TAF

Vol. 13
April 1998

Taxpayers Against Fraud

False Claims Act and *Qui Tam* Quarterly Review

Inside...

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

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

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

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Constitutionality

U.S. ex rel. Roby v. The Boeing Company, Order, C-1-95-375 (S.D. Ohio Feb. 11, 1998)

An Ohio district court held that a relator who was fired from his job in retaliation for filing a *qui tam* suit, and who properly brought a *qui tam* action on behalf of the Government for injuries suffered by the Government, met the injury in fact requirement necessary for Article III standing. The court further held that, after the Government has intervened in a *qui tam* action, the relator retains the right to participate as a party to the litigation.

Brett Roby brought a *qui tam* action alleging that the Boeing Corporation and its supplier, Speco Corporation, manufactured and sold defective transmission gears to the Army via Boeing's VH-47 (D) Chinook Army helicopters. The suit alleged that Speco manufactured the defective gears which Boeing then installed in the Army helicopters. Speco subsequently filed for bankruptcy and was dismissed from the case after settling with the Government.

Following the Government's intervention in the suit, Roby served his own discovery requests and responses to pleadings on Boeing. Boeing objected to Roby's separate pleadings as an undue burden, and filed a motion to limit Roby's participation. Boeing also filed a motion to dismiss Roby for lack of standing.

Relator Suffered Injury in Fact

The district court, rejecting Boeing's argument that Roby lacked standing because he had not suffered any injury as a result of Boeing's actions, found that Roby had suffered an injury in fact. Roby's standing was based on his personal injury as well as the injury to the Government.

Boeing did not argue that the FCA's *qui tam* provisions are unconstitutional, but rather that Roby's injury — his job termination as a result of bringing the *qui tam* suit — stemmed from his employment with Speco, not Boeing. As Speco was no longer a defendant, Boeing argued that Roby should be dismissed from the case.

In response, the Government stated that Roby's action is a "case" or "controversy" within the meaning of Article III of the Constitution, and that a *qui tam* relator need not demonstrate that he was personally injured by the fraudulent conduct of the defendant. The Government further asserted that Roby had standing because it was his knowledge of fraud which allowed the Government to go forward under the FCA. The Government analogized the *qui tam* mechanism to "[t]he assignment of a chose in action, an arrangement that permits an assignee who has himself suffered no injury from the defendant's conduct to sue anyway based upon the injury to the assignor." Roby recounted to the court that he suffered a cognizable injury because he was fired from his job after filing the *qui tam* suit against both Speco and Boeing, and was subject to belittling comments by Boeing in the media.

The court began its analysis by reviewing the three elements — "actual or threatened injury, resulting from the defendant's conduct, which is redressible by the court" — which a plaintiff must meet to satisfy Article III standing requirements. The court then discussed the different rationales under which courts have found that an FCA relator satisfies the standing requirements.

The court concluded that, in the present action, Roby possessed standing because he was personally injured by his job termination and, alternatively, because he brought this action on behalf of the Government and not solely for himself. First, the court noted that Roby had suffered "severe employment ramifications" as a result of filing this action. Moreover, these employment repurcussions stemmed from Roby's knowledge of fraud committed by both Speco and Boeing. Thus, Boeing could not deny liability because its codefendant had settled and been dismissed from the case.

In addition, the court held that Roby had properly brought this action on behalf of the Government for injuries suffered by the Government as a result of the alleged fraud. Therefore, even if Roby's job termination did not create an injury in fact, Roby had standing to pursue these claims on behalf of the Government.

In an interesting footnote, the court rejected the reasoning followed by the Southern District of Texas in <u>U.S. ex rel. Riley v. St. Luke's Episcopal Hospital</u>, 1997 WL 679105 (S.D.Tex. Oct. 21, 1997), 12 TAF QR 1 (Jan. 1998). In that anomalous decision, the district court held that the *qui tam* provisions are unconstitutional because the relator lacks standing. This court noted that <u>Riley</u> had failed to follow its own 5th Circuit precedent in <u>U.S. ex rel. Weinberger v. Equifax</u>, 557 F.2d 456, 460 (1977), which acknowledged that Congress "specifically provides for informer's suits."

Relator Remains Party with Right to Participate in Litigation After Government's Intervention

The district court also denied Boeing's motion to limit Roby's participation in the action. The court held that Roby remained a party to the litigation and rejected Boeing's arguments that the relator's separate discovery requests and responses to pleadings were harassing, causing Boeing to incur unnecessary expenses, or in any way preventing Boeing from effectively litigating the action.

In reaching this holding, the court reviewed the relator's actions in light of Congress' stated purpose of encouraging private enforcement suits through the 1986 FCA Amendments. In describing the relator's role in a *qui tam* action after the Government has intervened, the court cited to <u>U.S. ex rel. Stillwell v. Hughes Helicopters, Inc.</u>, 714 F.Supp. 1084, 1091(C.D.Cal. 1989), which held that, despite being subject to certain controls, the relator remains a party to the suit. The court further stated that, in accordance with § 3730(c)(2)(C)(iv) and § 3730(c)(2)(D) of the Act, the relator is given "unrestricted participation" in the litigation, subject to a request for limitation by the Government or the defendant on a showing of delay, interference, harassment, or undue burden.

In another footnote, the court cited to the Senate Report to the 1986 FCA Amendments, which described the relator's right to "[a]ct as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reasons." Therefore, in the court's view, Roby had the right to determine whether "separate facts exist," despite Boeing's argument that he was attempting to pursue a separate theory of the case from that of the Government.

<u>Hopkins v. Actions, Incorporated of Brazoria County</u>, 1997 WL 789429 (S.D. Tex. Dec. 19, 1997)

See "Section 3730(h) Retaliation Claims" below at page 8.

Public Disclosure Bar and Original Source Exception

U.S. ex rel. Lamers v. City of Green Bay, 1998 WL 117884 (E.D.Wis. March 13, 1998)

Performing a § 3730(e)(4) public disclosure bar analysis, a Wisconsin district court held that the relator's complaint was based upon publicly disclosed "essential elements" of the fraud, but the relator qualified as an original source. However, the court went on to hold that the relator failed to prove the "falsity" and "knowledge" elements of his FCA case.

In 1993, Green Bay Transit (GBT), which is owned and operated by the City of Green Bay (the City), received the first of several yearly block grants from the Federal Transit Administration (FTA) which enabled GBT to provide school bus service the City's public schools. Relator Allen Lamers, an officer of privately run Lamers Bus Lines, Inc., brought this *qui tam* action alleging that the City made false statements to obtain the FTA grant funds and to avoid repayment of improperly received grant funds in violation of FCA §§ 3729(a)(2) and (a)(7). Specifically, Lamers alleged that the City instituted a plan to bus Green Bay school children which did not comply with federal law, while at the same time representing to the FTA that GBT was in compliance.

As required by an earlier federal mass transportation statute, the City executed a "Standard Assurances" form which stated that the City would "comply with all Federal statutes, regulations, Executive orders and administrative requirements applicable to [federal transit funding]." As the Standard Assurances form was to be submitted only one time and thereafter incorporated by reference into future grant applications, the City also submitted a required "Statement of Continued Validity of One-Time Submissions." The Standard Assurances form was therefore renewed and incorporated by reference into subsequent applications during 1993, 1994, and 1995.

While GBT's grant application was being considered by the FTA, and continuing after the grant money was awarded to GBT, Lamer lodged two complaints with the FTA regarding GBT's school busing practices. In particular, Lamers asserted that GBT was conducting impermissible school bus operations and not the "tripper service" for which it received the FTA grant.

On January 19, 1995, solely based on a review of materials submitted by the parties, the FTA issued a decision based on Lamers' administrative complaint which found that GBT was conducting prohibited school bus service in several respects. However, despite the FTA's awareness of the regulatory violations, the FTA granted the City's 1995 application for funding. The FTA continued its oversight of GBT's compliance, deciding in 1996 that GBT was in total compliance. On June 26, 1995, Lamers filed his *qui tam* complaint. The Government declined to intervene.

Information Must Be "Affirmatively Disclosed"

After performing a public disclosure bar and original source exception analysis under § 3730(e)(4)(A), the court ruled that Lamers' complaint was based upon the publicly disclosed elements of the fraud allegations, but that Lamers qualified as an original source. Thus, the court held that it had subject matter jurisdiction over relator's claims.

In its public disclosure analysis, the court examined three types of materials — all related to the prior FTA administrative action — which might have been made public prior to the filing of Lamers' *qui tam* complaint. These included Freedom of Information Act requests made by Lamers' counsel, the FTA's January 19, 1995 administrative decision, and published news reports about the decision.

Not finding any 7th Circuit case law which examined the issue of what exactly constitutes publicly disclosed material under § 3730(e)(4)(A), the court mainly relied upon U.S. ex rel. Fallon v. Accudyne Corporation, 921 F.Supp. 611 (W.D.Wis. 1995), 2 TAF QR 5 (July 1995),which held that information must be "affirmatively disclosed" to be in the public domain. Fallon, adopting analyses from both the D.C. and 10th Circuits, held that potential access to information or access only by request is not sufficient to trigger the public disclosure bar. Applying this distinction between "theoretically available" and "actually disclosed" materials to the materials from the FTA's administrative action, the court found that the FTA's administrative decision, the news reports, and any Freedom of Information Act materials actually received by Lamers' counsel as a result of his request were in the public domain.

Publicly Disclosed "Essential Elements" Trigger Bar

The court then examined whether Lamers' *qui tam* complaint was "based upon" the publicly disclosed materials. Once again finding that the 7th Circuit had not specifically interpreted the "based upon" language of § 3730(e)(4)(A), the court again relied upon Fallon, which in turn had followed the analysis of the D.C.Circuit in U.S. ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645 (D.C.Cir. 1994). In Springfield, the D.C. Circuit had proposed an "X + Y = Z" formulation to illustrate its "based upon" analysis: If "X" and "Y" are critical elements of the fraudulent transaction, and if either "Z" (the allegation of fraud) or "X + Y" (a misrepresented state of facts and a true state of facts: all the critical elements) are in the public domain prior to the filing, then the suit must be based upon public disclosures of the allegations or transactions.

The court found that all the essential elements were publicly available prior to Lamers' filing. According to the court, the essential elements were derivable from the allegedly false grant applications and certifications obtained by Lamers' attorney through his Freedom of Information Act request ("X"), as well as from the "true factual circumstances" described in the FTA's administrative decision ("Y").

Having concluded that the essential elements of Lamers' *qui tam* complaint had been publicly disclosed, the court proceeded to examine whether Lamers could qualify as an original source under § 3730(e)(4)(B).

Relator With Knowledge of At Least One "Essential Element" Can Be Original Source

The court found that Lamers, as required to be an original source, had "direct and independent knowledge" of the extent of GBT's compliance with federal transit regulations. His knowledge was "direct" because either he or his representatives made up-close, firsthand observations of GBT routes, route map distribution, and other aspects of the school bus program. The fact that another citizen might have obtained the same "direct" knowledge from observation did not take away Lamers' original source status. Lamers' knowledge was also "independent" because it was not derived from public disclosures.

According to the court, Lamers' direct and independent knowledge of this one "essential element" ("Y") was sufficient to make Lamers an original source, despite the City's contention that Lamers could not also have had direct and independent knowledge of the City's allegedly false grant applications and misrepresentations to FTA officials ("X"). The court, consistent with the Springfield analysis, stated that if the relator has direct and independent knowledge of at least "X" or "Y" (i.e., one of the essential elements), he need not have such knowledge of "X + Y" or "Z" (i.e., the allegations or transactions which make up the fraud) to be an original source.

Finally, the court found that Lamers easily satisfied the requirement that the relator "voluntarily" disclose the information to the Government prior to filing. The court recognized that Lamers had been behind the FTA investigation of GBT school bus service from the beginning.

Falsity/Knowledge Standards Not Met

The court analyzed Lamers' § 3729(a)(2) and § 3729(a)(7) claims by making three inquiries: (1) Were statements made to get a claim paid or approved?; (2) Were the statements or claims "false or fraudulent"?; and (3) Did the City "knowingly" make the false statements and claims? The court answered its first inquiry by finding that Lamer had established that all the statements in question — both formal certifications of compliance and unofficial correspondence — were made in order to get a claim paid or approved by the Government.

Then, noting that other courts' determinations of "falsity" were inextricably linked to whether the defendant acted "knowingly," the court moved immediately to the third element. The court concluded that, while government knowledge does not automatically excuse an FCA violation, the "open dialogue" which had occurred between the City and the FTA during its administrative proceedings mitigated the defendant's intent to defraud.

The court proceeded to perform a lengthy and fact specific analysis of each item which Lamers alleged constituted a false claim. With regard to each claim, the court found on the facts that the City was not "knowingly" attempting to defraud the FTA. Moreover, in any instance where the City may have been acting knowingly, the court found that the defendant's statements were not "material" to getting a claim paid by the Government.

"Reverse" False Claim Court Fails

The court further ruled that Lamers had failed to establish the first required element of his § 3729(a)(7) reverse false claim count: that the City made statements to the FTA to avoid an existing obligation to pay. The court stated that "the reverse false claims provision has in mind an obligation to pay which is at least as immediate and recognizable as affirmative claims for payment under the statute."

Lamers asserted that the City continued to make false statements to protect itself from the possibility that the FTA, once aware of the truth, would demand reimbursement of the money granted in 1993, 1994, and 1995. However, as the FTA had knowledge of the City's compliance problems and never attempted to order the grant money refunded, the court found that Lamers had failed to show that the City had an "immediate, recognizable obligation" to repay the FTA.

Relator Participation in Litigation

U.S. ex rel. Roby v. The Boeing Company, Order, C-1-95-375 (S.D. Ohio Feb. 11, 1998)

See "Constitutionality" above at page 1.

Section 3730(h) Retaliation Claims

Neal v. Honeywell, Inc. et al., Memorandum Opinion and Order, No. 93 C 1143 (N.D. Ill. Feb. 19, 1998)

Following a three-week trial in which the jury awarded Judith Neal $550,000 for emotional distress and $90,000 in double back pay under § 3730(h), an Illinois district court ruled on a number of issues presented in post-trial motions. Among other things, the court upheld the jury's award of back pay, decreased the jury's emotional distress award to $200,000, reaffirmed that the issue of punitive damages did not belong before the jury, ruled that the interest on back pay was to be at the prime rate compounded on a yearly basis, and held that attorneys' fees and costs under § 3730(h) are to be determined under a fee shifting analysis (and not limited to costs actually paid or incurred by the plaintiff).

Judith Neal filed her § 3730(h) action against Honeywell, Inc. in 1993. As the jury subsequently found, she had been constructively discharged by Honeywell in 1987 after blowing the whistle on the falsification of ballistic test results at Honeywell's Joliet Arsenal Plant. As the district court put it, "the jury found that Honeywell . . . retaliated against and forced out of the company the one individual with courage enough to bring the appalling practice to the attention of the company's top management."

Award of Back Pay Upheld

In its post-trial motions, Honeywell attacked the jury's verdict on a number of grounds. First, Honeywell argued that the jury's finding of constructive discharge in August 1987 was irreconcilable with its finding that Honeywell's denial of Neal's promotion in April 1987 was not discriminatory. Alternatively, Honeywell argued that Neal's declination of lateral transfer opportunities in April constituted failure to mitigate damages.

The court rejected both of these arguments, explaining that the jury reasonably found that the earlier transfer scenario had little or nothing to do with the subsequent constructive discharge. "That scenario which the jury found to be non-retaliatory hardly means that Honeywell's subsequent conduct is somehow excused." Moreover, with respect to Honeywell's mitigation argument, "[t]he jury could certainly find that Neal had no way of knowing she would be forced out months later" and "she could hardly be expected to anticipate Honeywell's action later on and begin mitigating damages before her departure."

Honeywell's Acts Constituted Constructive Discharge

In rejecting a series of arguments asserted by Honeywell against the admissibility of evidence concerning a threat against Ms. Neal made by Joliet's production manager, the court lastly addressed Honeywell's contention that its acts were not sufficient to constitute constructive discharge or harassment. The court forcefully stated:

> This argument is a dud. First of all, the simple fact that Honeywell has an innocent, non-discriminatory explanation for the conduct means nothing after the jury rejected it. Secondly, Honeywell never does explain the largely uncontroverted testimony of Neal that for the last several weeks before she left, she was given nothing to do. She sat looking out her window at a grazing cow. The jury would have been fully justified in concluding this, together with a paid but unrequested month's vacation, conveyed a clear message to Neal to get out. The jury

> would certainly be entitled to find Neal faced intolerable conditions which amounted to constructive discharge. What job is worse than one with nothing to do?

Emotional Distress Award Reduced by Court

Turning to the jury's $550,000 emotional distress award, the court stated that Neal had presented clear and substantial evidence of her emotional distress, which began when Honeywell first reacted to her whistleblowing in the spring of 1987 and lasted until she started as a full-time college professor in the fall of 1988. According to the court, the jury's award was based on evidence that Ms. Neal suffered from clinical depression and was unable to work from August until December 1987, at which time she obtained a part-time teaching job which then led to her full-time position.

Applying the 7th Circuit's test for whether a compensatory damage award warrants a new trial or remittitur, the court found that the $550,000 verdict was excessive and had no rational basis in the evidence. The court emphasized that Ms. Neal's major depression lasted only eight months, and she never sought help from psychologists or psychiatrists. "She may have suffered a serious wound, but it healed in due course and there was not evidence it had any lasting effects. An award of more than one-half million dollars for these events with these results is simply off the charts."

The court suggested that Neal's "method of trying the case" — focusing largely on Honeywell's motivations and not on what was done to her — "was largely responsible for this extraordinary award." According to the court, Neal devoted days of testimony showing the extent of Honeywell's fraudulent activities in "a successful attempt to upset the jury," and "[c]ompensatory damages are not meant as retribution."

The court thus offered Neal a remittitur, concluding:

> Plaintiff may accept an award of $200,000 in compensatory damages or be given a new trial on that issue only. That amount clearly compensates fear of a threat or depression surrounding her ostracized status during her last several months at Honeywell, as well as her one year of depression thereafter.

No Punitive Damages Allowed

Turning to Neal's post-trial motions, the court stated in introduction: "The majority . . . deal with questions perhaps envisioned, but never decided by any court. They involve an analysis of a statute often silent about or unclear in its intent."

Addressing Neal's request for a new trial on punitive damages, the court explained: "Before trial we had tentatively decided to submit the issue of punitive damages to the jury. Before its verdict we concluded we would not. We should now say why." According to the court, while § 3730(h) neither provides for nor prohibits punitive damages, it is "extensive and specific in spelling out its remedies." Among these remedies, double back pay does more than make the plaintiff whole and "can only be intended to punish the employer"; thus, "[a]warding punitive damages would punish twice." Moreover, "all other federal whistleblowing statutes include a specific provision for exemplary damages when such are deemed appropriate by Congress."

The court went on to state that even if punitive damages were appropriate under § 3730(h), they were not in this case. According to the court, Honeywell's retaliation and constructive discharge were "simply not egregious enough" to justify punitive damages.

Double Back Pay and Interest

The jury concluded that Neal was entitled to $50,000 in back pay minus $10,000 earned in mitigation. To come up with the statutory double back pay figure, the court doubled $50,000 and subtracted $10,000 — for a total of $90,000.

The court then addressed whether interest should be calculated on the back pay or the double back pay. The former, concluded the court, looking at the statutory language and legislative history. Moreover, stated the court, logic suggests that the interest should be calculated on the net back pay of $40,000.

Next, the court addressed whether the interest should be simple or compound, and at what rate. According to the court, the prime rate is appropriate where there is no statutory interest rate, and "the interest must be compounded to make the plaintiff whole — a clear purpose of the remedial sections of 3730(h)." In sum, the court ruled that "the interest on the $40,000 of net back pay is to be at the prime rate for each year from 1988 through trial and that interest is to be compounded on a yearly basis." As such, the total interest due amounted to over $140,000.

In addition, the court ruled that pre-judgment interest should not be awarded with respect to the emotional distress damages: "Neal's damages for emotional distress have nothing to do with economic loss nor unjust deprivation of money. Thus, the rationale for pre-judgment interest disappears."

Section 3730(h) is a Fee Shifting Provision

Neals' attorneys claimed over $1.2 million in reasonable attorneys' fees and $150,000 in costs. Honeywell, however, argued that under the language § 3730(h) — which talks of "special damages" and "mak[ing] the employee whole" — the attorneys' fees must be limited to those actually paid or incurred by the plaintiff. In this case, Neal had incurred an obligation to pay one-third of her recovery to her attorneys under a contingent fee agreement.

The court stated that Honeywell's "rather ingenious argument has some appeal. It is the method by which attorneys' fees are calculated under the Equal Access to Justice Act . . . and other federal statutes." Nevertheless, the court held that § 3730(h), as well as all other attorneys' fees provisions in the FCA, "are intended as fee shifting provisions." The court reasoned that the same words presumptively mean the same thing throughout a statute, and the term "reasonable attorneys' fees" appears four times in the FCA; the first three times "it clearly means fees that are shifted to the defendant," and "[t]here is no good reason to suppose Congress meant something different the fourth time."

The court deferred ruling on the proper amount due for fees and costs since there had not yet been discovery on the issue. Finally, stating that "there is no reason to further delay the appeal of this lengthy and complex trial," the court concluded: "[T]his is a final and appealable order under Fed. R. Civ. P. 58, and disposes of the entire controversy except for attorneys' fees and costs . . . . It is fitting that this often tedious analysis of a munitions manufacturer's case should end in the same way as its faulty ammunition did — not with a bang, but a whimper."

Hopkins v. Actions, Incorporated of Brazoria County, 1997 WL 789429 (S.D. Tex. Dec. 19, 1997)

A Texas district court held that a plaintiff need not have standing as a relator to utilize the FCA § 3730(h) retaliation provision. Furthermore, in an express rejection of its own district's recent decision in U.S. ex rel. Riley v. St. Luke's Episcopal Hospital, the court alternatively held that the plaintiff did have constitutional standing as a relator.

During her employment as an administrative assistant for Actions, Incorporated of Brazoria County (Actions), plaintiff Doris Hopkins allegedly was ordered to use Medicare funds to pay the defendant's payroll and bills, and she was informed that other employees of Actions were instructed by management to forge physicians' and nurses' names on documents submitted to Medicare for reimbursement. After reporting her concerns to management and receiving no corrective action, Hopkins informed Actions' chairman of the alleged illegal activities. Two days later she was fired from her administrative assistant position. Hopkins subsequently filed a § 3730(h) retaliation claim.

Plaintiff Need Not Have *Qui Tam* Standing

In a motion to dismiss, Actions argued that Hopkins lacked standing to bring a *qui tam* action and therefore could not take advantage of § 3730(h). The district court rejected this argument, holding that § 3730(h) "forbids discrimination or retaliation against an employee who has made an intra-corporate complaint about fraud against the government, so long as that employee intends to file such an action and informs management clearly of that intention . . . ." Therefore, whether or not Hopkins had filed a *qui tam* action, or whether she would have ultimately been found to have standing as a *qui tam* relator, was irrelevant so long as the elements necessary for a retaliation claim were met.

In reaching its decision, the court relied upon those cases which broadly construe whistleblowing statutes. In particular, the court relied upon Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994), which recognized a line of cases holding that § 3730(h) protects internal whistleblowers who do not actually file *qui tam* actions. Although Robertson affirmed the lower court's dismissal of the plaintiff in that case, the circuit court distinguished its own holding from those "qualitatively different" cases where, unlike Robertson, the plaintiff had used words such as "illegal," "unlawful," or "*qui tam*" in his or her intracorporate complaint.

The court therefore denied Actions' motion to dismiss, finding that Hopkins had made her intentions sufficiently clear to her employer despite never having filed suit. Moreover, the court found that even if Hopkins did not have standing, she could still be acting "in furtherance of" a *qui tam* action as required by § 3730(h).

Rejecting Riley, Court Rules Plaintiff Had Standing

The court alternatively held that Hopkins had standing to pursue a *qui tam* action, thereby making the retaliation provision automatically applicable. The court expressly rejected its own district's decision in U.S. ex rel. Riley v. St. Luke's Episcopal Hospital, 1997 WL 679105 (S.D.Tex. Oct. 21, 1997), 12 TAF QR 1 (Jan. 1998), which held that relators have insufficient injury to establish Article III standing. The court stated:

> In light of the congressional purpose underlying the FCA and its plain language, this court rejects the St. Luke's reasoning. Moreoever, a close reading of Robertson reveals that the Fifth Circuit finds the standing question to be a nonissue on these facts. Indeed, in one of the few cases addressing the standing of a *qui tam* plaintiff, the Fifth Circuit described the FCA as a statute that "grants informers standing to sue and an award for successful action under the statute." U.S. ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456, 460 (5th Cir. 1977).

Thus, as an alternative basis for denying Actions' motion, the court found that Hopkins had standing as a relator and thus could pursue her retaliation claim.

Robinson v. Jewish Center Towers, Inc., 1998 WL 97291 (M.D. Fla. Feb., 27, 1998)

A Florida district court denied a motion to dismiss a § 3730(h) case brought by a bookkeeper who had pointed a government-approved independent auditor in the direction of her employer's alleged FCA violations. The court found that the plaintiff had alleged enough facts for a jury to conclude that she had initiated a government inquiry when she instructed the auditor to review time cards for inaccuracies, that a false claims action was a distinct possibility at the time she rendered her assistance, and that her employer was on notice that she was assisting the Government in a possible FCA action.

Marilyn Robinson was a bookkeeper for Jewish Center Towers, Inc. (Towers), which received Section 8 housing subsidies from the U.S. Department of Housing and Urban Development (HUD). Among other things, Robinson prepared monthly income and expense reports for HUD's review. According to Robinson, the reports she prepared at the direction of Towers' administrator, Juliet Massey, were false; in particular, Massey's son was paid $10,000 by Towers, partially using HUD money, for hours he did not in fact work. In November 1996, an independent auditor approved by HUD began to review Towers' financial information in order to prepare an audit report for HUD. Robinson instructed the auditor to review the family members' time cards for inaccuracies. In January 1997, Robinson declined to issue a check to Massey's son for sick days he had not accrued. The auditor advised Towers' president of that impropriety and, later in the month, presented Towers' board of directors with written recommendations citing various improprieties. In addition, the auditor told Robinson that she was sending a letter to the Inspector General to report the improprieties, which she had discovered with Robinson's help. Subsequently, Massey took a number of retaliatory actions against Robinson, ultimately firing her on February 17. Robinson then filed a § 3730(h) action against Towers.

Plaintiff Was Engaged in Protected Activity

In support of its motion to dismiss, Towers contended that Robinson had failed to allege that she had assisted the Government in bringing an FCA action. The court, however, responded that a reasonable jury could conclude that the independent auditor was essentially a HUD representative, and that when Robinson instructed the auditor to review the time cards, knowing they were inaccurate, she had initiated a government inquiry. Moreover, it did not matter that an FCA action was never filed, or whether Robinson was even aware of the FCA when she rendered her assistance to the Government. Applying the 11th Circuit's "distinct possibility" test established in Childree v. UAP/GA AG Chem, Inc., 92 F.3d 1140 (11th Cir. 1996), 7 TAF QR 6 (Oct. 1996), the district court found that, assuming the facts alleged by Robinson were true, an FCA action was a distinct possibility at the time she rendered her assistance.

Employer Was On Notice

Towers also argued that Robinson had failed to allege facts showing that Towers had notice that Robinson was acting in furtherance of an FCA action. Citing the alleged facts discussed above, as well as Robinson's allegations that the auditor had told Towers' president that Robinson felt her job was in jeopardy, and that the auditor had informed Massey that Robinson intended to speak to an attorney regarding her involvement with Towers, the court concluded that "a jury could find that Towers was put on notice that Robinson was assisting in an investigation, or that there was a distinct possibility that either Robinson or HUD could file [an FCA] action." (In addition to denying Towers' motion to dismiss with respect to Robinson's § 3730(h) claim, the court also denied Towers' motion to dismiss Robinson's pendent Florida Whistleblower's Act claim.)

Mruz et al. v. CARING, Inc. et al., 1998 WL 35379 (D.N.J. Jan. 28, 1998)

Section 3730(h) should not be extended to apply to those outside of an employment relationship with the plaintiff, according to a New Jersey district court. Accordingly, the court dismissed the plaintiffs' § 3730(h) claim — filed against their employers and associated entities and individuals (including a law firm and an attorney hired to represent an employer) — with respect to the attorney defendants and all but one of the individual defendants.

This § 3730(h) action arose out of the plaintiffs' discovery and investigation of alleged Medicaid and tax fraud committed by some the defendants — entities and individuals associated with CARING, Inc. — and the plaintiffs' subsequent termination from employment. In addition to their § 3730(h) claim, the plaintiffs alleged that certain defendants, including CARING's outside law firm (Fox, Rothschild, O'Brien & Frankel) and Ian Meklinsky, an attorney associated with the firm, violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by engaging in a campaign to retaliate for and, through intimidation, dissuade the plaintiffs from investigating and reporting the alleged fraud. The question before the court with respect to the § 3730(h) claim was the scope of who may be held liable for an unlawful discharge.

Employment Relationship is Hallmark of § 3730(h) Liability

Responding to the attorney defendants' contention that § 3730(h) is limited to suits against employers and that the plaintiffs had not alleged any employment relationship between themselves and the attorneys, the plaintiffs argued that non-employers can and should be held liable under Section (h) because "to hold otherwise would create an unwarranted 'immunity' for those who are not employers, but who nonetheless participate in activity prohibited by the statute." Relying on the plain language of the statue, the court rejected that argument: "Absent explicit statutory language, the Court sees no reason why 'whistleblower' liability should be extended in the wholesale and unprecedented fashion advocated by the Plaintiffs." According to the court, § 3730(h) liability cannot be extended on the basis of a conspiracy; instead, "the hallmark of liability under § 3730(h) is an 'employment relationship.'"

Case Dismissed as to Most Defendants

As such, noting that the plaintiffs had alleged that they were employed by various corporate entities (not the attorney defendants or the individual defendants), the court dismissed the § 3730(h) claim as to the attorney defendants and all but one of the individual defendants (who, according to the court, merely defined and supervised the plaintiffs' job assignments). The court found dismissal with respect to the remaining individual defendant unwarranted because of the open question "whether she was Plaintiffs' de facto employer as she is alleged to have dominated and dictated the actions of the CARING Corporations and their boards, and to have been conducting the affairs of the CARING Corporations in a way which benefited her, inter alia, personally."

Falsity of Claim/Knowledge

U.S. ex rel. Lamers v. City of Green Bay, 1998 WL 117884 (E.D.Wis. March 13, 1998)

See "Public Disclosure Bar and Original Source Exception" above at page 3.

Government Communications with Defendant Employees

U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 1998 WL 1924 (8th Cir. Jan. 6, 1998)

The 8th Circuit affirmed a district court's protective order against the Government's making ex parte contacts with lower-level employees of an FCA defendant who were not represented by counsel. It further affirmed the lower court's requirement that the Government preserve records for the defendant's review regarding ex parte contacts with former lower-level employees not represented by counsel.

This appeal arose out of a *qui tam* action alleging that McDonnell Douglas mischarged its employees' labor hours while working on military contracts. After intervening in the case, the Government conducted its pretrial investigation. Relying on a regulation promulgated by the Attorney General, government agents made ex parte contacts with various present and former lower-level employees of McDonnell Douglas without its consent. The company sought a protective order, which the court granted. U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 1997 WL 106717 (E.D. Mo. March 10, 1997), 9 TAF QR 13 (April 1997). The Government appealed from the district court's imposition of a protective order, which prevented government attorneys from engaging in ex parte communications with current employees of McDonnell Douglas. The protective order also required the Government to keep a list of former employees not currently represented by counsel and to preserve the documentation of those contacts for McDonnell Douglas' review.

Government Violated State and Local Federal Ethical Rules

In affirming the lower court's decision, the 8th Circuit first determined that the Attorney General's regulation on which the Government relied in making ex parte contacts falls beyond the limits of the Attorney General's statutory authority. For example, the so-called Housekeeping Statute, one of the statutes on which the Government relied, gives agencies the authority to regulate their own affairs — not to promulgate substantive regulations. The court found that the Attorney General's regulation does not address issues of internal agency procedures. Instead, they purport to exempt DOJ from the requirements of state and local federal ethical rules which bind all other litigants. The court found the regulation to be invalid regardless of the statutory authority the Government invoked.

FCA Liability/Damages

U.S. ex rel. Compton v. Midwest Specialties, Inc., 1998 WL 30811 (6th Cir. Jan. 22, 1998)

A contractor that failed to test brake-shoe kits and then submitted claims stating that the shoes conformed to contract requirements was liable under the FCA, ruled the 6th Circuit. Moreover, because the Government received no value from the brake shoes, as they were defective and had to be removed from Army jeeps, the $1.3 million contract price was a proper measure of actual damages.

In this case, Midwest Specialties, Inc. (Midwest), which had contracted with the U.S. Army to supply jeep brake-shoe kits, requested permission to "plug weld" the brake shoes instead of fillet welding them as required by the original contract. The deviation request, approved by the Army, added a quality assurance testing requirement taken from a deviation request submitted in connection with a different contract several years earlier. Among other things, it required the plug-weld to withstand a 5,000 pounds shear force test. Ultimately, Midwest delivered the brake shoes without performing the specified tests. Nonetheless, the company submitted over a dozen invoices to the Army that included a statement that the brake shoes conformed to the contract.

Subsequently, the brakes on an Army jeep failed when the welds on one of its Midwest brake shoes failed. The Army conducted tests on the shoes and found that 78 percent failed to pass one specified test, and more than 60 percent failed another test. As a result the Army "deadlined" the Midwest shoes, removed them from Army jeeps, and installed replacement brake shoes in its jeeps. The Government intervened in a *qui tam* action alleging various violations and amended the complaint to charge Midwest with knowingly providing and billing for brake shoes that did not conform to contractual testing requirements. The district court granted summary judgment in favor of the Government.

Government Contractors "Must Turn Square Corners"

The first of the two central questions on appeal was whether the record supported the lower court's finding that Midwest knowingly submitted a false claim. Regarding falsity, the 6th Circuit found that the contracts were unambiguous in requiring that Midwest test the plug-weld brake shoes. Nevertheless, Midwest argued that it would be unfair to hold it liable for failing to comply with the testing requirement because it was originally designed for brake shoes on a heavier vehicle than the jeep and because the shoes actually satisfied the shear force requirement. Rejecting this argument, the court stated, "[P]arties that contract with the Government are held to the letter of the contract — irrespective of whether the contract terms appear onerous from an ex post perspective . . . '[m]en must turn square corners when they deal with the Government.'"

Moreover, Midwest was the party that drafted the deviation request and included the testing requirement; thus, it "[could] not be heard to dispute the legitimacy of the testing requirement." And, as a factual matter, Army tests proved that more than 60 percent of the shoes failed the shear force requirement. Finally, there was "[a]bsolutely no admissible evidence" to show that Midwest had performed the tests in accordance with the contract, the court found.

As to whether Midwest "knowingly" submitted false claims, the court found that the record amply demonstrated at least "a reckless disregard for the falsity of its claims for payment for the jeep brake shoes." Midwest drafted the deviation request with the requirement, its president testified that he knew plug-welded shoes were subject to the testing requirement, despite this knowledge Midwest did not test the shoes, and, finally, Midwest submitted claims for payment certifying that the brake shoes satisfied the contractual requirements.

When the Government Receives No Value, Contract Price Can Be Measure of Damages

According to the court, damages under the FCA are "liberally calculated to ensure that they 'afford the government complete indemnity for the injuries done it.'" Before trebling, the district court calculated the actual damages as the full contract price (about $1.3 million). Midwest argued that the court should have calculated damages as the difference between the market value of the brake shoes as delivered and the value of the shoes as promised. However, according to the court, under either that formula or the contract price lump sum, the lower court's calculation was correct.

According to the appellate court, the record demonstrated that the brake shoes as delivered were completely worthless. Not only did most of them fail to withstand the shear force requirement, but they also did not come "with the quality assurance of a product that had been subjected to periodic testing" the court found. As such, the Army was compelled to remove the brake shoes from all its jeeps. While the court agreed that the case law on damages generally supported deducting value received by the Government, those cases nevertheless supported giving the Government full damages when it received no value at all. Thus, allowing the contract price as actual damages was the equivalent of calculating the promised value of the goods (about $1.3 million) less the received value (zero). As such, Midwest's treble damages would be based on $1.3 million in actual damages.

Seal Provision/Relator Share/ Attorneys' Fees

U.S. ex rel. Coughlin et al. v. International Business Machines Corp. et al., 1998 WL 24243 (N.D.N.Y. Jan. 15, 1998)

Finding that the needs outweighed the risks, a New York district court granted the relators' request to unseal the materials they filed in opposition to the proposed settlement agreement. The court refused, however, to increase the relators' share of the settlement from 15 to 25 percent. The court also ruled that the relators had not presented any evidence supporting the use of an hourly rate for their attorneys higher than was customary in that district.

The relators, Robert Coughlin and others, filed this *qui tam* case alleging that International Business Machines Corporation Federal Systems Co. (now Lockheed Martin Federal Systems) and one of its subcontractors, SCI Technologies, Inc., failed to test or properly inspect certain computer components manufactured for installation in computer systems for military aircraft and submarines. They also alleged that a number of the untested and improperly inspected components were defective and that IBM and SCI concealed these failures from the Government. The Government investigated these allegations and intervened in the action. It then negotiated a $200,000 settlement and the performance of certain warranty repair work worth not more than $500,000.

The relators filed three motions after the court approved the settlement agreement over their objection.

Filings Regarding Reasonableness of Settlement Unsealed

The relators asked the court to unseal the documents they filed in opposition to the proposed settlement agreement. After reviewing the statute's provisions and relevant case law, the court balanced the need for and the harm risked by the disclosure, determining that lifting the seal on the relators' opposition was warranted. The court also concluded, however, that the relators had not shown any justification for voiding the confidentiality agreement between the parties.

Relators Awarded 15 Percent of Settlement, Not Including Value of Warranty Repair Work

Next, the relators requested an increase in their share of the settlement from 15 to 25 percent. The court accepted the Government's position that percentage awards above 15 percent occur only when the relator goes above and beyond the norm by substantially contributing to the prosecution of the action. Based on that standard, and reviewing the relators' contributions, the court declined to raise their share above 15 percent. It noted in particular that Coughlin did not report the suspected fraud until after his retirement, that the relators' opposition to the Government's repeated motions for extensions of the seal appear to have hindered its investigation, and that the relators vigorously opposed settlement.

The court also found that the relators offered no legal support for their argument that they should receive a percentage of the value of the warranty repair work incorporated into the settlement agreement. And, the court noted, no warranty work ever became necessary.

Hourly Attorneys' Fee Rates Customarily Used in District Applied by Court

Finally, the relators asked for a review of the amount of attorneys' fee awarded. The court refused to use hourly rates higher than the customary rates used in the court's district. Noting that the relators' counsel failed to present an evidentiary basis for the higher rates they sought, the court applied the prevailing market rates within the Northern District of New York: $150 for partners and $100 for associates. The court also determined that not all functions should be compensated at the full hourly rate and, for example, awarded travel time at only a half rate.

Regarding costs, the court stated that reasonable out-of-pocket expenses incurred by an attorney which are normally charged to fee-paying clients are generally recoverable. The court found the requested cost amounts reasonable with one exception. That is, the court denied inclusion of electronic computer research fees, noting that the Second Circuit has held that such expenses are not recoverable.

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

In January 1998, a Cincinnati jury reportedly found in favor of the defendants in a *qui tam* suit alleging noncompliance with environmental laws in connection with an Army Corps of Engineers contract for the construction and repair of the Gallipolis Locks and Dam. According to the suit, while working on the government dam project, towboat operators dumped bilge into the Ohio River and failed to keep records of such discharges in violation of the Clean Water Act. The suit was filed in 1993, and in 1995 the Government declined to intervene. In November 1997, defendants Kanawha River Towing, Inc. and Campbell Transportation Company, Inc. — towboat companies that were subcontractors on the project — agreed to pay the Government $1.85 million. (The relators' share of the settlement was 29 percent.) *See 12 TAF QR 24 (Jan. 1998)*. The subsequent jury trial involved the remaining defendants — construction firms S.J. Groves & Sons Company, Guy F. Atkinson Construction Company, Dillingham Construction Company N.A., Inc., and Harbert International, Inc., and their joint venture GLR Constructors, the project's prime contractor.

U.S. ex rel. Aakhus v. Dyncorp, Inc. (D NM No. CIV-92-1435)

In February 1998, the 10th Circuit affirmed the district court's directed verdict in favor of DynCorp., Inc. in a *qui tam* case alleging various FCA violations, including violation of § 3729(a)(4). U.S. ex rel. Aakhus v. Dyncorp, Inc., 1998 WL 51278 (10th Cir. Feb. 10, 1998). FCA § 3729(a)(4) makes it unlawful for a person with possession or control of property used by the Government, while intending to defraud the Government or to conceal the property, to deliver less property than the amount for which the person receives a certificate or receipt. Under its contract to operate the Radar Target Scatter facility at the U.S. Army White Sands Missile Range, DynCorp was required to track and control government-issued property. The relator Miles Aakhus was a DynCorp systems engineer who designed an inventory tracking system for the facility. His FCA suit arose out of his contention that DynCorp had improperly deleted hundreds of missing items from the inventory database without government authorization. The court, however, found that Aakhus did not present sufficient evidence to support any of his claims.

SPOTLIGHT

THE "MULTIPLE RELATOR" PHENOMENON IN THE *QUI TAM* LAW

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I. INTRODUCTION

The past several years have witnessed a series of multi-million dollar fraud recoveries against major national and multi-national health care providers and entire health care sub-industries. The government's clinical laboratory dragnet, aided by numerous *qui tam* relators, provides the most profound example to date of industry-wide civil and (in some cases) criminal prosecutions, capturing virtually all of the industry's major corporate players. The series of cases that were investigated under the code name "Labscam" alleged that the leading national clinical laboratories systematically defrauded the federal and state governments over a period of half a decade. The cases resulted in recoveries to the government in the vicinity of one billion dollars.

II. THE "MULTIPLE RELATOR" PHENOMENON

The Labscam cases have shown what happens when more than one *qui tam* plaintiff (or relator) files a case against the same defendant for a similar fraud. In the Laboratory Corporation of America case (settled in November 1996 for $182 million), in which our firm represented a dermatologist who was the principal *qui tam* plaintiff, there were three other relators. In the SmithKline Beecham case ($325 million settlement), there were six separate suits. According to press reports, more than a dozen *qui tam* relators have filed cases in connection with the current Columbia/HCA investigation.

The framers of the False Claims Act anticipated this multiple relator phenomenon. 31 U.S.C. § 3730 (b)(5) provides that when two or more cases are filed based on the same facts, only the first to file survives. While the caselaw is somewhat sparse, most courts agree that § 3730 (b)(5) creates a "first-in-time, first-in-right" rule, and a "race to the courthouse" that makes no value judgments as to the relative merits of particular *qui tam* cases, or indeed the finer points of the information they have to offer, and focuses instead on the first-to-file.

While the "first-to-file" rule makes practical sense, the rule does not always operate consistently with the objectives of the *qui tam* law. For example, what if a later-filing relator has more complete or direct knowledge of the fraud? Does it make sense to eliminate a later-filing relator if he or she has more information than the first-to-file and can assist the Government by active participation in an undercover operation or the like?

In this article we discuss the law on the "first-to-file" rule, as well as the policy considerations both in support of and in opposition to it.

III. CURRENT CASELAW

Although the "first-to-file" rule has been considered by the courts only rarely, the cases on the subject exhibit a relatively consistent approach. While the statute bars cases "based on the *facts* underlying the pending action" (emphasis added), the approach taken in most of the cases involves an analysis of whether the second-filed case raises additional claims, allegations or causes of action to those in the earlier filed case or cases (rather than additional factual variations to the claims, allegations or causes of action in the earlier litigation). Several courts have added a requirement that the second-filed case must potentially give rise not only to additional claims but also to separate *recoveries* to the Government.

This latter approach was adopted in the most frequently quoted case on the subject, Erickson ex rel. U.S. v. American Institute of Biological Sciences, 716 F. Supp. 908 (E.D.Va. 1989):

> "Simply put, this provision establishes a first in time rule. The *qui tam* complaint filed first blocks subsequent *qui tam* suits based on the same underlying facts. In so doing, the statute prevents a double recovery. A subsequently filed *qui tam* suit may continue only to the extent that it is (a) based on facts different from those alleged in the prior suit **and** (b) gives rise to separate and distinct recovery by the Government." (emphasis added)[1]

The court in Erickson construed the (b)(5) language ("facts underlying the pending action") broadly, focusing on the recoveries potentially arising from each identifiable allegation.[2]

Erickson was recently applied in U.S. ex rel. Dorsey et al. v. Dr. Warren E. Smith Community Mental Health Centers, Civ. No. 95-7446 (E.D. Pa. June 25, 1997) (Ditter, J.); 1997 U.S. Dist. LEXIS 9424.[3] Expressly adopting Erickson, the court observed that the purpose of (b)(5) "is to prevent double recovery by parasitic suits."[4] In allowing the later-filed claims to remain, the court was influenced by the fact that the subject matter of Dorsey's suit (patient care) was not the same as the subject matter of the earlier case (accounting and fiscal matters):

> "Each individual false claim is to be treated separately for purposes of recovery and merely because Nixon alleged that the defendant had submitted false claims does not mean that Dorsey is precluded from pursuing other, distinct instances of false claim submission."[5]

In general, courts have declined to compare the minutiae of factual and circumstantial variations between overlapping claims.[6] For example, in United States ex rel. Hyatt v. Northrop Corp., No. CV 87-6892-KN, 1989 U.S. Dist. LEXIS 18941 (C.D. Ca. Dec. 27, 1989), the court discredited, *inter alia*, the later-filed relator's attempt to distinguish similar frauds on the basis that they occurred at different times[7] and in different geographic areas.[8]

The standard used by the court assumed a liberal reading of (b)(5). Factual variations between the cases were not sufficient, in the court's analysis, to permit the later-filed relator's claims to stand where they did not raise separate and distinct "issues" or substantive allegations, even where the frauds the relator alleged were a more specific variant of a broader scheme alleged in earlier suits.

The Third Circuit, in Stinson, Lyons, Gerling & Bustamonte, P.A. v. Prudential Ins. Co., 944 F.3d 1149 (3rd Cir. 1991), introduced the term "race to the courthouse" into the (b)(5) vernacular. Although the case was not decided on (b)(5) issues, dissenting Judge Scirica, noting the possibility that more than one person can be an "original source" of information for the purpose of the *qui tam* law, stated:

> "[O]nce an eligible relator has brought an action, no other private party can bring an action based on the same information. See Sec. 3730(b)(5). This situation creates a potential "race to the courthouse" among eligible relators, but such a race may also spur the prompt reporting of fraud."[9]

The notion that the primary policy objective of (b)(5) is to encourage people with knowledge of fraud to report it sooner rather than later was advanced recently by an Eastern District of Pennsylvania court in U.S. ex rel. Merena v. SmithKline Beecham Corp., et al., and related cases, Civ. No. 93-5974 (E.D. Pa. July 24, 1997) (VanArtsdalen, J.). This case sought to resolve the competing claims of relators in six separate suits brought against the clinical laboratory SmithKline Beecham.

The court held that "a later-filed action that alleges the same essential or material facts as the pending action" (also expressed as "the same material elements of a fraudulent transaction" as are alleged in the pending action) is barred by (b)(5).[10] The court was unequivocal in its view that (b)(5) "does not lend itself to a narrow interpretation that bars only 'identical suits' based on 'identical facts.'"[11]

In the court's view, a strict "first-to-file" rule serves the goals of the *qui tam* law because it encourages relators to file cases as soon as they learn of a fraud, permitting a prompt investigation by the Government and the speedy recovery of defrauded funds. The prompt reporting of fraud guards against the disappearance of documents, witnesses, stolen funds and the defrauders themselves.[12]

This "race to the courthouse" analysis, as distinct from one that would permit later-filed claims to remain if they differed in some minor factual respect from earlier-filed claims, has been articulated elsewhere. In U.S. ex rel. Cooper v. Blue Cross and Blue Shield of Florida, 19 F.3d 562 (11th Cir. 1994), the court stated in dicta that "once one suit has been filed by a relator or by the Government, all other suits against the same defendant based on *the same kind of conduct* would be barred."[13] (emphasis added) The court pointed out that this protects defendants from having to defend themselves against a multiplicity of *qui tam* suits.[14]

IV. POLICY OBJECTIVES AND ISSUES

The policy objectives behind the "first-to-file" rule are for the most part practical:

(1) The public interest is protected by (b)(5) because it promotes the prompt reporting of fraud. Delay may result in a potential and otherwise viable *qui tam* plaintiff being non-suited.

(2) Defendants are protected by (b)(5) from the cost and complexity of defending multiple lawsuits based on the same, or similar facts. The rule creates a singular, focused suit which the defendant can address and counter in a productive and cost-efficient manner.

(3) The Government is likewise protected from the costs associated with investigating and administering multiple *qui tam* suits and dealing with multiple relators who have nothing to contribute to the Government's recoveries. These costs can be particularly burdensome if "competing" cases are allowed to proceed to a single settlement and relator share issues must be resolved between two or more parties.

(4) Congress sought, through the 1986 FCA Amendments, to increase the role of the private citizen in fighting fraud perpetrated against the Government. The "first-to-file" rule furthers this goal by ensuring that, other things being equal, the relator who files expeditiously will be able to recover what he or she has earned through effort and risk, namely, the relator share of the recovery. The rule encourages cooperation and a working partnership between the relator and the Government throughout the investigation because it eliminates the risk that by agreeing to multiple extensions of the seal, the relator may be exposed to the filing of a "competing" lawsuit.

And yet the "first-to-file" rule can create practical problems and may have results that are inefficient or unfair. For example:

(1) Giving priority to the party that arrives at the courthouse first may not be giving priority to the party with the best, or the most, information. Consequently, the "first-to-file" rule has the potential to limit the information received by the Government. The first-filing relator's information may be second-hand and/or non-specific, while the later-filing relator may not only be able to provide direct evidence of fraud but to proactively assist the Government's investigation.

(2) While the prompt reporting of fraud is no doubt desirable, the risk that another relator may get to the courthouse first will result in the filing of some *qui tam* suits without adequate investigation of the merits and with scant regard to the dictates of Federal Rules of Civil Procedure 9(b) (fraud must be pled with specificity) and 11(b) (persons alleging facts in a lawsuit must do so either with evidentiary support or with a reasonable basis on which to believe they can develop such support through further investigation). At the very least, counsel may well feel compelled to elevate the interests of staking a claim above the interests of thorough due diligence by filing a bare bones complaint based on a preliminary investigation, with the intention of amending the complaint at a later stage.

(3) At present, the Government does not automatically inform a later-filing relator of an earlier-filed case. On one level, the longer the existence of more than one relator remains undisclosed, the more information the Government can obtain from different sources. On the other hand, failure to inform the later-filing relator may work an injustice if the relator is encouraged to invest time, money and resources in a *qui tam* case that in fact is statutorily barred.

(4) It may be impractical to expect that "competing" *qui tam* relators will be able to litigate priority issues when their cases are under seal and the Government is attempting to conduct a covert investigation. All parties would have to agree to partially lifting the seal in order to disclose their identities, allegations and/or complaints to each other. What if a relator seeks to dismiss another's claims and/or case? Litigation amongst relators would not assist and might even compromise the Government's investigation.

VI. CONCLUSION

31 U.S.C. § 3730(b)(5) is a "first-in-time, first-in-right" provision which addresses the relative rights of multiple relators in actions under the False Claims Act.

The statute bars a second case which is based on the "facts underlying the pending action." Current caselaw, while scarce, supports a broad construction of this phrase and the notion of a "race to the courthouse" between relators with knowledge of the same fraud. The cases on (b)(5) for the most part bear out that the subsection was not intended to invite a detailed comparative analysis of each and every particular raised by each relator in order to reach a conclusion on whether the second-filed case is barred. Instead, the analysis is focused on whether the allegations or causes of action in the second-filed case are separate and distinct, and possibly whether they potentially give rise to separate recoveries.

The "first-to-file" rule promotes the prompt reporting of fraud and protects defendants against a multiplicity of similar suits. It protects bona fide relators against parasitic later-filed claims. On the other hand, in rewarding those who file quickly, the rule encourages the filing of inadequately researched suits. It may limit the government's access to the best, most current or most detailed information. The means by which the rule is to be applied efficiently and consistently with the overall aims of the *qui tam* law remain an open question.

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NOTES

1. 716 F. Supp. at 918.

2. The separate recovery requirement has also been applied in the context of 31 U.S.C. § 3730 (e)(3), which gives priority to the first-filed case when that case is filed by the Government rather than another *qui tam* relator. Characterizing the case before it as one of first impression, the court in U.S. ex rel. S. Prawer and Co. v. Fleet Bank, 24 F.3d 320 (1st Cir. 1994), allowed a *qui tam* action concerning an underlying transaction which the Government was already litigating to stand because the *qui tam* suit sought a distinct remedy that was not being sought by the Government — an analysis that mirrors the separate recovery requirement set forth in Erickson. The court advanced a "host-parasite" analysis, stating that a case is not parasitic where it has the potential for providing a "useful or proper return" to the Government.

3. See also U.S. ex rel. Precision Co. v. Koch Industries, Inc., 31 F.3d 1015 (10th Cir. 1994), dealing with related, but not multiple lawsuits. Here, a corporate relator's two sole shareholders sought, and were allowed by the court, to intervene in the lawsuit and be added as plaintiffs. Citing Erickson, the Tenth Circuit stated that "when § 3730(b)(5) speaks of intervention, it means to prohibit parties unrelated to the original plaintiff from joining the suit to assert a claim based on the same facts relied upon by the original plaintiff." 31 F.3d at 1017-8.

4. 1997 U.S. Dist. LEXIS 9424, at *12.

5. Id., at *14.

6. In Dorsey, the court stated that the relator's claims survived because they "are not *identical to* Nixon's and would not lead to a double recovery." (emphasis added) The court cited both Erickson and the legislative history in support of this statement. Id., at *14-5. The Senate Committee on the Judiciary stated that "private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on *identical facts and circumstances*." (emphasis added) Senate Report No. 345, 99th Cong., 2nd Sess. (July 28, 1986), reprinted in U.S. Code Cong. & Admin. News 5266, p. 25. The Committee cited U.S. v. Baker-Lockwood Manufacturing Co., 138 F.2d 48 (8th Cir. 1943), in which "three civil actions involv[ing] the identical *cause of action* against the defendants" (emphasis added) had been filed, one by the Government and the other two by *qui tam* plaintiffs. The Committee's reference to "identical facts and circumstances" should not

be taken to mean that the (b)(5) bar was only intended to operate when the second-filed case pled the exact same dates, times, places or other factual predicates supporting the claims or causes of action. Such an interpretation has found little, if any, support in the courts.

7. Id., at *4.

8. Id., at *14.

9. 944 F.3d at 1176 n.5 (Scirica, J., dissenting).

10. The court disagreed with the Erickson "separate and distinct recovery test" as imposing an additional, impermissible requirement that is not present in the statutory language and, furthermore, is unhelpful; every false claim, in the court's analysis, gives rise to "a separate and distinct recovery," and there may be literally thousands of them (at pp.42-43).

11. "The 'facts underlying' a *qui tam* action (or any other action for that matter) are not merely the details regarding the time and place of the alleged fraud ...; they are, as the plain meaning of 'facts underlying' more broadly suggests, the allegations regarding the material elements of the fraudulent transaction that will support a claim for relief under the FCA." at p. 42.

12. Id., at pp. 44-45.

13. 19 F.3d at 567.

14. 19 F.3d 562, 567.

ALLEGATION: SKIMMING HUD FUNDS FROM HOUSING PROJECTS

U.S. v. Woldiger et al. (ED NY No. __)

DOJ has filed a False Claims Act suit alleging that several individuals and contractors improperly skimmed funds from federally funded low income housing projects. According to DOJ, the defendants sought to fraudulently remove the equity from eight housing projects and steal Section 8 housing assistance payments intended for the benefit of tenants. Between 1990 and 1997, the projects received more than $52 million in HUD funds. The Government's investigation has also led to criminal indictments.

Abraham Woldiger, Abraham Taub, Peter Hoffman, and David Abrahamson established limited partnerships to purchase and manage housing projects in New York, New Jersey, Rhode Island, Pennsylvania, and Illinois. They also established related "identity of interest" (IOI) companies to provide construction, maintenance, and repair at the projects. The alleged scheme involved skimming equity by having the IOI contractors bill the projects' managing agents for repairs that were not performed. To the extent that any repairs were made, the employees who did the work were paid salaries far lower than the labor costs that were billed.

The individual defendants allegedly took thousands of dollars per month from the IOI contractors' bank accounts that, as owners of the projects, they could not lawfully take from project funds because the projects were all in non-surplus cash positions. The money was spent on such personal items as home mortgages, insurance, credit card bills, travel, and parochial school tuition for their children. Conducting the investigation were the FBI, HUD OIG, and Labor OIG. Handling the criminal case is Assistant U.S. Attorney Miriam Best. The civil case is being handled by Assistant U.S. Attorneys Gwen Pollak and Gail Matthews.

ALLEGATION: UNPERFORMED PHYSICIAN HOUSE CALLS

U.S. v. Yedidsion, M.D. (CD CA No. __)

In January 1998, DOJ announced that it filed a False Claims Act suit alleging that Beverly Hills doctor David Yedidsion falsely billed Medicare for home visits to patients who were deceased or in nursing homes. Yedidsion also allegedly billed for patients who lived out of state or were incarcerated in state mental institutions, as well as for patients residing in facilities that had barred him. According to DOJ, the lawsuit is believed to be the largest of its type in the nation. The Government estimates that Yedidsion, who in 1994 was the single largest biller of doctor home health services in California, submitted at least 1,600 false bills.

In a related criminal case, Dr. Yedidsion was indicted in February 1998 by a federal grand jury on charges of defrauding Medicare. If convicted on all 20 mail fraud counts, Yedidsion faces a maximum sentence of 100 years in prison. The matter was investigated by the HHS OIG and Postal Inspection Service. Assistant U.S. Attorney Wendy Weiss is handling the civil case and Assistant U.S. Attorney Maurice Suh the criminal action.

ALLEGATION: BOGUS DERMATOLOGY SERVICES

U.S. v. Finkel, M.D. (D MA No. __)

In January 1998, a False Claims Act suit was reported alleging that Boston doctor Richard Finkel falsely billed Medicare and private insurers for dermatology services not provided. Finkel's patients had weight loss concerns, but since weight loss advice is only minimally reimbursed, the doctor allegedly billed for such services as the destruction of skin lesions, regardless of whether the patients had the condition. According to the complaint, the doctor sprayed patients with liquid nitrogen, ostensibly to treat potentially cancerous lesions, without obtaining consent and from such a distance as to be ineffective. Finkel reportedly was earlier criminally convicted by a jury, sentenced to prison, and fined.

ALLEGATION: OVERBILLING FOR DIALYSIS

U.S. ex rel. Fox v. Frazier, M.D. et al. (ED WA No. __)

In January 1998, DOJ intervened in a *qui tam* suit alleging that a group of kidney doctors routinely overbilled Medicare, Medicaid, and private insurers for dialysis received in the inpatient ward at Sacred Heart Medical Center in Spokane. The suit was filed in 1995 by Dr. Stephen Fox, who formerly worked for Northwest Nephrology Associates. Northwest doctors allegedly charged for a higher level of care than patients needed by routinely marking two progress notes on patient charts. Allegations also center on poor care provided by a founding partner of the medical group. In addition to the civil case, criminal charges are reportedly being pursued. Representing the Government is Assistant U.S. Attorney Bill Batey.

ALLEGATION: DEFECTIVE NAVY TARGET PARTS

U.S. ex rel. Jordan v. Northrop Grumman Corporation (CD CA No. 95-2985-ABC)

In January 1998, DOJ intervened in a *qui tam* suit alleging that Northrop Grumman Corporation installed defective parts in manufacturing target drones for the Navy. The suit was filed in 1995 by Daniel Jordan, a Northrop employee. Northrop allegedly knew the drones contained substandard parts that failed to meet contract specifications and were faultily made by the company's suppliers. Target drones are used by the Navy to provide realistic aerial targets that simulate enemy air threats for gunnery and missile training exercises.

According to the suit, in 1991 Northrop transferred its target drone operation to a different site and began acquiring parts from outside vendors instead of manufacturing them in-house as done previously. A government investigation confirmed that 32 target drones failed during operations at the Navy's Point Mugu, California firing range from 1993 through 1995. Northrop had warranted that its drones would be free from all defects in material and workmanship for 12 months. The NCIS investigated the matter. The relator's counsel is Dean Pace of Pace and Rose (Los Angeles, CA). Assistant U.S. Attorney Howard Daniels and Dennis Phillips of the DOJ Civil Division are representing the Government.

ALLEGATION: UNDERPAYMENT OF ROYALTIES BY OIL COMPANIES

U.S. ex rel. Johnson, Jr., Martineck, Wright, Brock, Brian, and Project on Government Oversight v. Shell Oil Company, Amoco Oil Company, Burlington Resources Inc., Conoco Inc. et al. *(ED TX No. 9:96CV66) (consolidated)*

In February 1998, DOJ announced that it intervened in a *qui tam* suit alleging that several major oil companies knowingly undervalued oil extracted from public and Indian lands to reduce royalties they would have had to pay the Government and Indian nations under federal mineral contracts. Since 1988, the companies allegedly undervalued hundreds of millions of barrels of oil taken from three oil-producing areas: off-shore drilling in the Gulf of Mexico; oil sites in California; and on-shore drilling in New Mexico, Wyoming, and other western states. DOJ, which intervened as to four of the 14 companies named in the original suit, advised the court that it had not decided whether to join as to the others.

Oil production on federal and Indian lands is governed by mineral lease agreements between the Department of the Interior and private oil companies under the Federal Oil and Gas Royalty Management Act of 1982. By law, the companies must pay the United States and Indian tribes a percentage of the value of the oil as a royalty. The collection of royalties from companies leasing mineral rights is overseen by the Minerals Management Service of the Interior Department.

The lawsuit was brought by the not-for-profit Project on Government Oversight and several individuals in the industry including petroleum engineers, a petroleum business manager, and an independent oil and gas operator. Michael Havard of Provost & Umphrey Law Firm (Beaumont, TX) is representing the relators. The Government is represented by U.S. Attorney Michael Bradford, Assistant U.S. Attorney O. Kenneth Dodd, and Dodge Wells of the DOJ Civil Division.

ALLEGATION: MISCHARGING SPACE TECHNOLOGY COSTS

U.S. ex rel. Bagley v. TRW Inc. *(CD CA No. CV-94-7755-RAP)*

In February 1998, DOJ announced that it intervened in a *qui tam* suit alleging that TRW Inc. unlawfully boosted its profits on federal contracts through several related cost mischarging schemes. The suit was brought in 1994 by Richard Bagley, former director of financial control at TRW's Space & Technology Group in Redondo Beach, California. TRW allegedly falsely mischarged independent research and development (IR&D) and bid and proposal costs associated with its attempt to enter the space launch vehicle business. According to DOJ, the Government would not have otherwise reimbursed TRW because the company had exceeded the contractual ceiling on expenditures. Company engineers also allegedly misclassified work for TRW's automotive businesses as "long-range marketing" when in fact the work was IR&D, resulting in higher overhead rates paid under the contracts. TRW further allegedly mischarged for the cost of fabricating a prototype satellite solar array wing. The relator's counsel is Eric Havian of

Phillips & Cohen (San Francisco, CA). Representing the Government are Assistant U.S. Attorney David Ringnell and David Long and Vanessa Green of the DOJ Civil Division.

ALLEGATION: FALSE PRESCRIPTION DRUG CLAIMS

U.S. and State of Florida ex rel. Mueller v. Eckerd Corporation (MD FL No. 95-2030-CIV-T-17C)

In February 1998, DOJ and the State of Florida intervened in a *qui tam* suit alleging that Eckerd Corporation, trade named Eckerd Drug Stores and a wholly-owned subsidiary of J.C. Penney Co., defrauded Medicaid, CHAMPUS, and FEHBP by presenting fraudulent claims for the full quantities of medications prescribed while delivering only a portion of the medications to program beneficiaries. Eckerd allegedly made no attempt to credit back discrepancies to the Government, retaining excess profit and returning medication to inventory for resale when the balance of a partially filled prescription was not later claimed by a beneficiary. As a result of its scheme, Eckerd allegedly has improperly received over $11.5 million since 1986. The lawsuit was filed by Louis Mueller, an Eckerd pharmacist who worked as a "floater" in the Tampa Bay area. The relator is represented by Gary Takacs of James, Hoyer, Newcomer, Forizs, Smiljanich, PA (St. Petersburg, FL). Representing the Government are Assistant U.S. Attorney Jay Trezevant and Allie Pang of the DOJ Civil Division.

ALLEGATION: BILLING FOR SERVICES BY PHYSICIANS ON LEAVE

U.S. ex rel. Abbott-Burdick, Gridley, Koonz, and Salvo v. University Medical Associates and the Medical University of South Carolina (D SC No. 3:96-1676-10)

In February 1998, DOJ intervened in a *qui tam* suit alleging that the Medical University of South Carolina (MUSC) and University Medical Associates defrauded Medicare, Medicaid, and CHAMPUS/TRICARE by submitting claims for services purportedly performed by physicians at times when they were absent from MUSC. The suit was brought in 1996 by four former MUSC employees. According to DOJ, at issue are hundreds of false claims for reimbursement. In particular, the suit cites instances where physicians in the MUSC Department of Ophthalmology billed for services when they were on a leave of absence. The case is reportedly unrelated to the Government's ongoing "PATH" initiative under which authorities have been examining the billing practices of teaching hospitals throughout the country. Assistant U.S. Attorneys Deborah Barbier and Jennifer Aldrich are handling the matter for the Government.

ALLEGATION: IMPROPER PATERNITY TESTING

U.S. ex rel. Bennett v. Genetics & IVF Institute Inc. (D MD No. JFM-95-1620)

In March 1998, a *qui tam* suit was reported alleging that Genetics & IVF Institute Inc. charged the Virginia Division of Child Support Enforcement for services not provided. The company, which has a multimillion dollar contract to perform paternity tests for the state, allegedly violated a contractual requirement that two tubes of blood be drawn from each individual tested. While the second tube was to be tested if the first test excluded the individual as the father, the company allegedly had decided to draw only a single tube even before the contract was awarded. The Federal Government reportedly pays 90 percent of Virginia's paternity testing costs. DOJ declined to intervene in the action. The suit was filed by David Bennett, who formerly worked as director of sales and marketing for the company. The relator's counsel is Robin Page West (Baltimore, MD).

Borough of Seaside Heights

In December 1997, DOJ announced that the Borough of Seaside Heights in New Jersey agreed to pay the Government $160,652 to settle False Claims Act allegations in connection with Federal Emergency Management Agency disaster assistance. The Borough had requested funding for the repair and replacement of certain items and facilities it claimed were damaged as a result of the December 1992 Nor'Easter. Besides repair of holiday displays and volleyball courts, proposed work included tree replacement, debris pick-up, and sewer cleaning. The Borough admitted DOJ's allegations that either the work was not performed properly or the damage was not the result of the storm, and that false documents were presented pursuant to its application for disaster relief and Damage Survey Reports. Under the settlement, the Borough agreed to cooperate fully with the Government in investigating possible criminal violations. Handling the matter was Assistant U.S. Attorney Kimberly Guadagno of the District of New Jersey.

Mediq Inc.

In December 1997, it was reported that Mediq Inc. of Pennsauken, New Jersey agreed to pay the Government $4.2 million to settle False Claims Act allegations that a former subsidiary defrauded Medicare and other federal health care programs. Mediq Imaging Services Inc. allegedly billed for unnecessary tests and tests ordered through an improper arrangement with doctors. The unit was reportedly sold to a competitor in 1995.

U.S. ex rel. HMO Health Plans v. San Luis Valley Regional Medical Center (D CO No. __)

In January 1998, it was reported that San Luis Valley Regional Medical Center agreed to pay the Government $265,000 to settle a *qui tam* suit alleging that the hospital routinely overbilled Medicare and Medicaid for blood tests. The lawsuit was filed by HMO Health Plans. According to DOJ, the Colorado hospital had a machine that automatically created a report called a histogram when blood tests were ordered. Federal programs were then charged for both the histogram and the blood tests. Assistant U.S. Attorney Lisa Christian represented the Government.

U.S. ex rel. Nelson v. North Hudson Community Action Health Center and Palisades General Hospital (D NJ No. __)

In January 1998, DOJ announced that North Hudson Community Action Health Center of New York (NHCAHC) and Palisades General Hospital of New Jersey (PGHNJ) agreed to pay the Federal Government and State of New Jersey $145,000 to settle a *qui tam* suit alleging that they improperly entered into an agreement whereby NHCAHC was to refer patients to PGHNJ in exchange for the hospital lending the health center $300,000. (Under the Medicare Anti-Kickback Act, the referral of Medicare patients in exchange for remuneration of any type is prohibited.) Peter Nelson, a former NHCAHC executive director, filed the lawsuit. Investigating the matter was the New Jersey Joint State/Federal Health Care Fraud Task Force. Under the agreement, $25,000 will be paid to the State of New Jersey for Medicaid claims. The relator's share was 17 percent of the remaining settlement amount or $20,400. Representing the Government were Assistant U.S. Attorney Janet Nolan and Marie-Therese Connolly of the DOJ Civil Division.

U.S. ex rel. Mays, III and State of Tennessee ex rel. Mays, III v. Paracelsus-Fentress County General Hospital, Inc., Paracelsus Healthcare Corporation, and Smith, M.D. (ED TN No. 3:94-CV-0134)

In January 1998, DOJ announced that a hospital company agreed to pay the Federal Government and State of Tennessee $3 million to settle a *qui tam* suit alleging Medicaid and Medicare fraud involving outpatient services that were not supervised by a physician and inpatient rehabilitation care for which there was inadequate physician involvement. The action was filed in 1994 by James Mays, III, a former counselor employed by the defendants. According to the lawsuit, Houston-based Paracelsus Healthcare Corporation admitted, treated, and discharged outpatients undergoing alcohol and drug rehabilitation at company clinics in Tennessee without any physician involvement. In addition, patients treated at a hospital inpatient substance abuse rehabilitation unit failed to receive the required number of physician visits under Tennessee's Medicaid regulations. The settlement further resolves claims that the Paracelsus hospital deceived the state regarding the frequency of inpatient physician visits performed. As part of the settlement, the hospital has agreed to implement a corporate integrity program. The relator's share was $599,817. The relator was represented by Ronald Attanasio of Hurley, Sharp & Attanasio (Knoxville, TN).

U.S. ex rel. Cullen, Jr. v. National Environmental Testing Inc. et al. (ND CA No. __)

In January 1998, DOJ announced that an environmental testing firm and its former parent corporation agreed to pay the Government $320,100 to settle a *qui tam* suit alleging the failure to properly test the level of hazardous substances in soil and water samples as required under contracts with the Army Corps of Engineers. The settlement resolves allegations against National Environmental Testing Inc. (NET) and its wholly-owned subsidiary, NET Midwest Inc. (both of Illinois), and the British corporation Ocean Group, plc, the former sole shareholder of NET. The suit was filed in 1996 by Thomas Cullen, Jr., a former division manager of NET Midwest's laboratory at Santa Rosa, California.

Employees of the Santa Rosa laboratory allegedly failed to follow mandatory analytical procedures in testing for hazardous substances in samples arising from environmental investigations and remedial actions at federal facilities. The laboratory served as the quality control facility used by the Corps to measure the effectiveness of the clean-up at hazardous waste sites for such solvents as benzene and toluene. The complaint alleged that employees failed to measure the contaminants by a scientific method, instead visually estimating levels. The EPA suspended the lab from federal contracting in March 1996, with the suspension ending later that year following a negotiated compliance agreement. The case was investigated by the Army Criminal Investigative Command, Air Force Office of Special Investigations, NCIS, and EPA OIG. The relator's share was $62,700.

U.S. v. Chester Care Center, Bishop Nursing Home et al. (ED PA No. 98-CV-139)

In January 1998, Chester Care Center, Bishop Nursing Home, and several other entities agreed to pay the Government $500,000 to settle a False Claims Act suit alleging inadequate care for nursing home residents. Misconduct referenced in the consent order and judgment includes failure to provide adequate nutrition, adequate nursing care to residents with diabetes, adequate monitoring of water temperatures, adequate wound care, and adequate staffing, as required by state and federal law. The Chester agreement represents the second nursing home quality of care FCA settlement to date. *See U.S. v. GMS Management-Tucker, Inc. et al., 6 TAF QR 31 (July 1996).*

Among the numerous issues addressed in the agreement are nutrition and wound care standards, resident safety, basic care, psychiatric services, medical care, nursing care, therapy services, quality assurance, and staff training. Under the settlement, defendants must comply with provisions of the Nursing Home Reform Act and certain protocols as well as adopt a corporate compliance program. The agreement further provides for appointment of a Monitor to oversee compliance with the consent order. Assistant U.S. Attorneys James Sheehan and David Hoffman handled the case.

U.S. ex rel. Sneed v. Pall Aeropower Corp. (MD FL No. 93-1798-CIV-T-15A)

In January 1998, Pall Aeropower Corp., formerly Pall Land and Marine Corporation, agreed to pay the Government $2.2 million to settle a *qui tam* suit alleging that it overcharged the Army for air filters for the AH-1 "Cobra" helicopter. The suit was brought in 1993 by a former Pall manager, Vern Sneed. While negotiating with the Army, Pall allegedly did not disclose manufacturing changes it intended to make that significantly reduced costs, as required under federal law. The case was investigated by the Army Criminal Investigative Command and DCIS. The relator's share was 17 percent or $374,000. The relator's counsel was Randall Reder (Tampa, FL). The Government was represented by Alan Kleinburd and Alice Valder Curran of the DOJ Civil Division.

U.S. ex rel. Alderman v. Weiss et al. (CD CA CV 97-6734-RSWL)

In February 1998, DOJ announced that a medical equipment supplier and its owner agreed to pay the Government $1.75 million to settle a *qui tam* suit alleging improper marketing of incontinence supplies for elderly patients. The suit was brought by Geraldine Alderman, a former employee of Nissim Institutional Providers, Inc. Nissim, several related corporations, owner-operator Howard Weiss, and employee Mendel Duchman agreed to the settlement, concluding a case that resulted in criminal penalties as well. Pursuant to the alleged scheme, Medicare was falsely billed for adult urinary incontinence supplies to nursing home patients across the country. According to DOJ, saline solution, syringes, and lubricant were not provided as billed and were not medically necessary. The supplies were part of a package or "kit" which also included a free disposable diaper that served as an inducement to nursing homes to place orders for the kits.

In the earlier criminal prosecution, two of the related companies, Crown Ostomy, Inc. and Medi-Shield, Inc., pleaded guilty to wire fraud charges and each was ordered to pay a criminal fine of $75,000. Weiss and Nissim have also entered into a corporate integrity agreement with HHS, and four companies agreed to be permanently excluded from Medicare, Medicaid, and other federal health care programs. The matter was investigated by the HHS OIG and the Health Care Fraud Task Force for the Central District of California, which includes the FBI, Postal Inspection Service, California Bureau of Medi-Cal Fraud, and DCIS. The criminal case was initially investigated by the U.S. Attorney's Office for the Northern District of Florida prior to its transfer to Los Angeles. Assistant U.S. Attorney Consuelo Woodhead represented the Government on the civil side, and Assistant U.S. Attorney Kimberly Dunne handled the criminal action.

University of Pittsburgh / PATH Initiative

In March 1998, the University of Pittsburgh, 18 physician clinical practice plans allied with the School of Medicine, and UPMC Health System agreed to pay the Government $17 million to settle False Claims Act allegations of improper Medicare and Medicaid billings. The settlement arises from a self-audit undertaken pursuant to the federal PATH project, which reviews Medicare Part B payments for physicians at teaching hospitals. According to DOJ, this is the first PATH settlement that jointly resolves both Medicare and Medicaid billing issues. In this case, $3 million of the settlement is for Medicaid fraud.

The PATH audit found that physicians billed for services actually rendered by residents, as well as engaged in upcoding (billing for a level of evaluation and management services when the code level selected is not supported by sufficient documentation in medical records). Under the settlement, the clinical practice plans must adopt a five year corporate integrity agreement with HHS. According to DOJ, the 18 practice plans will soon consolidate into a single centralized practice plan to be named University of Pittsburgh Physicians. Assistant U.S. Attorney Robert Eberhardt of the Western District of Pennsylvania represented the Government.

U.S. ex rel. Werther v. Washington Consulting Group (ED VA No. __)

In March 1998, DOJ announced that Washington Consulting Group (WCG), a Maryland company, paid the Government $425,000 to settle a *qui tam* suit alleging that it knowingly charged false labor costs to numerous federal contracts. The suit was brought by Ellen Werther, a former WCG employee. According to DOJ, company employees altered time sheets to show that work was performed under federal contracts when it was not, and they also billed for unallowable costs. WCG performed such work for federal agencies as computer related design and statistical reports. While labor charges relating to seven federal entities were at issue in the case, most of WCG's work last year was for the Federal Aviation Administration. The matter was investigated by the Defense Contract Audit Agency and the Department of Energy's OIG. The relator's share was 22 percent. The relator was represented by Margaret McGoldrick of Spiegel & McDiarmid (Washington, DC). The Government was represented by Marie-Therese Connolly of the DOJ Civil Division.

TAF NEWS

Anti-FCA Bill Introduced in House

- On March 19, at the prompting of the American Hospital Association, Congressman Bill McCollum (R-FL) introduced H.R. 3523, which would significantly weaken the False Claims Act as it applies to health care fraud. Hearings before the House Judiciary Committee's Subcommittee on Immigration and Claims are tentatively scheduled for early May. The text of the McCollum Bill can be found on TAF's Internet site.

Qui Tam Practitioner Guide

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

TAF on the Internet

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

Previous Publications

- Back issues of the *Quarterly Review*, including the "1997 Year In Review," are available in hard copy as well as on TAF's Internet site.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). We thank Neil Getnick, Lesley Skillen, and Richard Dircks for their contribution in this issue. To discuss a potential article, please contact Associate Director Alan Shusterman.

Call for Experts and Investigators

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

FCA Reports and Video

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

Qui Tam Attorney Network

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

TAF Library

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

Acknowledgments

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