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False Claims Act and *Qui Tam* Quarterly Review

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

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

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

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Government Right to Object to Settlement

U.S. ex rel. Doyle et al. v. Health Possibilities, P.S.C. et al., 2000 WL 294175 (6th Cir. March 22, 2000)

Joining the 5th Circuit, the 6th Circuit ruled that FCA § 3730(b)(1) grants the Government an absolute veto power over settlements in *qui tam* actions. Emphasizing the plain meaning of § 3730(b)(1) and the United States' position as the real party in interest in *qui tam* litigation, the court ruled that the Government may exercise its right to object to the settlement even where it has not intervened in the action. The court then vacated a settlement order which had been entered by the district court over the Government's objections.

In 1996, plaintiffs John and Mariann Doyle brought a defamation action against Health Possibilities, P.S.C., Urgent Treatment Centers of Kentucky, and a number of other defendants. They later filed a separate *qui tam* action against the same parties, alleging that the defendants had engaged in upcoding and had submitted other false claims to Medicare.

In January 1997, the Government declined to intervene in the action and the parties subsequently reached a settlement covering both the defamation and *qui tam* suits. Pursuant to the settlement, plaintiffs received $150,000 for the defamation claims, but the *qui tam* claims were released in exchange for injunctive relief and attorneys' fees and costs; no monetary amount was assigned to the *qui tam* claims. The Government objected to the settlement and asserted that, pursuant to § 3730(b)(1) of the statute, the FCA does not permit settlement without the Attorney General's consent.

The district court held that the consent provision of § 3730(b)(1) only applies to the 60-day period during which the Government can decide if it wants to intervene, and that if the Government wants to challenge the settlement after that point it has to seek "good cause" intervention under § 3730(c)(3) of the statute. The district court approved the settlement and the Government appealed.

§ 3730(b)(1) Supports Absolute Veto Power Over Settlements

The 6th Circuit stated that the appeal turned entirely on the scope of § 3730(b)(1), which provides that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal...." The court declined to follow the 9th Circuit in Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994), which held that the consent provision is not absolute. The 9th Circuit ruled that, after the Government has declined to intervene, it is restricted to challenging the settlement for "good cause" pursuant to § 3730(c)(3). The 6th Circuit instead joined with the 5th Circuit, which in Searcy v. Phillips Electronics of North Am. Corp., 117 F.3d 154 (5th Cir. 1997), 10 TAF QR 3 (July 1997), held that the consent provision plainly grants the Government absolute veto power over settlements at any point in the litigation. The 6th Circuit stated that this holding was not only supported by the plain language of the statute, but also by the FCA's purpose, structure, and legislative history.

FCA Protects Public Interest

Noting that the FCA provides a number of mechanisms "to ensure that the government retains significant authority to regulate *qui tam* litigation" and that the U.S. receives the bulk of any recovery even when it does not intervene, the court included the Government's veto

power as a "critical aspect of the government's ability to protect the public interest in *qui tam* litigation." Looking to the FCA's purpose, the court stated that the Act "is not designed to serve the parochial interests of relators, but to vindicate civic interests in avoiding fraud." The court expressed concern that an unchecked ability to settle *qui tam* suits could foster "sweetheart" settlements, whereby relators couple *qui tam* claims with personal ones and avoid the *qui tam* recovery division requirements by allocating settlement monies to the personal claims.

The court reasoned that its holding was consistent with the right given to relators pursuant to § 3730(c)(3) to "conduct" *qui tam* litigation when the Government does not intervene, because nothing in the statute suggests this right includes unilateral settlement authority. Again the court relied upon Searcy, which stated that "[a] relator has 'conducted' an action if he devises strategy, executes discovery, and argues the case in court, even if the government frustrates his settlement efforts."

The 6th Circuit also concluded that the relator's right to conduct the litigation does not "annul the government's status as the real-party-in-interest." Noting that the consent language appears immediately after statutory language stipulating that a relator acts "for [himself] and for the United States Government," the court stated that "[t]hese requirements are indispensable to the *qui tam* framework, as relators have Article III standing to bring FCA actions only because they act on the government's behalf." The court further stated that while the 1986 Amendments to the FCA may have encouraged more private parties to bring *qui tam* suits, this encouragement did not signal a desire to "strip away the government's power to consent to settlements made in its name."

No Separation of Powers, Mootness Issues

Both the relators and the defendants argued that, because the FCA requires the Attorney General's consent for "dismissal" and not just for settlements, separation of powers and mootness issues would arise if the consent requirement were construed to extend beyond the 60-day intervention determination period. Addressing the separation of powers argument, the court concluded that the consent provision applies only to "voluntary" dismissals and not court-ordered dismissal. As such, the requirement that the Attorney General consent to settlements does not infringe upon the judiciary's authority to decide cases properly within its jurisdiction. The court also rejected the argument that an unqualified consent provision would lead the courts to keep "moot" cases on their dockets after both relators and defendants had come to settlement terms. The court reasoned that, since the Government is the real party in interest in a *qui tam* action, the case cannot be moot so long as the Government's interests are adverse to those reflected in a proposed settlement. The court vacated the decision below and remanded the case to the district court.

Bankruptcy/Police Powers Exception to Automatic Stay

U.S. ex rel. Jane Doe 1 et al. v. X, Inc. et al., 2000 WL 305742 (E.D. Va. March 23, 2000)

Ruling that False Claims Act suits fall under the "police powers" exception to the automatic stay in bankruptcy, a Virginia district court held that relators could proceed with a *qui tam* action against a defendant who had declared bankruptcy. Moreover, the court held that the relators could proceed without Government intervention. Pursuant to the automatic stay, however, while the defendant remains in bankruptcy the parties may not enforce any money judgment that is entered.

After the defendants to this *qui tam* action filed for bankruptcy under Chapter 11, the Government made its fifth request for an extension of time in which to decide whether to join the *qui tam* suit. The district court was therefore asked to decide if the automatic stay provision of Chapter 11 bankruptcy applied, which would obviate the need for the Government's request, or if the *qui tam* action fell into the "police powers" exception to the automatic stay provision and could proceed.

FCA Actions Enforce the Government's Police or Regulatory Power

Although a declaration of bankruptcy under Chapter 11 normally effects an automatic stay on pending lawsuits, Chapter 11 provides that the stay does not apply to a "proceeding by a governmental unit . . . to enforce such governmental unit's police and regulatory power, including the enforcement of a judgment other than a money judgment . . . ."

The court quickly concluded that a False Claims Act suit is unquestionably an action to enforce the Government's "police or regulatory power." The court noted the ample authority holding that laws such as the False Claims Act that are designed to prevent, stop, or fix fraud through imposition of damages are police and regulatory laws.

Qui Tam Action Qualifies as Action by a "Governmental Unit"

The court then turned to the question of whether an action maintained by a relator where the Government has not yet intervened qualifies as a suit brought "by a governmental unit." The court found no authority directly on point, but analogized to those cases which have asked whether a *qui tam* suit against a state agency is barred by the 11th Amendment because the relator is a private party. The court followed the line of 11th Amendment cases holding that the United States is always the real party in interest even where it elects not to intervene. The court noted that, even without intervention, the United States receives the majority of any amount recovered and retains significant rights over the litigation. Thus, the court held that an action maintained by a relator when the Government has not intervened qualifies as an action brought by a governmental unit for purposes of the police powers exception.

Entry of Money Judgment Remedies Fraud

The court noted the split of authority on whether an FCA suit seeks enforcement of a money judgment, and described two different tests used to make this determination. Under the "pecuniary advantage" test, an action, even one seeking entry of a money judgment, can still fall under the police powers exception so long as it does not conflict with the bankruptcy court's control over the property of the estate and does not create a pecuniary advantage for the Government in relation to the other creditors. The narrower "pecuniary interest" test holds that an action can only fall into the police powers exception if the Government is seeking to "protect public health, safety and welfare," and is not seeking to protect a pecuniary interest.

The court concluded that the pecuniary advantage test is more reasonable and that it has been "implicitly adopted" by the 4th Circuit. The court reasoned that this approach permits the Government to seek entry of a money judgment as the remedy for violations of fraud or other police or regulatory laws. According to the court, therefore, in imposing penalties under the FCA the Government is seeking to deter and punish violations of its regulations rather than protect some monetary interest.

The court ruled that the relators in this case could proceed with the action up to and including the point where the amount of any

judgment against the defendants is quantified, but that they could not seek enforcement of that judgment so long as the defendants remained in bankruptcy. The court then granted the Government's motion for an extension of time in which to make its intervention determination.

Public Disclosure Bar and Original Source Exception

A-1 Ambulance Service, Inc. et al. v. State of California et al., 202 F.3d 1238 (9th Cir. Feb. 7, 2000)

The 9th Circuit affirmed a lower court's dismissal of a *qui tam* action for lack of subject matter jurisdiction where it found that the "material transactions" making up the alleged fraud had been publicly disclosed in county agency proceedings. Rejecting a narrow definition of "hearing," the court ruled that the county agency proceedings were "administrative hearings" within the meaning of the § 3730(e)(4) public disclosure bar.

In the early 1990's, two California counties issued requests for proposals (RFP's), or bids, for their respective Emergency Medical Services (EMS) programs. Both RFP's became part of the public record and both counties held public hearings to determine the operating area and terms for ambulance services contracts. The hearings and the RFP's helped to determine the maximum rates that the selected EMS provider would be able to bill Medicare and other third-party payors. Ultimately, Monterey County selected Pen-Med as its EMS provider and San Mateo County selected Med-Trans.

After its bids to provide ambulance services to San Mateo and Monterey Counties proved unsuccessful, A-1 Ambulance Service, Inc. initiated a *qui tam* action against these counties, as well as the state of California and the two ambulance services that secured the contracts. The *qui tam* suit alleged that the counties and the ambulance companies conspired to shift costs to Medicare in violation of the anti-kickback provisions of the Medicare Act.

According to A-1, by not subsidizing the cost of providing emergency ambulance services to the indigent, the counties forced Med-Trans and Pen-Med to charge Medicare beneficiaries higher prices to offset the losses from servicing indigent patients who were ineligible for Medicare benefits. A-1 appealed the dismissal of its suit for lack of subject matter jurisdiction under the § 3730(e)(4) public disclosure bar.

County Agency Proceedings are "Administrative Hearings"

On appeal the 9th Circuit addressed only two elements of the public disclosure bar analysis: (1) whether there was a public disclosure via one of § 3730(e)(4)(A)'s enumerated means and (2) whether it was the "allegations or transactions" making up the fraud which had been disclosed. According to the court, A-1 did not claim to be an original source.

The court found that the agency proceedings held by Monterey and San Mateo counties were "administrative hearings" within the scope of § 3730(e)(4)(A). The court reasoned that agency actions are inherently administrative, and that the numerous public proceedings conducted by the agencies qualified as "hearings" within the meaning of the FCA. The competitive bidding process for awarding EMS contracts necessarily entailed several public administrative proceedings, beginning with RFP's and ending with selection. The court rejected A-1's contention that administrative hearings must be at the federal level for the FCA's public disclosure bar to apply.

County Hearings Revealed "Material Transactions"

The court further determined that the county agency proceedings revealed the essential elements of A-1's fraud claims. The administrative hearings publicly disclosed: (1) the amount of county subsidies for exclusive area operating contracts; (2) that counties would not be billed for services to indigent patients; (3) the maximum rates EMS providers could charge Medicare and third-party payors; and (4) whether Medicare reimbursement would be sufficient at such rates. According to the court, this amounted to the public disclosure of all the "material transactions" of the cost-shifting schemes alleged by A-1. In reaching its holding, the court relied upon U.S. ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994), which held that "the substance of the disclosure need not contain an explicit 'allegation' of fraud; the jurisdictional bar is raised so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain." In keeping with this view, the 9th Circuit stated that "[t]he mere fact that A-1's own expertise in the area of emergency ambulance services may have enabled it to formulate its novel legal theory of fraud is irrelevant to the question of whether the material transactions giving rise to the alleged fraud were already disclosed in the public domain in the first place." As A-1 did not qualify as or claim to be an original source, the court ended its analysis and dismissed the action.

FCA Liability/Implied False Certification

***U.S. ex rel. Swafford v. Borgess Medical Center et al.*, Opinion, No. 4:97-CV-116V (W.D. Mich. Feb. 18, 2000)**

A Michigan district court dismissed on summary judgment a *qui tam* action alleging that physicians' failure to comply with applicable standards of care caused the submission of false claims for reimbursement. The court ruled that the relator's implied false certification theory could only succeed where the Government's payment is clearly conditioned on compliance with those standards.

Jack Swafford, a registered vascular technologist, filed a *qui tam* action alleging that his former employers failed to comply with federal health care program regulations or accepted standards of care in the interpretation of venous ultrasound studies. The complaint centered on the physicians' practice of having technicians perform venous ultrasound tests and compile worksheets reporting whether the tests were positive or negative for specified risk factors. The physicians allegedly relied on these worksheets, without consulting the underlying data, to seek Medicare reimbursement for the interpretative, professional component of the test. The Government declined to intervene and the relator proceeded with the action, arguing that the physicians' practices fell so far short of the medical standard of care as to result in false claims to the Government. The defendants moved for summary judgment.

HCFA Carriers Manual Not Binding Law for Providers

As a threshold issue in determining whether the physicians submitted false claims, the district court examined what law or administrative regulations govern provider services rendered in connection with venous ultrasound studies. Swafford acknowledged that Medicare had not specifically promulgated regulations governing a physician's interpretation of venous ultrasound. The court rejected the relator's argument that it should rely on the Health Care Financing Administration (HCFA) Carriers Manual regulations on radiology, holding that "the Carriers Manual is merely a guide for fiscal intermediaries between Medicare and physi-

cians," and lacks "the binding effect of law or regulation." The court found that the relator had failed to establish that the HCFA Carriers Manual set standards for reimbursement requests by providers or that the physicians knew or believed the regulations to be applicable to their claims for payment. The court relied on U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013 (7th Cir. 1999), 16 TAF QR 7 (April 1999), which held that mere violations of administrative regulations are not actionable under the FCA "unless the violator knowingly lies to the government about them."

Payment Must Be Conditioned on Compliance

The relator argued that, even when applying regulations included in a Providers Handbook relied upon by the defendants, the claims were false under two different theories of falsity: implied false certification and actual falsehood. For purposes of deciding the motion, the court allowed that the relator had accurately characterized the standard of care. The court ruled, however, that the relator also would need to show that the Government conditioned its payment on that standard.

Noting that the 6th Circuit had never addressed the issue, the court relied upon the 7th Circuit decision in Luckey v. Baxter Healthcare Corporation, 183 F.3d 730 (7th Cir. July 1999). In Luckey, the applicable regulations required defendant Baxter Screening Laboratory to test blood plasma for hepatitis and HIV prior to sale. Baxter did so, but the relator argued that Baxter should have used an arguably more effective and more expensive blood plasma test. According to Luckey, each time Baxter presented a claim to the Government for payment it impliedly certified its compliance with applicable regulations and this certification was false since Baxter did not employ the most accurate test available. The Luckey court found, however, that it would "strain language past the breaking point" to equate "imperfect tests" with "no tests." Here, the district court followed Luckey and held that Swafford could not assert a successful claim under the FCA simply by demonstrating that the physicians' approach to "interpretation" failed to conform to the standard of care. The Physicians Handbook required the physicians to "interpret" the tests and they had provided some interpretation. The district court followed the Luckey court proposition that the implied false certification theory can only succeed where the defendant's compliance with regulatory authority is so essential for reimbursement that, if the Government had been aware of the defendant's noncompliance, it would have refused payment.

Examining the actual falsehood theory, the court also rejected the relator's argument that the defendants' practice was so far from constituting an "interpretation" in any reasonable sense of the word that their claims for reimbursement for this service contained actual falsehoods. According to the court, this dispute over the meaning of terms undefined in the Providers Handbook failed to establish falsity under the FCA. Finally, the court concluded that even if the claims were false, the relator had failed to meet his burden of adducing facts that the defendant had acted knowingly or with reckless disregard for applicable regulations.

Statute of Limitations/FCA Liability/Damages

U.S. v. Salti et al., Memorandum Opinion, No. 1:96CV1065 (N.D. Ohio Feb. 2, 2000)

An Ohio district court awarded the Government $71 million in a False Claims Act suit alleging conspiracy to defraud the Federal Food Stamp and Women, Infants, and Children

Benefits Program. The court ruled that the Government's case was not time-barred because it is the government attorney with the authority to file the FCA suit, and not the Government's investigator, who triggers the three-year limitations provision of § 3731(b)(2). The court imposed liability on the defendants for their role in directing the fraudulent scheme and awarded damages based on the face value of the claims involved.

In May 1996, the Government filed a False Claims Act suit against Mohammed and Mahmoud Salti alleging that, from 1984 to 1995, they had conspired to defraud the Government of millions of dollars by illegal trafficking in food stamps and the Women, Infants, and Children (WIC) benefits program. The defendants owned numerous stores from which they initially were licensed to redeem food stamps and WIC coupons. After being disqualified from these programs for violating applicable regulations, they transferred ownership of the stores to others. According to the Government, these were sham transfers in that the nominal owners continued to act under the control and direction of the defendants in fraudulently obtaining food stamps and WIC coupons. The lawsuit alleged that the nominal owners illegally purchased food stamps and WIC coupons for cash at less than face value and then redeemed them to the Government at face value to earn a profit. In February 1999, the Government moved the court for summary judgment.

Statute of Limitations Not Triggered by Government Investigation

In addressing statute of limitations issues, the court rejected the Saltis' argument that the case was time-barred under the pre-1986 FCA because the complaint included pre-1986 claims. The court observed that the Government's claims centered around events occurring in 1987 or after, and ruled that the 1986 version of the statute applied.

Relying on § 3731(b)(1), however, which provides that the action must be brought within "6 years after the date on which the violation of section 3729 is committed...," the defendants also claimed that the Government was time-barred under the 1986 FCA as to events occurring before 1990. The Government relied upon § 3731(b)(2), which alternatively provides that the action must be brought within "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." The Government asserted that the pertinent official did not learn of the conduct until early 1994 and thus acts committed as early as May 1986, which were within the 10-year period, could be fairly considered.

The court therefore considered who in fact is the official "charged with the responsibility to act" under § 3731(b)(2). Law enforcement agents were investigating the Saltis more than three years before the suit was filed. According to the court, however, law enforcement agents are not public officials "charged with responsibility to act." The court accepted the declaration of the assistant United States attorney in charge of the case that he did not receive significant information about the Saltis' scheme until 1994, thus making the filing timely. The court reasoned that law enforcement officials and investigators are not officials in charge under § 3731(b)(2) since they must be given the opportunity to complete their investigations without fear of triggering the statute of limitations. In addition, the court found no evidence that the law enforcement officials or government attorneys were dilatory.

Liability Attaches Where Defendants Directed the Fraudulent Scheme

The court further ruled that the Saltis could

not avoid liability simply because their agents and employees, including the nominal store owners, were the individuals who actually submitted the claims and transferred the assets as required to implement the scheme. The court conceded that mere knowledge of a false claim does not give rise to liability under the FCA because the statute does require engagement in conduct which causes a false claim to be presented. However, the court disagreed with the defendants' characterization of their acts. It found that, pursuant to § 3729(a)(1), the defendants had "caused" false claims to be submitted in that they directed the scheme and it worked directly to their benefit.

In addition, the court found that the Saltis had engaged in a § 3729(a)(3) conspiracy to defraud the Government. The Saltis were part of an agreed scheme with a conspiratorial objective and had committed overt acts in furtherance of the conspiracy.

Damages Measured by Face Value of Claims

The court calculated single damages to be $23.6 million, the face value of the food stamps and WIC coupons involved, and awarded $71 million in treble damages to the Government. The Government did not request allowed statutory penalties of $5000 to $10,000 per claim since it could not realistically estimate the number of fraudulent transactions which had occurred. The Government estimated such penalties would have amounted to an additional $43 million.

The court again rejected the argument, reasserted by the Saltis, that they did not actually submit any claims and therefore the Government could not link them to the economic damages suffered. Moreover, relying on U.S. v. Bornstein, 423 U.S. 303 (1976), the court held that actual damages could be based on the value of the claims without knowing the number of claims made. The number of claims would only be the basis for civil penalties, which the Government was not requesting.

Relator's Share/Settlement Proceeds

U.S. ex rel. Thornton v. Science Applications International Corporation et al., 2000 WL 320518 (5th Cir. March 28, 2000)

The 5th Circuit ruled that the value of claims released by a defendant in exchange for the settlement of a False Claims Act suit must be included as proceeds for purposes of calculating the relator's share, unless the released claims are "so intertwined with the FCA claims" as to be de facto counterclaims. The court also held that the relator was not barred from contesting the valuation of non-cash proceeds after the settlement hearing since the Government failed to advise him of the value of the released claims prior to finalization of the settlement.

In this *qui tam* suit, which related to the installation of a government security system, the Government intervened and settled the action for a payment of $230,000 in cash, the release of contractual claims the defendants had against the Government, and the transfer of the security system's software code to the Government. Relator Peter Thornton argued that the total value of the settlement, including the non-cash items, should be used to calculate the relator's share. The parties disputed the value of the released claims. The district court included the released claims, but not the software code, in its valuation of the overall settlement; it gave no indication of how it determined the value of the released claims, but awarded Thornton all of the cash proceeds of the settlement as a 22.33 per-

cent relator's share. The Government appealed, challenging the inclusion of the released claims in the overall settlement value, the relator's right to object to the released claims' valuation after the settlement was approved, and the district court's valuation of these claims.

Released Claims May Be Proceeds

The parties agreed that that the "proceeds" of a False Claims Act settlement, from which the relator's share is derived, can include items of non-cash value. The 5th Circuit noted, however, that certain principles govern whether released claims are proceeds of the action. First, according to the court, it must be clear that included claims are released in return for the Government's release of the FCA claims. The 5th Circuit agreed with the district court's decision not to include the software code as proceeds, as the rights to the software were never in dispute and were not given in return for the release of FCA liability. The circuit court also agreed with the district court's determination that the defendant's claims against the Government were released in exchange for the settlement of the FCA claims.

Second, the court stated that the released claims against the Government should not "be so intertwined with the government's FCA claim that the FCA suit triggers them as counterclaims." In such instances, the released claims should not be included as proceeds because the Government might not have been exposed to liability if the FCA suit had not been brought. Thus, to include their value in calculating the relator's share might leave the relator in a better position than the Government. In this case, the court found that the released claims were not de facto counterclaims since the defendants had filed their administrative claims prior to the filing of Thornton's *qui tam* action. As such, the court ruled that the value of these counterclaims must be included in the overall valuation of the settlement for purposes of determining the relator's share.

Valuation Necessary Prior to Approval of Settlement

The court agreed with the Government that normally the valuation of non-cash proceeds must be made before the district court approves the settlement. The court reasoned that this approach allows the Government to withdraw a settlement if its net cash value appears too small after subtracting the relator's share. Moreover, this sequence does not prejudice the relator as long as he and the court are on notice of the components of the settlement and the Government's estimate of any non-cash proceeds. In this case, however, the relator received no advance notice of the Government's valuation of the released claims and so was free to contest the valuation of the non-cash proceeds at the time the relator's share was being determined.

Finally, the court noted that the record was devoid of any indication of how the district court reached its valuation of the released claims. Therefore, the court vacated the decision and remanded the matter with instructions for the Government to provide the district court with documentation supporting its estimate of the released claims.

U.S. ex rel. Merena v. SmithKline Beecham Corporation; U.S. ex rel. Spear et al. v. SmithKline Beecham Clinical Laboratories, Inc.; U.S. ex rel. Grossenbacher et al. v. SmithKline Beecham Clinical Laboratories, Inc., 205 F.3d 97 (3rd Cir. Feb. 29, 2000)

The 3rd Circuit reversed a district court decision granting a nearly $52 million relator's share in a multi-claim *qui tam* suit against SmithKline Beecham. The circuit court held

that a relator's share may be determined on a per-claim basis and that, regardless of Government intervention, relators are entitled to no share of the proceeds from claims that are subject to dismissal under the public disclosure bar. Accordingly, the case was remanded to the district court with instructions to determine whether the relators qualified as the original sources of the publicly disclosed claims resolved by the settlement.

In 1993, Robert Merena became the first of several relators to file *qui tam* actions alleging that SmithKline Beecham Clinical Laboratories had engaged in a variety of schemes to defraud federally and state funded health care programs. One allegation involved "the automated chemistry scheme," in which SmithKline was alleged to have added tests to automated chemistry profiles and then unbundled these tests for the purpose of bilking the Government. After various dismissals, the surviving claims were maintained by the relators in this action: Merena; Kevin Spear, the Berkeley Community Law Center, and Jack Dowden (Spear relators); and Glenn Grossenbacher and Charles Robinson, Jr. (Grossenbacher relators).

In 1996, the Government formally intervened and reached a settlement with SmithKline which included the claims raised in the Merena, Spear, and Grossenbacher actions. The district court approved the $325 million settlement agreement and dismissed the three *qui tam* actions with prejudice, maintaining jurisdiction over the determination of the relator's share. The Spear relators reached an agreement with the Government entitling them to 15 percent of the $13 million that the Government attributed to one discreet claim.

The Merena and Grossenbacher relators came to a private agreement as to how they would divide any relator's share paid to Merena by the Government, but could not agree with the Government as to what that share should be. In the district court, the Government argued that the automated chemistry claims should have been dismissed under the § 3730(e)(4)(A) public disclosure bar, and therefore that the district court lacked both subject matter jurisdiction over those claims and the authority to grant a share of those proceeds.

The district court held that the issue of subject matter jurisdiction was "mooted" by the Government's intervention in the *qui tam* actions, and further noted that the Government never sought at any point prior to the settlement to have the automated chemistry claims dismissed. The district court also held that the False Claims Act did not contemplate a claim-by-claim analysis, but spoke of suits in their entirety, leading it to conclude that the relators' share must be determined based on the total settlement or judgment rather than on individual claims. Characterizing their assistance as "valuable and substantial," the court awarded the relators nearly $52 million, which represented 17 percent of the total settlement with SmithKline, excluding those portions of the settlement paid to states for Medicaid fraud losses and the amount paid to the Spear relators. The Government appealed.

Share Determined on Per-Claim Basis

The 3rd Circuit characterized this case as revolving around two chief legal issues: (1) application of the relevant provisions of the *qui tam* statute to a multi-count complaint; and (2) interpretation of the public disclosure bar and original source exception in relation to the relator's share provisions in cases where the Government intervenes.

The court noted that the wording of the False Claims Act seems to contemplate that each suit brought under the Act will contain only one claim. Courts have nevertheless consistently permitted the Government to take over only certain claims in multi-count complaints. Moreover, courts have permitted parties to set-

tle only some of the claims in a case, and courts may do a claim-by-claim analysis under the § 3730(b)(5) first-to-file provision of the FCA. The court therefore determined that each claim in a multi-count complaint must be analyzed separately for purposes of determining if it should be dismissed under the public disclosure bar. Thus, the court held that it could determine what, if any, relator's share would come from the automated chemistry claims by looking at those claims standing alone.

Government Intervention Does Not Moot Public Disclosure Issue

Where the Government intervenes, § 3730(d)(1) provides for a 15 to 25 percent relator's share. However, where the Government intervenes but the action "is one which the court finds to be based *primarily* on disclosures of specific information...," the relator is only entitled to a zero to ten percent share.

The court held that § 3730(d)(1), taken in conjunction with the § 3730(e)(4) public disclosure bar, provides for three categories of recovery. Where the Government has intervened, 15 to 25 percent should be awarded to relators in any one of the following three cases:

1. A relator brings an action that is not based on publicly disclosed information;
2. A relator who qualifies as an "original source" brings an action that is "based upon" but not "primarily based" upon publicly disclosed information; or,
3. A relator who qualifies as an "original source" brings an action that is "primarily based" upon publicly disclosed information, but the relator provided that information.

The court further ruled that the zero to ten percent provision should apply to only one kind of relator: a party who qualifies as an original source, but whose action is "primarily based" upon publicly disclosed information and who did not provide that information. Finally, the court ruled that if a relator's suit is subject to dismissal under the public disclosure bar, he is not entitled to any recovery regardless of Government intervention.

The relators' interpretation of § 3730(d)(1), which would permit relators in the case of Government intervention to obtain a share of the recovery even if their claims are subject to dismissal under § 3730(e)(4), was rejected by the court as rewarding parties who provided little, if any, public service.

Relators Must Be Original Sources to Collect Share

The 3rd Circuit held that by its own terms the settlement agreement preserved the Government's right to contest the issue of the relator's share. The court also characterized as clearly erroneous the district court's finding that it lacked sufficient information to conduct a claim-by-claim allocation of the settlement proceeds. The Government had produced evidence in the district court documenting that $241 million of the total settlement could be attributed to the automated chemistry claims. The court found that the district court was not obligated to accept the Government's percentages, but it did have sufficient information to conduct an allocation.

The court concluded by holding that it is "beyond dispute" that the automated chemistry claims in the relators' suits were based on publicly disclosed information. Therefore, the court remanded the case to the district court for a determination of whether the relators were original sources for those claims.

U.S. ex rel. Fox v. Northwest Nephrology Associates, P.S. et al., 2000 WL 282468 (E.D. Wash. Feb. 15, 2000)

Holding that a relator's share is derived from proceeds of the *qui tam* action which are actu-

ally received by the Government, a Washington district court found it reasonable to pay the relator's share in installments as the Government is paid. The court declined to award the maximum possible relator's share as the *qui tam* case concluded short of trial, but tentatively awarded the relator a 20 percent share based on his assistance to the Government, the personal hardship he suffered in pursuing the action, and the fraud deterrence effect of his *qui tam* suit.

In 1998, the Government intervened in a *qui tam* action filed by Dr. Stephen Fox and the suit settled shortly thereafter. Two of the defendants agreed to stipulated judgment amounts of $600,000 and $500,000 respectively, but the settlements provided that those amounts would be deemed satisfied if they made timely payments amounting to 75 percent of the totals. The settlement agreements also provided that the relator would receive his share only from amounts actually received by the Government, and that Fox would be entitled to receive his share from each installment payment as it was made, not in a lump sum. Fox challenged this arrangement, and also urged the court to award him the statutory maximum of 25 percent rather than the 17 to 19 percent relator's share proposed by the Government.

Relator's Share Derived from Proceeds Received by Government

Fox argued that the relator's share should be calculated based on the stipulated judgment amounts, rather than on the smaller amounts that would actually be received by the Government provided the defendants made timely payments. The court disagreed, noting that the FCA provides that the relator's share will be determined based on the "proceeds" of the settlement and citing to authority suggesting that the term means the amount actually recovered by the Government. The court further noted that, in the event the defendants defaulted on their payment obligations, the agreement provided that they would be liable for the full stipulated judgment amounts and that Fox's share would be determined based on this larger amount.

The district court also rejected Fox's argument that the the installment terms for the paying of the relator's share amounted to an interest-free loan to the defendants. The court characterized the question as one of "reasonableness" and concluded that there was nothing "manifestly or grossly unjust" in the relator receiving his payments as the Government receives its own payments.

Court Tentatively Awards 20 Percent Share

Fox requested the statutory maximum of 25 percent as his relator's share despite the fact that the case never went to trial. The court noted that the statute does not expressly mention whether the case goes to trial as a factor in determining the relator's share, but concluded that going to trial was nevertheless "an important factor" in evaluating the assistance a relator has provided to the Government and thus "it should be a rare occurrence when the maximum percentage is awarded in a case that has settled short of trial." The Government argued that a share between 17 and 19 percent was appropriate, noting that the filing of the *qui tam* action stopped the fraud, the relator provided information unknown to the Government, and the relator provided "some assistance to the government." The Government also, however, cited to grounds for decreasing the percentage, naming a number of failures on Fox's part, such as his refusal to make monitored phone calls to the defendants and his refusal to speak with the Government at all until he was granted immunity. While Fox denied it, the Government also claimed that Fox had participated in the fraud and that he had substantially delayed in reporting it.

Although it did not directly address the participation or delay issues, the court did defend Fox's actions otherwise, concluding that his refusal to speak with Government authorities until he had immunity was "not a significant consideration" in determining his share and that his refusal to make monitored phone calls was based on a concern for his personal safety that was "not patently unreasonable."

Ultimately, the court stated that there was "little doubt that the efforts of Dr. Fox were significant in bringing about the settlements with the defendants" and added that it had "no reason to doubt" that Fox had endured some personal and professional hardship in bringing this suit. The court concluded by tentatively awarding Fox 20 percent, subject to a later hearing, with the caveat that the court would under no circumstances award the statutory maximum.

Res Judicata

***U.S. ex rel. King v. Hillcrest Health Center Inc. et al.*, Order, No.CIV-98-295-W (W.D. Okla. Jan. 4, 2000)**

An Oklahoma district court dismissed a *qui tam* suit on res judicata grounds, holding that the *qui tam* action arose out of the same events as those at issue in a prior wrongful termination action. The court determined that the events giving rise to the two lawsuits formed a "series of connected transactions" so closely related in time and origin that the evidence presented in the two suits would "substantially overlap," thus necessitating dismissal of the *qui tam* action.

In 1999, Dr. John King and Hillcrest Health Center, along with a number of its physicians, settled a 1997 wrongful discharge lawsuit in which King alleged that he had been unlawfully terminated from his position as a resident for refusing to participate in Hillcrest's fraudulent practices. Subsequent to filing that action, King initiated a *qui tam* suit against Hillcrest and many of the same physicians, alleging that they defrauded federally funded healthcare programs through a variety of schemes. The defendants moved to dismiss the *qui tam* action, arguing that the settled wrongful discharge action barred the *qui tam* action under res judicata.

Res Judicata Triggered by Transactional Similarities

The court stated that in the 10th Circuit, there are three elements that must be satisfied before a case can be dismissed on res judicata grounds: (1) a judgment on the merits in the initial lawsuit; (2) identity of parties in the two lawsuits; and (3) identity of the cause of action in the two lawsuits. The parties did not dispute that the first two elements were met. The court held that the third element was also met, despite the fact that the two suits were based on different legal theories which were "not grounded on precisely the same set of facts." Noting that the 10th Circuit applies a "transactional approach" for determining if there is identity of causes of action, the court reasoned that the factual events giving rise to the two lawsuits formed a " 'series of connected transactions' closely related in time, space and origin" in that the evidence presented in both lawsuits would substantially overlap. The court therefore dismissed the *qui tam* action on res judicata grounds.

Attorneys' Fees

***U.S. ex rel. Poulton v. Anesthesia Associates of Burlington, Inc. et al.*, 2000 WL 266756 (D.Vt. March 3, 2000)**

A Vermont district court approved, with limited exceptions, a *qui tam* relator's § 3730(d)(1)

motion for attorneys' fees and costs following a global settlement. Noting the complexity of the case and the risks of not prevailing in the matter, the court rejected many of the defendants' attacks on the reasonableness of the attorneys' fees requested and granted an upward adjustment of the lodestar amount.

Shortly after the Government intervened in Dr. Thomas Poulton's *qui tam* suit the case settled, with the defendants paying $3.3 million to resolve fraud liability and $400,000 to resolve Poulton's retaliation claims. The Government approved a relator's share of 24 percent. Poulton then moved the court pursuant to § 3730(d)(1) to award him attorneys' fees and costs in the amount of $342, 965 against defendant Fletcher Allen Healthcare.

Court Awards Requested Fees

Fletcher argued that any attorneys' fees and costs awarded should be apportioned equally among the three defendants who participated in the settlement. The court disagreed, noting that Fletcher Allen had paid nearly 90 percent of the settlement amount, whereas the other two defendants had paid little more than ten percent and were essentially insolvent. The court also agreed with the Government's assertion that Fletcher was liable in the matter "regardless of what entity or individual is the most culpable." As such, the court determined that Fletcher should pay 90 percent of Poulton's fees and costs.

Fletcher was also unsuccessful in arguing that the relators' attorneys did not assist the Government with those claims that formed a large part of the settlement. The court found that throughout the litigation the Government had lauded the "very valuable" assistance provided by Poulton's attorneys. The Government had also offered Poulton a relator's share that was nearly the statutory maximum, reflecting the importance of his assistance. In addition, the case resulted in a global settlement, meaning the relative merits of the various claims were not determined.

In reviewing Poulton's motion, the court applied a lodestar approach, which requires the relator to meet the initial burden of demonstrating the reasonableness of the attorneys' hourly rates and the number of hours worked. The court evaluated the reasonableness of the hourly rate, taking into account "the prevailing [local] marketplace rates for the type of work and the experience of the attorneys." Poulton argued that he retained two Philadelphia firms whose hourly billing rates were higher than the Vermont norm because he could not find Vermont counsel with sufficient *qui tam* experience and conflicts clearance. The court rejected the contention that there were no available Vermont attorneys who were experienced in *qui tam* actions, but did note that "retention of out-of-state counsel was feasibly necessary for consultation on the more complex health care fraud and *qui tam* aspects" of the case. The court thus decided on hourly rates for attorneys and associates that were more than the state norm but less than charged in this instance.

Risk Justifies Increase in Lodestar

Refusing to make reductions for "unsuccessful claims," the court again stated that the settlement does not determine which claims are meritorious. The court also found that use of both of the relators' law firms to perform various tasks was not an unnecessary duplication of effort, and that Fletcher had failed to meet its burden of proving otherwise.

The court agreed to Poulton's request for a ten percent increase in the lodestar amount based on the substantial risk of taking the case, a factor approved in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987), as justifying such an increase.

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

In a decision released in January 2000, an Ohio district court ruled that consequential damages are not recoverable under the False Claims Act. The *qui tam* action, in which the Government has intervened, alleges that Boeing supplied the United States with helicopters made with defective gears and that, knowing of the defects, it submitted false claims for payment. Boeing moved for partial summary judgment, arguing that the Government could not recover the cost of repairing and replacing the helicopters, but only the difference between the cost of the defective gears and compliant gears. In holding that consequential damages are not recoverable, the court relied upon legislative history and prior case law, particularly U.S. v. Bornstein, 423 U.S. 303 (1976). In Bornstein, the Supreme Court held that the proper measure of FCA damages is the difference between what the Government contracted for and what it received. The district court reasoned, however, that the cost of repairing and replacing defective helicopters may in fact be direct or indirect damages, which are recoverable under the FCA, and that this is a causation issue requiring a factual record. Therefore, while the court granted Boeing's motion for partial summary judgment as to the consequential damages issue, it did not rule on whether the actual costs sought by plaintiffs were recoverable.

In March 2000, the district court without analysis denied the parties numerous cross-motions for summary judgment, ruling that many issues of fact remained and setting the case for trial. The court also reiterated its previous holding that Boeing's High Value Items Clause (HVIC) defense could not be asserted as an affirmative defense to a False Claims Act suit. The HVIC is a contractual clause providing that, under certain circumstances, a contractor's liability for equipment provided pursuant to the contract may be limited. If the contractor has liability insurance covering the high value items, the HVIC defense does not apply. The court found that there remained issues over whether the defendant had liability insurance or whether the HVIC defense applied as to the Government's common law claims against Boeing. It therefore denied the motion for summary judgment on those grounds.

In re Subpoena to the U.S. Attorney's Office, Southern District of New York in the case captioned Brock v. Merrill Lynch & Co., et al., 98-498-Civ-Lazzara, venued in the Middle District of Florida ***(SD NY No. M 85-BSJ)***

In January 2000, a New York district court quashed a subpoena directing the Government to submit 111 documents provided to it by a relator in the course of a sealed *qui tam* action. The court held that the petitioner, who was not identified by name and who was not a party to the *qui tam* action, had provided no valid basis for lifting the seal and that the documents sought by the subpoena were protected by the law enforcement privilege and/or the work product privilege. Producing the documents would, according to the court, reveal currently unnamed defendants, uncover methods of investigation, and compromise settlement negotiations. The court further cautioned that, even if the settlement negotiations concluded, which would lift the law enforcement privilege, the petitioner would have to show greater need than it had to date in order to overcome the work product privilege.

***U.S. ex rel. Berge v. The Regents of the University of Alabama et al.* (4th Cir. No. 99-1270)**

In February 2000, the 4th Circuit affirmed a district court order designating an unsuccessful *qui tam* relator as the sole party owing costs to the defendants in a case in which the Government had not intervened as to the merits. The court held that the Government's intervention in the case at the appellate level solely for purposes of defending the constitutionality of the *qui tam* provisions was not sufficient to waive the Government's sovereign immunity. The court noted that the only provision in the FCA to address awarding costs against the Government, § 3730(g), applies to situations where the Government has "brought" the action "under this section." According to the court, the Government did not initiate or become involved in the *qui tam* case, and had only intervened pursuant to 28 U.S.C.A. §2403(a), a general statutory provision authorizing intervention in cases where the constitutionality of a federal law is challenged.

***U.S. v. Sazama* (D. Utah No 1:98-CV-0044SB)**

In February 2000, a Utah district court ruled that a civil False Claims Act suit brought four months after a criminal plea agreement did not violate the double jeopardy clause of the U.S. Constitution. In 1997, Sazama had entered into a criminal plea agreement that required him to pay nearly $11,000 in penalties for submitting false claims to Medicare. Four months later the U.S. brought a civil suit against Sazama for the same false claims, seeking nearly $34,000 in damages under the FCA and common law fraud penalties up to $1.1 million. Sazama argued that at the time of the plea agreement he relied on the interpretation of the double jeopardy clause provided in U.S. v. Halper, 490 U.S. 435 (1989), which he claimed would have barred a subsequent civil action. The Government countered that the subsequent disavowal of Halper in Hudson v. U.S., 522 U.S. 93 (1997) (issued 3 months after Sazama's agreement) allowed the suit to go forward, but even under the standard in Halper the action still would not be barred. The court agreed, noting that Halper expressly provided that a civil FCA action could follow a criminal one. Halper only set a narrow exception for an unusual case where a small-time offender was faced with sanctions overwhelmingly disproportionate to the damage he had caused. Halper, the court noted, provided that an FCA action alleging only one or two false claims would not fall within the purview of the double jeopardy clause. The district court held that Hudson had disavowed the exception set in Halper, but even if it had not, Sazama was not facing sufficiently disproportionate penalties to have caused the exception in Halper to apply. The court further noted that Sazama's defense of laches may only be asserted against the U.S. in rare cases and granted the Government's motion for summary judgment on FCA liability and damages.

FCA NEWS

H.R. 4142 WOULD ELIMINATE MINIMUM FINE

On March 30, 2000, Rep. Robert Ney (R-OH) introduced H.R. 4142, a bill which would amend the False Claims Act by striking the mandatory $5000 to $10,000 civil penalty per false claim. The bill, which was co-sponsored by Reps. Michael Oxley (R-OH), James Traficant (D-OH), and Mark Green (R-WI), has been referred to the House Judiciary Committee. The text of the bill can be found online at http://thomas.loc.gov.

QUI TAM ACTIONS RETURN OVER $3 BILLION TO FEDERAL TREASURY

In February 2000, the Department of Justice announced that more than $3 billion has been recovered in civil fraud cases brought under the *qui tam* provisions of the False Claims Act since the law was amended in 1986. According to DOJ, $3.3 billion has been recovered in *qui tam* suits in which the Government has intervened and $211 million has been recovered in cases litigated by relators without Government intervention. DOJ states that almost half of the recoveries have come in the last two and a half years. Among the most recent recoveries:

- In the largest civil recovery in a health care fraud case, Fresenius Medical Care North America agreed to pay $385 million to resolve *qui tam* allegations that the company and its subsidiaries conspired to pay illegal kickbacks and submitted false claims for laboratory tests and therapies for kidney dialysis patients. Fresenius is the largest provider of dialysis services in the United States. (*See* Judgments and Settlements, page 26.)

- Beverly Enterprises, Inc., the nation's largest nursing home operator, agreed to pay $170 million to settle allegations that it billed Medicare for labor costs incurred in treating non-Medicare beneficiaries at its skilled nursing facilities across the country. (*See* Judgments and Settlements, page 28).

- Chevron Corporation, Mobil Oil, and Oxy-USA have agreed to pay a combined $138.5 million to resolve *qui tam* suits alleging that since 1988 the companies underpaid royalties on oil taken from Federal and Indian lands. (*See* Judgments and Settlements, page 30).

Acting Assistant Attorney General David Ogden of the Civil Division stated:

> The False Claims Act's *qui tam* provisions have provided a remarkable return for the taxpayers of this country. The Department of Justice's recovery of more than $3.3 billion through whistleblower suits demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against the fraudulent use of public funds.

GOVERNMENT FILES CLAIM FOR $1 BILLION IN VENCOR BANKRUPTCY

In re: Vencor, Inc. et al. (D DE Bankruptcy Case Nos. 99-3199 through 99-3327)

On March 9, 2000 the Department of Justice filed a proof of claim for more than $1 billion in the bankruptcy case of Vencor, Inc. and its subsidiaries. Vencor, who along with its 127 subsidiaries and affiliates is one of the largest health care providers in the country, voluntarily filed for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code in September 1999. The Government's claim in bankruptcy stems from its reported intervention in as many as twelve *qui tam* suits against Vencor alleging that over the past decade Vencor defrauded the Medicare program in a variety of ways. Among other allegations, the suits allege that Vencor and its affiliates: (1) illegally shifted costs from wholly-owned subsidiary Vencare Inc., which runs a multimillion dollar contractual health services business, onto Vencor's hospital cost reports; (2) systematically ordered medically unnecessary blood tests on kidney-dialysis patients to boost Medicare billings; (3) placed patients who did not need it into hospice care because Medicare pays more for hospice care than for regular long-term care; (4) changed patient diagnoses to increase Medicare reimbursement; and (5) overcharged Medicare for transportation of nursing home patients. The DOJ has also filed a $290 million proof of claim on behalf of the Health Care Financing Administration alleging overpayments to Vencor from the Medicare program, although no fraud is alleged.

DOD FORMS *QUI TAM* REVIEW PANEL

For an 18-month trial period, the Department of Defense has established a *qui tam* review panel in lieu of supporting the defense industry's legislative efforts to weaken the False Claims Act. The panel will focus on *qui tam* cases against defense contractors where the Department of Justice has declined to intervene. It will provide defense contractors with a forum to persuade the DOD to request the Department of Justice to intervene in *qui tam* cases solely for the purpose of seeking dismissal. The memorandum establishing the panel [*See* Memorandum, page 19] provides that it should make such a recommendation to the Department of Justice only where there is extraordinary justification, and that any recommendation would be nonbinding on the DOD, the DOJ, or the parties to the underlying litigation.

DEPUTY SECRETARY OF DEFENSE

1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

JAN [illegible]

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Civil False Claims Act

The Civil False Claims Act has been the subject of considerable debate in recent years. Our defense industry has argued that the Act should be amended in light of its perception that the Act is applied unfairly and has become an impediment to the Department's ability to attract high-quality commercial firms to the defense market. Others, including our auditing and investigative community, believe the Act is an essential tool to protect the integrity of the procurement process. At my request, the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) and the General Counsel of the Department of Defense have conducted a careful review of the issues associated with the Act. Based upon their review, I have concluded that the Act remains an important tool and we should remain vigilant in discovering and acting upon instances of alleged fraud or other misconduct. The Department will not seek to change the Act. There are, however, actions that the Department can and should take to ensure that the Act is applied consistently in a fair and appropriate manner.

Although the Act plays an important role in protecting the Government's interests and in deterring misconduct, because of the considerable stigma attached to allegations of fraud, the exposure to potentially significant penalties and multiple damages, and the considerable costs of defending against such allegations both to contractors and to the Department of Defense, its provisions should be invoked only in appropriate circumstances. I want to reemphasize that the Act applies only when there was knowledge that a submitted claim was false or when there was reckless disregard of the truth. The Act does not, however, require specific intent to defraud. Innocent or honest mistakes should not be pursued under the Act. In these instances, appropriate contractual or administrative mechanisms should be employed.

In light of these important considerations and the need to take a fresh look at the Department's treatment of matters under the Act, you are directed to review and update your internal procedures for handling allegations of fraud or other misconduct for consistency with the following. First, decisions as to whether to refer a particular matter to the Department of Justice

under the Act must be made by individuals at a suitably high level within your department or agency to ensure that there are sufficient and proper legal and factual bases for doing so, taking into account applicable statutes, regulations, implementing agency guidance, and departmental policies. Second, in making these decisions, all available remedies should be examined in accordance with DoD Directive 7050.5, and only those that are applicable and appropriate under the circumstances should be undertaken. This procedure for referrals should not be construed to affect informal discussions between agency personnel or with Department of Justice personnel before reaching a decision.

In addition to authorizing the Government to initiate an action for alleged violations of the Act, the Civil False Claims Act provides that a private individual, called a relator, may bring a civil action, called a qui tam action, on behalf of the United States. The Government, through the Department of Justice, may elect to intervene in these actions and prosecute the case. Where a qui tam action involves a military department or defense agency, the Department of Justice routinely requests that department or agency to recommend whether the Government should intervene. The considerations discussed above in connection with determining whether to refer a matter to the Department of Justice under the Act apply equally to reviewing a qui tam action and recommending whether the Department of Justice should intervene.

The Act also provides that if the Government does not intervene in a qui tam action, the private individual nevertheless may prosecute that action on behalf of the Government. Although many of these actions are dismissed soon after the Government declines to intervene, some may continue for years, causing contractors to incur substantial costs defending against the allegations, and potentially subjecting the DoD to burdensome discovery and expert witness requests. In some cases, the DoD ultimately may reimburse the contractors for a significant portion of these costs. The Act provides, however, that the Government may move to dismiss a qui tam action subject to certain conditions.

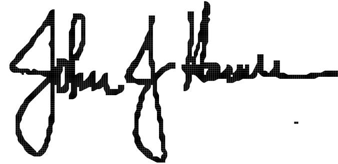
The DoD traditionally has not made recommendations to the Department of Justice concerning dismissal. Although a decision to recommend against intervention in a qui tam action does not necessarily mean that dismissal is warranted, it may be appropriate in some cases for the DoD to take the initiative to recommend that the Department of Justice move to dismiss a qui tam action. Accordingly, your procedures for reviewing qui tam actions should specifically provide for consideration, in those cases where it is recommended that the Government not join the suit, of whether the DoD should recommend that the Department of Justice seek to dismiss.

In addition, I am establishing, for an eighteen month trial period, a Qui Tam Review Panel as an in-house panel that will be available to consider extraordinary cases where the Government has declined to intervene in a qui tam action and the military department or defense agency involved has decided not to recommend that the Department of Justice seek to dismiss the action, but the affected contractor believes that there are compelling reasons that it should be dismissed. A contractor's request for the Panel to consider a particular case must be submitted within a reasonable time after the contractor learns that the Government will not intervene in the qui tam action. The Panel will consider and make recommendations concerning dismissal only in those cases where there is extraordinary justification for a recommendation for dismissal, for example, a case that demonstrably is without merit. The Panel's proceedings will be informal and its deliberations and recommendations will be advisory only and will not be binding on the Department of Defense, the Department of Justice, or the parties to the underlying litigation.

The permanent members of the Panel will be the Director of Defense Procurement, who will serve as the chair, the Deputy General Counsel for Acquisition and Logistics, the Deputy Inspector General, and a senior representative from each military department. A senior

representative of any defense agency that may be involved in a particular qui tam case will serve on the Panel for purposes of considering that case. In addition, the panel may invite DoD subject-matter experts or any other individuals, such as the relator, to provide information, as it deems necessary. The Panel will brief the USD(AT&L) and the General Counsel on its recommendations.

I solicit your personal commitment to ensuring that the Civil False Claims Act is applied by your department or agency in a responsible and appropriate manner. Please provide the USD(AT&L) and the DoD General Counsel with your updated procedures in response to this memorandum within 45 days. The USD(AT&L) and the General Counsel will conduct periodic reviews to determine whether the Panel is proving effective.



Top 1999 *Qui Tam* Recoveries

Company U.S. District Court	Allegations	Government Recovery	Relator Share
Olsten Corporation ND GA	Fraudulent billing for nonreimbursable sales and marketing activities	$40.92 million	Donald McLendon $9.8 million
Fresenius Medical Care Holdings, Inc. ED PA	False billing of Medicare, unbundled tests, kickbacks to physicians	$16.5 million	Franklin West and Robert Kane $3.2 million Elizabeth Strelow $25,500 Christopher Piacentile $20,000
Ventura County, CA CD CA	Fraudulent billing of Medicare for outpatient psychiatric services	$15.3 million	Jerome Lance $2.7 million
Medical Consultants, Inc. d/b/a Emergency Physicians Billing Service WD OK	Submission of false bills to Medicare, Medicaid, TRICARE, and FEHBP on behalf of emergency physicians	$15 million	Estate of Theresa Semtner $3.2 million
Medaphis Inc. WD MI	Subsidiary emergency physician billing service submitted false claims to Medicare, Medicaid, TRICARE, and FEHBP	$15 million	Greg Robinson $2.4 million
Blue Cross and Blue Shield of Colorado and New Mexico Blue Cross and Blue Shield, Inc. D NM	False statements to HCFA regarding performance as Medicare intermediaries	$12 million	Robert Casey and Robert Caswell $1.84 million
Infusion Management Systems, Inc. ND TX	Submission of false bills and reports to Medicare for services not rendered	$10 million	Jennifer Thomas $1.5 million Brupbracher & Associates, Inc. $125,000
Walgreen Co. MD FL	Submission of claims for partially filled prescriptions to Medicaid, TRICARE, and FEHBP	$7.6 million	Louis Mueller $678,584

ALLEGATION: DURABLE MEDICAL EQUIPMENT SUPPLIER FRAUD

U.S. ex rel. Mies v. Rehabilicare, Inc. et al.
(MD FL No. 98-2707-CIV-T-23 C)

In January 2000, DOJ intervened in a *qui tam* suit alleging that Rehabilicare, Inc., Staodyn, Inc., and Henley Healthcare, Inc. violated Medicare regulations in the sale of durable medical equipment. Rehabilicare, which merged with Staodyn and purchased Henley in 1998, sells transcutaneous electrical nerve stimulation (TENS) and neuromuscular stimulator (NMS) units to Medicare beneficiaries. The lawsuit alleges that Rehabilicare and Staodyn used altered, incomplete, or facsimile versions of certificates of medical necessity to support the sale of TENS and NMS units to Medicare beneficiaries, in violation of Medicare regulations. Company employees allegedly would complete patient diagnosis information physicians had failed or neglected to complete. The complaint further alleges that the companies used "hint sheets" attached to the certificates in order to instruct physicians as to what diagnosis and billing codes would most likely result in Medicare reimbursement, and sought reimbursement for equipment supply kits sold at 1000 percent mark-up of their true value. According to the complaint, every beneficiary who rented a TENS or NMS unit was required to purchase it irrespective of whether it had been effective or whether a physician prescribed the sale. The *qui tam* action was filed in 1998 by Elizabeth Mies, a former Medicare Supervisor for Rehabilicare. Jack E. Fernandez, Jr. of Bavol, Bush & Sisco (Tampa, FL) is counsel for the relator. The Government is represented by Assistant U.S. Attorney Steven Nisbet.

ALLEGATION: FRAUDULENT BILLING OF SUBCONTRACTOR COSTS

U.S. v. Boeing North American, Inc. et al.
(CD CA No. ___)

In January 2000, DOJ filed a False Claims Act suit against Boeing North American, Inc., United Space Alliance, and Rockwell International Corporation alleging that the contractors concealed false claims submitted by Omniplan, a Rockwell subcontractor, under NASA contracts. From 1986 to 1993, Omniplan served as a subcontractor under Rockwell's contracts to manage and operate the space shuttle and space station programs for NASA.

According to the complaint, Rockwell assured NASA that Omniplan's costs were reasonable and allowable while it suppressed evidence of fraud on the part of Omniplan. Omniplan, through Rockwell, allegedly charged NASA for buildings and equipment that Omniplan leased at inflated rates to phony companies it created. The suit further alleges that Omniplan operated a pizza delivery service out of a building billed to NASA, and that Omniplan's owners charged as expenses such items as jewelry, a ski lodge, and vacations to Nepal and Singapore. DOJ asserts that Rockwell was aware of many of these improper costs, but risked losing tens of millions dollars in award fees and bonuses which were based in part on how well it managed costs and oversaw its contractors.

After forming the contracts with NASA, Rockwell merged with Boeing and then formed United Space Alliance. In 1995, Omniplan owner Ralph Montijo pleaded

guilty to nearly 180 felony violations stemming from Omniplan's fraudulent practices. Handling this matter for the Government are Assistant U.S. Attorney Faith Devine and DOJ Civil Division attorneys Joel Hesch and Donald Williamson.

ALLEGATION: FALSE NURSING SERVICES CLAIMS

***U.S. ex rel. Longville v. County of Summit et al.* (ND OH No. 5:99CV0738)**

In January 2000, a *qui tam* suit was unsealed alleging that Summit County, Ohio and its Board of Mental Retardation and Developmental Disabilities submitted thousands of false nursing services claims to Medicaid. According to the complaint, the Board billed Medicaid using billing forms that exaggerated the amount of time taken to perform brief tasks and billed under nursing codes when nurses did not perform the services. The complaint further states that the Board billed as nursing services activities which did not constitute those types of services. The suit was filed in April 1999 by Board employees Patricia Longville and Moses McCormick. DOJ declined to intervene. The relators are represented by Warner Mendenhall (Akron, OH).

ALLEGATION: HOME HEALTH CARE COST-SHIFTING

***U.S. ex rel. Marine v. Columbia Adventura Medical Center et al.* (SD FL No. 97-4368)**

In February 2000, DOJ intervened in a *qui tam* suit alleging that Columbia/HCA Healthcare Corporation and nine of its subsidiary hospitals in southeast Florida submitted false claims to Medicare for home health services. Many of the allegations in the lawsuit concern Columbia/HCA's Resource Center, a facility which provided support services for home health care to the nine subsidiary hospitals and which was financed by the hospitals based on their relative proportion of home health visits. The hospitals used Medicare payments for home health services to finance the Resource Center. According to the complaint, one of the subsidiary hospitals was over the Medicare cost cap, but Columbia shifted that hospital's share of Resource Center costs to the other subsidiary hospitals. The other subsidiaries claimed Medicare reimbursement for Resource Center costs that belonged to the ineligible hospital. The suit also alleges that Columbia used the Resource Center for "cost dumping," in which its hospitals submitted Medicare claims for Resource Center expenses which actually included such ineligible costs as copying charges for its Director of Food Services and office space expenses for accounting personnel. Columbia also allegedly billed Medicare twice for the same billing and data processing services. The *qui tam* suit was brought by Michael Marine, a former Division Reimbursement Manager for the southeast Florida division of Columbia/HCA. The FBI investigated this matter for the Government. The relator is represented by Andrew Grosso (Washington, D.C.) and Jonathan Kroner (Miami, FL).

ALLEGATION: FALSE CERTIFICATION OF ANTIMISSILE SYSTEM TESTS

***U.S. ex rel. Schwartz v. TRW Inc.* (CD CA No. CV96-3065)**

In February 2000, a *qui tam* suit was unsealed alleging that military contractor TRW falsely certified tests and evaluations of a key component for the Government's proposed $27 billion

antimissile system. The relator, Dr. Nira Schwartz, was hired by TRW in 1995 as a senior engineer to develop algorithms designed to distinguish between real and fake warheads. According to the lawsuit, the interceptor failed in test after test but TRW insisted that the technology was performing adequately. Schwartz's allegations center on TRW's certifying to the Government that interceptors using TRW's computer programs succeeded 95 percent of the time. The suit alleges that TRW's interceptors succeeded a mere 5 to 15 percent of the time. The DOJ has declined to intervene. After her suit was filed, the DCIS conducted a 3-year investigation, reportedly stating in its final report that TRW's antimissile system contained technical discrepancies and warranted further review. The relator is represented by David Affeld (Los Angeles, CA).

ALLEGATION: BILLING FOR NURSING HOME SERVICES NOT PERFORMED

U.S. ex rel. Marash v. Weitzman ***(ED MI No. 98-CIV-70729)***

In March 2000, DOJ announced that it intervened in a *qui tam* action alleging that Raymond Weitzman, M.D. submitted false claims to Medicare and Medicaid for nursing home patient services he never performed. According to DOJ, Weitzman billed Medicare and Medicaid for millions of dollars in nursing home patient services which he claimed to have rendered in one-day periods, when it would have been impossible for these services to be provided in the time claimed. In January 2000, a federal grand jury indicted Weitzman, a Detroit physician, on criminal charges arising from the same false claims. Assistant U.S. Attorney Michael Reardon is representing the Government.

ALLEGATION: UNDERPAYMENT OF GAS ROYALTIES

U.S. ex rel. Wright et al. v. AGIP et al. ***(ED TX No. 9:98CV30)***

U.S. ex rel. Osterhoudt v. Amoco et al. ***(ED TX No. CA98CV101)***

U.S. ex rel. Murray v. Mobil ***(ED TX No. 9:99CV340)***

In March 2000, DOJ announced that it intervened in three *qui tam* actions against Exxon-Mobil, Shell Oil Company, and Burlington Resources, Inc. alleging that the companies knowingly underpaid royalties owed to the U.S. and Indian nations for the extraction of gas from Federal and Indian lands. According to DOJ, the defendants hold mineral lease agreements administered by the Department of Interior and the companies' alleged undervaluation of gas extracted pursuant to these leases resulted in underpayment of royalties.

Since 1998, DOJ has intervened against 7 oil companies for knowingly undervaluing oil extracted from Federal and Indian lands and has collected more than $300 million from defendants in these oil royalty suits. *See* ***U.S. ex rel. Johnson et al. v. Shell Oil Company***, Judgments and Settlements, page 30.

***U.S. ex rel. Ven-A-Care of the Florida Keys, Inc. v. National Medical Care, Inc. et al.* (D MA No. 97-10962-NG)**

***U.S. ex rel. Ven-A-Care of the Florida Keys, Inc. v. Fresenius Medical Care Holdings, Inc. et al.* (D MA No. 97-11033-NG)**

***U.S. ex rel. Dana R. Austin v. National Medical Care, Inc.* (D MA No. 94-12164-NG)**

***U.S. ex rel. Jay A. Buford, Russell J. Davis, and William L. Schoff v. LifeChem, Inc. et al.* (D MA No. 95-10706-NG)**

***U.S. ex rel. Price v. W.R. Grace & Co., et al.* (D MA No. 97-11022-NG)**

***U.S. ex rel. Bradford v. National Medical Care, Inc. et al.* (SD FL No. 96-3350)**

In January 2000, Fresenius Medical Care North America agreed to pay the Government **$486 million** in criminal fines and civil penalties to resolve allegations that three subsidiaries it acquired in its 1996 purchase of National Medical Care, Inc. (NMC) submitted false lab testing claims and conspired to pay illegal kickbacks. The settlement — the largest one for health care fraud in the nation's history — includes $101 million in criminal fines and $385 million to resolve FCA liability. The culmination of a five-year investigation conducted jointly by a number of federal agencies and involving false claims submitted to six government health care programs, the settlement fully resolves five *qui tam* suits and partially resolves a sixth. Fresenius is the world's largest provider of kidney dialysis products and services.

The global settlement includes four agreements that resolve the various false claims allegations against National Medical Care and its subsidiaries LifeChem, Inc., NMC Homecare, Inc., and NMC Medical Products, Inc. The largest settlement requires Fresenius to pay $253.3 million to resolve allegations that it filed fraudulent claims with Medicare and other government agencies related to intradialytic parenteral nutrition (IDPN), a therapy for patients undergoing dialysis. DOJ asserted that NMC Homecare submitted claims for this nutritional treatment that were based on fraudulent medical data, billed for equipment that was not used, and paid kickbacks to facilities to induce referral of business for IDPN therapy. In addition to the settlement payment, Fresenius agreed to withdraw approximately $136.9 million in IDPN claims that it has pending or are about to be filed. *Qui tam* cases regarding these false claims were filed by a former NMC employee, Dana R. Austin, and a competitor of NMC, Ven-A-Care of Key West, Florida. Relators received $44.8 million.

In a separate settlement Fresenius agreed to pay $112.2 million to resolve allegations that LifeChem filed false and fraudulent claims with Medicare and other government programs for blood tests which were either unnecessary or which had already been paid for by Medicare. Relators Jay A. Buford, Russell J. Davis, and William L. Schoff, all of whom are former NMC Medical Products salesmen, will receive over $18.1 million. There remain some outstanding claims in this *qui tam* suit that were not resolved by the settlement. DOJ has declined to intervene in the pursuit of these outstanding claims.

The third settlement agreement, resolving claims that NMC failed to properly report and repay credit balances and other overpayments it received from Medicare, calls for a $16.8 million payment from Fresenius. Two *qui tam* actions, one filed in Boston by Gregory S. Price and one in Miami by Richard Bradford, will be

settled by this agreement. The two relators, both former NMC employees, will receive $2.9 million.

The last of the settlement agreements resolves claims that Medicare was improperly billed by NMC for diagnostic tests that were part of clinical studies. These claims were brought directly by the Government.

Fresenius entered into the four false claims settlements as part of a larger overall resolution of civil and criminal claims. The company has also entered into a Corporate Integrity Agreement that requires compliance audits and training to prevent future violations. All three subsidiaries are permanently excluded from participation in all federally funded health care programs.

Representing the relators in the IDPN suits were Atlee Wampler III and James Breen of Wampler, Buchanan & Breen (Miami, FL) for Ven-A-Care and Robert Vogel (Washington, D.C.) for Dana Austin. Representing Buford, Davis, and Schoff in the LifeChem suit was John Rankin. In the overpayment suits, relator Price was represented by W. Christian Hoyer of James, Hoyer, Newcomer, Forizs & Smiljanich (Tampa, FL) and relator Bradford was represented by Robert Barnett (Miami, FL). Representing the Government were Assistant U.S. Attorneys Patricia Connolly, Suzanne Durrell, Mark Lavine, and Susan Winkler and DOJ Civil Division attorney Maya Guerra.

***U.S. v. Truman Medical Center et al.* (WD MO No. 99-0498-CV-W-BC)**

In January 2000, Truman Medical Center and Hospital Hill Health Services Corporation, Inc. agreed to pay the Government **$330,000** to resolve a False Claims Act suit alleging that they submitted false claims to the Medicaid program. The defendants allegedly billed Medicaid for prenatal care for indigent women that was not in fact provided or that was provided but should have been billed at a much lower rate. The defendants also allegedly submitted claims to Medicaid indicating that doctors had performed deliveries of newborn children to indigent mothers, when the deliveries were instead performed by nurses, medical students, or others whose services are not eligible for Medicaid reimbursement. Assistant U.S. Attorney Andrew Lay represented the Government.

***U.S. ex rel. Under Seal v. Columbia Regional Hospital* (D MO No. ___)**

In January 2000, Columbia Regional Hospital of Columbia, Missouri agreed to pay the Government **$359,000** to settle a *qui tam* suit alleging that the hospital improperly coded Medicare and Medicaid claims for pneumonia patients. The lawsuit alleged that from 1993 to 1996 the hospital routinely used diagnosis codes to bill for treatment of a more complex form of pneumonia than was supported by the medical records, thereby increasing reimbursement from Medicare and Medicaid. The relator's name remains under seal. The matter was investigated by HHS OIG. Assistant U.S. Attorney Andrew Lay represented the Government.

***U.S. v. Stephen K. Pettey* (D UT No. 2:99 CV-0631-C)**

In January 2000, Stephen K. Pettey was ordered to pay the Government **$258,233** by default judgment to resolve a False Claims Act suit alleging that he bilked the U.S. Postal Service. The lawsuit, filed in 1999, alleged that Pettey fraudulently tendered checks to the U.S. Postal Service for business postage on checking accounts that he knew were closed. Assistant U.S. Attorney Eric Overby represented the Government in this matter.

U.S. ex rel. Todarello v. Beverly Enterprises, Inc. (ND CA No. C96-3697 TEH)

In February 2000, Beverly Enterprises, Inc. — the nation's largest nursing home operator — agreed to pay the Government **$170 million** to settle a *qui tam* suit alleging that Beverly conducted a nationwide scheme to defraud Medicare. The action was filed in 1995 by Domenic Todarello, who formerly headed a number of Beverly nursing homes in California and Arizona. In a related settlement, Beverly subsidiary Beverly Enterprises-California, Inc. agreed to pay a criminal fine of $5 million, divest itself of 10 nursing homes, and plead guilty to mail fraud and false statement charges. In addition, Beverly signed a Corporate Integrity Agreement with HHS.

Beverly, which is headquartered in Ft. Smith, Arkansas, has 561 nursing homes in 32 states. Beverly also operates assisted-living centers, home care centers, outpatient clinics, and physical rehabilitation therapy services. According to DOJ, from 1992 to 1998 Beverly billed Medicare for labor costs incurred in treating non-Medicare beneficiaries at its skilled nursing facilities across the country. DOJ further alleges that Beverly prepared false documents, such as phony nurse sign-in sheets, to support its claims for payment, and that it provided subsidiary Beverly-California, Inc. with fabricated nursing cost figures designed to maximize profits and avoid detection by Medicare auditors. The relator's share of the civil settlement was 17 percent or $28.9 million. The relator was represented by Francis Balint, Jr. of Bonnett, Fairbourn, Friedman & Balint and attorneys John Stoia, Jr. and Jeffrey Lawrence of Milberg, Weiss, Bershad, Hynes & Lerach (Los Angeles, CA). The case was investigated by HHS OIG and the FBI. The Government, in its civil case, was represented by Assistant U.S. Attorney Gail Killefer and Laurie Oberembt of the DOJ Civil Division.

CRSS, Inc. and Metcalf & Eddy, Inc.

In February 2000, defense contractors CRSS, Inc. and Metcalf & Eddy, Inc. agreed to pay **$16.7 million** to resolve allegations of regulatory violations and improper accounting practices in their work under a foreign military sales contract.

According to DOJ, the contractors' joint venture was awarded the Peace Shield Contract for the construction of an air defense system in Saudi Arabia in 1984. The settlement resolves allegations that the joint venture improperly obtained reimbursements for subcontractor costs from the U.S. before it paid out those costs and that it violated applicable cost accounting standards. The joint venture will pay $8.5 million to resolve liability under the False Claims Act and other laws for the alleged payment timing violations, and CRSS will pay $8,172,000 to settle allegations regarding its accounting practices under the contract. This matter was handled for the Government by Assistant U.S. Attorney Glenn MacTaggart and Stephen Altman and Richard Sofield of the DOJ Civil Division.

University Medical Center

In February 2000, University Medical Center of Tucson, Arizona agreed to pay the Federal Government **$309,000** and the Arizona Health Care Cost Containment System Administration $21,000 to settle allegations that it overcharged for outpatient clinical laboratory services. According to DOJ, the hospital overcharged state and federally funded health care programs for outpatient clinical laboratory services by double-billing and "unbundling." In this

instance, unbundling refers to the practice of using two or more billing codes in lieu of the one proper code in order to increase reimbursement. The hospital had already instituted a compliance plan in 1998. The Government was represented by Assistant U.S. Attorney David Duncan.

U.S. v Page Avjet Corporation ***(WD TX No. SA-97-CA-781-EP)***

In February 2000, DOJ announced that Page Avjet agreed to pay nearly **$1.4 million** to settle a False Claims Act suit alleging that the company improperly used U.S. funds to pay for foreign goods and services. Page Avjet, a now defunct San Antonio aircraft maintenance company, entered into numerous purchase orders financed by the U.S. under the Foreign Military Sales Program to supply $1.25 million worth of aircraft ground support equipment to the Government of Israel. DOJ alleges that, in spite of the law requiring that goods and services supplied under foreign aid contracts be manufactured in the U.S., Page Avjet subcontracted with an Israeli firm to supply the goods. Caroline Mark of the DOJ Civil Division represented the Government.

Medical Center at Princeton

In February 2000, the Medical Center at Princeton agreed to pay the Government **$2.1 million** to resolve allegations that the multi-facility health care provider violated Medicare regulations in its billings for outpatient procedures. According to the settlement, from 1992 to 1997 the Medical Center billed Medicare for outpatient procedures as if they were inpatient procedures in order to increase Medicare reimbursement. The Medical Center, which includes a 449-bed community teaching hospital, is located in Princeton, New Jersey. The Government was represented by Assistant U.S. Attorney Michael Chagares.

U.S. ex rel. Reppine v. University of Chicago Hospitals et al. ***(ND IL No. 96 C 8273)***

In February 2000, the University of Chicago, a faculty physician's group, and the University of Chicago Hospitals agreed to pay the United States and the State of Illinois **$10.9 million** to settle a *qui tam* suit alleging that they filed false claims for reimbursement to Medicare and Medicaid. The University allegedly submitted claims for inpatient services that were not supported by sufficient documentary evidence and filed claims for both inpatient and outpatient services that were wrongly coded. The *qui tam* suit was filed in 1996 by Al Reppine, who previously worked for an affiliate of the University as a registered nurse. The relator's share was $1,404,473 from the $8.275 million paid to the Federal Government and $445,527 from the $2.625 million paid to the State of Illinois. Steve Cohen (Chicago, IL) was counsel for the relator. The Government was represented by Assistant U.S. Attorney Linda Wawzenski.

Charter Behavioral Health System

In February 2000, DOJ announced that Charter Behavior Health System of Jackson, Mississippi agreed to pay **$600,000** to resolve allegations that it submitted thousands of false claims for psychiatric services to Medicare and Medicaid. DOJ alleged that from 1992 to 1999 Charter engaged in "upcoding," or billing the Government for a higher level of service than actually provided, on bills it submitted on behalf of local psychiatrists. The settlement also resolves allegations that, to increase Medicare and Medicaid reimbursement, Charter characterized weekly treatment team meetings as group therapy even though there were no patients present and no psychiatric

services were provided. Charter, Inc. recently filed for Chapter 11 bankruptcy. The matter was handled for the Government by Assistant U.S. Attorney Cliff Johnson.

U.S. v. Salti et al. ***(ND OH No. 1:96CV1065)***

In February 2000, an Ohio district court awarded the Government **$71 million** in a False Claims Act suit alleging that Mohammed and Mahmoud Salti conspired to defraud the Federal Food Stamp and the Women, Infants, and Children (WIC) Benefits Program. The Saltis owned numerous stores from which they were initially licensed to redeem food stamps and coupons. After being disqualified from these programs for violating applicable regulations, they transferred ownership of the stores to others. These were sham transfers, in that the nominal owners continued to act under the control and direction of the Saltis in fraudulently obtaining food stamps and WIC coupons. The nominal owners illegally purchased food stamps and WIC coupons for cash at less than face value and then redeemed them to the Government at face value to earn a profit. The Saltis are reportedly in their home country of Jordan and have refused to return to the United States. *See* ***U.S. v. Salti et al.***, Decisions, page 6.

U.S. ex rel. Johnson et al. v. Shell Oil Company et al. ***(ED TX No. 9:96 CV66)***

In March 2000, Conoco, Inc. agreed to pay **$26 million** to settle a *qui tam* action alleging that the company underpaid royalties for oil produced on Federal and Indian land. This settlement follows a January 2000 settlement by Chevron Corporation arising out of the same *qui tam* suit, in which Chevron agreed to pay **$95 million** to resolve its liability.

The *qui tam* action was filed in 1996 by J. Benjamin Johnson and John Martinek, former employees of Atlantic Richfield Co. The suit alleged that 14 oil companies engaged in systematic underreporting for millions of barrels of oil. According to DOJ, the defendants were required to submit reports reflecting the amount and value of oil they produced pursuant to leases administered by the Department of Interior. Instead, the oil companies allegedly submitted reports for a ten-year period that undervalued the oil and, as such, they paid fewer royalties than owed. DOJ has previously reached settlement agreements with several other defendant oil companies in this action, including a $45 million settlement with Mobil Oil Company and a $7.3 million settlement with Oxy USA Inc.

The relators' share was approximately $14.5 million in the Chevron settlement and $4.2 million in the Conoco settlement. Michael Havard and Reuben Guttman of Provost & Umphrey Law Firm (Beaumont, TX) represented the relators.

U.S. ex rel. Scott v. Connecticut General Life Insurance Company Medicare Administration ***(D MD No. AMD-97-2340)***

In March 2000, Connecticut General Life Insurance Company, a subsidiary of Cigna Corp., agreed to pay **$8.9 million** to settle a *qui tam* action alleging that it submitted false claims to the Government in its role as a Medicare carrier. The lawsuit alleged that Connecticut General overcharged the Government for millions of dollars in paper costs incurred in connection with printing Medicare forms and checks. The suit further alleged that from 1990 to 1992 Connecticut General overstated pension and benefit costs and charged HCFA for unallowable corporate overhead costs. The company failed to disclose the overcharges during a Government audit.

The *qui tam* suit was filed in 1997 by Peter Scott, a former manager and 40-year employee of Cigna. The relator's share was $840,000. J. Stephen Simms of Greber & Simms (Baltimore, MD) represented the relator. The Government was represented by Assistant U.S. Attorney Hollis Fleischer.

Eisenhower Medical Center

In March 2000, DOJ announced that Eisenhower Medical Center of Rancho Mirage, California agreed to pay **$1.3 million** to resolve allegations of fraudulent Medicare billings for magnetic resonance imaging (MRI) and neurological diagnostic tests. According to DOJ, most of the tests were performed on patients who responded to advertisements by Dr. Isaac Sultan, a neurologist with staff privileges at Eisenhower. DOJ alleges that Dr. Sultan would diagnose every patient with the same disorder, radiculopathy, which would necessitate that the patient receive a battery of tests from Eisenhower. Sultan would then perform the tests himself, but would do so after normal business hours and without other physicians present. Sultan purportedly billed Medicare for far more tests than could normally be done in the amount of time claimed. According to the Government, Eisenhower was aware of these practices but refused to discipline Dr. Sultan. The matter was handled for the Government by Assistant U.S. Attorney Susan Hershman.

U.S. ex rel. Bond v. Jacobs Engineering Group, Inc. ***(CD CA No. CV-97-4837-HLH)***

In March 2000, DOJ announced that Jacobs Engineering Group, Inc. agreed to pay **$35 million** to settle a *qui tam* suit alleging that the company improperly billed for inflated lease payments under its contracts with various government agencies. Jacobs, an engineering, construction, and maintenance contractor, sold its Pasadena, California corporate headquarters in 1982 and then rented the property at a higher cost than it would have paid had it still owned the property. In reimbursement claims under various contracts with the DOD, the Department of Energy, and the EPA, Jacobs allegedly included as "indirect costs" full rental costs for the building in violation of a regulation barring companies from charging the Government anything over the cost of ownership in the event of a sale/leaseback. DOJ also alleged that Jacobs falsely certified in many of the bills and other documents submitted to the agencies that it had identified and excluded all unallowable costs and that Jacobs made false representations to a federal auditor regarding these charges. Former Jacobs employee Edwin Bond filed the *qui tam* action in 1997, but was dismissed from the action last year; he has appealed. Michael Dawson (Claremont, CA) is counsel for the relator. The Government was represented by Assistant U.S. Attorney Donna Maizel.

U.S. ex rel. Peterson v. Maxwell-Sierra ***(D NV No. CV-N-94-00704-ECR)***

In March 2000, DOJ announced that Nevada defense contractor Maxwell-Sierra agreed to pay **$320,000** to settle a *qui tam* action alleging that it sold improperly tested electronic parts to the DOD and NASA. The lawsuit was filed in 1994 by Scott Peterson, a former technician and quality assurance employee of the company. The suit alleged that Maxwell-Sierra and five of its current and former employees improperly tested or failed to test essential electronic components in several military and aerospace systems. Maxwell-Sierra's contracts with DOD and NASA required these components to be manufactured and tested in accordance with detailed military specifications. Maxwell-Sierra is a division of San Diego-based Maxwell

Technologies. DCIS, NASA OIG, the Air Force's Office of Special Investigations, and the Army's Civil Investigation Command investigated the matter. The relator's share was 15 percent or $48,000.

U.S. ex rel. McMorrough et al. v. Northrop Grumman Corp. ***(WD LA No. 95-0382)***

In March 2000 defense contractor Northrop Grumman, agreed to pay the Government **$750,000** to settle a *qui tam* suit alleging that it failed to properly treat 5000 aluminum replacement parts used on military aircraft. The action was filed in 1995 by two former Northrop Grumman employees, former repair station chief inspector Theodore McMorrough and former station manager Sammy K. Hanson. The lawsuit alleged that furnaces used to manufacture new aluminum replacement parts by Northrop Grumman were not calibrated or tested in order to heat treat the parts for strength and flexibility.

The settlement resolves those portions of the suit in which the DOJ intervened. The relators have made additional claims against Northrop Grumman which the Government has declined to join. These allegations involve claims that Northrop Grumman overcharged the DOD for certain repairs, bought uncertified replacement parts, and failed to follow proper procedures in making repairs. The relators' share was 24 percent or $180,000. Hunter Lundy of Lundy & Davis (Lake Charles, Louisiana) represented the relators. Assistant U.S. Attorney John Broadwell represented the Government.

U.S. ex rel. Sarasola et al. v. St. Johns Home Health Care Agency, Inc. et al. ***(SD FL No. 95-1278-CV)***

In March 2000, DOJ announced that the Estate of Arnold Friedman agreed to pay **$120,700** to settle a *qui tam* action alleging that St. Johns Home Health Care, Inc. of Florida submitted claims to federally funded health care programs for services never performed, medically unnecessary services, and services rendered to ineligible beneficiaries. The *qui tam* suit was filed by former St. Johns employees Valentin Sarasola and Mario Cardoso. The relator's share was 15 percent or $18,100. The case was handled for the Government by Assistant U.S. Attorney Barbara Bisno.

TAF News

FCA Conference Materials

- As part of its information clearinghouse activities, TAF has materials available for distribution at conferences and other programs. Information can be tailored to a legal or general audience. Resource material, including statistical information, is also available for those writing articles on the FCA.

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.

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- 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 recent legislative developments. TAF's site is located at http://www.taf.org.

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Quarterly Review Submissions

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

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- 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 electronic mail system for Attorney Network members.

TAF Library

- TAF's FCA library is open to the public, by appointment, during regular business hours. 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.