulds v. Texas Tech University et al., 1997 WL 631729 (N.D. Tex. Oct. 3, 1997)

See "State Entities as FCA Defendants" above at page 11.

Rule 9(b)

U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al., Order, Civ. No. 4-96-734 (D. Minn. Sept. 24, 1997)

A Minnesota district court ruled that a *qui tam* complaint alleging fraudulent anesthesiology billing by dozens of defendants throughout a six year period was sufficiently specific to satisfy the Rule 9(b) pleading requirement.

Minnesota Association of Nurse Anesthetists, an association of professional certified registered nurse anesthetists, filed this *qui tam* action in December 1994 against various hospitals, administrators, anesthesiology practice groups, and medical doctor anesthesiologists. The relators alleged that the defendants fraudulently billed Medicare for services that the anesthesiologists did not perform or that did not qualify for reimbursement. The Government declined to intervene.

In March 1997, the district court denied defendants' motion to dismiss for lack of subject matter jurisdiction under § 3730(e)(4). However, the court agreed with the defendants that the relators' complaint lacked sufficient specificity to satisfy Rule 9(b) and dismissed it without prejudice, granting plaintiffs leave to file an amended complaint. U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al., Memorandum Opinion and Order, Civ. No. 4-96-734 (D. Minn. Mar. 3, 1997), 9 TAF QR 3 (Apr. 1997).

Rule 9(b) Pleading Requirement Satisfied

According to the district court, the Rule 9(b) pleading requirement may be relaxed if the defendant controls the information required for proper pleading, or if the fraudulent activity involves numerous transactions or occurred over a long period a time. As to the §§ 3729(a)(1) and (2) counts in the relators' amended complaint, the court found that Rule 9(b) was satisfied because "a plethora of examples of allegedly fraudulent conduct by individual defendants including names, dates, and descriptions of procedures" were provided. With respect to hospital defendants, fewer examples were provided, but most of these examples included specific information including names, dates, and descriptions of procedures.

The relators were unable to provide specific examples regarding defendant St. Cloud Hospital because the necessary detailed information was exclusively in the hospital's possession. Yet, the court found Rule (9)(b) satisfied because the complaint did include "an adequate description of the nature and subject matter of the alleged false claims" and "provided notice sufficient to allow Defendants to defend against the allegations."

The court found that, in light of the relaxed standard applicable when defendants exclusively control necessary information, the relators "minimally satisfied" Rule 9(b) as to their count alleging a conspiracy to defraud the Government in violation of § 3729(a)(3). The court stated,however, that "Plaintiffs will face a substantially greater burden to withstand a summary judgment motion as to [the conspiracy count]."

The court rejected the defendants' argument that the complaint should be dismissed because it relied exclusively on information gathered through discovery. According to the court, its March Order recognized that "Plaintiffs' allegations were based upon their own knowledge" and "the basis of the [more particular amended] complaint continues to be Plaintiffs' knowledge and reasonable belief."

"Reverse False Claim" Count Dismissed

The court granted the defendants' Rule 12(b)(6) motion with respect to the relators' § 3729(a)(7) "reverse false claim" count. The relators argued that the defendants' alleged pattern of continually submitting false claims in violation of §§ 3729(a)(1) and (2) was in part intended to avoid an obligation to repay the Government for those same fraudulent submissions; thus, each alleged submission also violated § 3729(a)(7). The court responded that this liability theory "subjects the Defendants to a gratuitous penalty for the same allegedly improper act." The relators suggested no independent basis for subsection (a)(7) liability. Instead, the alleged misconduct "is within the purview of subsections (a)(1) and (2) rather than (7)."

U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al., 125 F.3d 899 (5th Cir. Oct. 23, 1997)

See "Anti-Kickback and Self-Referral Violations" above at page 5.

Res Judicata

In Re Schimmels, 127 F.3d 875 (9th Cir. Oct. 14, 1997)

According to the 9th Circuit, the Government is in "privity" with relators in FCA litigation and, therefore,was bound by an adverse bankruptcy court adjudication against the relators in the *qui tam* case at hand.

Five relators filed an FCA case against a sewage and water project contractor in Spokane, Washington alleging fraud against the

Government on seven major public works projects. All but two of the defendants settled. The district court entered a partial summary judgment against the remaining two defendants holding that they had violated the Act and an Order specifying damages. The court did not resolve all the issues pending in the litigation, including the amount of civil money penalties, the apportionment of the recovery between the Government and the relators, and other FCA allegations. Thereafter, the two defendants filed a petition for Chapter 11 bankruptcy triggering an automatic stay of all judicial actions against them. The relators appealed the intermediate appellate court's ruling upholding the stay.

Meanwhile, the Government and the relators filed separate adversary complaints in the bankruptcy court for a determination of the dischargeability of the FCA money judgment. The Government's complaint lay dormant while the bankruptcy court took up the relators' complaint. Without reaching the merits of the relators' complaint, the court granted summary judgment for the debtors-defendants, finding that the relators had failed to file timely opposition papers. The relators then filed a motion to intervene as plaintiffs in the Government's adversary proceeding. The bankruptcy court denied this motion and entered summary judgment in favor of the debtors-defendants and against the Government ruling that all damages and penalties imposed in a *qui tam* action would be dischargeable in bankruptcy. Both the Government and the relators appealed to the district court.

The district court ruled that the relators' attempt to intervene in the Government's adversary proceeding was barred by res judicata because they had already brought their own adversary proceeding on the very same issue and lost. As to the Government, the district court ruled that the summary judgment entered against the relators in their adversary proceeding had full res judicata effect against the United States. It reasoned that the involuntary dismissal of the relators' adversary proceeding had the effect of an adjudication on the merits and was res judicata as to the Government on whose behalf the relators were litigating. The Government appealed this ruling to the 9th Circuit.

In two previous opinions in this case, the 9th Circuit (1) vacated as moot the bankruptcy appellate panel's decision denying the relators relief from the automatic stay, and (2) affirmed the district court's dismissing as untimely the relators' appeal from the bankruptcy court's adverse decision on dischargeability. The issue remaining for 9th Circuit review was whether the summary judgment entered against the relators in their adversary proceeding against the debtors-defendants was res judicata with respect to the Government.

Government Bound by Default Judgment Against Relators

The 9th Circuit rejected the Government's argument that it should not be bound by the default judgment entered against the relators. In reaching this conclusion, the court reiterated that, under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. It explained that the central reason for this doctrine is to support the purpose of civil courts — to resolve conclusively disputes within their jurisdiction. The doctrine, the court continued, covers "privies" or persons so identified in interest with a party to former litigation that they represent precisely the same right in respect to the subject matter involved.

The Government argued that its interest and the relators' interests were adverse in this situation because the relators were seeking to vindicate their own separate and discrete financial interests in the proceeds of the *qui tam* judg-

ment. The 9th Circuit disagreed, finding a unity of interest between the relators and the Government regarding the *qui tam* recovery. It also cited relevant sections of the FCA for its conclusion that the Government is the real party in interest in any *qui tam* action despite the relator's litigation role. The court pointed out that the statute itself gives the Government the authority to intervene in the relator's action for good cause, including in the bankruptcy court concerning issues regarding enforcement of *qui tam* judgments. Further, the court found no "partial assignment" of the Government's claim to the relators since the Government completely declined to intervene in the relators' action. Finally, the court found that the Government was aware of, and even tacitly participated in, the adjudication of the relators' adversary proceeding, but never sought to intervene in it.

Involuntary Dismissal of Relators' Adversary Proceeding Binds Government Under Res Judicata

An involuntary dismissal generally acts as a judgment on the merits for purposes of res judicata regardless of whether the dismissal results from procedural error or from the court's examination of a substantive claim. The Government, while not taking exception to this rule, did object to the involuntary dismissal's having an effect on its cause of action. The 9th Circuit reiterated that the doctrine of res judicata applies to parties and their privies. As the court had already found that the Government and the relators were in privity, it concluded that the involuntary dismissal of the relators' adversary proceeding also bound the Government.

ALLEGATION: FRAUDULENT PSYCHOTHERAPY AND OCCUPATIONAL THERAPY SERVICES

***U.S. ex rel. Castaneda et al. v. GMR Healthcare, Inc. et al.* (WD TX No. SA-96-CA-1305)**

DOJ has intervened in a *qui tam* suit against GMR Healthcare, Inc. alleging fraudulent Medicare and Medicaid mental health services. The suit was filed in 1996 by three former employees of GMR, which owned and operated Community Mental Health Centers in Texas. Community Mental Health Centers provide specialized outpatient services for chronically mentally ill individuals including day treatment and other "partial hospitalization services." Named as individual defendants are the two psychiatrists and the licensed marriage and family therapist who are the principals of the corporation.

Allegations address a variety of misconduct including: billing for patients admitted without a physician's certification and treated without a treatment plan; billing for individual psychotherapy sessions not performed; upcoding claims; billing for attendance at group psychotherapy sessions by patients not present, or for group sessions that were merely recreational (such as bingo or movies); and billing for ineligible patients. Additional violations cited are: billing for psychotherapy or occupational therapy sessions that were not conducted by qualified professionals; billing for services misrepresented as occupational therapy; falsifying documents in support of claims; billing for undocumented claims; and improper referrals of patients by physician-owners. The relators' counsel is Glenn Grossenbacher (San Antonio, TX). Assistant U.S. Attorney Marialyn Barnard is representing the Government.

ALLEGATION: INFLATED BILLINGS FOR POLLUTION ABATEMENT SYSTEM

***U.S. v. Gramoll Construction Co. and Western Sheet Metal, Inc.* (D UT No. 2:97 CV 0771J)**

In September 1997, DOJ filed a False Claims Act suit against Gramoll Construction Co. and Western Sheet Metal, Inc. alleging inflated billings for work done on the Material Test Facility (MTF) in Dugway, Utah. Gramoll was awarded a contract by the Army Corps of Engineers for the construction of the Dugway facility. Western subcontracted with Gramoll to provide pollution abatement system (PAS) duct work for the MTF. The PAS was intended to carry sometimes lethal concentrations of chemical warfare agents from test chambers and other sites within the MTF to another location for safe destruction. According to the complaint, Gramoll and Western initially installed the PAS duct using flanged rather than welded connections. Testing of the PAS in 1990 showed unacceptable levels of leakage for a system carrying poison gas, and the Corps directed Gramoll to weld the PAS to an airtight standard. The facility was completed and accepted from Gramoll by the Government in 1991.

According to DOJ, in 1992 Western submitted two inflated claims for payment to Gramoll for costs supposedly incurred in relation to its work on the PAS. Gramoll in turn based its claims for payment to the Government on Western's inflated claims to Gramoll. In addition, DOJ alleges that Western inadequately performed the testing of the PAS duct and that Gramoll concealed this from the Government by submitting false quality control reports. DOJ further contends that Gramoll knew or should have known that Western's claims contained false statements and that Gramoll therefore should not have certified to the Government that the amount requested accu-

rately reflected the amount for which Gramoll believed the Government was responsible. In 1995 Gramoll submitted another false claim, this time based on Western's claim for payment for 1994 repairs, work which Gramoll and Western certified to have completed properly in 1991. Handling the case for the Government is Assistant U.S. Attorney Eric Overby.

ALLEGATION: DEFECTIVE MILITARY AIRCRAFT

U.S. ex rel. Kerr v. The Boeing Company

In October 1997, a *qui tam* suit was reported alleging that The Boeing Company produced defective aircraft and falsely certified parts and workmanship. The suit, brought by former company employee Timothy Kerr, also alleges sabotage in connection with planes built for Asian customers. The lawsuit, which concerns commercial as well as military aircraft, maintains that company inspectors violated quality control standards in order to meet production schedules. Originally filed in California, the case is reportedly being investigated by the U.S. Attorney's Office in Seattle.

ALLEGATION: FALSE CERTIFICATION OF DISCOUNTS TO GSA

***U.S. ex rel. Falck v. Clark Equipment Company and Ingersoll-Rand Company* (ED VA No. 97-1763-A)**

In October 1997, DOJ intervened in a *qui tam* suit against Ingersoll-Rand Company, its subsidiary Clark Equipment Company, and operating unit Melroe Company. According to the lawsuit, Clark/Melroe falsely certified to the General Services Administration that its best discount for excavation equipment was 24 percent when in fact it had established national discount programs with dealers ranging from 36 to over 42 percent. In connection with the resultant inflated claims, the complaint alleges concealment of records and other pricing information. The suit was filed in 1997 by Steven Falck, a former Melroe salesman. The relator's counsel is William Hardy of Kleinfeld, Kaplan and Becker (Washington, D.C.). Representing the Government are Assistant U.S. Attorney Gerard Mene and Polly Dammann and Alicia Bentley of the DOJ Civil Division.

ALLEGATION: MEDICARE AND MEDICAID HOSPICE FRAUD

***U.S. v. Kirschenbaum et al.* (ND IL No. __)**

In October 1997, DOJ announced that it filed a False Claims Act suit against attorney Ari Kirschenbaum, his wife, and various corporations and limited partnerships he controlled. The lawsuit alleges fraudulent Medicare and Medicaid claims arising from the operation of a not-for-profit hospice, Samaritan Care, Inc., including at least 213 instances of Medicare reimbursements based on false billings.

In a related criminal matter, DOJ announced a 73 count indictment against Kirschenbaum that seeks forfeiture of $28.25 million in proceeds from the alleged crimes, and the Government has obtained a court order freezing about $20 million in personal assets. In addition to Medicare and Medicaid fraud and fraud involving the sale of operations to Integrated Health Services (a Maryland-based provider), the indictment cites schemes to defraud the State of Illinois of taxes and unemployment benefits. Conducting the investigation were the FBI and HHS OIG. Handling the case are Assistant U.S. Attorneys Sheila Finnegan, Michele Fox, and Susan Haling.

ALLEGATION: KICKBACKSINVOLVING HUD-INSURED PROPERTIES

***U.S. v. Kaplan* (ND CA No. __)**

In November 1997, DOJ filed a False Claims Act suit against Shelby Kaplan alleging a kickback scheme involving the management of five HUD-insured family housing properties. Ms. Kaplan, the general partner of the property owners, allegedly gave Insignia Management group the exclusive right to manage these properties in exchange for Insignia's agreement to pay back to Kaplan 20 percent of the monthly fees they earned. The management fees were paid entirely from the tenants' rents and from HUD Section 8 money. According to DOJ, the arrangement damaged the Government because project assets were misappropriated and the rents that were subsidized by HUD were inflated. Alleged false claims and statements include management certifications, annual financial statements, applications for housing assistance payments, and applications for rent increases. The complaint further contains allegations under anti-kickback laws and the HUD double damages statute, which covers regulatory breaches.

In August, Insignia settled with the Government for $5 million and agreed to disclose other similar schemes in which it has been involved. DOJ is also pursuing a related False Claims Act kickback suit against A. Bruce Rozet, Deane Earl Ross, Associated Financial Corporation, Lawrence Penn, and several associated entities.

ALLEGATION: FALSE AMBULANCE CLAIMS

***U.S. v. Yahola et al.* (ND OK No. __)**

In November 1997, a False Claims Act suit was reported alleging that Roman Yahola, Harley Revis, and Terrance Revis submitted more than $1 million in false claims to Medicare and Medicaid in connection with Revis Ambulance Service of Sapulpa,Oklahoma. In a related criminal matter, a grand jury reportedly has returned a 64 count conspiracy and mail fraud indictment against the individuals. Assistant U.S. Attorney Loretta Radford is handling the case.

U.S. ex rel. Kurilec and Benard v. University of Connecticut Health Center (D CT No. 3:96CV00288 PCD)

In October 1997,the University of Connecticut Health Center agreed to pay the Government **$1.3 million** to settle a *qui tam* suit alleging fraud in connection with a grant program at its Medical and Dental Schools. The suit was filed in 1996 by Martha Kurilec, D.M.D., and Paul Benard, D.M.D., who held geriatric dental fellowships at the University's Dental School. UCONN allegedly falsely certified that certain facilities and programs were included in the dental fellowships, in particular misrepresenting to the Government that clinical placements had been made for the period 1988 to 1996. The settlement is the largest to date of a health care *qui tam* case in Connecticut. Investigating the matter were Special Agents of the FBI assigned to the Connecticut Health Care Fraud Task Force. The relators' share was $234,000. The relators were represented by Hope Seeley of Santos & Seeley, P.C. (Hartford, CT). Assistant U.S. Attorney Alan Soloway represented the Government.

Alton Ochsner Medical Foundation/"72 Hour" Rule

In October 1997, it was reported that Alton Ochsner Medical Foundation in New Orleans agreed to pay the Government **$1.7 million**, the highest settlement to date in the federal "72 hour window" investigation, which focuses on hospital Medicare billing for outpatient diagnostic tests. Under Medicare, tests done within 72 hours of an admission are considered part of an inpatient stay and reimbursed in the hospital's DRG payment. However, hospitals have billed separately for these tests, resulting in double payments. According to published reports, the government probe has produced at least 1,500 settlements and recoveries of over $48 million. Federal authorities have estimated that as many as 4,600 hospitals nationwide owe money in connection with this duplicate billing.

The Government's 72 Hour FCA initiative, launched following repeated HHS audits and continued overbilling by hospitals, is headed by the U.S. Attorney's Office in Harrisburg, Pennsylvania. Along with repayments to the Government, hospitals have been ordered to reimburse Medicare beneficiaries who also were improperly billed. (In general, beneficiaries pay a portion of the cost of outpatient tests, but Medicare covers the entire cost if the patient is admitted.)

Trendway Corporation

In October 1997, DOJ announced that Trendway Corporation of Holland, Minnesota agreed to pay the Government **$1.25 million** to settle False Claims Act allegations that it overcharged the General Services Administration for systems furniture by not offering GSA the same discount it gave commercial customers and not providing accurate pricing information. The overcharges were discovered by GSA's OIG during an audit. The settlement agreement was reached through use of an alternative dispute resolution proceeding involving an independent mediator selected by the Government and Trendway. Handling the case was Patricia Davis of the DOJ Civil Division.

Crozer-Chester Medical Center

In October 1997, DOJ announced that Crozer-Chester Medical Center (successor to Springfield Hospital) agreed to pay the Government **$664,504** to settle False Claims Act allegations that the hospital misused a pneumonia diagnosis code in its Medicare claims.

According to DOJ, Crozer-Chester improperly submitted a principal diagnosis code for a relatively rare category of pneumonia cases (those due to "other specified bacteria") when the claims were not supported by the corresponding medical records. The treatment of the rarer pneumonia is reimbursed by Medicare at a higher rate. Federal authorities are reportedly examining pneumonia upcoding at a number of facilities throughout the country.

The Crozer-Chester agreement calls for the hospital to cooperate in the Government's ongoing investigation and to implement a corporate integrity program with respect to inpatient treatment. Investigating the matter was the HHS OIG. Assistant U.S. Attorney Mark Kmetz of the Eastern District of Pennsylvania handled the case.

U.S. v. Lopez et al. ***(MD FL No. 97-1858-CV-T-99A)***

In October 1997, DOJ announced that Frank J. Lopez agreed to pay the Government **$2 million** to settle a False Claims Act suit involving improper claims submitted by two clinics he operated, Somed Co. and Physicians 1st Choice Inc. (PFC). According to DOJ, Lopez and his corporations paid kickbacks to physicians and clinic owners in exchange for patient referrals to Somed and PFC. The Government contends that Lopez and his employees attempted to cover up the kickback payments by calling them "rent" payments to physicians for use of examination space. However, these rent payments were either far in excess of the fair market value for comparable examination space or were for office space that did not actually exist. DOJ further alleges that Lopez formed corporations which he used to channel the funds generated by the clinics into his personal bank or brokerage accounts, or accounts held in the name of his wife. Between 1994 and 1997, Medicare paid $5 million to Somed and PFC, about 40 percent of which is alleged to have been tainted by the kickback scheme. Defendants signed a consent judgment in addition to the settlement agreement.

In July 1997, Lopez and others were indicted as part of DOJ's "Operation Takeback" initiative, which targets Florida providers who pay illegal rebates, bribes, and kickbacks for Medicare patient referrals. This is the first civil settlement stemming from those criminal charges. Conducting the investigation were the HHS OIG, DCIS, IRS, and U.S. Postal Service. The Government was represented by Assistant U.S. Attorneys Jay Trezevant and Steven Nisbet.

U.S. ex rel. Slutman v. Government Technology Services Inc. ***(ED VA No. 95-48-M)***

In October 1997, DOJ announced that Government Technology Services Inc. (GTSI) agreed to pay the Government **$400,000** to settle a *qui tam* suit alleging that the company overcharged federal agencies for computers and related equipment under several General Services Administration contracts. The action was brought in 1992 by Mary Slutman, a former employee of Novell Inc. GTSI, one of the largest dealers in computer equipment purchased by federal agencies, allegedly failed to inform GSA contract negotiators about rebates, marketing development funds, and marketing credits it received from certain manufacturers, and GTSI did not reduce its prices to reflect its own lower costs. The case was investigated by the GSA OIG. The relator's share was 17 percent or $68,000. The relator's counsel was Phillip Dearborn of Piliero, Mazza & Pargament (Washington, D.C.). The Government was represented by Patricia Davis of the DOJ Civil Division.

***U.S. ex rel. McKeeman v. Physicians Clinical Laboratory et al.* (ED CA No. CV S97 I005GEBGGH)**

In October 1997, Physicians Clinical Laboratory (PCL), the second largest provider of clinical laboratory services in California, agreed to pay the Federal Government **$2 million** to settle a *qui tam* suit alleging overbilling for lab tests. PCL reportedly will also pay the State of California $100,000 to resolve allegations that the company overbilled Medi-Cal, California's Medicaid program. According to DOJ, PCL overcharged Medicare, Medi-Cal, and CHAMPUS by using the wrong billing codes for blood and urine tests. The lawsuit was brought by Taylor McKeeman, PCL's former vice president for clinical operations, who supervised the company's testing facilities throughout California. In November 1997, PCL and several of its affiliates filed for bankruptcy under Chapter 11. The relator's share was $150,000. The relator's counsel was R. Brooks Cutter (Sacramento, CA). Representing the Government was Assistant U.S. Attorney Robert Twiss.

***U.S. ex rel. Giardini v. Teledyne, Inc. et al.* (CD CA No. 95-2977)**

In October 1997, Allegheny Teledyne Incorporated and several Teledyne units agreed to pay the Government **$13.95 million** to settle a *qui tam* suit alleging that a recently acquired subsidiary of Allegheny routinely billed the Government for work done for commercial customers, resulting in inflated prices for military systems. In addition to the improper cross-charging, Teledyne allegedly failed to perform required tests. The suit was brought in 1995 by Robert Giardini, who was in charge of quality assurance at Teledyne Systems Company and its successor, Teledyne Electronic Systems.

Along with Teledyne, Litton Industries was named as a defendant in the suit. Litton reportedly settled its portion of the case in 1996 by making a $265,000 adjustment to its overhead calculations for the Government. The relator's counsel was Eric Havian of Phillips & Cohen (San Francisco, CA). Assistant U.S. Attorney Susan Hershman represented the Government.

***U.S. ex rel. Kissel, Derington, Phillips, and Valentine v. Vendell Healthcare, Inc. et al.* (ND FL No. 95-50037/RV)**

In November 1997, DOJ announced that Vendell Healthcare, Inc., a bankrupt Nashville-based company, paid the Government **$4.2 million** to settle a *qui tam* suit alleging that it overcharged several federal health insurance programs. According to DOJ, two Florida hospitals formerly owned by Vendell and several affiliated outpatient clinics previously operated by Vendell in Florida and Alabama filed false claims. The lawsuit, brought in 1995 by four former Vendell employees, alleged that Vendell admitted and treated patients in its psychiatric facilities without regard to medical necessity, billed Medicare, CHAMPUS, and the Federal Employee Health Benefits Program for services not rendered, and entered into bogus contracts with doctors to pay kickbacks for patient referrals. Other allegations involved claiming reimbursement in Medicare cost reports for services of a psychiatrist who had been excluded from Medicare and CHAMPUS for a prior fraud conviction. The settlement has been approved by the Bankruptcy Court in Nashville.

In March, two Vendell subsidiaries which owned the hospitals and affiliated outpatient clinics pled guilty to conspiracy to defraud the federal programs as well as private insurance companies. Additionally, in August Vendell agreed to pay over $654,000 and drop about $680,000 in

bills to settle Medicaid False Claims Act allegations in connection with Rivendell of Nebraska, a psychiatric hospital for children and adolescents owned by Vendell. *See* 11 TAF QR 36 (Oct. 1997). Joining in the investigation were the FBI, DCIS, OPM OIG, DCAA, and HHS OIG. The relators were represented by Christopher Krafchak of Krafchak & Associates (Los Angeles, CA) and John Uskert (Panama City, FL).

***U.S. ex rel. Cook-Strayer and Field v. Pizzagalli Construction Company, Inc. et al.* (ED NC No. __)**

In November 1997, DOJ announced that Pizzagalli Construction Company, Inc. of South Burlington, Vermont agreed to pay the Government **$950,000** to settle a *qui tam* suit alleging that Pizzagalli defrauded the Army Corps of Engineers during the construction of the Faith Barracks Project at Fort Bragg, North Carolina. The action was filed in 1996 by Brenda Cook-Strayer and Wayne Field, former Pizzagalli employees. According to the Government, Pizzagalli did not follow the contract plans and specifications, failed to report substantial construction defects, and engaged in a cover-up to hide the problems from the Army Corps. Most of the settlement payment will be used to offset the increased costs incurred by the Corps to complete construction of the Barracks complex. Investigating the matter was the Army Criminal Investigation Command. The relators were represented by Rick Glazier (Fayetteville, NC). Representing the Government was Assistant U.S. Attorney Norman Acker.

***U.S. ex rel. Pickens and Thomas v. Kanawha River Towing, Inc. et al.* (SD OH No. C-1-93-790)**

In November 1997, Kanawha River Towing, Inc. and Campbell Transportation Company, Inc.agreed to pay the Government **$1.85 million** to settle a *qui tam* suit alleging noncompliance with environmental laws. According to the suit, in connection with a dam project, tugboat operators dumped bilge into the river and failed to keep records of the discharges, in violation of the Clean Water Act. The action was brought in 1993 by Earl Pickens and John Thomas. The settlement does not resolve allegations against certain other defendants. The relators' share was 29 percent. Representing the relators were James Helmer, Ann Lugbill, and Paul Martins of Helmer, Lugbill, Martins & Neff Co., L.P.A. (Cincinnati, OH) and Meredith Lawrence (Crestview Hills, KY).

***U.S. ex rel. Sikalis v. Thomas, Thomas, and Ron Thomas School of Cosmetology* (D MD No. AMD-95-1181)**

In November 1997, the Ron Thomas School of Cosmetology and its owners entered into a consent judgment for **$2 million** to settle a *qui tam* suit alleging false statements and certifications that the vocational school met all statutory and regulatory requirements to participate in financial assistance programs administered by the Department of Education. According to the lawsuit, false claims were submitted under the Guaranteed Student Loan and Pell Grant programs. The suit was filed in 1995 by Thomas Sikalis in conjunction with Taxpayers Against Fraud, The False Claims Act Legal Center. Mr. Sikalis is a former Ron Thomas School employee. The settlement resolves a consolidated civil action also involving a mail fraud injunction. On the criminal side, Mr. and Mrs. Thomas both pled guilty and have been sentenced to jail terms.

According to the *qui tam* complaint, the defendants falsified time cards, attendance records, and academic records to make it appear as

though students were attending classes and maintaining satisfactory progress. Program violations included failure to require adequate documentation of student eligibility, failure to ensure that students had the ability to benefit from the educational programs offered, and concealment of the high dropout and default rates of students. As part of the consent judgment, the Thomases and School also agreed to permanent exclusion from government contracting and programs. The relator's counsel was Christopher Mead of London & Mead (Washington, D.C.). Assistant U.S. Attorney Kathleen McDermott represented the Government.

***U.S. ex rel. Oberman v. McDonnell Douglas Corporation* (CD CA No. 91-3139 JMI)**

In November 1997, McDonnell Douglas Corporation, a wholly owned subsidiary of The Boeing Company, agreed to pay the Government **$2 million** to settle a *qui tam* suit alleging that it overcharged DOD to repair equipment used to manufacture C-17 aircraft. The suit was brought by Douglas Oberman, a former McDonnell Douglas employee. Under the terms of the settlement, the price of the prime contract will be reduced by $2 million. The relator was represented by Phillip Benson (Los Angeles, CA) and Donald Warren of Monaghan & Warren (San Diego, CA). David Cohen of the DOJ Civil Division represented the Government.

***U.S. v. The University of Chicago and Wied, M.D.* (ND IL No. 96 C 5814)**

In November 1997, DOJ announced that the University of Chicago agreed to pay the Government **$250,000** and a former medical professor will pay **$400,000** to settle a False Claims Act suit alleging the misappropriation of federal grant funds for cancer research. According to the suit, the University and Dr. George Wied, a former professor of obstetrics, gynecology, and pathology, misapplied about $850,000 in NIH funds for salaries, computer maintenance, telephone charges, and equipment. The complaint cited false statements and claims in connection with the initial and subsequent grant applications and federal cash transactions reports.

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

University of Virginia Health Services Foundation

In November 1997, DOJ announced that the University of Virginia Health Services Foundation, the private practice organization of the University of Virginia Medical School Faculty which bills Medicare for the services of its physicians, agreed to pay the Government **$8.6 million** to settle claims that it improperly billed for services provided by residents and interns in the teaching setting. Violations cited included inadequate documentation of suffi-

cient involvement by teaching physicians and errors in billing the level of services provided by attending physicians.

Under Medicare, teaching physicians may bill the federal program for services they actually provide or that are provided by residents or interns under their personal and identifiable direction. Graduate medical education funds under Medicare Part A pay for the services of residents and interns. To bill Medicare Part B for the teaching physician, the teaching physician must provide supervision to the residents and interns over and above that for which Part A has already paid.

The Foundation settlement reportedly was not concluded as part of the Government's ongoing "PATH" initiative, under which authorities have been examining the billing practices of teaching hospitals throughout the country. Rather, prior to PATH the Foundation undertook a self-audit and contacted DOJ. Handling the matter was Assistant U.S. Attorney Brian Miller of the Eastern District of Virginia.

U.S. ex rel. Hearn v. Kurwa et al. ***(CD CA CV-96-7720-WDK)***

In December 1997, DOJ announced that Dr. Badrudin Kurwa, an opthamologist, paid the Government more than **$375,000** to settle a *qui tam* suit alleging fraudulent Medicare billings. The suit was filed in 1996 by Sandra Hearn, who formerly worked as Dr. Kurwa's practice administrator. The doctor allegedly submitted false claims since 1991 and, when faced with an audit of his billings, altered patient charts to conceal the irregularities. According to DOJ, the settlement represents more than ten times the amount the doctor billed Medicare. Kurwa further agreed to a five year compliance program with HHS. The relator was represented by Lisa Foster of Phillips & Cohen (San Diego, CA). Assistant U.S. Attorney Faith Devine represented the Government.

U.S. ex rel. Federal Equipment Inc. v. Myers Systems ***(SD OH No. __)***

In December 1997, it was reported that a subsidiary of Myers Industries Inc. agreed to pay the Government **$400,000** to settle a *qui tam* suit alleging that the Myers Systems unit misrepresented its size in order to win 23 small business set-aside contracts with DOD. The suit was brought in 1995 by Federal Equipment Inc. of Cincinnati, a Myers competitor. DOJ declined to intervene in the action. The relator's share was 29 percent or $116,000. The relator was represented by Daniel Bellman (Columbus, OH).

U.S. v. Grimaldi and Grimco Pneumatic Corp. ***(D NJ CA No. 97)***

In December 1997, DOJ announced that Grimco Pneumatic Corporation and David Grimaldi, Jr., Grimco's president and owner, agreed to pay the Government **$704,000** to settle a False Claims Act suit alleging that the company provided defective arresting cable equipment to the Navy. Aircraft carriers rely upon the system of arresting gears, cables, and wires to snare a plane's tailhook as the aircraft lands on deck. According to DOJ, the defects required the Navy to recall all contracted parts. Grimaldi and Grimco also pled guilty to two counts of obstructing an investigation by failing to produce inspection records and by producing falsified inspection records.

According to DOJ, Grimaldi has admitted that Grimco manufactured installation and spares kits for the arresting cables which were badly machined, out-of-dimension, and defective.

Grimco also failed to perform various contractually required procedures and inspections on the components, including heat treatment, magnetic particle inspections, and dye penetrant inspections. Conducting the investigation were the Naval Criminal Investigative Service, DCIS, and the Air Force Office of Special Investigations. The civil settlement was handled by Assistant U.S. Attorney Michael Chagares. The Government was represented in the criminal case by Assistant U.S. Attorney Alain Leibman.

SPOTLIGHT

1997 YEAR IN REVIEW

Case Law Recap

SUPREME COURT RULING/RETROACTIVITY

High Court does not address "public disclosure" and "harm to fisc" issues, ruling instead that jurisdictional bar should not have been applied retroactively to pre-1986 conduct

In a much anticipated opinion, the Supreme Court in its first look at a *qui tam* action since the 1986 Amendments decided only the narrow threshold issue of retroactivity and left all other issues unaddressed. In ***Hughes Aircraft Company v. U.S. ex rel. Schumer*, 117 S. Ct. 1871 (U.S. June 16, 1997)**, the Court reversed the 9th Circuit and unanimously held that the 1986 FCA amendment permitting *qui tam* suits based on information in the Government's possession does not apply retroactively to *qui tam* suits regarding pre-1986 conduct; therefore, the action at hand should have been dismissed, as required by the pre-1986 version of the Act. Because of this retroactivity holding, the Court expressed no opinion on the "public disclosure" and "harm to the public fisc" issues that also were presented.

The case spurred widespread interest among industry groups, who filed numerous *amicus* briefs supporting the defendant Hughes Aircraft's position, and public interest groups — including TAF, Project on Government Oversight (POGO), National Employment Lawyers Association (NELA), and National Health Law Program, Inc. (NHeLP) — who argued for affirmance of the 9th Circuit's decision. The Department of Justice also argued in support of the 9th Circuit's holding. *(Copies of TAF's amicus brief are available upon request.)*

While in 1997 the Supreme Court was presented several additional petitions for certiorari involving *qui tam* actions, it chose not to grant any of the petitions and no FCA actions are currently pending before the Court.

CONSTITUTIONALITY

Contrary to all other courts that have considered the issue, Texas judge holds *qui tam* provisions unconstitutional

In perhaps the most surprising decision of the year, a federal district judge in Texas ruled for the first time that the *qui tam* provisions under the False Claims Act are unconstitutional. The controversial holding in ***U.S. ex rel. Riley v. St. Luke's Episcopal Hospital*, 1997 WL 679105 (S.D. Tex. Oct. 21, 1997)**, runs counter to the decisions of three circuit courts and countless district courts around the country that have considered the issue. Despite ample precedent to the contrary, the judge in this case held that Congress cannot "confer standing upon a *qui tam* plaintiff who has suffered no cognizable injury under Article III of the Constitution . . . consistent with principles of 'separation of powers.'" The case is currently on appeal to the 5th Circuit.

PUBLIC DISCLOSURE BAR AND ORIGINAL SOURCE EXCEPTION

As has been the pattern for the past several years, most of the litigation involving *qui tam* cases in 1997 centered around the public disclosure bar and original source exception at FCA § 3730(e)(4). Section 3730(e)(4)(A), broken out by its basic elements, forecloses those actions that are:

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

Following are summaries of how the courts addressed these various elements of the public disclosure provision in decisions rendered in 1997.

"BASED UPON"

Two Circuits adopt "substantially similar" or "virtually identical" as proper interpretation of "based upon," rejecting 4th Circuit's "derived from" definition

In ***U.S. ex rel. Findley v. FPC-Boron Employees' Club et al.*, 105 F.3d 675 (D.C. Cir. Jan. 24, 1997)**, the D.C. Circuit rejected the 4th Circuit's interpretation of "based upon" as meaning "derived from" and instead aligned itself with those circuits that view "based

upon" as meaning that the suit's allegations are "substantially similar to" publicly disclosed allegations or transactions. The decision came in the context of an appealed dismissal of a *qui tam* action disputing the legality of prison employees' clubs retaining vending machine income. While the relator claimed he had never heard of the GAO study, legislative report, and court decision the D.C. Circuit found to constitute public disclosures, the appellate court held that the *qui tam* action was nevertheless "based upon" these public disclosures because it was substantially similar to them.

The 6th Circuit came to a similar conclusion in ***U.S. ex rel. McKenzie v. Bellsouth Telecommunications*, 123 F.3d 935 (6th Cir. Aug. 26, 1997)**, affirming dismissal of a *qui tam* suit containing allegations the court concluded were "the same as" or "virtually identical" to those in earlier lawsuits publicized in newspaper articles. Citing close similarities and the relator's admission that she had seen news reports of at least one of the earlier suits, the appellate court concluded that the *qui tam* action was based, at least in part, on public disclosures.

Fourth Circuit's "derived from" definition adopted by district court

A *qui tam* suit alleging fraudulent anesthesiology billing was not jurisdictionally barred since it was not "based upon" a public disclosure, according to a Minnesota district court. In ***U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al.*, Memorandum Opinion and Order, Civ. No. 4-96-734 (D. Minn. Mar. 3, 1997)**, the court adopted the 4th Circuit's Siller "derived from" definition of "based upon" and found that the relators, who had previously filed an antitrust complaint with similar allegations against some of the same defendants, did not "use" that complaint in order to "create" the *qui tam* action. Rather, the *qui tam* suit as well as the antitrust complaint were based upon the relators' own knowledge of the alleged fraud.

"ALLEGATIONS OR TRANSACTIONS"

Because disclosures of facially valid or innocuous transactions fail to reveal the essential elements of the relator's claim, § 3730(e)(4) bar is not triggered

In ***U.S. ex rel. Pogue v. American Healthcorp, Inc.*, 1997 WL 579202 (M.D. Tenn. July 14, 1997)**, a much litigated case involving alleged illegal kickbacks and self-referrals, a Tennessee district court ruled that the disclosures of facially valid or innocuous transactions among the defendants in SEC reports and related news articles were insufficient to constitute the disclosure of "allegations or transactions" under § 3730(e)(4)(A). According to the court, the materials at issue did not reveal the essential elements of the relator's claim and did not give rise to an inference of fraud. For example, the materials did not mention that the medical directors made referrals of patients to diabetes centers or that the defendant hospitals filed Medicare and Medicaid claims for the services provided to patients referred by the medical directors. According to the court, the

disclosures which described the defendants' relationships were insufficient to put the reader on notice of the allegedly incestuous relationship among the defendants and the resultant fraud perpetrated against the Government.

MEANS FOR PUBLIC DISCLOSURE

"Administrative reports" prepared by state and local governments, as opposed to the Federal Government, do not trigger § 3730(e)(4) bar

In ***U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. Aug. 21, 1997)**, the 3rd Circuit concluded that expanding the meaning of "administrative report" to include reports prepared by state and local governments would,in effect, be a return to the "draconian" "government knowledge" bar that was explicitly repealed by the 1986 FCA Amendments. The court therefore held that the § 3730(e)(4) public disclosure bar covers only those administrative reports that originate from the Federal Government. The appellate court reversed the lower court's dismissal because the *qui tam* suit's "allegations or transactions" were not revealed through any of the means enumerated in § 3730(e)(4)(A). *(Copies of the amicus brief submitted by TAF in this case are available upon request.)*

Payroll records released under state law and correspondence with local governments are not means of disclosure under § 3730(e)(4)(A)

In ***U.S. ex rel. I.B.E.W., AFL-CIO, Local Union No. 217 et al. v. G.E. Chen Construction, Inc. et al.*, 954 F. Supp. 195 (N.D. Cal. Jan. 29, 1997)**, the court held that in order for the public disclosure bar to apply, the alleged disclosure must occur in one of the enumerated means in § 3730(e)(4)(A). The alleged disclosures in this case — certified payroll records obtained by the relator union through a provision of the California Labor Code, and private correspondence between the union and the City and County of San Francisco — did not qualify as disclosures in or from one of the Act's enumerated means.

"ORIGINAL SOURCE"

New interpretation of "original source" requires relator to have notified the Government prior to the public disclosure

While agreeing with the 4th Circuit (and disagreeing with the 9th and 2nd Circuits) that an original source need not have provided information to the actual entity that made the public disclosure, this year the D.C. Circuit adopted yet a new twist on "original source." In ***U.S. ex rel. Findley v. FPC-Boron Employees' Club et al.*, 105 F.3d 675 (D.C. Cir. Jan. 24, 1997)**, the court held that to qualify as an "original source" a relator must have direct and independent knowledge of the information on which the *publicly disclosed* allegations are based and must have provided that information to the

Government not just prior to filing suit (as stated in § 3730(e)(4)(B)) but *before the public disclosure occurred.* The 6th Circuit also adopted the D.C. Circuit's new interpretation of "original source," ruling in ***U.S. ex rel. McKenzie v. Bellsouth Telecommunications*, 123 F.3d 935 (6th Cir. Aug. 26, 1997)**, that the relator was not an original source because she did not notify the Government of the alleged fraud prior to any public disclosure.

Relator granted immunity for statements to Government did not "voluntarily" provide information and cannot satisfy "original source" test

Setting forth another troubling new ruling on an "original source" issue, in ***U.S. ex rel. Stone Clay v. AmWest Savings Association*, Memorandum and Order, No. 3:96-CV-0549-G (N.D. Tex. Oct. 2, 1997)**, a Texas district court found that because the relator had obtained immunity from criminal prosecution in return for making statements to the Government in its criminal fraud investigation of the defendant, the relator did not "voluntarily" provide his false claims information to the Government and therefore did not satisfy the original source definition.

CASES HELD TO BE WITHIN THE SCOPE OF THE FCA

Anti-Kickback and Self-Referral Violations

In ***U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp. et al.*, 125 F.3d 899 (5th Cir. Oct. 23, 1997)**, the 5th Circuit reversed a lower court dismissal of a *qui tam* action alleging that the defendants violated the FCA by billing Medicare while violating the Medicare anti-kickback statute and Stark self-referral laws. According to the appellate court,a claimant submits a false or fraudulent claim when falsely certifying compliance with a statute or regulation where the Government has conditioned payment upon such certification. The action was remanded for further factual findings. *(Copies of the amicus brief submitted by TAF in this case are available upon request.)*

Service Contract Act Violations

In ***U.S. ex rel. Sutton v. Double Day Office Services, Inc. et al.*, 121 F.3d 531 (9th Cir. Aug. 11, 1997)**, the 9th Circuit held that an actionable *qui tam* suit may arise out of non-compliance with the Service Contract Act (SCA). Reversing the lower court, the 9th Circuit ruled that the relator's *qui tam* suit against his former employer was not barred by the SCA's bar on private rights of action.

CASES HELD TO BE OUTSIDE THE SCOPE OF THE FCA

Davis-Bacon Act employee classification interpretations

In ***U.S. ex rel. I.B.E.W., AFL-CIO, Local Union No. 217 et al. v. G.E. Chen Construction, Inc. et al., 954 F. Supp. 195 (N.D. Cal. Jan. 29, 1997)***, the court ruled that the relators' allegations regarding employee classifications under the Davis-Bacon Act were within the sole jurisdiction of the Department of Labor. However, the court held that it had jurisdiction to hear the remaining allegations that were not dependent on a determination of the proper classification of workers.

False statements to conceal violations that could subject person to future penalties or fines

In ***U.S. ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc. et al., Opinion and Order, No. C2-97-776 (S.D. Ohio Nov. 13, 1997)***, the court ruled that § 3729(a)(7), the "reverse false claim" provision under the FCA, did not apply to importers that allegedly falsely represented to U.S. Customs officials that they did not violate various customs laws restricting the importation of garments from China. According to the court, "a person who violates a statute or regulation that subjects that person to a possible monetary fine or forfeiture of property and who then makes a false statement to conceal that offense" is not liable under the Act for "having concealed the existence of an 'obligation' to the government by means of a false statement." The court found that the reverse false claim provision does not reach so broadly.

A similar result was reached in ***U.S. v. Q International Courier, Inc., 1997 WL 781218 (8th Cir. Dec. 22, 1997)***. There the 8th Circuit found that, although a mail courier firm may have violated certain statutes and regulations, the Government failed to demonstrate that the defendant owed an "obligation" to pay domestic postage rates on letters remailed to the United States from a foreign country; thus, they did not violate the § 3729(a)(7) reverse false claim provision. According to the court, an FCA defendant "must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness."

Misrepresentations and nondisclosures that would not have affected Government's payment of funds

The 8th Circuit affirmed the summary judgment dismissal of a *qui tam* suit that alleged that a corporation fraudulently shifted to the federal Pension Benefit Guaranty Corporation (PBGC) its obligation for an unfunded employee pension plan. In ***U.S. ex rel. Rabushka v. Crane Company, 122 F.3d 559 (8th Cir. Aug. 11, 1997)***, the appellate court found that there was insufficient evidence of "false or fraudulent" claims because the defendant's alleged misrepresentations and nondisclosures would not have affected the PBGC's decision regarding whether to terminate the pension plan and thus hold the defendant, instead of the Government, responsible for the unfunded pension liabilities.

"CLAIM"/KNOWLEDGE STANDARD

HCFA 1500 form submitted to Government constitutes "claim" rather than each false entry on form

In ***U.S. v. Krizek et al.*, 111 F.3d 934 (D.C. Cir. May 2, 1997)**, a case involving upcoding, the D.C. Circuit found that each HCFA 1500 form the defendants submitted constituted a demand or request for money from the Government and thus a "claim" under the FCA. In reaching this conclusion, the appellate court rejected the Government's argument that each false CPT code entry constituted a "claim." The court also ruled that "reckless disregard" is a linear extension of "gross negligence" or "gross negligence-plus" — all of which satisfy the Act's knowledge requirement.

RELATOR'S RIGHTS AND LIMITATIONS

Section 3730(b)(5) bars later-filed *qui tam* actions alleging same material elements of fraud as in earlier actions

In ***U.S. ex rel. Merena et al. v. SmithKline Beecham Corp. et al.*, Nos. 93-5974 , 95-6953, 95-6551, 96-7768, 97-1186, and 97-3643 (E.D. Pa. July 23, 1997)**, a case involving the largest *qui tam* recovery to date, a Pennsylvania district court was asked to sort through which of several overlapping *qui tam* complaints could survive. The court ruled that, with the exception of one allegation, three later-filed actions were encompassed by the settlement of the earlier actions and barred by § 3730(b)(5), the FCA's "first-to-file" rule. According to the court, § 3730(b)(5) bars a later-filed action if it alleges the same material elements of a fraudulent transaction that are alleged in a pending or resolved action. The court rejected arguments from the later-filed relators that § 3730(b)(5) should only bar suits alleging identical facts. As a result of the court's holding, the three later-filed relators were left without a claim to any interest in the relators' share arising from the $325 million settlement.

Later-filed related *qui tam* action can survive if it contains different allegations that would not lead to double recovery

In ***U.S. ex rel. Dorsey v. Dr. Warren E. Smith Community Mental Health/Mental Retardation and Substance Abuse Centers*, 1997 WL 381761 (E.D. Pa. June 25, 1997)**, the court ruled that neither § 3730(b)(5) (the first-to-file provision) nor § 3730(e)(3) (the pending government action provision) applied to bar a *qui tam* suit in which the relator alleged different types of false Medicare claims than those alleged in a *qui tam* suit previously filed against the same defendant. The court found that the second suit's claims involved unnecessary services, whereas the first suit's claims involved accounting and fiscal matters. As such, the claims were not identical and would not lead to a double recovery, and the second suit's allegations were not based on those in the first case.

Prefiling release of *qui tam* claim valid where, prior to the release, Government investigated and concluded no fraud

In ***U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. Mar. 19, 1997)**, the 9th Circuit ruled that a relator who executed a general release with his former employer to settle a state law employment action was barred from bringing a subsequent *qui tam* action. Although in a previous case the 9th Circuit had found that a similar release entered into without the Government's knowledge or consent was unenforceable as against public policy, the court enforced the release in this case because the Government had investigated the relator's allegations of fraud prior to the settlement and release and concluded that no fraud had occurred. The court ruled that, under these circumstances, the public interests underlying FCA enforcement by private citizens did not outweigh the public interest in encouraging settlement of private disputes.

A *qui tam* action survives the relator's death and relator's estate can proceed with the case

In ***U.S. ex rel. Semtner v. Medical Consultants, Inc. et al.*, 1997 WL 82094 (W.D. Okla. Feb. 24, 1997)**, the court ruled that a *qui tam* action survives the relator's death, and a personal representative of the relator's estate can proceed with the case. Finding that under the traditional survivorship tests the relator's claims were neither "penal" nor "remedial," the court held that "the only rational characterization of the relator's claims must be derived from the underlying claim of the government." Since the remedial nature of the Government's claim was not contested, the court found that the relator's claims survive her death and a representative may be substituted.

Relator cannot intervene in related action where relator's interests are adequately represented by the Government

In ***Cedars-Sinai Medical Center et al. v. Shalala*, 1997 WL 559486 (9th Cir. Sept.10, 1997)**, the 9th Circuit ruled that a relator was properly denied the opportunity to intervene in and move to dismiss a declaratory judgment action brought by hospitals who were also defendants in the relator's *qui tam* action. The hospitals prevailed at the district court level in their challenge of Medicare's policy regarding nonpayment for investigational medical devices. The appellate court affirmed the district court's denial of the relator's motion to intervene because the relator's interests were adequately represented by the Government. However, the 9th Circuit indicated that even if the hospitals succeeded in having the Medicare rule declared invalid, that would not be a defense to the *qui tam* action.

GOVERNMENT'S RIGHTS AND LIMITATIONS

Government has right to object to settlement in *qui tam* action

In a *qui tam* suit in which the Government objected to the breadth of the release language of the settlement reached by the relator and the defendants, the 5th Circuit held

that FCA § 3730(b)(1) expressly grants the Government an absolute veto power over settlements in *qui tam* actions. Differing from the 9th Circuit,the 5th Circuit in ***Bortner on behalf of U.S. v. Philips Electronics North America Corp. et al. v. U.S., 117 F.3d 154 (5th Cir. June 30, 1997),*** ruled that the Government may exercise its right to object even if it has not intervened in the action. As such, the appellate court vacated the $1 million settlement order and remanded the case to the district court.

Relator cannot compel Government to conduct "diligent" investigation of *qui tam* case

In ***U.S. ex rel. Baggan v. DME Corporation, 1997 WL 305262 (D.D.C. May 27,1997)***, the court ruled that the Justice Department's investigation of a *qui tam* case is not a ministerial act that the Attorney General has a duty to perform in a specific way. Mandamus, therefore, does not lie against the Attorney General to compel a "diligent" investigation of a *qui tam* case during the seal period.

DOJ attorneys not exempt from professional responsibility rules regarding *ex parte* contacts

In ***U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288 (E.D. Mo. Mar. 10, 1997)***, a Missouri district court rebuffed Justice Department attempts to exempt its attorneys from Missouri's rules of professional responsibility regarding *ex parte* contacts, labeling "disappointing" and "alarming" the Department's arguments that the state's ethical rules were superseded by DOJ regulations. The issue arose in the context of a *qui tam* case in which the Government intervened and sought information about mischarging from current and former employees of the defendant. While holding that the state's rules of professional responsibility applied, the court held that DOJ can make *ex parte* contacts with current employees who are merely "fact witnesses." The court also found that the rules permit *ex parte* contacts with unrepresented former employees, but ordered DOJ to make information obtained from such contacts available to the defendant, subject to work product limitations.

STATE ENTITIES AS FCA DEFENDANTS/ELEVENTH AMENDMENT

In 1997, the issue of whether states and state entities may be sued under the False Claims Act received increased attention. While most courts have held that states may be FCA defendants and a number of state entities have paid substantial settlements to the Government, this past July a Minnesota district court held that the Act does not apply to states (*see* Zissler below). Earlier in the year, the 4th Circuit reaffirmed its previous ruling that states do not have 11th Amendment immunity against *qui tam* suits (*see* Berge below). In 1998, three additional circuit courts (2nd, 5th, 8th) are expected to address the issue of state entities as FCA defendants.

States do not have 11th Amendment immunity against *qui tam* suits

In ***U.S. ex rel. Berge v. The Board of Trustees of the University of Alabama et al., 104 F.3d 1453 (4th Cir. Jan. 22, 1997)***, a *qui tam* suit brought by a former graduate student against a state university and university medical researchers and professors, the 4th Circuit ruled that states do not have 11th Amendment sovereign immunity against False Claims Act suits. Defendants and various *amici* argued that, in light of the Supreme Court decision in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), states are protected from *qui tam* suits by the 11th Amendment. However, the appellate court ruled that, since the Government is the real party in interest even when it declines to intervene in the *qui tam* action, 11th Amendment immunity is a "non-issue." *(Copies of the amicus brief submitted by TAF in this case are available upon request.)*

FCA does not apply to states as defendants because Congress has not clearly stated such in the FCA's language

In a surprising ruling in ***U.S. ex rel. Zissler v. Regents of the University of Minnesota, Memorandum Opinion and Order, 3-95-168/RHK/FLN (D. Minn. Jul. 23, 1997)***, the court held that the FCA does not apply to states as defendants because Congress has not clearly stated such in the FCA's language. Invoking the "plain statement rule," the court dismissed the Government's and the relator's FCA counts against the state university. The case against the University of Minnesota — involving alleged NIH grant fraud, improper sale of unapproved drugs, and Medicare kickback violations — is now on appeal to the 8th Circuit. *(Copies of the amicus brief submitted by TAF in this case are available upon request.)*

State institutions are not immune from either *qui tam* suits or suits under § 3730(h)

In ***U.S. ex rel. Foulds v. Texas Tech University, 1997 WL 631729 (N.D. Tex. Oct. 3, 1997)***, the court held that state institutions are not immune from either *qui tam* suits or suits under the § 3730(h) anti-retaliation provision. According to the court, the 11th Amendment does not apply to *qui tam* cases because the Government is the real party in interest. It also does not apply to suits under § 3730(h) because it would be the Government that would suffer the greatest harm if recourse under the anti-retaliation provision were eviscerated. The Texas district court further concluded that a state institution is a "person" under the Act and, therefore, may be named as a defendant.

FILING AND SEAL PROCEDURES

Continued seal of *qui tam* case denied where DOJ failed to show good cause

In a *qui tam* case under seal for more than 19 months, a California district court denied further extension of the seal period because the Justice Department failed to show "a

single cogent reason" to maintain the seal. In ***U.S. ex rel. Costa and Thornburg v. Baker & Taylor, Inc. et al.*, 1997 WL 97325 (N.D. Cal. Jan. 16, 1997)**, the court highlighted the FCA's legislative history and stated that the "good cause" requirement for seal extensions "is a substantive one, which the government can only satisfy by stating a convincing rationale for continuing the seal." In this case, the court found that the Government had "utterly failed to meet that burden."

ATTORNEYS' FEES/SETTLEMENT PROCEEDS

Government has right to share of settlement funds labeled legal fees which were actually proceeds of the *qui tam* action

In ***U.S. ex rel. Gibeault et al. v. Texas Instruments Corp. et al.*, 104 F.3d 276 (9th Cir. Jan. 3, 1997)**, the 9th Circuit upheld a district court finding that certain settlement funds that had been labeled as legal fees by the parties instead represented proceeds of the *qui tam* action, a share of which therefore belonged to the Government. The appellate court ruled that the relators' law firm was liable for the Government's share, even though the firm had transferred the funds at issue to its clients.

SECTION 3730(h) RETALIATION CLAIMS

Failure to promote can constitute constructive discharge

In ***Neal v. Honeywell, Inc. et al.*, 958 F. Supp. 345 (N.D. Ill. Feb. 3, 1997)**, an Illinois district court reconsidered its earlier decision and ruled that the plaintiff could pursue her claim for constructive discharge under FCA § 3730(h). In an earlier decision, the court had ruled that the plaintiff could not pursue the constructive discharge claim because the defendant had offered her reasonable lateral employment opportunities which she chose to decline. On reconsideration, Neal presented evidence that she had a reasonable expectation of receiving a promotion at the time of the lateral offers. While Honeywell argued that the failure to promote cannot form the basis of a constructive discharge claim, the court disagreed. Referencing Title VII cases,the court held that the failure to promote, accompanied by the aggravating circumstances Neal had presented (harassment and threats), can support a constructive discharge claim.

Employee need not have filed or contemplated FCA suit for § 3730(h) to apply

In ***U.S. ex rel. Dorsey v. Dr. Warren E. Smith Community Mental Health/Mental Retardation and Substance Abuse Centers*, 1997 WL 381761 (E.D. Pa. June 25, 1997)**, the court rejected the defendant's suggestion that, in order for §3730(h) to apply, an employee who is fired must have filed suit or at least known of the FCA and contemplated suing under it. "That reasoning is inconsistent with and would undermine the

purpose of that provision," the court stated. The Pennsylvania district court agreed with other courts that have found that one need not have actually filed a *qui tam* action to have been engaged in protected activity. "Rather, as long as litigation was a 'distinct possibility' internal complaints suffice."

Bringing fraud to attention of supervisors and pointing out news article on *qui tam* case involving similar fraud were protected activities and put employer on notice

While in ***U.S. ex rel. McKenzie v. Bellsouth Telecommunications*, 123 F.3d 935 (6th Cir. Aug. 26, 1997)**, the 6th Circuit dismissed the relator's *qui tam* action as barred by § 3730(e)(4), it reversed the district court's dismissal of the relator's § 3730(h) claim. According to the court, the plaintiff had to show only that she had engaged in a protected activity and her employer knew about it. The court found that her bringing the alleged fraud to the attention of her supervisors and showing them a newspaper article describing a *qui tam* action in Florida involving similar allegations of fraud were protected activities under the Act. It further concluded that her showing her supervisor the newspaper article was relevant to the requirement that the employer be on notice that the employee was contemplating a *qui tam* action against it.

Hospital that granted staff privileges to physician plaintiff was not his "employer"and therefore not covered by § 3730(h)

In ***Latham v. Navapache Healthcare Association et al.*, Order, CIV 96-2547-PHX-EHC (D. Ariz. Sept. 29, 1997)**, an Arizona district court ruled that a hospital defendant was not the plaintiff's "employer" and thus could not be held liable under § 3730(h). Section 3730(h) states: "Any employee who is discharged . . . harassed, or in any other manner discriminated against in the terms of conditions of employment by his or her employer . . . shall be entitled to all relief necessary to make the employee whole." While the FCA does not define the terms "employer" or "employee," the Supreme Court has held that these terms "describe the conventional master-servant relationship as understood by common law agency doctrine." Accordingly, the court relied on the following in finding that Navapache was not Latham's employer: Latham did not allege that Navapache ever paid him any compensation, had any direct control over his actions, or entered into any employment contract for his services; in fact, Navapache's only affiliation with Latham was that it granted him temporary staff privileges so that he could use the hospital's facilities; and Arizona courts have held that a hospital is not an employer merely because it has granted medical staff privileges.

Top 1997 *Qui Tam* Recoveries

Company U.S. District Court	Allegations	Government Recovery	Relator Share
SmithKline Beecham Clinical Laboratories, Inc. ED PA	False billing of Medicare, Medicaid, CHAMPUS, and FEHBP for additional tests not needed or ordered, tests not performed, code jamming, and kickbacks	$325 million	Robert Merena, Charles Robinson, Jr., and Glenn Grossenbacher (shares not decided) Kevin Spear, Jack Dowden, and Berkeley Community Law Center $1.9 million (proposed settlement)
New York University Medical Center SD NY	Submitting false information in connection with indirect costs associated with federally sponsored research grants and contracts	$15.5 million	Emmanuel Roco $1.56 million
Teledyne, Inc., Allegheny Teledyne Incorporated, Teledyne Industries, Inc., Teledyne Electronic Systems, Inc., and Teledyne Systems Company, Inc. CD CA	Cross-charging work done for commercial customers resulting in inflated prices for military systems, failure to perform required tests	$13.95 million	Robert Giardini (share not decided)
OrNda Healthcorp CD CA	Fraudulent Medicare claims by hospitals through improper contracts and kickbacks	$12.65 million	James Montagano $2.34 million
Blue Shield of California ND CA	False claims by Medicare contractor, altering documents and obstructing HCFA audits	$12 million	Weldon Dodson $2.16 million
American Eurocopter Corporation, Eurocopter International, and Eurocopter France ED VA	Overcharges and illegal commissions in connection with foreign sale of helicopters	$10 million	Jeffrey Tribble, J. Wayne Trimmer, and James Buffington, Jr. $2.4 million
EmCare Inc. WD OK	Upcoding of Medicare, Medicaid, CHAMPUS, and FEHBP claims for emergency physician services	$7.75 million	Estate of Theresa Semtner $1.5 million
SPECO Corporation SD OH	Manufacturing faulty transmission parts for Army helicopters resulting in flight failures	$7.2 million	Brett Roby 23 percent (defendant in bankruptcy)

Qui Tam Statistics

(as reported by DOJ in October 1997)

Total Recoveries Near $2 Billion, Filings and Returns Hit Record Levels in FY '97

Total *qui tam* recoveries exceed $1.83 billion, with over 2,000 *qui tam* cases filed since the False Claims Act was amended in 1986. In fiscal year 1997 alone, a record 530 cases were filed and over $625 million was returned to the U.S. Treasury.

FY 1987:	33 cases	FY 1993:	131 cases
FY 1988:	60 cases	FY 1994:	221 cases
FY 1989:	95 cases	FY 1995:	279 cases
FY 1990:	82 cases	FY 1996:	363 cases
FY 1991:	90 cases	FY 1997:	530 cases
FY 1992:	119 cases		

Qui tam recoveries in cases pursued by DOJ:

FY 1988:	$355,000	FY 1993:	$173 million
FY 1989:	$15 million	FY 1994:	$379 million
FY 1990:	$40 million	FY 1995:	$244 million
FY 1991:	$72 million	FY 1996:	$127 million
FY 1992:	$134 million	FY 1997:	$625 million

DOJ has intervened in or otherwise pursued 267 cases and declined 1,009. The remainder are under investigation.*

Thirty-one million dollars has been recovered in cases declined by DOJ. The average recovery in all *qui tam* cases where there has been a recovery is $7.2 million, with $1.005 million as the average relator's award and $183,000 as the median relator's award. Relators' awards when DOJ intervened in or otherwise pursued the action, where shares have been determined, total $244 million (an average of 16% of recovery). Relators' awards in declined cases total $8.9 million (an average of 29%).

Health Care Fraud Accounts for Majority of New Cases

The percentage of *qui tam* cases involving HHS as the client agency is as follows:

FY 1987:	12%	FY 1995:	34%
FY 1988-92:	15% each year	FY 1996:	56%
FY 1993:	30%	FY 1997:	54%
FY 1994:	36%		

** According to DOJ, these figures are not current and depend on reporting from the U.S. Attorneys' Offices.*

TAF NEWS

Call for Experts and Investigators

- In response to inquiries, TAF is working to compile a list of experts and investigators across an array of substantive areas. Please contact our Legal Resources Attorney, Amy Wilken, with any suggestions you may have.

Qui Tam Practitioner Guide

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

TAF on the Internet

- TAF's Internet presence, designed to educate the public and legal community about the False Claims Act and *qui tam*, has expanded to highlight the growing health care trend and other major developments in the field. TAF's site is located at http://www.taf.org.

Previous Publications

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

Quarterly Review Submissions

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

FCA Reports and Video

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

Qui Tam Attorney Network

- TAF is continuing to build and facilitate an information network for *qui tam* attorneys. For an Attorney Network Application or a description of activities, please contact TAF. Be sure to ask about TAFNET, our new electronic mail system for Attorney Network members.

Amicus Program

- To advance the goals of the FCA, TAF files *amicus* briefs on significant legal and policy issues in cases throughout the country. If you would like to discuss a potential *amicus* submission, please contact TAF Senior Staff Attorney Priscilla Budeiri. Copies of TAF's *amicus* briefs are available upon request.

TAF Library

- TAF's FCA library is open to the public, by appointment, during regular business hours. To schedule a visit or to inquire about TAF's resources, please contact Legal Resources Attorney Amy Wilken. Submissions of case materials such as complaints,disclosure statements, briefs,and settlement agreements are appreciated.

Acknowledgments

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