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

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

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Public Disclosure Bar and Original Source Exception

U.S. ex rel. Dunleavy v. County of Delaware, 1997 WL 474414 (3d Cir. Aug. 21, 1997)

Concluding 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and local governments would, in effect, be a return to the "draconian" "government knowledge" bar that was explicitly repealed by the 1986 FCA Amendments, the 3rd Circuit held that the § 3730(e)(4) public disclosure bar covers only those administrative reports that originate from the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).

Anthony Dunleavy brought a *qui tam* action alleging that the County of Delaware fraudulently failed to return Community Development Block Grant moneys to the Department of Housing and Urban Development (HUD). The Government declined to intervene in the action but later negotiated a $1.9 million administrative settlement with the defendant. The district court dismissed the *qui tam* case after finding that certain newspaper articles, a pre-trial memorandum from unrelated litigation, and the County's annual audits and Grantee Performance Reports (GPRs) publicly disclosed "allegations or transactions" before Dunleavy filed his complaint.

The 3rd Circuit prefaced its analysis with the observation that Dunleavy's right to proceed with his *qui tam* action was unimpaired by the Government's administrative settlement. The court then went on to observe that § 3730(e)(4)(A) divests a court of subject matter jurisdiction only when each of the four elements of that subsection exists and the relator is not an "original source." Citing the D.C. Circuit's analysis of "allegations or transactions" in U.S. ex rel. Springfield Terminal v. Quinn, 14 F.3d 645 (D.C. Cir. 1994), the court determined that, since there was no contention that the "Z" variable, an accusation of wrongdoing, had been publicly disclosed, there was no reason to invoke the jurisdictional bar unless both the "X" and "Y" variables (a misrepresented state of facts and a true state of facts) were disclosed.

The court then reviewed each of the six items cited by the defendant as containing public disclosures of allegations or transactions. It concluded that five of the items revealed only the actual state of facts ("X"). Only the 1992 GPR submitted by the County to the Federal Government contained the misrepresented state of facts inasmuch as it failed to inform the Government that the County possessed funds owed to HUD.

The court then turned to whether a GPR is one of the sources enumerated in § 3730(e)(4)(A) and whether there was sufficient disclosure of the GPR to support the conclusion that the information it contained had been made public. The court never had to answer the second question because it concluded that the GPR was not a source of disclosure contemplated by Congress.

Means Enumerated in § 3730(e)(4)(A) Are Exhaustive

The 3rd Circuit agreed with the "prevailing view" best enunciated by the 11th Circuit in U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991), that the enumerated means

listed in § 3730(e)(4)(A) are exhaustive. That is, by no other means than those enumerated may "allegations or transactions" become publicly disclosed for purposes of § 3730(e)(4)(A).

The court then reasoned that the only way a GPR could fit within the statutory language was if it were an "administrative report." But, according to the court, Congress did not provide much guidance with which to determine the scope of the enumerated means. Further, the word "administrative" is capable of many meanings. Therefore, the court invoked the doctrine of *noscitur a socii* to treat the term "administrative" as one which gathers its meaning from the words around it. The court explained that application of this doctrine is particularly appropriate where, as here, a word is capable of many meanings and should not be given a broader meaning than Congress intended.

Only Those Administrative Reports Generated by the Federal Government May Trigger the Public Disclosure Bar

The 3rd Circuit concluded that the term "administrative" when read with the word "report" refers only to those administrative reports that originate from the Federal Government. Inasmuch as "administrative" lies "sandwiched" between "congressional" and "Government Accounting Office," both clearly entities of the Federal Government, the court found it "hard to believe" that Congress intended "administrative" to refer to both state and federal reports. According to the court, a broad reading of "administrative report" would, in effect, be a return to the "draconian" "government knowledge" bar of 1943.

The court further reasoned against finding that the § 3730(e)(4) bar could be triggered by materials produced by an entity bent on convincing a federal agency that no fraud had occurred. For example, in this case there was no suggestion that HUD had any access to information about the misrepresented state of facts beyond what the County submitted in its GPR.

Thus, since not all essential elements of the alleged fraud had been publicly disclosed through enumerated means, the 3rd Circuit reversed the district court's dismissal and remanded the case for further proceedings consistent with its opinion.

U.S. ex rel. McKenzie v. Bellsouth Telecommunications, 1997 WL 510191 (6th Cir. Aug. 26, 1997)

The 6th Circuit affirmed 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 the close similarities and the relator's admission that she had seen news reports of at least one of the earlier suits, the court concluded that the *qui tam* action was based, at least in part, on public disclosures. Adopting the D.C. Circuit's new interpretation of "original source," the court also ruled that the relator was not an original source because she did not notify the Government of the alleged fraud prior to any public disclosure. However, the 6th Circuit reversed the district court's dismissal of the relator's § 3730(h) claim, finding sufficient evidence that the relator was engaged in protected activity and her employer retaliated against her as a result of that activity.

For over 25 years, Mary McKenzie was a dispatcher for South Central Bell's maintenance technicians. McKenzie's *qui tam* complaint alleged that South Central Bell directed her and the other dispatchers to routinely falsify trouble reports so that the company would not need to refund the cost of service to the Government and other customers whose telephone lines were not restored within 24 hours. McKenzie complained about this practice from

1984 until she suffered two emotional breakdowns and was placed on permanent disability leave in 1992. She alleged that, during the period she objected to the practice, she was harassed and threatened with discharge.

Similar Allegations from Previous Litigation Publicized in Newspaper Articles Were Publicly Disclosed

The 6th Circuit found that McKenzie's allegations had been publicly disclosed prior to her *qui tam* suit through two previously filed cases and newspaper publicity related to them. One suit, the Dorris case, was filed in Tennessee state court against the same defendant and alleged wrongful discharge and tort claims, although not fraud involving federal facilities. One of Dorris' allegations was that the defendant's employees were incorrectly reporting the time at which a repair was made if the repair was not made within the time promised. The court found that Dorris' allegations were nearly identical to some of McKenzie's and that newspapers had widely disseminated information about the Dorris suit.

The second suit, Falsetti, was filed against another division of BellSouth. According to the court, large portions of the McKenzie complaint were nearly identical to portions of the Falsetti complaint. In addition, McKenzie acknowledged that she showed her supervisor a newspaper article about the Falsetti case.

"Based Upon" Means "Supported By"

After concluding that there were public disclosures, the 6th Circuit addressed whether McKenzie's *qui tam* action was "based upon" those disclosures. The court concluded that construing "based upon" to mean "supported by" was the construction most consistent with its interpretation of the FCA's purpose. According to the court, the jurisdictional requirements were designed to restrict the number of persons who may bring *qui tam* actions, thereby avoiding parasitic suits. By adopting the "supported by" interpretation, the court meant to preclude individuals who based any part of their allegations on publicly disclosed information from bringing a *qui tam* action. Since McKenzie's case contained allegations that were the same as some of the Dorris allegations, and her complaint referenced the Falsetti allegations, the court found it "not difficult" to conclude that her lawsuit was based at least in part upon the Dorris and Falsetti allegations.

Court Finds That To Qualify as "Original Source" Relator Must Have Informed Government of Alleged Fraud Before Any Public Disclosure

The 6th Circuit noted that the meaning of "original source" was a matter of "first impression" for the court and, after reviewing other circuits' holdings, adopted the D.C. Circuit's new interpretation of the requirement set forth in U.S. ex rel. Findley v. FPC-Boron Employees' Club et al., 105 F.3d 675 (D.C. Cir. Jan. 24, 1997), 9 TAF QR 1 (Apr. 1997). With little analysis, the court concluded that an "original source" was a person who informed the Government of the alleged fraud "before the information has been publicly disclosed." The court stated that its interpretation of "original source" was consistent with Congress' goal of encouraging individuals aware of fraud to bring the information forward. According to the court, its interpretation also prevents "parasitic" cases by those who "simply feed off of previous disclosures of government fraud."

According to the court, McKenzie was not the first to inform the Government of the alleged fraud. She also filed her complaint three years after Falsetti and "well after" the allegations in Dorris were made public. As such, the court determined that she did not qualify under its "original source" test.

Section 3730(h) Retaliation Claim Reinstated

Turning to McKenzie's claim under § 3730(h), the 6th Circuit determined that McKenzie had to show she had engaged in a protected activity and her employer knew about it. The court found that McKenzie's 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 McKenzie's 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. As such, the 6th Circuit reversed the district court's dismissal of McKenzie's § 3730(h) claim.

U.S. ex rel. Pogue v. American Healthcorp, Inc., Memorandum and Order, No. 3:94-0515 (M.D. Tenn. July 14, 1997)

In 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 were insufficient to constitute the disclosure of "allegations or transactions" under § 3730(e)(4)(A). The court also held that the relator's complaint satisfied Rule 9(b)'s heightened pleading requirements.

The *qui tam* case of A. Scott Pogue passed another hurdle when a Tennessee district court denied defendants' motions to dismiss for lack of subject matter jurisdiction and other grounds. (*See* 5 TAF QR 2 (Apr. 1996) for a summary of the court's earlier opinion regarding defendants' motion to dismiss for failure to state a claim upon which relief may be granted.)

Disclosure of "Facially Valid or Innocuous Transactions" Does Not Trigger the Public Disclosure Bar

Sidestepping the issue of whether SEC-filed reports are "administrative reports" under § 3730(e)(4)(A), the district court ruled that those reports and related news articles did not contain information that gave rise to an inference of fraud. Applying the D.C. Circuit's analysis of "allegations or transactions," the court found that the materials did not contain the essential elements of the relator's claim. First, there was no mention in any of the documents that the medical directors made referrals of patients to the diabetes centers. Second, there was no public revelation that the defendant hospitals filed Medicare and Medicaid claims for the services provided to patients referred by the medical directors. According to the court, "[t]he crux of Plaintiff's FCA claim is that reimbursement claims were filed for the treatment of illegally-referred patients; without disclosure of the facts that patients were referred by the medical directors, and that Medicare and Medicaid claims were filed for those referred patients, there is no basis for [an] inference that false claims were submitted."

Reviewing recent case law, the court noted that courts decline to read the public disclosure bar so broadly as to assume that fraudulent schemes are apparent from the disclosures of "facially valid or innocuous transactions." For purposes of this case, the court stated that it was "unconvinced that the disclosures regarding Defendants' relationships . . . sufficiently put the reader on notice of the allegedly incestuous relationship among the Defendants, and the resultant fraud perpetrated against the United States." Since the court found that the disclosures identified by the defendants were not of the underlying "allegations or transactions" of relator's complaint, the court terminated its analysis and declined to invoke § 3730(e)(4).

Rule 9(b)'s Pleading Requirements Are Satisfied When Defendants Receive Notice of the Charges

The district court also ruled that Pogue's complaint satisfied the heightened pleading requirements of Rule 9(b). The complaint alleged that defendant West Paces Medical Center (West Paces) entered into a series of incentive-based contracts with defendant Diabetes Treatment Centers of America (DTCA) whereby West Paces would pay DTCA a commission based on the number of diabetes patients admitted to West Paces. In addition, the complaint alleged that DTCA contracted with various physicians to ostensibly act as medical directors but in actuality compensated the physicians for referrals of diabetes patients to West Paces. The complaint also alleged that these contracts violated the laws restricting kickbacks and self-referrals, and that West Paces knew of this illegality.

The court stated that "[a]lthough no specific dates or West Paces employees are identified, the complaint alleges that the hospital participated in a systematic, fraudulent scheme, spanning the course of twelve years; thus, reference to a time frame and to West Paces generally is sufficient." Further, in response to West Paces's contention that Pogue failed to provide any supporting factual allegations for its claim that West Paces "knowingly" participated in the fraud, the court held that Rule 9(b) allows knowledge and intent to be pled generally.

Moreover, according to the court, Pogue set forth facts supporting an inference of West Paces's knowledge since the complaint alleged that West Paces allowed DTCA's diabetes centers to be established in its facility, that the physicians retained by DTCA referred patients to West Paces, that West Paces paid DTCA a commission based on the number of patients admitted, and that it filed Medicare and Medicaid reimbursement claims for treatment of those patients. These allegations, according to the court, were "sufficient to support the inference that West Paces knew that DTCA's purpose in hiring the Atlanta Physicians was to increase the number of diabetes patients referred to the center, and that the physicians' compensation and continued employment was based on the number of referrals made."

Finding that the primary purpose of Rule 9(b) is to ensure that defendants receive notice of the charges against them, the court determined that the complaint's allegations were sufficient. According to the court, to require more detail would undermine Rule 8's admonishment to keep pleadings simplistic.

Section 3730(b)(5) First-to-File Provision/Section 3730(e)(3) Pending Government Action Provision

U.S. ex rel. Merena et al. v. SmithKline Beecham Corp. et al., Memorandum and Order, Nos. 93-5974 , 95-6953, 95-6551, 96-7768, 97-1186, and 97-3643 (E.D. Pa. July 23, 1997)

In a case involving the largest *qui tam* recovery to date and multiple overlapping *qui tam* complaints, a Pennsylvania district 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

will not have any interest in the yet to be determined relators' share arising from the $325 million recovery.

Six separate *qui tam* actions were at issue in motions before a Philadelphia district court related to the recent $325 million settlement of False Claims Act claims against SmithKline Beecham Clinical Laboratories. The first three actions were filed by Merena, Robinson, and Spear ("MRS"). The Government negotiated the settlement with the defendants on behalf of itself and the relators in these three actions. And the MRS relators agreed among themselves as to their respective rights to share in the recovery. Three additional relators (LaCorte, Clausen, and Miller) ("LCM") argued that they were entitled to a portion of the settlement. These relators, according to the district court, filed their *qui tam* actions "long after" the first three actions were filed. LCM argued, however, that the settlement agreement settled and released SmithKline of liability for some or all of their claims and, as such, that they should receive a portion of the relators' share.

All relators, defendants, and the Government agreed that the court needed to decide two issues: (1) whether the terms of the settlement agreement settled and released LCM's *qui tam* claims; and (2) whether those relators' claims are barred by § 3730(b)(5).

Scope of Settlement Agreement Is Determined by Application of Ordinary Contract Interpretation Principles

In deciding whether the terms of the settlement agreement settled and released LCM's FCA claims, the court analyzed the settlement agreement under the same principles that apply to ordinary contract interpretation. Thus, it was to determine and effectuate the intent of the parties as evidenced by the normal meaning of the words used in the agreement.

The court concluded that the settlement agreement was intended to resolve all claims that the Government has or may have which are either the same as or encompassed by the generalized and particularized allegations set forth in the settlement agreement and the MRS complaints.

Settlement Agreement Encompassed All But One Claim in the Later-Filed Complaints

Clausen and Miller contended that all of their claims were settled by the settlement agreement. LaCorte, however, argued that some of his claims were not settled. After an exhaustive analysis, the court concluded that the settlement agreement released all but one of LaCorte's allegations — submission of false claims for unordered and medically unnecessary urinalysis tests. In reaching its conclusion, the court analyzed the claims in LaCorte's complaint, measured them against the terms of the settlement agreement, and applied the principle that the settlement agreement released any narrower claims that were subsumed by the broader allegations of the settlement agreement and the MRS complaints. The court concluded that Lacorte's urinalysis claim was not covered by the settlement agreement because it was not alleged in either of the MRS complaints nor included in the settlement agreement.

As to one of the other claims that LaCorte argued was not settled, all of the parties to the settlement agreement — MRS, the Government, and SmithKline — disagreed. Agreeing with the settlement parties, the court stated that it "should afford great, if not absolute, deference to the unanimous and reasonable interpretation given to the [settlement's] language by all parties to the [settlement]."

Section 3730(b)(5) Bars Later-Filed Actions Alleging the Same Material Elements of a Fraudulent Transaction

The court next analyzed whether § 3730(b)(5)

barred the LCM complaints and, therefore, LCM from receiving a portion of the relators' share of the $325 million settlement. That section bars "related action[s] based on the facts underlying the pending action."

The court reviewed the minimal case law defining the scope of § 3730(b)(5) and concluded that the section does not lend itself to a narrow interpretation that bars only "identical suits" based on "identical facts." The court concluded that a "related action based on the facts underlying the pending action" is a later-filed action that alleges the same essential or material facts as the pending action. According to the court, the facts underlying a pending action are "the broad underpinnings upon which the cause of action is built" or "the allegations regarding the material elements of a fraudulent transaction which will support a claim for relief under the FCA."

In reaching its conclusion, the court explicitly rejected the "separate and distinct recovery" test set forth in Erickson v. American Inst. of Biological Sciences, 716 F. Supp. 908 (E.D. Va. 1989), as unnecessarily complicating the already difficult task of applying § 3730(b)(5). According to the court, requiring a determination that a *qui tam* claim "give rise to a separate and distinct recovery" in order to bypass § 3730(b)(5) impermissibly reads words into the statute.

The court defended its first-to-file test as encouraging relators to file *qui tam* litigation as soon as they learn of a fraud against the Government. In response to LCM's arguments that a broadly applied bar will discourage relators, the court stated that "the *qui tam* provisions are, and always have been, a 'nothing ventured nothing gained' proposition, and the first-to-file rule will not discourage relators (or their lawyers) from filing suit."

Because, as it had already determined, all three later-filed actions (except for LaCorte's urinalysis claim) were subsumed in the settlement agreement and the LCM complaints, the court concluded that all three later-filed actions (except for LaCorte's urinalysis claim) were barred by § 3730(b)(5).

The court went on to note that if, as in the present case, the first-filed *qui tam* action is concluded in settlement, no relator other than the first-to-file would have any claim to the relator's share "[e]ven if the settlement encompasses a wider spectrum of activities than what was alleged in the original *qui tam* complaint." According to the court, "[i]n other words, if a later-filed action makes allegations not contained in the first-filed complaint but which are encompassed by the terms of the settlement agreement, the later-filing relator is not entitled to seek a portion of the relator's share awarded in the settled case."

Relevancy of Section 3730(e)(3) Raised by Court

In its opinion, the court discussed the relevancy of § 3730(e)(3), which bars *qui tam* actions based on allegations that are the subject of a suit in which the Government is already a party, to this case despite the parties' agreement that the § 3730(e)(3) jurisdictional bar was not an issue before the court. In a footnote, the court expressed its inclination to rule that the Government was at least a *de facto* "party" within the meaning of § 3730(e)(3) at least by the time it sent a 16-page "framework for settlement" to SmithKline. The court suggested that the Government's interpretation of § 3730(e)(3) — that only formal intervention makes the Government a "party" — could work to the significant financial detriment of first-to-file relators. It further predicted that, if this were the rule, future relators might feel compelled to protect their financial interests by vigorously opposing the Government's requests for extensions of the seal period.

U.S. ex rel. Dorsey v. Dr. Warren E. Smith Community Mental Health/ Mental Retardation and Substance Abuse Centers, 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997)

A Pennsylvania district 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.

Charles Dorsey, an outpatient director at the Dr. Warren E. Smith Community Mental Health/Mental Retardation and Substance Abuse Centers (Smith Community Centers) filed a *qui tam* suit and related § 3730(h) retaliation claim in November 1995. The Government declined to join the suit. Dorsey alleged that Smith Community Centers was unnecessarily enrolling individuals into outpatient therapy programs in order to increase its government reimbursements. According to Dorsey's complaint, after being pressured but refusing to generate false documents and improper enrollments, Dorsey was fired in December 1993.

Smith Community Centers moved to dismiss Dorsey's *qui tam* case on the grounds that the court lacked subject matter jurisdiction pursuant to § 3730(b)(5) and § 3730(e)(3). Section 3730(b)(5) provides: "When a person brings an action under [the *qui tam* provisions], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." Section 3730(e)(3) provides: "In no event may a person bring an action under [the *qui tam* provisions] which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party."

Smith Community Centers argued that the facts underlying the Dorsey suit were already part of a similar suit, i.e., U.S. ex rel. Nixon v. Dr. Warren E. Smith Community Centers, CA No. 94-3667, pending at the time Dorsey filed his complaint. It argued that both plaintiffs alleged that it had fraudulently submitted claims to increase revenues; therefore, the claims in the Dorsey action were barred as "unquestionably and totally derivative of those in Nixon."

To determine whether the Dorsey and Nixon complaints were founded upon the same facts and allegations, the district court compared their respective allegations. According to the court, Nixon, a fiscal director for the defendant, brought a *qui tam* suit alleging that Smith Community Centers had improperly received Medicaid reimbursement by using estimated expenses rather than actual expenses. Nixon also alleged that the defendant had billed Medicaid for the costs of a consultant who did not in fact provide any services. Nixon, however, did not allege that the defendant had billed Medicare for unnecessary therapy programs. In November 1995 a jury found for Nixon on all claims. While the defendant offered evidence from trial testimony that Dorsey had informed Nixon of improper enrollments, the court found such information irrelevant to whether Dorsey's action was barred.

Claims Must Be Identical and Lead to Double Recovery to Trigger § 3730(b)(5) and § 3730(e)(3) Barriers

"The purpose of the barriers articulated in sections 3730(b)(5) and 3730(e)(3) is to prevent double recovery by parasitic lawsuits," the

court stated. The court found that each false claim is to be treated separately for purposes of recovery and thus Dorsey was not precluded from pursuing "distinct instances of false claim submission" merely because Nixon had also alleged the submission of false claims. As such, the court found that Dorsey's claims of improper billings or enrollments were not identical to Nixon's claims and would not lead to a double recovery.

Dorsey Case Not Based On Same Allegations as Nixon Case

The court stated that § 3730(e)(3) could be read more broadly than § 3730(b)(5) since, in order for it to apply, Dorsey's suit "must be based on the allegations and transactions which were the subject of the Nixon case." Here, according to the court, Dorsey's allegations were not based upon those in the Nixon case because Dorsey's involved patient care rather than accounting and fiscal matters. Moreover, Dorsey's allegations would be supported by different evidence than Nixon's. "In short," stated the court, "the only similarities between these two actions are (1) that the defendant is the same, (2) that both plaintiffs are represented by the same counsel, and (3) that both plaintiffs have accused the defendant of submitting false claims." Thus, Dorsey's action could continue. (The court noted that, because it found the two actions to be factually distinct, it did not need to address whether § 3730(e)(3) applied to the Nixon case even though the Government had not intervened.)

Employee Need Not Have Contemplated FCA Suit for § 3730(h) To Apply

The district court rejected the defendant's suggestion that, in order for § 3730(h) to apply, an employee who is fired prior to filing suit must have 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. According to the court, Congress enacted § 3730(h) to "discourage those who would use economic compensation as a bargaining tactic when trying to persuade employees to refrain from exposing fraud." Moreover, as part of encouraging relators to come forward Congress wanted to assure employees considering exposing fraud that they were protected.

Summarizing the prevailing test under current case law for properly stating a § 3730(h) claim, the court found that the plaintiff must make three showings: that he was engaged in protected activity, i.e., lawful action in furtherance of an action under the FCA; that the employer knew the employee was engaged in protected activity; and that the employer fired the employee because of that activity.

Intracorporate Complaints Can Constitute Protected Activity Under § 3730(h)

Regarding the first element, the district court agreed with other courts that have found that one need not have actually filed a *qui tam* action to be engaged in protected activity. "Rather, as long as litigation was a 'distinct possibility' internal complaints suffice," the court stated. For guidance the court relied upon Passaic Valley Sewerage Comm'rs v. United States Dept. of Labor, 922 F.2d 474 (3d Cir. 1993), a case interpreting the Water Pollution Control Act, 33 U.S.C. § 1367 (WPCA), a similar whistleblower protection statute that largely guided Congress in drafting § 3730(h). In Passaic Valley, the 3rd Circuit ruled that a whistleblower who had only made intracorporate complaints was protected by the WPCA, a statute which the court found provides narrower protection than § 3730(h).

Plaintiff's Evidence Satisfied Knowledge and Causation Elements for Retaliation Claim

Regarding the defendant's knowledge and causation, the court found that on both issues Dorsey had provided sufficient evidence for a jury to find in his favor. Specifically, the court found that a jury could infer that Dorsey believed that the defendant's actions violated the law and that the defendant was aware of his belief. And, a jury could infer that Smith Community Centers fired him for the "actions he took to prevent the improper billings." Accordingly, the court allowed the retaliation claim to continue.

State Entities as FCA Defendants

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)

In a surprising ruling, a Minnesota district 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 involves alleged NIH grant fraud, improper sale of unapproved drugs, and Medicare kickback violations.

In February 1995, James Zissler filed a *qui tam* suit against the Regents of the University of Minnesota. The Government intervened in the suit in December 1996 and filed its own complaint alleging violations of the FCA and common law claims. The Government and relator alleged that the University fraudulently submitted grant applications to the NIH for research related to Antilymphocyte Globulin (ALG), an organ transplant drug; sold unlicensed ALG drug products; made fraudulent submissions for non-approved and unreimbursable drugs to Medicare; and received illegal kickbacks related to home infusion services. The alleged violations involved millions of dollars in illegal profits and improper payments.

FCA § 3729(a) establishes civil liability for "any person" who knowingly submits a false claim. Thus, the central issue before the court was whether "person" includes a state or state entity. According to the court, in common usage the term "person" does not include the sovereign. However, "there is . . . no hard and fast rule excluding states from the definition of the word 'person' in statutes," the court noted.

The University argued that in order for Congress to apply a federal law to the states, it must "make its intention to do so unmistakably clear in the language of the statute." The University further argued that the FCA does not contain such a plain statement of congressional intent. The Government, on the other hand, argued that the "plain statement rule" applies only to federal laws that "'alter the usual constitutional balance between the States and the federal government,' and the FCA does not alter such balance." Thus, the Government argued, the FCA need not contain a "plain statement" applying it to states.

To resolve the issue the district court relied upon the following non-FCA Supreme Court cases: Will v. Michigan Dept. of State Police, 491 U.S. 51 (1989), Gregory v. Ashcroft, 501 U.S. 452 (1991), and Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991). According to the court, Will and Gregory stand for the proposition that if Congress intends to "'alter the usual constitutional balance between the States and the Federal Government' it must make its intention to do so 'unmistakably clear in the lan-

guage of the statute.'" The court then looked to Hilton, which clarified that "Will did not create a per se rule of constitutional law that precluded the application of general liability statutes to the states, absent a clear statement by Congress that it intends to subject the states to the provisions of the law." Rather, Will's "plain statement rule" is a "'rule of statutory construction to be applied where statutory language is ambiguous.'"

The district court stated its interpretation of Hilton as follows:

> [T]he plain statement rule should be used to interpret federal statutes which, if applied to the states, could subject them to monetary liability, if the statutes are ambiguous on the issue of whether Congress intended them to apply to the states. Thus, absent a clear statement of Congressional intent that such a statute applies to the states, a court should find that the statute does not so apply, and thus, cannot subject the states to liability.

Court Finds FCA Ambiguous as to Whether "Person" Includes States

Turning to the FCA, the district court found congressional intent to be ambiguous and thus the plain statement rule applicable. According to the court, the statute is unclear whether person includes states because the civil liability section does not define the word "person." Further, the section of the FCA providing for civil investigative demands states that "for purposes of this section" person is "'any natural person, partnership, corporation, association, or other legal entity, including any state or political subdivision of a state.'" Thus, the court reasoned that, by defining person for the civil investigative demand section, "Congress created doubt as to whether the term 'person' in the civil liability section should encompass the states as well."

Court Finds No Evidence of Congressional Intent to Apply FCA to States

Reviewing the FCA's legislative history, the district court found no demonstration of congressional intent to apply the Act to the states. The FCA was originally passed during the Civil War to combat fraud by Union army contractors, and the inclusion of the word "person" in the civil liability section has remained unchanged since then, the court found.

Furthermore, the court was not persuaded by the following 1986 Senate Report statement regarding the history of the Act and court interpretations: "The term person is used in its broad sense to include partnerships, associations, and corporations . . . as well as states and political subdivisions thereof." According to the court, the 1986 FCA Amendments did not alter the definition of "person" or to whom the Act applied. As such, the court rejected any reliance on the views of the 1986 Congress.

The court concluded that "the FCA does not apply to the states because Congress has not, in language of the FCA, clearly indicated that it applies to them." Accordingly, because the University is a state entity, the FCA does not apply to it.

FCA Liability/Unfunded Employee Pension Plans

U.S. ex rel. Rabushka v. Crane Company, 122 F.3d 559 (8th Cir. Aug. 11, 1997)

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. 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.

This case stems from a series of events dating back to the 1980s which involved Crane Company, its subsidiary CF & I Steel Corp. (CF & I), and the PBGC. In the early 1980s, CF & I began experiencing financial difficulties that left its employee pension plan obligations underfunded. Concerned about its potential liability for those obligations, Crane spun off CF & I to its shareholders in May 1985. At the time of the spin-off CF & I's unfunded pension liability was approximately $46 million. By November 1990, it had grown to $140 million at which point CF & I filed for bankruptcy. In March 1992, with the unfunded pension liability at $270 million, the PBGC terminated CF & I's pension plan and assumed those plan obligations protected by ERISA.

Stanley Rabushka, a former Crane shareholder, filed a *qui tam* suit "alleging that Crane spun off CF & I with the intent of wrongfully shifting its liability for CF & I's unfunded pension obligations to the PBGC." Specifically, he alleged violations of § 3729(a)(1) and (a)(2) as well as reverse false claims under (a)(7) and conspiracy under (a)(3). According to the court, the following theory underlies Rabushka's case:

> [T]o avoid being saddled with CF & I's unfunded pension liability, Crane spun off CF & I, knowing that it was bankrupt and would not survive. Crane hoped that CF & I would survive long enough so that when it did go bankrupt — and the PBGC was forced to terminate CF & I's plan and assume its liabilities — Crane could not be held liable for those obligations.

Under applicable laws and regulations, when a pension plan like CF & I's is terminated, the PBGC assumes responsibility for insured benefits. However, the PBGC can assert a subrogation claim against an employer who failed to fund a pension plan.

Rabushka argued that Crane had a duty to report through the CF & I plan administrator that Crane's spin-off of CF & I was a liquidation. According to Rabushka, had the PBGC been aware that the spin-off was a liquidation and of the true extent of the unfunded pension liabilities (also allegedly misrepresented), it would have immediately terminated the plan — in order to avoid an increase in the PBGC's future liabilities — and held Crane responsible for the unfunded liabilities. The district court granted Crane's motion for summary judgment, finding that Crane did not make or cause to be made any false statement to the PBGC. The 8th Circuit affirmed, but on different grounds than those relied upon by the lower court.

No False Claims If PBGC Would Have Covered the Unfunded Pension Liabilities Regardless of Defendant's Actions

Crane argued that the alleged misrepresentations and nondisclosures attributed to it were "immaterial to and had no influence on" the PBGC; thus, they were "not a cause" of PBGC's decision not to terminate the plan prior to March 1992. In the view of the appellate court, this went to the underlying premise essential to all counts of Rabushka's complaint. Characterizing the issue as the "very heart of Rabushka's claims," the court found that if the relator could not show that the PBGC would have terminated the plan in 1985 had it known that the

spin-off was, in fact, a liquidation, then there were no false or fraudulent claims because the PBGC's payment of CF & I's unfunded pension liabilities would have occurred regardless of Crane's actions.

Insufficient Evidence to Show that Claims Were "False or Fraudulent"

According to the court, the issue was whether there was sufficient evidence to show that the claims were "false or fraudulent." Summarizing the deposition testimony of a key PBGC official, the court found that the PBGC had a "policy against involuntarily terminating a plan when it had sufficient assets to pay current benefits," that the CF & I plan was able "to pay benefits as they came due in 1985," that "the spin-off did not warrant an involuntary termination in 1985," that the PBGC refused to terminate the plan in 1987, and that the PBGC would not have terminated the plan in 1985 even if it had "determined that CF & I's liquidation or inability to make benefit payments was inevitable so long as those events did not occur for more than one year." Together these facts "overwhelmingly establishe[d]" that the PBGC would not have terminated the plan in 1985. Rabushka, on the other hand, had only a "scintilla of evidence in support of his theory" — insufficient evidence to avoid summary judgment, the court stated.

Reverse False Claims Provision Does Not Apply to Pre-1986 Conduct

In addition, the 8th Circuit affirmed the district court's dismissal of Rabushka's reverse false claims allegations because § 3729(a)(7), first passed in 1986, could not be applied retroactively to Crane's pre-1986 conduct. The court relied on its own precedent — Miller v. FEMA, 57 F.3d 687 (8th Cir. 1995) — holding that the 1986 FCA Amendments do not apply retroactively to pre-1986 conduct.

Relator Intervention in Parallel Proceedings

Cedars-Sinai Medical Center et al. v. Shalala, 1997 WL 559486 (9th Cir. Sept. 10, 1997)

A relator was properly denied the opportunity to intervene in and move to dismiss a declaratory judgment action brought by hospitals who are also defendants in the relator's *qui tam* action, according to the 9th Circuit. 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.

The relator — whose *qui tam* case remains under seal — moved to intervene and dismiss a declaratory judgment action brought against the Government by Cedars-Sinai and twenty-four other hospitals challenging a 1986 Health Care Financing Administration (HCFA) policy providing that Medicare will not cover investigational medical devices that have not been approved for marketing by the FDA. The district court held that the challenged policy was invalid because it was not issued in accordance with the rulemaking requirements of the Administrative Procedure Act. *See* 6 TAF QR 27 (July 1996). The relator's *qui tam* action, which was filed prior to the declaratory action, alleges that 130 hospitals knowingly submitted false claims for non-FDA-approved medical devices that were barred from Medicare coverage under the 1986 HCFA policy. In addition to ruling the policy invalid, the district court denied the relator's motion.

Relator Had No Right to Intervene Because the Government Could Adequately Represent the Relator's Interests

The 9th Circuit weighed the relator's motion to intervene as a matter of right against a four prong test, finding that the relator's claim failed the fourth prong — that is, that the intervening party's interest must be inadequately represented by the other existing parties. According to the court, the only issue to be decided on the merits in the declaratory action was the validity of the 1986 HCFA policy. On that issue the relator's and Government's interests were identical, the court stated. According to the court, the Government was capable of adequately representing its own interest and the relator had failed to show any distinct interest that the Government would not adequately represent. Moreover, the court noted that the rule particularly applied in this case because "a *qui tam* plaintiff by definition asserts not his own interests, but only those of the United States."

The 9th Circuit rejected the relator's argument that U.S. ex rel Kelly v. Boeing, 9 F.3d 743 (9th Cir. 1993) — which recognized that a relator's interest in his potential recovery and costs expended on litigation give him a personal stake in the case — and U.S. ex rel. Robinson v. Northrop Corp., 824 F. Supp. 830 (N.D. Ill. 1993), establish that relators do have interests distinct from the Government's. According to the 9th Circuit, Kelly and Robinson involved Article III standing, not intervention. As such, the recognition of the relator's personal stake in those cases was merely to support the proposition that relators have incentive to litigate their cases zealously and thereby ensure an adversary context as Article III requires. Neither of those cases held that relators "have any interests so distinct from those of the government that they will support intervention."

"First to File" Rule Does Not Apply

Regarding his motion to dismiss — also considered and denied by the district court — the relator argued that the district court should have dismissed the declaratory action under the "first to file" rule, which provides that "when cases involving the same parties and issues have been filed in two different districts, the second district court has discretion to transfer, stay, or dismiss the second case in the interest of efficiency and judicial economy." According to the 9th Circuit, the lower court correctly decided that the issues in the two actions were different. The issue in the declaratory action was whether the 1986 HCFA policy was valid, whereas the issue in the *qui tam* suit was whether any of the hospitals knowingly submitted false claims. Thus, the "first to file" rule was not applicable, the court held.

Invalidity of HCFA Policy Is No Defense to False Claims Allegations

Finally, the 9th Circuit addressed the relator's argument that the hospitals had brought the declaratory action only for purposes of establishing an affirmative defense to the *qui tam* action in a favorable forum. The relators cited to 8th Circuit case law holding that a court should dismiss such an action under these circumstances.

According to the 9th Circuit, "[e]ven if the Hospitals succeed in having the rule declared invalid, however, that will be no defense to the Relator's claims under the [FCA]." The court further stated that "[i]f the Hospitals did knowingly submit false claims in order to receive payment for devices not covered under the 1986 rule, the invalidity of the rule will be no defense."

The Government's appeal of the district court's ruling was also before the 9th Circuit. However, the appellate court did not reach the merits of

the ruling but rather remanded the case for consideration of whether a statute of limitations defense was waived by the Government and, if not, whether the declaratory action is barred by the statute of limitations.

Service Contract Act Violations

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 noncompliance 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.

Relator Richard Sutton was employed by Double Day Office Services, Inc., a moving company that contracted with the Government to move federal employees. The contracts at issue were governed by the SCA, which requires government contractors to pay service employees minimum wages and benefits determined by the Secretary of Labor. Sutton filed a *qui tam* suit based on Double Day's alleged noncompliance with the SCA. The district court dismissed the suit, holding that Sutton lacked standing because his False Claims Act claim was equivalent to an SCA claim and there is no private right of action under the SCA. U.S. ex rel. Sutton v. Double Day Office Services, Inc. et al., 1996 WL 207766 (N.D. Cal. Apr. 23, 1996), 6 TAF QR 14 (July 1996).

SCA Bar on Private Actions Does Not Preclude *Qui Tam* Suit

Recognizing that the SCA does not confer a private right of action to employees but instead grants exclusive enforcement to the Secretary of Labor, the 9th Circuit stated that, to the extent any of Sutton's claims were for damages to himself for not being paid SCA-required wages, he lacked standing to pursue those particular claims. Moreover, agreeing with a D.C. Circuit decision barring a RICO action for SCA-based damages, the court stated that "a party may not bring an action for the equivalent of SCA damages under the guise of another statute."

Sutton's FCA case, however, was brought "to recover for damage to the United States, not to recover damage to himself." According to the appellate court, the damage under an SCA action would be the amount Sutton was underpaid by Double Day, whereas in the FCA case Sutton sought to recover civil penalties plus three times the damage to the Government.

Furthermore, stated the court, Sutton's FCA claim was based on different actions by Double Day than an SCA claim. While failure to pay prevailing wages is an SCA violation, it is not an FCA violation. Instead, an FCA violation occurs when the defendant submits "a claim for payment to the United States falsely stating that it had complied with the SCA. The FCA attaches liability to the claim for payment, not the underlying activity."

In short, "[b]ecause Sutton's *qui tam* claim under the FCA is based on different actions and for different damages than a claim under the SCA would be, his suit is not barred by the SCA's bar on private rights of action."

Barring FCA Action Would Be Contrary to Congressional Intent

The 9th Circuit went on to suggest that if Sutton's suit were barred then any plaintiff, including the Government, would be barred from suing Double Day for the alleged fraudulent activity. "Accepting Double Day's position would require the improbable conclusion that Congress intended to authorize suits for fraud on the government where a contractor lies

about lawful actions but to preclude suits where a contractor lies about unlawful actions."

Moreover, barring Sutton "would frustrate the purpose of the FCA, which was 'intended to reach all kinds of fraud, without qualification, that might result in financial loss to the Government.' It would preclude *qui tam* actions by people who are most likely to know that a fraud against the United States has been committed."

Finally, the 9th Circuit stated that "holding that the SCA bars actions under the FCA would require concluding that the SCA impliedly pre-empts the FCA," which would be contrary to Supreme Court precedent regarding implied preemption.

Section 3730(h) Retaliation Claims

U.S. ex rel. McKenzie v. Bellsouth Telecommunications, 1997 WL 510191 (6th Cir. Aug. 26, 1997)

See "Public Disclosure Bar and Original Source Exception" above at page 2.

U.S. ex rel. Dorsey v. Dr. Warren E. Smith Community Mental Health/Mental Retardation and Substance Abuse Centers, 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997)

See "Section 3730(b)(5) First-to-File Provision/ Section 3730(e)(3) Pending Government Action Provision" above at page 8.

DOJ Relator's Share Guidelines

The following Guidelines were recently obtained from the Justice Department by TAF through a Freedom of Information Act request.

December 10, 1996

Relator's Share Guidelines

Section 3730(d)(1) of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, provides that a qui tam relator, when the Government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA action depending upon the extent to which the relator substantially contributed to the prosecution of the action. When the Government does not intervene, section 3730(d)(2) provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than 25 percent and not more than 30 percent.

The legislative history suggests that the 15 percent should be viewed as the minimum award — a finder's fee — and the starting point for a determination of the proper award. When trying to reach agreement with a relator as to his share of the proceeds, or proposing an amount or percentage to a court, we suggest that you begin your analysis at 15 percent. Then consider if there are any bases to increase the percentage based on the criteria set forth below. Having done this, consider if that percentage should be reduced based on the second set of criteria. Of course, absent one of the statutory bases for an award below 15 percent discussed at the end of these guidelines, the percentage cannot be below 15 percent (or 25 percent if we did not intervene).

Items for consideration for a possible increase in the percentage

1. The relator reported the fraud promptly.
2. When he learned of the fraud, the relator tried to stop the fraud or reported it to a supervisor or the Government.
3. The qui tam filing, or the ensuing investigation, caused the offender to halt the fraudulent practices.
4. The complaint warned the Government of a significant safety issue.

5. The complaint exposed a nationwide practice.
6. The relator provided extensive, first-hand details of the fraud to the Government.
7. The Government had no knowledge of the fraud.
8. The relator provided substantial assistance during the investigation and/or pre-trial phases of the case.
9. At his deposition and/or trial, the relator was an excellent, credible witness.
10. The relator's counsel provided substantial assistance to the Government.
11. The relator and his counsel supported and cooperated with the Government during the entire proceeding.
12. The case went to trial.
13. The FCA recovery was relatively small.
14. The filing of the complaint had a substantial adverse impact on the relator.

Items for consideration for a possible decrease in the percentage

1. The relator participated in the fraud.
2. The relator substantially delayed in reporting the fraud or filing the complaint.
3. The relator, or relator's counsel, violated FCA procedures:
   a. complaint served on defendant or not filed under seal.
   b. the relator publicized the case while it was under seal.
   c. statement of material facts and evidence not provided.
4. The relator had little knowledge of the fraud or only suspicions.
5. The relator's knowledge was based primarily on public information.
6. The relator learned of the fraud in the course of his Government employment.
7. The Government already knew of the fraud.
8. The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Government's position in litigation.
9. The case required a substantial effort by the Government to develop the facts to win the lawsuit.

10. The case settled shortly after the complaint was filed or with little need for discovery.
11. The FCA recovery was relatively large.

These items are not meant to be an exhaustive list of the criteria one should consider when trying to determine an appropriate award for a relator, but they do constitute many of the factors that routinely should be considered.

Finally, please note that section 3730(d)(1) limits the relator to no more than 10 percent of the proceeds when the complaint is based primarily on public information and that section 3730(d)(3) allows the court to reduce the percentage below 15 percent if the relator planned and initiated the fraud and requires the court to dismiss the relator if he is convicted for the actions giving rise to the submission of the false claims.

Qui Tam: An AUSA's Perspective

By Kathleen McDermott

The whistleblower provisions of the False Claims Act offer a unique opportunity for citizens and the law enforcement community to work in partnership to deter fraud and ensure our government programs operate with integrity and public confidence. The success of the *qui tam* provisions has significantly increased public awareness of the False Claims Act and how individuals can make a difference. Though in partnership, the role and obligations of the government enforcement community and the *qui tam* community differ in significant ways. This article offers one view of how the legal and ethical obligations of the enforcement community interact with the statute's requirements and the interests of the *qui tam* plaintiff.

Originally enacted by a wartime Congress in 1863 to combat procurement fraud in Union contracts, the False Claims Act was designed from inception to recruit to the government's anti-fraud mission both whistleblowers and rogues. The statute contains a unique provision allowing private citizens to bring suits on behalf of the United States.

In 1986 Congress sought to modernize the False Claims Act to make it the government's "primary litigative tool" to combat fraud. Sen. Report 99-345, 99th Cong. 2d Sess. (1986) (1986 WL 31937). The Congressional purpose of the 1986 amendments was two-fold: 1. To provide the law enforcement community with more effective tools; and 2. To encourage individuals knowing about government fraud to bring that information forward by increasing monetary incentives and providing whistleblower protection. Id. As Congress envisioned, the False Claims Act has evolved into the government's "primary litigative tool" to combat fraud and is the centerpiece of fraud initiatives in U.S. Attorney's Offices. The statute is an integral component of coordinating criminal, civil and administrative remedies in parallel and joint investigations. In recent years, Congress has authorized the Department of Justice to create Affirmative Civil Enforcement Units ("ACE") in U.S. Attorney's Offices to pursue fraud and abuse in government programs utilizing principally the False Claims Act. ACE Units are comprised of attorneys, auditors and paralegals devoted entirely to civil fraud prosecutions.

The *qui tam* provisions of the False Claims Act serve to substantially aid the government's fraud initiatives. *Qui tam* suits are a major practice area for U.S. Attorney's Offices including the District of Maryland, which ranks 9th in the nation for *qui tam* filings. Since 1994, over $45 million has been recovered from investigations and settlements derived from *qui tam* filings in U.S. District Court for the District of Maryland. These recoveries are in addition to the U.S. Attorney's Office's False Claims Act cases that do not derive from *qui tam* suits and which also have resulted in substantial recoveries.

The success of the 1986 amendments is best told by the recoveries: According to government statistics, since 1986 over 1655 *qui tam* suits have been filed, resulting in eventual recoveries of over $1.8 billion when the government has investigated the allegations and taken over the prosecution of the suit. The forecast of increased *qui tam* filings is, again, told in the numbers. In 1986 less than 50 *qui tam* suits were filed nationwide; in 1996, approximately 360 suits were filed. The success of the 1986 amendments do not, however, tell the whole story. The government has declined to intervene in approximately 800 suits, of which over 600 were eventually dismissed. Significantly, of those cases where the government declined to take over prosecution of the suit, whistleblowers recovered approximately $26 million.

In the District of Maryland, for example, no declined *qui tam* has been successfully pursued to date. In the only *qui tam* to go to trial after the government's declination, *U.S. ex rel. Berge v. Bd. Of Trustees, Unv. Of Alabama*, 104 F.3d 1453 (4th Cir. 1997), a jury verdict in favor of the United States and relator was reversed. Other declined cases have resulted in dismissal under motion. See, e.g., *U.S. ex rel. Milam v. Unv. Of Texas et al.*, 961 F.2d 46 (4th Cir. 1992). While many *qui tam* suits present allegations that the government may not choose to pursue, the whistleblower provisions are embraced as an integral law enforcement tool and the government has a strong interest in supporting the principled and proper use of the statute.

Qui Tam Complaint Filing Issues

Under §3730(b), a person may bring a civil action for violating the false claims provisions of §3729 "for the person and for the United States Government." The term "person" has been construed to include corporations, and other business entities, State agencies and possibly in-house corporate counsel. *U.S. ex rel. Lujan v. Hughes Aircraft*, 67 F.3d 242 (9th Cir. 1995) (suggesting an in-house counsel may be a proper relator after balancing conduct to be disclosed with authority to disclose).

The action must be filed under seal and the relator must serve on the United States a copy of the Complaint and a written disclosure statement of all material evidence pursuant to FRCP 4(I), §3730(b)(2). The United States has 60 days to determine whether to intervene and take over the suit. The 60 day period may be extended for good cause. If the United States declines to intervene in the suit, the relator may elect to pursue the allegations on behalf of the United States. Absent any jurisdictional or other legal defects, the relator is generally entitled to a statutory share of any recovery. If the United States intervenes or otherwise negotiates the settlement, the statutory percentage may range from 15-25%. If the relator pursue the action after the government's declination, the statutory share may range from 25-30%. There are a few trial practice issues that might be considered before filing the complaint.

1. The failure to file the Complaint under seal and provide the disclosure statement may result in dismissal of the action. *U.S. ex rel Pilon v. Martin Marietta and General*

Electric, 60 F.3d 995 (2d Cir. 1995); *Erickson v. American Institute of Biological Science*, 716 F. Supp 908, 912 (E.D. Va. 1989) (seal); *U.S. ex rel. Woodward v. Country View Care Center*, 797 F.2d 888, 892 (10th Cir. 1986) (seal and disclosure statement). Because the filing of a *qui tam* complaint impacts government resources, the jurisdictional requirements of the statute must be met before the government's evaluation can reasonably take place. The intervention deadline does not run until the United States receives both the Complaint and an adequate disclosure statement. It is important to note that the disclosure statement must be served on the United States but is not required to be filed with the Court.

It is advisable to contact the U.S. Attorney's Office prior to filing the *qui tam* Complaint. While the U.S. Attorney's Office cannot and will not offer any legal advice or opinion on the viability of any action, the ACE or Health Care Fraud Coordinators can offer valuable assistance in ensuring that the procedural mechanics operate smoothly.

2. The written disclosure statement of material evidence is frequently labeled attorney-client privileged when presented to the government. The United States does not have an attorney-client privilege with a relator. There may exist substantial law enforcement concerns and objections to the production of the document, however, that may be asserted to protect the government's investigative efforts, including any criminal or grand jury investigation.

It may be possible to construe the disclosure statement as work product of the relator. In *U.S. ex rel. O'Keefe v. McDonnnell Douglas Corp*., 918 F. Supp 1338 (E.D. Mo. 1996), the Court held that the disclosure statement was work-product prepared in anticipation of litigation. The Court nevertheless held that the production of the statement may be necessary where the defendant demonstrates substantial need and good cause. In *U.S. ex rel. Fallon v. Accudyne Corp et al.*, 880 F. Supp 636 (W.D. Wis. 1995), the Court recognized a "joint privilege" to protect a disclosure statement from production based upon the fundamentally inherent interests between the relator and the United States. There is no guarantee that a disclosure statement will or in fairness should be protected from eventual discovery. *U.S. ex rel. Stone v. Rockwell International,* 144 F.R.D. 396 (D.Colo 1992) (not privileged); *U.S. ex rel. Robinson v. Northrop Corp.*, 824 F. Supp 830 (N.D. Ill. 1993) (no work product privilege). As a practical matter, the disclosure statement should present "material evidence." Accordingly, it should be fact-oriented and devoid of the legal strategy or hypotheses of counsel.

3. The Complaint allegations should be based on facts and the personal knowledge of the relator. Does the relator possess information of fraudulent conduct or is the Complaint based upon speculation and assumptions? Many courts, moreover, apply FRCP 9(b) to the allegations brought by a relator. For example, *U.S. ex rel. De Carlo v. Kiewit/AFC Enterprises,* 937 F. Supp 1039 (S.D.N.Y. 1996), held that FRCP 9(b) applies to allegations under the False Claims Act and complaints filed on "information and

belief" are not sufficient. *U.S. ex rel. Gold v. Morrison-Knudsen*, 68 F.3d 1475 (2d Cir. 1995)(same); see also *United States v. EER Systems*, 950 F. Supp. 130 (D. Md. 1996)(non-*qui tam*). It is common sense to note that vague, speculative allegations decrease the government's likelihood of devoting investigative resources and intervening in the action.

4. The relator should be educated to the risks of whistleblowing and the investigative process, particularly in speculative, marginal cases. The seal provisions of the statute provide only temporary anonymity. Accordingly, even after the government declines to intervene and the relator determines not to proceed there is a danger that the public record will reveal the filing of suit that both the relator and United States declined to pursue.

Additionally, it is important to realize that successful *qui tam* cases are time-consuming and the investigative process may be months, even years. The filing of a *qui tam*, from the government's perspective, is the beginning of an investigation that may be far more complex than realized. The investigative process, moreover, cannot be fully shared with the relator. Both the relator and the government need to have frequent and candid discussions regarding the progress and obstacles of the investigation and the role the relator or relator's counsel can realistically play in a law enforcement investigation.

5. The unique *qui tam* provisions of False Claims Act must be invoked in a principled manner. It is inappropriate to threaten an employer or competitor with the filing of a *qui tam* to negotiate more favorable employment or business terms. Moreover, if a defendant is "tipped off" to the likelihood of a *qui tam* suit, the government's investigation of any allegations may be compromised. Similarly, it is inappropriate and against public policy to deter *qui tam* filings through settlement agreement releases and contracts. *U.S. ex rel Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995) (releases unenforceable); see also *U.S. ex rel. DeCarlo v. Kiewit/AFC Enterprises,* 937 F. Supp 1039 (S.D.N.Y. 1996) (same).

The Government's Investigative Process

The statute provides that "the Attorney General diligently shall investigate a violation of section 3729." §3730(a). Though the applicability of this provision to the *qui tam* provisions under §3730(b) is logically presumed, the government has wide discretion in how, when, and to what extent it will investigate an allegation. *U.S. ex rel Baggan v. DME Corporation*, 1997 WL 305262 (D.C. 1997). The initial challenge for a U.S. Attorney's Office is how to balance its basic policies and principles for authorizing and commencing investigations with its mandatory involvement in an involuntary civil proceeding. Different challenges and concerns are further provoked where the government has an investigation underway; the *qui tam* filing operates to place the govern-

ment in the position of dealing with a civil action and requesting from the court extensions of time to intervene and continue the seal for the benefit of an existing investigation. The federal court, then, has the potential to influence the conduct of the investigation and the government is in the position of having to justify its investigative efforts and progress to the court to obtain the extensions and continuations of the seal.

Once a *qui tam* is filed, it is immediately processed by the responsible U.S. Attorney's Office and the Commercial Litigation Branch of the Department of Justice. The Inspector General's Office for the affected agency is notified as well as the Federal Bureau of Investigation. Many *qui tam* filings involve multiple defendants and multi-Districts. There may exist an ongoing criminal or civil investigation that existed prior to the filing of the *qui tam* action. Accordingly, there is a substantial amount of time devoted to ascertaining the existence of any pending or prior investigations with other Districts. Additionally, the *qui tam* allegations may be relevant to a health care fraud task force or other fraud initiative.

The U.S. Attorney's Office works with local law enforcement agencies to evaluate the allegations and assignment of investigative resources. The Department of Justice pursues parallel or joint criminal and civil investigations. Accordingly, when a *qui tam* suit is served, it is provided to the appropriate criminal division supervisor for evaluation for criminal potential. If appropriate, the *qui tam* allegations may be investigated for criminal and civil violations.

It is a rare *qui tam* that comes with all the evidence necessary to make an intervention decision. Accordingly, the government's investigative efforts are often time-consuming and proceed under the same investigative principles as any other investigation. This means that the investigation takes incremental steps with each step based upon the needs of the investigation and the relative merits of the allegations. Moreover, not all cases can or should receive immediate investigative resources. The U.S. Attorney's Office will often spend considerable time reviewing programmatic regulations and documents with the client agency to determine if the allegations present proper investigative issues. Because *qui tam* suits divert law enforcement resources from existing investigations, it is imperative to separate the wheat from the chaff as soon as possible.

One of the first steps in the investigative process is the interview of the relator. At the interview, the relator may be questioned on the allegations in the suit with a focus on the personal knowledge and corroboration the relator can bring to the allegation. It is common to probe the motive and background of the relator as would be done for any witness coming forward. One important concept that is emphasized is that the relator is not the agent or investigator for the United States and has no authority to act on behalf of the United States. If the relator's interview and disclosure of material evidence warrant further review, the government may pursue additional evaluation efforts such as the interview of other witnesses, the review of government records and

at some point, if appropriate, the issuance of a subpoena to the defendant for records. Other investigative steps may be taken as well.

The Government's Intervention Decision

While the statute provides 60 days for the government to make an intervention decision, the government must seek an extension of time in virtually every instance. The processing and assignment of investigative resources frequently takes more than 60 days. Additionally, and somewhat contrary to the notion of private attorneys general pursuing *qui tam* suits as a supplemental government resource, it is no secret that the laboring oar of these investigations falls heavily, if not exclusively, on the Department of Justice and the affected agencies. If an audit of a defense contract or medical provider is warranted, it is the government that expends the resources to conduct the audit and it is the government that is in the best position to access necessary data and move the investigation to a successful result. It is common for an investigation to take several months before there is sufficient information to even evaluate liability potential.

The government may consider intervention in any meritorious suit. Accordingly, if the suit allegations are appropriately established, the U.S. Attorney's Office will likely recommend intervention. The intervention decision is influenced by the affected agency's recommendation and the merits established by the investigation. It is important to recognize that the U.S. Attorney's Office must be persuaded that the liability elements of the statute exist to be satisfied that intervention is appropriate. A relator's speculative assertions, feelings of hostility or even righteousness are not a substitution for real evidence and do not dictate the government's investigation or intervention decision.

Settlement Negotiations Pre-Intervention

The structure of *qui tam* investigations compels the government in most instances to disclose the investigative results to the defendant and pursue resolution discussions before it intervenes in the action. While the alchemy of False Claims Act settlement negotiations vary little in *qui tam* and other False Claims Act cases, settlement negotiations in *qui tam* suits present special challenges.

Where the government's investigation suggests False Claims Act liability and that intervention may be recommended, at the appropriate time, the government will often move to partially lift the seal to advise the defendant of the existence of the *qui tam* Complaint. The ability of the government and defendant to undertake discussions about the investigation while the case is under seal is absolutely crucial to a fair and thorough consideration of the allegations. Accordingly, in cases where the government perceives False Claims Act liability, it may move to continue the seal so that the defendant has the opportunity to review the government's allegations and respond. This process in many instances is the most time-consuming part of the action but also the most essential. It must be considered that the defendant may pos-

sess information that may cause the government to think differently about the allegations; equally important is that the defendant may want the opportunity to prepare a substantive or mitigation response for appropriate consideration.

Frequently, the defendant will know of the existence of an investigation from the receipt of a subpoena during the course of the investigation. The origin of the investigation, however, is unknown. The eventual knowledge that the investigation was provoked by a trusted employee, family member or business competitor can be a bitter pill to swallow and affect the pace and objectivity of settlement negotiations, particularly when it dawns on the defendant the relator may receive a recovery for whistleblowing and have attorney's fees paid from the defendant's assets. In most instances, it is not necessary or productive to have the relator participate in settlement negotiations of the False Claims Act allegations, though that is a discretionary decision by the U.S. Attorney. The government, moreover, will not participate in negotiating any relator claims for attorney's fees or discharge. For these reasons, the negotiations of the separate interests proceed on separate track.

In every False Claims Act suit the issue of greatest contention is damages. The statute is designed to affect the pocketbook of the wrongdoer. Paying back only the amount calculated as single damages, sometimes called restitution or refund or overpayment, is generally not acceptable in a False Claims Act action and operates as a reward rather than a deterrent to fraudulent schemes. Grasping the fundamental and immutable concept that the defendant will face a multiplier of calculated damages and possibly penalties is a psychological hurdle in settlement negotiations that defendants and defense counsel should get over quickly if the process is to proceed to any resolution. A corollary principle that must be accepted by the relator and relator's counsel is that False Claims Act settlements must be fair, principled and in complete accord with the public interest. The relator's subjective expectations of a monetary recovery should carry no weight in the government's negotiation of a False Claims *qui tam* action.

In some instances, a defendant will assert an inability to pay defense to the action. When such a defense is invoked, the government will require the defendant to complete under oath financial disclosure forms and to produce pertinent financial information for review by an auditor or financial analyst. If the defense is established sufficiently, the government retains the option to consider a payment plan or other remedial strategy. The production of financial information sometimes establishes an ability to pay and reveals the defendant's primary concern to be financial inconvenience.

After the False Claims Act amount is determined by agreement between the government and the defendant, the relator's share is negotiated between the government and the relator. The starting point, generally, for an award is the statutory minimum of 15%. Factors that may be considered in determining whether the percentage share should be more than the minimum may include actual contribution to the investigation, coopera-

tion in the investigation, compliance with the statute's requirements, any involvement in the scheme or delay in reporting the wrongful conduct, quality of evidence provided to the government, and public importance of the fraud scheme exposed.

The Government's Declination Decision

The government's evaluation period often has the practical effect of operating as a principled gatekeeper on the use of the False Claims Act. Many *qui tam*s suit do not go forward after the United States declines to intervene. When it determines to decline to intervene, the government may share its general views of the merits of the suit with the relator, subject to the nondisclosure of privileged material. Investigative reports and other investigative work product are not shared with the relator. The government's decision to decline intervention should not be construed, however, as a statement on the merits of the suit. See *U.S. ex rel. Berge v. Bd. Of Trustees, Unv. Of Alabama,* 104 F.3d 1453 (4th Cir. 1997) (OIG report recommending no action does not establish allegations are without merit). The government retains the right to intervene at a later time upon a showing of good cause. 31 U.S.C. §3730(c)(3). When the relator determines to go forward after the government declines to intervene, the United States remains the real party in interest with significant rights to be protected.

Accordingly, the United States is entitled to receive all pleadings, deposition transcripts and other discovery information. It should be apprised of new facts and legal theories asserted by the relator as new developments may alter the government's original evaluation of the suit. The U.S. Attorney's Office continues to monitor declined *qui tam* cases and in rare, appropriate instances is available to assist the Court or parties on litigation issues.

Most importantly, the dismissal of any *qui tam* False Claims Act suit must have the written consent of the Court and the Attorney General. 31 U.S.C. 3730. *U.S. v. Phillips Electronics*, 1997 WL 361932 (5th Cir. June 30, 1997). The government may object to the dismissal of a False Claims Act action with prejudice that does not reflect False Claims Act liability and recoveries. Settlements derived from False Claims Act litigation should reflect the public interest and important policy interests of the United States, and not the pecuniary self interest of the relator and defendant. Settlement agreements, therefore, are reviewed for reasonableness and appropriateness. In *U.S. ex rel. Gibeault v. Texas Instruments*, 104 F.3d 276 (9th Cir. 1997), the Court reviewed the reasonableness of a settlement and determined that the $300,000 labeled as attorney fees by the relator and defendant were in part proceeds of the action and due to the public treasury. The United States, as the real party in interest, is entitled a proper share of recoveries in an action brought on its behalf for damages suffered by the United States. *U.S. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994) (the government has review opportunity rather than consent role).

Any settlement agreement must contain standard False Claims Act releases and exclusions. The government will generally agree to release only conduct investigated and that forms the basis of the recovery. Moreover, the government excludes from the ambit of any release potential claims by the Internal Revenue Service, potential criminal liability, administrative remedies and state law tort claims for defective services. The percentage recovery due to the relator in a declined *qui tam* is negotiated with the government, not the defendant. Sample settlement agreements are available from the U.S. Attorney's Office.

The False Claims Act has succeeded in becoming the government's primary weapon in battling fraud, waste and abuse. The *qui tam* provisions of the statute are an integral law enforcement tool for discovering and pursuing fraudulent schemes. The principled use of these provisions will ensure the continued success and credibility of this unique and effective statute.

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U.S. ex rel. Newsham et al. v. Lockheed Missiles and Space Company, Inc. (ND CA No. C-88-20009-JW)

In July 1997, on a motion for reconsideration in light of the Supreme Court's retroactivity holding in Hughes Aircraft Company v. U.S. ex rel. Schumer, No. 95-1340, 1997 WL 321246 (U.S. June 16, 1997), 10 TAF QR 1 (July 1997), the California district court vacated its prior decision and dismissed the *qui tam* action filed in 1988 by Margaret Newsham and Martin Bloem against their former employer, Lockheed Missiles and Space Company, Inc. The district court had previously found that the *qui tam* suit, which involved alleged fraudulent conduct that occurred prior to 1986, was not barred under the 1986 FCA Amendments' § 3730(e)(4) "public disclosure" provision. However, in accordance with Schumer, the district court now had to apply the restrictive pre-1986 version of the FCA, which required dismissal of a *qui tam* action with which the Government did not proceed if it was "based on evidence or information the Government had when the action was brought." According to the district court, since Newsham in 1984 had provided the Government with information regarding Lockheed's alleged fraud, application of the pre-1986 law required dismissal of her subsequent *qui tam* suit.

U.S. ex rel. Stone v. Rockwell International Corporation (D CO No. 92-CR-107-M)

In August 1997, the 10th Circuit affirmed the district court's ruling that Rockwell International's 1992 plea agreement with the Government did not preclude the Government from subsequently intervening in James Stone's *qui tam* suit. U.S. v. Rockwell International Corporation, 1997 WL 525201 (10th Cir. Aug. 26, 1997). In 1992 Rockwell pleaded guilty to various environmental crimes in connection with its operation of the Department of Energy's Rocky Flats Nuclear Weapons Plant and agreed to pay a $18.5 million fine; in return the Government promised to refrain from further criminal and civil proceedings except with respect to, inter alia, issues raised in Stone's *qui tam* suit. The same day Rockwell executed the plea agreement the Justice Department elected not to intervene in the *qui tam* suit, which had been filed three years earlier. In 1995, however, the Government moved to intervene for good cause under FCA § 3730(c)(3). The district court rejected Rockwell's contention that this attempt to intervene breached the 1992 plea agreement, and the 10th Circuit affirmed the lower court's interpretation of the agreement.

U.S. ex rel. Findley v. FPC-Boron Employees' Club et al. (D DC No. 95-7189)

In October 1997, the Supreme Court denied the relator's petition for writ of certiorari seeking review of the D.C. Circuit decision U.S. ex rel. Findley v. FPC-Boron Employees' Club et al., 105 F.3d 675 (D.C. Cir. Jan. 24, 1997), 9 TAF QR 1 (Apr. 1997), which affirmed dismissal of the *qui tam* suit on § 3730(e)(4) public disclosure grounds. The petition had urged the Supreme Court to resolve conflicts among the circuits on the meaning of the terms "based upon" and "original source."

INTERVENTIONS AND SUITS FILED/UNSEALED

ALLEGATION: DEFECTIVE AIRCRAFT CARRIER PARTS

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

In July 1997, DOJ filed a False Claims Act suit against a New Jersey machining company and its president/owner for alleged defects in arresting cable equipment systems supplied to the Navy and installed on at least seven aircraft carriers. 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. The defendants were earlier indicted on charges of obstructing federal auditors and making false statements.

Under the contract, the company was to have various components of the assemblies heat treated and then tested for cracks and other deficiencies, but in many instances that was not done. Grimaldi and Grimco also allegedly failed to maintain a thorough quality control effort. The Navy became aware of numerous defects in the assemblies and their components as aircraft carriers experienced failures, including the USS Independence, USS Kitty Hawk, and USS Constellation. According to DOJ, the defendants sought to deceive the Government about the cause of the failures, and after repeated evasive tactics Grimaldi provided falsified and fictitious inspection records to government auditors. Conducting the investigation were the Naval Criminal Investigative Service and Defense Criminal Investigative Service. The Government is represented by Assistant U.S. Attorney Michael Chagares.

ALLEGATION: FALSE BILLING FOR PRE-ADMISSION MEDICAL TESTS

U.S. ex rel. Branhan v. Mercy Health System of Southwest Ohio et al. (SD OH No. C-1-96-396)

In July 1997, a *qui tam* suit was reported alleging improper billing of Medicare for pre-admission tests by Mercy Hospital Anderson in Ohio and related institutions. The suit was filed in 1996 by Dorothy Branhan, an admissions clerk at Mercy Anderson. According to the complaint, the defendants created a duplicate record and billing system for Medicare patients. More specifically, they assigned Medicare patients who were undergoing preadmission testing two billing numbers so that they could bill the Government for both preadmission testing and the DRG reimbursement. DOJ has declined to intervene in the action. The relator is represented by Robert Armand Perez, Sr. (Cincinnati, OH), Ellen Doyle (Pittsburgh, PA), Philip Blomer (Cincinnati, OH), and Bradley Weiss (Washington, D.C.).

ALLEGATION: FDIC AND RTC CONTRACTOR FRAUD

U.S. v. Lange et al.

In July 1997, the FDIC announced that DOJ filed a False Claims Act suit against three California residents alleging fraud in connection with contracts issued by the FDIC and the former RTC to auction assets. According to the complaint, the defendants fraudulently acquired contracts and overbilled the two agencies for work performed. Pursuant to the scheme, Alisha Lange owned a sham company called LFC Real Estate Clearinghouse, Inc. (LFCREC), which was in fact owned and operated by her husband. The Langes improperly certified that LFCREC was woman-owned, enabling the firm to obtain

lucrative contracts that called for LFCREC to auction property for the FDIC and RTC that had been acquired from failed financial institutions. The shell company was paid more than $1 million in commissions and also was reimbursed over $2.5 million for claimed expenses. According to the Government, LFCREC was a shell for Lange Financial Corporation, a Newport Beach firm that is one of the largest auctioneers in the country. LFCREC hired subsidiaries of Lange Financial to perform auction work and failed to disclose that the subsidiaries were related companies. These subsidiaries allegedly overbilled for services.

Besides potential False Claims Act liability, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) provides for a $5 million penalty for making false statements to influence the RTC and FDIC. The matter was investigated by the FDIC OIG.

ALLEGATION: FALSE ROYALTY RECORDS INVOLVING OIL RECOVERY

U.S. ex rel. CO_2 Claims Coalition v. Shell Oil Company et al. (D CO No. 96-Z-2451)

In August 1997, a *qui tam* suit was unsealed alleging that Shell Oil and other companies submitted false records relating to the value of CO_2 used for enhanced oil recovery. The *qui tam* allegations are part of multiple causes of action set forth in a class action complaint filed in 1996. According to the complaint, the companies represented that the price of CO_2 would remain proportional to the price of oil, but the CO_2 was not priced accordingly. The defendants allegedly did not settle their royalty obligations in accordance with underlying lease agreements and applicable rules and regulations which required a determination of "reasonable value." The lawsuit further alleges a variety of other pricing, conflict of interest, and antitrust violations. DOJ declined to intervene in the action. The relator is represented by John Cogswell (Buena Vista, CO), Leo Crowley (Flagstaff, AZ), and David Hjelmfelt (Englewood, CO).

ALLEGATION: UNNECESSARY AND UNPERFORMED MENTAL HEALTH SERVICES

U.S. ex rel. Caplan v. National Consulting Group, Inc., f/k/a and a/k/a National Recovery Institute Group, Inc. (SD FL No. 96-6482-CIV)

In August 1997, DOJ intervened in a *qui tam* suit alleging that National Consulting Group, Inc., which operated facilities providing substance abuse rehabilitation and therapy services, billed CHAMPUS and Medicaid for treatment that was not properly documented, medically necessary, or provided. In certain instances, care was allegedly rendered by non-qualified personnel. The suit was filed by Joelee Caplan, a former psychotherapist at one of the facilities.

The complaint cites double billing for patients attending counseling groups at overlapping times, as well as falsely billing recreational activities as group sessions, including taking patients to the beach, bowling, and K-Mart. Movie showings were also billed as group therapy. The lawsuit further alleges that the defendant had employees falsely author progress notes and sign-in sheets to reflect that services were provided when they were not, and that patients' charts were falsified to reflect therapy sessions which were not held. Individual treatment plans for each patient, required by CHAMPUS and Medicaid, also were not provided. The relator is represented by Kenneth Nolan (Hollywood, FL), J. Stephen Simms of Greber & Simms (Baltimore, MD), and Robin Page West (Baltimore, MD). Representing the Government are Assistant U.S. Attorney Laurie

Rucoba and Daniel Anderson of the DOJ Civil Division.

ALLEGATION: INFLATED HOME HEALTH CARE MANAGEMENT COSTS

U.S. v. Rogers, Callaway, and Alpha Medical Inc. et al. (ED TN No. __)

In August 1997, DOJ announced that it filed a False Claims Act suit against a health care management company, the former executive director of a home health agency, and others for overcharging Medicare at least $30 million for inflated management expenses associated with the operation of several home health care agencies. The suit maintains that the fees were not reimbursable because Alpha Medical and the agencies were related organizations under Medicare rules. As such, the agencies were entitled only to reimbursement up to the amount of Alpha's reasonable and related costs for patient care in managing the home health agencies. The complaint indicates that the parties were related on account of various overlapping board positions and ownership by relatives and associates. The suit further alleges the submission of false bid letters to the Medicare fiscal intermediary to prevent a finding that the organizations were related. The falsified documents were intended to establish the existence of competitive bids or a market search for other management companies that, in fact, never occurred.

ALLEGATION: OVERCHARGING ON DOE POWER CONTRACT

U.S. ex rel. Norbeck v. Basin Electric Power Cooperative (D ND No. __)

In September 1997, DOJ announced that it intervened in a *qui tam* suit alleging that Basin Electric Power Cooperative of Bismarck, North Dakota overcharged millions of dollars on a DOE contract. The action was filed in 1995 by Robert Norbeck, a former chief auditor for Basin. According to the lawsuit, Basin billed DOE's Western Area Power Administration for costs that were not allowed or were falsified. Basin allegedly used a 10 year amortization period for certain costs charged under the contract when it customarily used 20 year amortization periods for those same costs at other power plants, and in fact switched back to a 20 year period when the contract ended. As a result, Western paid a disproportionate share of costs, according to DOJ. Furthermore, Basin allegedly used a wholly owned subsidiary, Dakota Coal Company, to charge profit margins to Western that were not allowed under the contract. The DOE OIG investigated the matter. The relator's counsel is Irv Nodland (Bismarck, ND). The Government is represented by Ben Vernia of the DOJ Civil Division.

ALLEGATION: OVERBILLING FOR HELICOPTER AMBULANCE SERVICES

U.S. ex rel. Cox v. Memorial Medical Center et al. (SD GA No. __)

In September 1997, a *qui tam* suit was reportedly unsealed alleging that three Georgia hospitals overbilled federal health care programs for helicopter service. The suit was filed earlier this year by Jeff Cox, a former employee of Omniflight Helicopters. Omniflight and five other air ambulance companies operating in Georgia were also named in the suit. The hospitals and aircraft companies allegedly falsified mileage records to inflate their reimbursements. Allegations reportedly involve using land miles instead of nautical miles and billing for miles not flown. DOJ declined to join in the action. James Franklin and Daniel Snipes of Franklin, Taulbee Law Offices (Statesboro, GA) are representing the relator.

ALLEGATION: STUDENT FINANCIAL AID FRAUD

U.S. ex rel. Faw and Faw v. Brewton-Parker College, Georgia Baptist Convention et al. (SD GA No. CV 697-016)

In September 1997, DOJ partially intervened in a *qui tam* suit alleging that Brewton-Parker College defrauded the Government in connection with various financial aid programs. According to the complaint, violations include crediting Pell Grant funds to student accounts with no eligibility, not following work-study program requirements, disbursing funds to citizens of foreign countries, failing to pay student loan, scholarship, and work-study monies owed, and falsifying documentation. The students for whom certain improper awards were made were predominantly athletes for Brewton-Parker. The complaint further alleges that the defendants consistently destroyed or altered evidence of the fraud. The suit was brought by Martha Faw, formerly the assistant director of financial aid at the college. Representing the relator is Mike Bothwell (Roswell, GA). The Government is represented by Assistant U.S. Attorney James Coursey, Jr.

ALLEGATION: FAULTY MEDICAL EQUIPMENT AND FALSIFICATION OF TESTS

U.S. ex rel. DeWitt v. Cincinnati Sub-Zero Products Inc. (SD OH No. __)

In September 1997, a *qui tam* suit was reportedly unsealed alleging that Cincinnati Sub-Zero Products Inc. knowingly sold faulty heart surgery equipment and altered 100 inspection reports. The suit was brought by Dawn DeWitt, a former sales and marketing assistant for the company, which supplied the Veterans Administration, private hospitals, and physicians. According to the lawsuit, a company executive ordered defective units shipped and caused fraudulent test results to be created afterward. Used, rebuilt parts were also allegedly installed in equipment that was sold as new. Additionally, the medical supply firm deceived the Food and Drug Administration about inspections and product testing. DOJ declined to intervene in the action. The relator is represented by Mark Krumbein (Cincinnati, OH).

U.S. ex rel. Taylor v. Woodall, Ed's Transmission-Allison, Inc. et al. (WD WA No. __)

In May 1997, Ed's Transmission-Allison, Inc. agreed to pay the Government $515,000 to settle a *qui tam* suit alleging that Community Transit of Snohomish County (CT) was defrauded in connection with the repair of bus transmissions. CT receives grants from the Federal Transit Administration in addition to farebox collections and state revenues. The suit was brought in 1993 by company employee Robert Taylor. The company allegedly charged for parts that were not installed and falsely billed low priced used, repaired, or rebuilt parts as new parts at new parts prices. According to DOJ, this civil case and CT's restitution claims have been settled for a total of $825,000. Further, Taylor's allegations led to a criminal action in which the court imposed a 30 months prison sentence on the company's manager, Ralph Woodall.

Under the settlement agreement, Woodall and Ed's Transmission are barred from contracting with the Government for three years. Conducting the investigation were the Department of Transportation OIG, FBI, IRS Criminal Investigative Division, Department of Labor Office of Pension, Welfare, and Benefits Administration, and Federal Transit Administration. The relator's share was 25 percent or $128,750. The relator's counsel was T. Dennis George (Seattle, WA). Representing the Government on the criminal side were Assistant U.S. Attorneys Bruce Carter and Bob Westinghouse, and on the civil side Assistant U.S. Attorney Harold Malkin.

U.S. ex rel. Red River Service Corporation v. Honolulu Disposal, Inc. (D HI No. 96-00417 DAE; No. 96-00813 ACK)

In June 1997, DOJ announced that Honolulu Disposal Service, Inc. agreed to pay the Government $823,986 to settle two *qui tam* suits alleging overbilling in connection with refuse collection. The suits were brought by Red River Service Corporation, a competitor of Honolulu Disposal, which had numerous contracts to collect, transport, and dispose of refuse from Army, Air Force, Navy, and Coast Guard bases and housing areas. According to one of the lawsuits, Honolulu Disposal billed the Army for collecting hundreds of tons of refuse each month from housing facilities at Hickam Air Force Base. Subsequently, Red River, an Oklahoma based company, took over performance of the contract, but despite similar contract terms and conditions, Red River reported collecting substantially less refuse each month. According to DOJ, Honolulu Disposal overstated its refuse tonnage by approximately 318 tons each month. The matter was investigated by the Defense Criminal Investigative Service, Naval Criminal Investigative Service, Army Audit Agency, and Army Pacific Internal Review Office. The relator's share was 20 percent or $164,797. The relator was represented by Ted Bailey (San Antonio, TX) and Jeff Buchli (Honolulu, HI). Representing the Government was Assistant U.S. Attorney Tracy Hino.

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

In June 1997, DOJ announced that Coastal Emergency Physicians Group of Texas, P.A., agreed to pay the Federal Government and State of Texas $268,460 to settle a *qui tam* suit alleging that Medicus Medical Group received overpayments based on false claims submitted by Medicus' billing company. (Coastal, an emergency physician staffing company, acquired Medicus in 1993.) Coastal's payment resolves allegations of false billings to Medicare, Medicaid, and CHAMPUS. According to DOJ, Medicus hired an Oklahoma City billing com-

pany, Emergency Physicians Billing Services (EPBS), to submit claims on its behalf. EPBS changed the codes of claims and billed for services more extensive than those actually provided by Medicus' physicians.

This agreement follows a recent settlement with another defendant in the action, EmCare Inc., for $7.75 million. *See* 10 TAF QR 21 (July 1997). According to DOJ, the Government is continuing to pursue recoveries against EPBS and its other customers. Joining in the investigation were the HHS OIG, FBI, Defense Criminal Investigative Service, Program Integrity Branch of OCHAMPUS, Office of Personnel Management OIG, and various state Medicaid Fraud Control Units. The relator's share, awarded to the estate of Theresa Semtner, was approximately $47,394. The relator was represented by Cheryl Vaught of Vaught & Connor (Oklahoma City, OK) and Robert Vogel (Washington, D.C.). Representing the Government was Laurie Oberembt of the DOJ Civil Division.

U.S. v. First Tennessee Bank, National Association (ED TN No. 3:94 CV 323)

In June 1997, First Tennessee Bank, National Association (FTB) agreed to pay the Government $2.75 million to settle a False Claims Act suit alleging that it deceived the Department of Education to obtain federal insurance on defaulted student loans. Prior to making a default claim for insurance, the lender was required to make certain minimum efforts to collect on delinquent loans. Instead, FTB allegedly submitted fabricated collection histories to secure insurance on more than $1.3 million in loans. The bank further forged documents on other loans. According to the complaint, by falsifying the collection histories, FTB misrepresented its collection efforts and thereby submitted false claims for insurance. The case was investigated by the Department of Education OIG. Representing the Government was Richard Vartain of the DOJ Civil Division.

U.S. ex rel. Coughlin et al. v. IBM et al. (ND NY 93-CV-1408 TJM/DNH)

In July 1997, DOJ announced that Lockheed Martin Corporation agreed to pay the Government $200,000 to settle a *qui tam* suit alleging that it failed to inspect and test computer components used on military aircraft. Allegations related to the failure of IBM Corporation's Federal Systems Division, subsequently acquired by Loral Corporation and then by Lockheed Martin, and an IBM subcontractor to perform required inspections and tests. Lockheed further agreed to provide a limited warranty for the computer parts. The suit was brought by a former employee of IBM's Federal Systems Division, now known as Lockheed Martin Federal Systems.

Under the agreement, the Government reserved its right to proceed against the defendants if any of the parts involved in the settlement are defective. Having only partially intervened as to certain defendants, DOJ stated that relators Robert and Mary Coughlin can pursue the case against other defendants. Stanley Alderson of the DOJ Civil Division represented the Government.

U.S. ex rel. Montagano v. Midway Hospital Medical Center, Inc., OrNda Healthcorp and Summit Health Ltd. (CD CA CV95-4948-TJH)

In July 1997, DOJ announced that OrNda Healthcorp, a nationwide hospital company, agreed to pay the Government $12.65 million to settle a *qui tam* suit alleging that several of its hospitals defrauded Medicare through illegal contracts and kickbacks. The action was brought in 1995 by Dr. James Montagano, chief

of surgery at Midway Hospital in Los Angeles. According to the lawsuit, OrNda had improper financial relationships with physicians and paid them for referrals of Medicare patients. Some physicians were paid for being "directors" of hospital programs that did not exist, while other doctors were paid for services that were not needed or performed.

OrNda, which was based in Nashville, was acquired earlier this year by the Santa Barbara based Tenet Healthcare Corporation, the second largest investor-owned health care services company in the country. Tenet was part of the settlement agreement as the successor in interest to OrNda. The settlement does not resolve any potential claims against physicians involved in the fraudulent scheme. The relator's share was $2.34 million. The relator's counsel was Henry Gradstein of Gradstein, Luskin & Van Dalsem (Los Angeles, CA). Representing the Government were Assistant U.S. Attorney Consuelo Woodhead and Laurie Oberembt of the DOJ Civil Division.

U.S. v. Metzinger et al. (ED PA No. 94-7520)

A False Claims Act settlement was recently reported in which Harry Metzinger and William Ritter agreed to pay the Government $60,000 to resolve allegations that they defrauded Medicare in connection with clinical laboratory outpatient services. The defendants, Medicare billing consultants, further agreed to cooperate fully with the Government in the prosecution of any hospital to whom they provided advice. Their obligation to furnish expert assistance extends for three years, and they also agreed to permissive exclusion from Medicare and state health care programs for three years.

In related settlements, Gnaden Huetten Memorial Hospital agreed to pay the Government $800,000, and Ohio Valley Hospital $270,000, to resolve false billing allegations. The hospitals, which contended that they relied in good faith upon the advice of Metzinger & Associates in submitting claims, also agreed to cooperate fully in associated prosecutions. Representing the Government was Assistant U.S. Attorney James Sheehan.

Vendell Healthcare, Inc.

In August 1997, DOJ announced that Nashville based Vendell Healthcare, Inc. agreed to pay the Government more than $654,000 and to drop about $680,000 in bills to settle False Claims Act allegations involving Medicaid overcharges. According to the Government, Vendell fraudulently billed on behalf of Rivendell of Nebraska, a psychiatric hospital for children and adolescents that was owned by Vendell. Alleged fraudulent claims included advertising costs that were incurred to increase patient admissions rather than educate the public about medical matters, and legal fees incurred in connection with another settlement. The case against Vendell, which arose after audits of Rivendell's Medicaid billings uncovered more than $4 million in overpayments, was settled for $1.3 million because of Vendell's March 1997 bankruptcy. Allegations referenced in the underlying settlement agreement included upcoding, submitting multiple bills, and billing for psychiatric services not provided.

According to DOJ, this health care fraud settlement is the largest in Nebraska history. The matter was investigated by the FBI, HHS OIG, and Nebraska Department of Health and Human Services Finance and Support. Assistant U.S. Attorney Paul Boeshart of the District of Nebraska and Marie O'Connell of the DOJ Civil Division handled the case.

Security Photo Corporation

In August 1997, DOJ announced that Security Photo Corporation of Burlington, Massachusetts agreed to pay the Government $140,000 to settle False Claims Act allegations that it supplied goods which were not made in the United States or in one of the other countries designated under the Trade Agreements Act. Security Photo provided photo identification products, including badges, holders, clips, and chains, as well as the cameras and film for making the identification badges. According to DOJ, the company admitted that it procured from China, a non-designated country, many of the inexpensive supplies at issue. Security Photo had concealed the non-designated source in part by misrepresenting itself as a manufacturer of all of the products offered when it was actually a reseller. Handling the case was Assistant U.S. Attorney Thomas Kanwit of the District of Massachusetts.

Olympus America Inc.

In August 1997, Olympus America Inc. agreed to pay the Government $22.8 million to settle False Claims Act allegations that it overcharged the Department of Veterans Affairs for medical equipment by not giving the Government the same discount it gave commercial customers. According to DOJ, Olympus' contracting personnel failed to provide VA negotiators with accurate information concerning its commercial pricing practices for such equipment as colonoscopes and laparascopes. The VA negotiated a lesser discount based upon Olympus' false representation that it did not give any discounts to commercial users. Olympus informed the Government of the overcharges under the VA's voluntary disclosure program. The case was handled by Assistant U.S. Attorney Deborah Zwany of the Eastern District of New York and Patricia Davis of the DOJ Civil Division.

Canon U.S.A., Inc.

In September 1997, DOJ announced that Canon U.S.A., Inc. agreed to pay the Government $6 million to settle False Claims Act allegations that it failed to provide the General Services Administration with accurate discount and pricing information and did not pass on price reductions in connection with a multiple award schedule contract for micrographics products. The case originated with a criminal investigation that resulted in a 1994 guilty plea to mail fraud by a former Canon contracting officer. The matter was investigated by the General Services Administration OIG. The civil case was handled by Assistant U.S. Attorney Richard Hayes of the Eastern District of New York, and the criminal prosecution by Assistant U.S. Attorney Joel Cohen.

Baptist Medical Center

In September 1997, DOJ announced that Baptist Medical Center of Kansas City, Missouri agreed to pay the Government $17.5 million to settle False Claims Act allegations that it paid more than $1 million in kickbacks to a local medical group in return for the group's referral of Medicare-eligible patients. According to DOJ, Baptist submitted fraudulent Medicare claims in connection with sham consulting contracts it entered into with three osteopaths doing business as the Blue Valley Medical Group. The settlement also resolves allegations that Baptist violated the Stark I statute by submitting clinical laboratory claims for Medicare patients referred by Blue Valley. Baptist and the HHS OIG agreed separately to a corporate integrity agreement. The Government was represented by U.S. Attorney Jackie Williams of the District of Kansas.

TAF NEWS

Qui Tam Practitioner Guide

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

Previous Publications

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

TAF On The Internet

- TAF's Internet presence, designed to educate the public and legal community about the False Claims Act and *qui tam*, has 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.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). We thank Assistant U.S. Attorney Kathleen McDermott for her contribution in this issue. To discuss a potential article, please contact Associate Director Alan Shusterman.

Tenth Anniversary Resources

- To mark the anniversary of the 1986 FCA Amendments, TAF has available a variety of resources including a Tenth Anniversary Report, an Assessment of Economic Impact, and an educational video highlighting the effectiveness of the Act. These materials 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.

FCA Library

- TAF's library is open to the public, by appointment, during regular business hours. To schedule a visit or to inquire about TAF's resources, please contact our Legal Resources Administrator, Amy Wilken. Submissions of case 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.