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TAXPAYERS AGAINST FRAUD

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, Department of Justice interventions, and settlements.

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

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

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Public Disclosure Bar and Original Source Exception

U.S. ex rel. LeBlanc v. Raytheon, 1995 U.S. Dist. LEXIS 1055 (D.Mass. Jan. 25, 1995)

In U.S. ex rel. LeBlanc v. Raytheon, the district court dismissed a *qui tam* action containing allegations of defects in the Patriot missile that the relator would not have known "but for" public disclosures in congressional hearings and news articles. The relator's added analysis that Raytheon must have violated quality control requirements was not sufficient to save the action from the public disclosure bar.

LeBlanc's suit, filed in 1992, alleged that Raytheon made false claims to the Government concerning the Patriot Air Defense Missile System (Patriot) before, during, and after the Persian Gulf War. Specifically, LeBlanc claimed that Raytheon failed to comply with contractual requirements, including MIL-Q-9858A (a general quality control specification), and sold the Government nonconforming Patriots that malfunctioned during the Gulf War. Further, Raytheon allegedly covered up the Patriot's failures, misrepresented its effectiveness, and then sold billions of dollars worth of additional Patriots to the Government. LeBlanc supported his allegations with public statements made by Congressman John Conyers and M.I.T. Professor Theodore Postol, both of whom had suggested that Raytheon "misrepresented" the Patriot's Gulf War performance.

"Special Expertise" Insufficient if All Material Information is Publicly Disclosed

In considering whether LeBlanc's allegations had been publicly disclosed before the filing of his complaint, the court first found that Rep. Conyers' and Prof. Postol's statements had previously been made public. When the court then compared LeBlanc's allegations of Patriot defects against public statements about the Patriot, it found that all the allegations had been disclosed publicly in a congressional hearing, in published articles, or in a GAO report. At the hearing on the motion to dismiss, LeBlanc's counsel conceded that LeBlanc's allegations concerning both the Patriot's defects and Raytheon's exaggerations of success had, in fact, been previously disclosed publicly.

LeBlanc argued, however, that his allegation that Raytheon failed to comply with MIL-Q-9858A had not been publicly disclosed and that its inclusion in the complaint was sufficient to avoid the public disclosure bar. He contended that his "special knowledge" of government contracting enabled him to conclude from the previously disclosed information that Raytheon must have failed to comply with the quality control specification.

Relying on U.S. ex rel. Stinson v. Prudential, 944 F.2d 1149 (3rd Cir. 1991) and U.S. ex rel. Springfield Terminal v. Quinn, 14 F.3d 645 (D.C.Cir. 1994), the district court ruled that "special expertise" does not suffice to overcome the jurisdictional bar. A relator must possess substantive information about the fraud, not just background information which enables him to understand the significance of a publicly disclosed transaction or allegation. Stating the rule another way, the court said that expertise in a particular field does not give a relator the basis for a *qui tam* suit "when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts." In the court's view, LeBlanc had merely deduced violations from his work experience and the prior public statements. Anyone with defense procurement knowledge after reading about the Patriot problems could have concluded that Raytheon failed to comply with MIL-Q-9858A, which requires inspections, testing, and other measures to ensure that substantive specifications are met.

Court Agrees with 4th Circuit's Interpretation of "Based Upon" as "Derived From"

LeBlanc advanced the alternative argument that even if the information had been publicly disclosed, he did not "base" his complaint on these disclosures but merely used them as "points of departure" for his own investigative efforts. The district court concluded that LeBlanc's investigation primarily involved speaking with Prof. Postol and compiling documents from the Professor and other Patriot experts. There was no contention by LeBlanc that he had "inside" information concerning the alleged false claims or that he himself had seen the confidential Patriot specifications.

In deciding the matter, the district court noted the dispute among the circuits in interpreting "based upon" in the public disclosure bar. It found persuasive the interpretation in U.S. ex rel. Siller v. Becton Dickinson, 21 F.3d 1339 (4th Cir. 1994) that a relator's action is "based upon" a public disclosure of allegations only "where the relator has actually derived from the disclosure the allegations of his complaint." The court also noted a similar interpretation made earlier in its own district in U.S. ex rel. LaValley v. First National Bank of Boston, 707 F. Supp. 1351 (D.Mass. 1988). On the other hand, some circuits, most notably the Tenth and Second, had barred *qui tam* suits regardless of where the relator got the information if the allegations had been publicly disclosed, unless the relator satisfied the "original source" exception. To support this view, they had defined "based upon" to mean "supported by" and had barred *qui tam* suits even if partly based upon publicly disclosed allegations. Despite its siding with the Fourth Circuit interpretation, the district court avoided resolving the issue for this case,holding that under either interpretation LeBlanc's suit was barred.

LeBlanc Had No Information "but for" the Public Disclosures

According to the district court, LeBlanc would necessarily lose if mere public disclosure of the allegations invoked the jurisdictional bar since the court had demonstrated that the allegations about the Patriot and Raytheon had already been publicly disclosed. Applying the Siller interpretation, the court concluded that because LeBlanc had admitted to using the publicly disclosed allegations as "points of departure," he would not have known anything about the Patriot problems "but for"the public disclosures. Quoting Siller, the court ruled that LeBlanc "actually derived from the disclosure the allegations upon which his *qui tam* action is based." Because LeBlanc conceded that he was not an "original source" of the allegations, the court did not need to address the "original source" exception to the public disclosure bar.

U.S. ex rel. Barth and International Brotherhood of Electrical Workers v. Ridgedale Electric Inc., 1995 U.S. App. LEXIS 532 (8th Cir. Jan. 13, 1995)

In U.S. ex rel. Barth et al. v. Ridgedale Electric Inc., the 8th Circuit affirmed a lower court dismissal of a *qui tam* action as jurisdictionally barred because the relators lacked "original source" standing under §3730(e)(4)(B) of the Act. The court found that International Brotherhood's knowledge of the false claims was insufficiently "direct" and that Barth, a Ridgedale employee, had not "voluntarily" provided his information to the Government as required by the "original source" exception to the public disclosure bar.

The relators filed their complaint in 1992, alleging that Ridgedale submitted false certifications of contract compliance and fraudulent payroll reports in order to conceal its failure to pay Davis-Bacon Act prevailing wages on a federally-funded construction project. Specifically, Ridgedale falsely classified the positions held by some of its employees. Moreover, the complaint alleged that Ridgedale's president requested that Barth prepare false time cards to indicate that he had been a supervisor on the project even though he had no supervisory duties. After complying with the request, Barth was laid off by Ridgedale. A union representative, Michael Priem, became suspicious that the payroll information was false based on his observations of the job site, interviews with employees, and review of the company's reports. Priem then relayed his concerns to a HUD investigator, who in turn contacted Barth regarding the false classifications.

Relators Had "Independent" Knowledge

In reviewing the lower court decision, the 8th Circuit stated that the False Claims Act (FCA) must be analyzed in the context of what the circuit court saw as "its twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." Accordingly, to prevent parasitic suits Congress created the "public disclosure" bar and "original source" exception. Because the Union and Barth conceded on appeal that a public disclosure had occurred, the 8th Circuit only addressed the "original source" issue. Under the Act, in order to be an "original source," the relator must have "direct" and "independent" knowledge of the information and "voluntarily" provide it to the Government before filing suit. The circuit court found that both the Union and Barth had "independent" knowledge of the fraudulent activity apart from the public disclosures. The inquiry therefore focused on whether the Union's knowledge was "direct" and whether Barth "voluntarily" provided his information.

First-Hand Information Required for "Direct" Knowledge

The 8th Circuit adopted a narrow definition of "direct" knowledge as that which is "unmediated by anything but the plaintiff's own labor" or "marked by absence of an intervening agency." The circuit court reasoned that the "direct" requirement prevents parasitic lawsuits by "disinterested outsiders" who "stumble" upon information. Under its interpretation, the *qui tam* provisions were not intended to permit suits by persons "who obtain secondhand information from an individual who has direct knowledge." As such, the 8th Circuit cited with approval other decisions that had barred relators who did not have "first hand knowledge."

The circuit court then found that the lower court properly concluded that Priem derived his information from intermediary sources by observing the job site, reviewing the publicly-filed payroll records, and interviewing Ridgedale employees. The 8th Circuit characterized Priem as merely a "recipient of information and not a direct source" because he was "simply gathering information on behalf of the Union." Since he lacked "direct" knowledge, Priem was not an "original source" under the Act, and the Union's claim was jurisdictionally barred.

"Voluntarily" Not Satisfied if Government Initiates Interview

Barth, on the other hand, did have "direct" knowledge because of his employment with Ridgedale. The circuit court found, however, that Barth did not "voluntarily" provide his information to the Government because he provided information only after being contacted by a HUD investigator. According to the 8th Circuit, the FCA is intended to encourage individuals to come forward at the earliest possible time and to discourage those who remain silent. In the view of the court, to allow Barth to proceed with his claim would reward him for merely complying with the Government's investigation. Since Barth failed to satisfy the "voluntarily" requirement of the "original source" exception, the 8th Circuit concluded that his suit was properly dismissed and affirmed the judgment of the district court.

Editor's Note: The Eighth Circuit's interpretation of "voluntarily" appears to conflict with legislative history. Senator Grassley, a main sponsor of the 1986 FCA Amendments, stated on August 11, 1986 the following: "In the definition of 'original source' the requirement that the individual 'voluntarily' informed the Government or news media is meant to preclude the ability of an individual to sue under the qui tam section of the False Claims Act when his suit is based solely on public information and the individual was a source of the allegations only because the individual was subpoenaed to come forward. However, those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information which later led to a public disclosure would be considered to have 'voluntarily' informed the Government or media and therefore considered eligible qui tam relators." Congressional Record, August 11, 1986, S 11244.

Statute of Limitations

Hyatt v. Northrop Corp. et al., Order Dismissing Complaint Against All Defendants, No. CV 93-2529-KN (C.D.Cal. Jan. 19, 1995)

In Hyatt v. Northrop Corp. et al., the district court dismissed relator Hyatt's complaint on statute of limitations grounds, ruling that the three year tolling provision in the FCA statute of limitations, 31 U.S.C. §3731(b)(2), applies only to actions brought by the Government and not to *qui tam* suits. Applying the six year limitations period in §3731(b)(1), the court dismissed all of Hyatt's claims since the alleged violations occurred before May 13, 1986 and suit was not filed until April 30, 1993. Hyatt, who had previously filed two *qui tam* actions against Northrop, brought the present action against Northrop and several other subcontractors, alleging various fraudulent acts in connection with the Blue Laser, MX Missile, and B1-B Bomber.

1986 Amendments to Statute of Limitations Apply Retroactively

Judge Kenyon rejected defendants' contention that the 1986 amendments to the statute of limitations, codifying the three year tolling provision, are not to be applied retroactively. The court relied on the recent Ninth Circuit decision in Chenault v. United States Postal Service, 37 F.3d 535 (9th Cir. 1994), which applied the reasoning in Landgraf v. USI Film Prods, 114 S.Ct. 1483 (1994). Chenault held that because statutes of limitation are generally procedural, they should be applied retroactively unless they resurrect a "stale" claim, result in "manifest injustice," or there is clear legislative intent to the contrary. Judge Kenyon found that Hyatt's claims were not "stale" prior to the enactment of the 1986 amendments. Furthermore, defendants had failed to show that retroactive application would cause "manifest injustice" or that such application would contravene legislative intent.

Three Year Tolling Provision Does Not Apply to Hyatt's *Qui Tam* Action

The district court next ruled that §3731(b)(2), which allows no action to be brought "more than 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," should apply only to actions brought by the Government and not to *qui tam* actions. Judge Kenyon recognized that the §3731(b) statute of limitations explicitly applies to "a civil action under §3730," which would include either a Government initiated or relator initiated action; however, he reasoned that when a statute's "plain meaning" leads to absurd results or results clearly at variance with the policy behind the legislation, the court must look past the literal language to read the statute consistent with its overall policy.

In Judge Kenyon's view, based in part on the House and Senate Reports on the 1986 FCA Amendments, Congress enacted §3731(b)(2) to ensure that "the Government" does not lose its right to file actions because of the inherent difficulty in detecting fraud. However, when, as in this case, the relator knows about the violations "well prior to three years before bringing the action," the purpose behind the tolling provision does not apply. Under such circumstances, it is the relator's delay, not the inherent difficulty in discovering fraud, that has prevented the action from being filed earlier. In a footnote Judge Kenyon rejected Hyatt's argument that the tolling provision should apply to him because he "effectively stands in the shoes of the government." The judge noted that if this were so, the suit would still be dismissed because the three year tolling period would begin to run when the relator learned of the fraud.

Elements of Liability

U.S. ex rel. Piacentile v. Wolk, Advanced Care Associates and Miller, Memorandum Opinion, No. 93-5773 (E.D.Pa. Jan. 13, 1995)

In U.S. ex rel. Piacentile v. Wolk et al., the district court allowed a *qui tam* action to proceed against one owner of a small medical supply company but dismissed the complaint against the other owner for lack of any allegation that the owner had taken any action to submit or cause the submission of a false claim. While the complaint alleged knowledge by the second owner, the court found that knowledge plus action is necessary to state a violation under the FCA.

The Government intervened in this case alleging that Advanced Care Associates knowingly altered Certificates of Medical Necessity (CMNs) after they were signed by a physician and included false information on the Medicare Claims Forms (Forms 1500). According to the complaint, Wolk, one of the owners of Advanced Care, supervised and instructed the employees who falsified the CMNs and signed the Forms 1500 knowing that they contained false information. It was also alleged that Miller, co-owner of Advanced Care, knew that the CMNs were being altered by Wolk, that Miller benefited financially from the fraud, and that he knew Wolk destroyed records to conceal the fraud.

Information Added to CMN without Physician Authorization is "False"

Before the district court were two motions to dismiss under F.R.C.P. 12(b)(6) for failure to state a claim. Wolk argued that it is possible for a CMN to be altered without the physician's authorization but not contain false statements and thus not constitute a FCA violation. The court disagreed. CMNs require a physician's signature which certifies that the information therein represents his professional judgment. Moreover, CMNs only embody information ratified by the physician who signs them. Accordingly, the district court held that "any information added, without authorization, by an individual other than the physician signing the CMN is 'false' for purposes of the False Claims Act."

The court further ruled that Wolk's reliance on United States v. Stelweck, 108 B.R. 488 (E.D.Pa. 1989) was misplaced. In that case the court found no evidence at trial that the additional information on the forms was put there without the express permission of the signing physician. In the view of the Wolk court, Stelweck found only that there was no evidence "that the typed information constituted false information, as opposed to legitimate additions made after [an employee of the medical supplier] contacted the physician who signed the CMNs." Stelweck would have found the post-signature additions false for purposes of the FCA if there had been evidence that the signing physician had not authorized the additions. Post-signature physician authorization is thus a factual question to be resolved at trial. As such, Wolk could present evidence at trial, not on the motion to dismiss, that the post-signature additions to the CMNs were made with the signing physician's approval. Since the court held that information added without physician authorization is false under the FCA, the Government's allegations were sufficient to support a claim under the Act.

"Mere Inaction" Insufficient for Liability

The district court then turned its attention to defendant Miller. First, it decided whether Miller was liable for violating the FCA based only on the allegations that he knew of the fraud and record destruction. The court held that there must be some action taken by the defendant which causes the claim to be presented to the Government in order to state a claim under the Act. The Government failed to allege that Miller took any action that constituted "presenting or causing to be presented" a false claim. In short, "[m]ere inaction is not enough to constitute a violation of the False Claims Act."

No Shareholder or Corporate Officer Liability for Miller

Next, the court determined whether Miller was liable for the actions of Advanced Care as a shareholder who benefited from the fraud or a corporate officer who knew of the record destruction. The court ruled that Miller was not liable under the FCA because of his position as a shareholder. In order to "pierce the corporate veil" for shareholder liability, the corporation must be shown to be a sham. Here there was no suggestion that Advanced Care was "something less than a bona fide corporate entity." Additionally, Miller was not liable as an officer because under Pennsylvania "participation theory" of liability, the defendant must engage in a wrongful act. Miller could be "held liable for misfeasance but not for simple nonfeasance." According to the court, the Government failed to allege any misfeasance on the part of Miller; therefore, he could not be held liable for the torts of the company.

Preemption of the False Claims Act

<u>U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc.</u>, Memorandum and Order, No. 93-C-801-S (W.D.Wisc. Mar. 13,1995)

In <u>U.S. ex rel. Fallon et al. v. Accudyne et al.</u>, District Judge John Shabaz denied the defendants' motion to dismiss for failure to state a claim, holding that the relators' allegations clearly fell within the language of the FCA and that environmental laws did not preempt FCA liability. The relators alleged that Accudyne knowingly failed to comply with environmental laws as was required by its contracts with the Department of Defense and then made false representations, certifications, and claims to the Government that it had complied. In reliance upon these false representations, the Government paid on the contracts.

Contractor's False Representations of Compliance with Environmental Laws Give Rise to Claim

The defendants presented two arguments to support their motion to dismiss for failure to state a claim. The first portrayed the relators' claim as an effort to impose liability based solely on noncompliance with environmental statutes. The companies argued that this was not a claim within the meaning of the FCA. In reaching his decision, Judge Shabaz reasoned that the FCA was intended to provide a broad remedy for all attempts to defraud the Government. He stated that the complaint clearly alleged that Accudyne knowingly failed to comply with environmental laws, as required by contract, and lied to the Government about its noncompliance in order to induce payment. Judge Shabaz explained that this situation was no different from a contractor who falsely represents to the Government that testing has been performed in order to get a claim paid. He noted that it is not the violations of environmental laws themselves that give rise to the FCA claim but rather the false representations about compliance that do so. Accordingly, the relators' allegations that Accudyne made false statements to induce payment constituted a claim within the language of the FCA.

FCA and Environmental Statutes Provide Remedies for Entirely Different Conduct

Accudyne also argued that to the extent that the relators stated a claim, it was preempted by the specific remedial provisions of the environmental laws under the doctrine set forth in Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1 (1981). The court, however, found that Sea Clammers did not hold that a "statutory claim is preempted by a subsequent statutory enactment which regulates conduct different from that supporting the original claim." According to Judge Shabaz, the FCA and environmental statutes provide remedies for completely different behavior. The former is a remedy for fraud while the latter is a remedy for polluting. To infer preemption of the FCA by environmental laws would create the "absurd implication" that Congress intended to provide a remedy for fraud where a "contractor lies about lawful actions but preclude a remedy for lies about unlawful actions." Judge Shabaz further noted that the remedies themselves are completely distinct. A FCA action could not compel environmental clean-up or damages for environmental pollution. Nor could a suit under environmental laws result in fraud damages or penalties.

FCA Is Not Preempted in Other Contexts

Judge Shabaz observed that the Second Circuit in U.S. v. General Dynamics Corp., 19 F.3d 770 (2nd Cir. 1994) and U.S. v. Foster Wheeler Corp., 447 F.2d 100 (2nd Cir. 1971) ruled that the FCA was not preempted by other federal statutes. In General Dynamics the proscribed conduct was kickbacks and the other remedy the Anti-Kickback Act, while in Foster Wheeler the conduct was defective pricing and the other remedy was the Truth in Negotiations Act. If there was no inconsistency in allowing a FCA action in the face of these other specific remedies for related underlying conduct, then, according to Judge Shabaz, there was certainly "no inconsistency in permitting remedies for fraud on the one hand and violation of federal environmental statutes on the other."

Joint Privilege Protects Relator/Government Communications

U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliant Techsystems, Inc., Memorandum and Order, No. 93-C-801-S (W.D.Wisc. Mar. 6,1995)

In U.S. ex rel. Fallon et al. v. Accudyne et al., District Judge John Shabaz ruled that all disclosures between the relators' counsel and the Government that fell into attorney-client privilege and work product information were protected from discovery by the defendants. Judge Shabaz noted that the FCA requires that the relator reveal all his information about the case to the Government; however, nothing in the statute requires or suggests these disclosures be provided to anyone other than the Government. The Government and the relators had a common interest in prosecution of this suit, and as a general matter joint parties' communications are privileged unless waived. Since the Government's and relators' interests are "inherently aligned," they should be treated as joint parties. "To rule otherwise," stated Judge Shabaz, "would completely deprive the United States and the relators of the benefit of privilege in this and every other case."

OTHER LEGAL DEVELOPMENTS

Robertson v. Bell Helicopter Textron Inc., US SupCt, No. 94-1160, review denied (Feb. 21,1995)

In February 1995, the U.S. Supreme Court denied the petition for certiorari filed by a Bell Helicopter employee who alleged that he was retaliated against by the company in violation of the "whistleblower protection" provision of the FCA, 31 U.S.C. §3730(h). The Court let stand a 5th Circuit decision affirming the lower court's ruling that there was insufficient evidence that Bell knew Robertson was acting in furtherance of remedying illegal or unlawful activity.

Cannestrino v. United States, No. 93-4466

In January 1995, the Federal Government obtained a FCA judgment for $5,000 against an individual who had filed a false claim in a tort suit against the U.S. Postal Service. According to Deputy Assistant Attorney General Eva Plaza, who heads the Torts Branch, the Goverment has used the FCA to counterclaim in other tort cases, but those cases settled before trial. Cannestrino was the first to end in a judgment. An Assistant U.S. Attorney involved in the matter explained that Cannestrino's claimed neck injury from an auto accident with a Postal vehicle was a hoax; therefore, his suit constituted a false claim against the Government and he was subject to civil penalties under the Act. The judge agreed, finding that Cannestrino "manufactured these injuries, submitted a false claim and testified falsely at the time of trial with regard to these injuries."

An Issue of First Impression

Scope of Government Right to Dismiss *Qui Tam* Suits

U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co. et al., Memorandum Opinion and Order, No. CV-F-88-566-OWW (E.D.Cal. Mar. 3, 1995)

In U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co. et al., the court ruled that the Government does not have an absolute right to dismiss *qui tam* suits over a relator's objection, finding instead that Government dismissals are subject to judicial review. The U.S. District Court for the Eastern District of California is the first federal court to consider under what circumstances the United States may dismiss a facially meritorious FCA claim over the opposition of the relator. Under the standard of review articulated by the court, the Government can dismiss a *qui tam* suit only if the decision to dismiss "is rationally related to a legitimate governmental purpose and that dismissal is not arbitrary, fraudulent, or illegal."

The court ruled that where the Government presents a "facially satisfactory" basis for the dismissal, the court will not inquire further; however, the relator is entitled to an evidentiary hearing by showing a "substantial and particularized need." A relator can establish such need by "challenging the legitimacy of the asserted governmental interest," or showing that it is "pretextual," or that "dismissal is fraudulent," or that the "dismissal does not rationally advance the asserted interest." Applying this standard, the district court ruled that Sequoia had presented sufficient evidence to raise three "colorable claims" that dismissal was "arbitrary" or "based upon improper considerations," and that an evidentiary hearing would be scheduled accordingly.

Sequoia originally filed suit under the FCA in 1988 against various citrus packing houses (there are now eleven named defendants) for allegedly filing reverse false claims. A reverse false claim refers to knowingly making or using a false statement or record to "conceal, avoid, or decrease" an obligation to pay money to the Government. In this case, FCA liability was premised upon violations of the Agricultural Marketing Agreement Act (AMAA). Under the AMAA, the Secretary of Agriculture issues marketing orders limiting the quantity of various commodities, including oranges and lemons, that may be marketed by handlers. Handlers who exceed their allotment are subject to civil fines. Sequoia alleged that the defendants exceeded their quotas and made false statements to the Government to avoid, among other things, paying penalties for violating the orders. Although the Government had itself brought suits against many of the defendants for violating the AMAA, it moved on two occasions to dismiss Sequoia's *qui tam* suit for failure to state a claim, arguing that the facts alleged did not present an actionable reverse false claim under the FCA. The court rejected those motions. In the fourth year of the case, the Government moved to intervene for good cause and Sequoia opposed. The district court permitted the intervention in 1993. Later the Government moved to dismiss, precipitating the present decision.

In deciding the case, the court first determined what standard of review, if any, applies to a Government motion to dismiss a *qui tam* suit. The Government argued that the court had no power to review its dismissal decision or, in the alternative, that review is limited to "excluding abuse of prosecutorial discretion." Sequoia maintained that only objectively meritless FCA claims should be dismissed. Alternatively, Sequoia asserted that either the F.R.C.P. 41(a)(2) standard of prejudice or the FCA §3730(c)(2)(B) "fair, adequate and reasonable under all the circumstances" standard of review for settlement should be applied. In a lengthy opinion, the district court systematically addressed each of these contentions as well as other ancillary arguments.

Government May Move to Dismiss Despite Late Intervention

The district court rejected Sequoia's assertion that the Government cannot move to dismiss because it did not intervene at the beginning of the suit. Sequoia argued that §3730(c)(1) of the FCA, giving the Government primary responsibility over the litigation, applies only when the Government intervenes within the initial 60 day seal period. According to the court, the Ninth Circuit rejected this position in upholding the constitutionality of the FCA in U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993). In that case the circuit court stated that the Government has the same degree of control regardless of when it intervenes. Moreover, such an interpretation assures the constitutionality of the *qui tam* provisions by maintaining the proper separation of powers since otherwise the Government's right to intervene would be impaired.

Estoppel or Laches Does Not Bar Government from Moving to Dismiss

Sequoia next argued that the Government is barred from dismissing the case by the doctrine of judicial estoppel. This doctrine precludes litigants from taking inconsistent legal positions in the same litigation in order to "prevent parties from playing fast and loose" with the judicial process. Sequoia asserted that the Government's motion to dismiss was a breach of its prior "commitment" to prosecute the FCA claims diligently. The district court ruled, however, that regardless of whether the Government's commitment was a "legal" position, the Government was not barred from seeking dismissal by judicial estoppel. Its promise was made in good faith and not to play "fast and loose" with the judicial process. Further, the court reasoned that equity requires that a litigant be able to respond to changed industry conditions. Here the Government had changed its position because another federal court had ruled that AMAA marketing orders for Navel and Valencia oranges were invalid.

Sequoia's Three Alternative Standards of Review Rejected

Considering in turn each of Sequoia's alternative standards of review, the district court first ruled that F.R.C.P. 41(a)(2) does not prevent dismissal by the Government. This rule, which permits voluntary dismissal by the plaintiff, is applied in the court's discretion in order to avoid legal prejudice to a defendant. The court rejected use of this rule given that the FCA already has a specific provision granting dismissal authority, and "where two statutes are inconsistent, generally, the more specific statute prevails." Furthermore, Rule 41(a)(2) is concerned with prejudice to the defendant. Sequoia, a plaintiff, was trying to invoke the rule to protect its rights. The district court found no authority for such an application.

The court next dismissed Sequoia's "objectively meritless" standard by which the proper standard of review would be either the standards for a F.R.C.P. 12(b)(6) motion to dismiss or a motion for summary judgment. It reasoned that such a standard would give relators an improper amount of Executive Branch authority that would "significantly undermine the Government's prosecutorial discretion and would violate separation of powers."

Finally, the district court rejected using the "fair, reasonable and adequate" settlement standard, relying on the plain language of the statute. According to the court, Congress enacted separate provisions with different language for dismissal and settlement, providing an express standard of review for the latter. Treating them exactly the same, as Sequoia urged, would in fact render the dismissal provision superfluous by eliminating any distinction between the two provisions.

The court further reasoned that Congress has in other areas,i.e., F.R.C.P. 23(e) (providing a single standard of review for dismissal or compromise of class action lawsuits), explicitly provided a uniform standard of review for both settlement and dismissal. Although Congress certainly knew how to create a uniform standard, it chose not to do so under the FCA. Finally, courts in the context of antitrust law have rejected Sequoia's contention that identical standards of review for settlement and dismissal should be used even though identical standards are not explicitly included in the statute. The court quoted with approval language from U.S. v. Mercedes-Benz of North America, 547 F.Supp. 399, 401 (N.D.Cal. 1982) to the effect that even if it is illogical for Congress to provide fewer procedural safeguards for dismissal where no relief is obtained, as opposed to more safeguards for settlement where some relief is obtained, and both situations are subject to similar abuses, Congress must be the one to correct the abuses.

No Absolute Government Authority to Dismiss

Although the court rejected Sequoia's three alternative standards of review for dismissal, it also quickly rejected an absolute dismissal authority by the Government as contrary to the plain language of the statute. The court found that treating "hearing on the motion" in the dismissal provision as a mere formality which enables the relator to "air his views" would render the phrase meaningless. No hearing would be necessary if the Government had an absolute right to dismiss. Furthermore, this interpretation runs counter to the common law definition of "hearing" as a formal proceeding where the court decides issues of fact or law. Under the Government's interpretation, according to the court, there would be no issues of fact or law to be determined. The court would merely be performing a ministerial function of granting dismissal. The district court found no precedent for interpreting "hearing on the motion" to mean that dismissal should be granted regardless of objections raised.

The district court also found that the legislative history did not support the Government's position, citing language that shows Congress' intent to protect and enhance the status and rights of the *qui tam* plaintiff. An absolute dismissal power by the Government is inconsistent with such an intent. According to the court, Congress sought to ensure that FCA claims are prosecuted fully even in the face of political pressure on the Executive Branch not to. A heightened role for the *qui tam* plaintiff helps to ensure such diligent prosecution.

The court rejected the Government's interpretation of U.S. ex rel. Kelly v. Boeing, 9 F.3d 743 (9th Cir. 1993) as requiring that the Government's authority to dismiss be absolute or the statute would be unconstitutional. The Government asserted that the Kelly Court upheld constitutionality in part because it found that the Executive Branch exercised sufficient control over FCA cases and "went so far as to doubt that the 'notice and hearing requirement has amounted to much of a hurdle for the government.'" According to the district court, this was a mistaken reading. In fact, Kelly had not held that the FCA is constitutional because the hearing is not much of a hurdle but rather stated that "it is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government." Additionally, the court found numerous other statements showing that "while Kelly does not define the scope of judicial oversight of government dismissal of *qui tam* actions, it expressly acknowledges that such oversight exists."

Criminal Prosecutorial Misconduct Standard Does Not Apply

The district court also rejected the Government's argument that Sequoia must demonstrate that the Government abused its prosecutorial discretion in moving to dismiss because its decision was based on a suspect classification or the exercise of constitutional rights. Sequoia had alleged neither of these two circumstances. In its reasoning, the court was careful to distinguish between criminal versus civil prosecutions and arbitrary versus discriminatory prosecutorial decisions. Judicial oversight in criminal prosecutions only exists when the prosecutions are based on discriminatory considerations. Courts do not review allegedly arbitrary prosecution decisions in criminal cases because they are ill suited to articulate objective standards in light of the various factors that enter into a charging decision. In order to establish concrete rules, the court would have to involve itself in the "minute details" of hundreds of charging decisions. As a result, according to the court, the benefits of reviewing an allegedly arbitrary criminal prosecution decision are outweighed by the practical problems attendant to such review and concerns for separation of powers. Prosecution decisions based on suspect classifications, on the other hand, should be reviewed by courts because "remedying discrimination outweighs the practical problems presented by judicial oversight."

The district court dismissed the Government's argument that judicial review in this case presents the same kinds of problems as in a criminal action. The factors present in a criminal charging decision — availability of resources, merit, enforcement priorities, and deterrence — were not relevant in Sequoia. First, FCA suits can be prosecuted by the relator obviating the need for government resources except to review the settlement — a "minimal burden" since the Government does not have to intervene to oppose a settlement. Secondly, the Government for purposes of this motion conceded the merits of Sequoia's case. Nor were the other two factors relevant given that the "marketing orders and the disputed regulations promulgated thereunder have been abandoned." According to the court, the Government did not rely on any of these factors in deciding not to prosecute. Moreover, the district court would not have to examine the "minute details" of many other cases to determine if the Government acted arbitrarily. The Sequoia matter represented the first time the Government sought to dismiss a case pursuant to §3730(c)(2)(A). Judicial review in this instance would impose little burden on the Government.

FCA Purposes Support Judicial Review of Government Efforts to Dismiss

The court also found that the purposes underlying the FCA supported judicial review. If the case were dismissed, public money lost due to fraud would be unrecoverable. Unlike criminal actions where the harm from discriminatory conduct is greater than the harm from arbitrary conduct, failure to prosecute legitimate FCA claims, regardless of whether the decision is discriminatory or arbitrary, causes the same loss to the U.S. Treasury. Further, whereas in criminal cases the concern for separation of powers militates against judicial review of arbitrary charging decisions, in FCA cases Congress has specifically provided for judicial review of dismissals. Such review does not restrict the Government's discretion because the Government has no constitutionally protected right to enforce the law arbitrarily.

"Rationally Related" Test as Standard of Review for Dismissal

Having rejected both Sequoia's and the Government's various standards of review for dismissal, the district court examined the FCA's legislative history to formulate the proper standard. From the Senate Judiciary Committee Report, the court discerned that Congress intended that the relator could formally object to motions to dismiss by the Government. These objections could be presented in an evidentiary hearing if the relator showed a "substantial and particularized need." To make this showing, the relator is required to present a "colorable claim that the settlement or dismissal is *unreasonable in light of existing evidence,* that *the Government has not fully investigated the allegations,* or that *the Government's decision was based on arbitrary and improper considerations.*" (emphasis added by court). Given these legislative concerns, the district court defined the standard of review for dismissal as follows: "the dismissal of a meritorious case is arbitrary and improper if it is not rationally related to a legitimate governmental interest or will perpetrate fraud or illegality."

The district court noted that although the Senate Report was drafted before final passage of the FCA Amendments, the Ninth Circuit has on two occasions referred to this language in interpreting the settlement and dismissal provisions. According to the court, it was doubtful Congress amended the statute after the Report was written to allow arbitrary dismissal by the Government. The language in the Report was considered probative of Congressional intent. Furthermore, it is consistent with the purposes of the FCA which include the enhancement and encouragement of *qui tam* suits to ensure prosecution of fraud against the Government even if the Department of Justice is unwilling to pursue the case. Moreover, the court said that separation of powers is preserved because the standard articulated is deferential to the Government, which would still maintain the ultimate authority over prosecution decisions "so long as it does not act arbitrarily."

Finally, the district court ruled that the standard of review for dismissal is less burdensome than that for settlement. The court would not engage in the weighing of competing interests as prescribed in the review of settlements. Rather, "if the finding can be made that the Government's decision to dismiss is rationally related to a legitimate governmental purpose and that dismissal is not arbitrary, fraudulent, or illegal, the inquiry is at an end."

Sequoia Shows "Substantial and Particularized Need" for Evidentiary Hearing

In applying this standard of review, the district court evaluated whether the Government had presented a "facially satisfactory" basis for dismissal, in which case further review was not necessary, or whether Sequoia was entitled to an evidentiary hearing through a showing of "substantial and particularized need." The court stated that such a showing could be made by "challenging the legitimacy of the asserted governmental interest," or by "pointing to facts that indicated the claimed interest is pretextual," or "that dismissal is fraudulent," or "if it appears that dismissal does not rationally advance the asserted interest."

In articulating its interest, the Government characterized dismissal as necessary to serve the purposes of the AMAA by restoring "peace" to the citrus industry. In this pursuit, the Government had terminated the marketing orders and dismissed all the cases premised on AMAA violations. According to the Government, dismissal of the FCA claims was a "necessary part of the amnesty policy." The Government also contended that these FCA cases could destroy certain members of the industry and thwart the purpose of the AMAA which was to enhance the profitability of industry members. Sequoia, on the other hand, argued that dismissal was not rationally related to the goal of industry peace and, in fact, would increase rather than decrease animosity between the alleged cheaters and non-cheaters. Sequoia contended that much of the industry did not want marketing orders and thought they were ineffective. Sequoia also claimed that the Government's asserted interest in industry peace was pretextual because in fact, dismissal was sought as a political favor to the defendants and not as part of a general amnesty policy. In support of this argument, Sequoia noted that the Government did not move to dismiss these FCA cases at the same time it dismissed the AMAA actions.

In the end, the district court found that Sequoia had made a "colorable claim" that dismissal was "arbitrary" or "based upon improper considerations." Sequoia had "challenged the legitimacy of the governmental objectives," "challenged the efficacy of dismissal to reach these objectives," and had "raised a claim that the Government's reasons for dismissal are pretextual and the result of improper influence." The court concluded that these "colorable claims" satisfied the burden of showing a "substantial and particularized need" for an evidentiary hearing. At this evidentiary hearing the Government will have the burden of demonstrating a valid governmental interest and how dismissal serves that interest. Thereafter, the burden will "shift to the relator to present evidence that dismissal is arbitrary, fraudulent, or illegal."

DOJ INTERVENTIONS

<u>U.S. ex rel. Copeland v. Lucas Western Inc. and Lucas Aerospace Inc.</u> (D UT No. 93-C-831B)

In February 1995, DOJ intervened in this *qui tam* suit alleging that U.S. subsidiaries of the British corporation Lucas Industries, plc. defrauded the Department of Defense by concealing defects, fractures, and imperfections in military parts. The suit, filed in 1993 by a former machinist for the company, alleges falsification of gear charts for a key component of the Navy's F/A-18 planes as well as major defects in gearboxes for the Army's Multiple Launch Rocket System. According to DOJ, the Government is analyzing reports of equipment accidents and mishaps to determine whether the faulty parts were a factor.

Lucas Western had pleaded guilty in January 1995 to 37 counts of making false certifications to DOD that gearboxes for the Navy fighter jets and Army rocket launchers had been fully inspected in accordance with contractual requirements when, in fact, they had not. A record criminal fine of $18.5 million was paid by the company. As a result of its misconduct, Lucas Industries has been barred from receiving new government contracts. The relator is represented by Lon D. Packard of Packard, Packard & Johnson (Salt Lake City, Utah).

<u>U.S. ex rel. Brandimarte v. Wurtzel, M.D. and Life Centers Limited</u> (ED PA No. 94-2398)

In February 1995, DOJ intervened in this *qui tam* suit, brought in 1994, alleging that a Philadelphia outpatient mental health provider overbilled Medicaid. According to the complaint, Wurtzel's company, Life Centers Limited, fraudulently charged for services never performed or otherwise not reimbursable. Life Centers served mainly low income patients eligible for Medicaid.

The relator, a former corporate administrator for the company, was allegedly instructed to give Wurtzel the monthly summary sheets before submitting them to Medicaid. Wurtzel then added units of therapy for those patients who had not reached the maximum authorized. Routine administrative phone calls as well as other uncovered services were also billed as therapy, and Wurtzel allegedly made false diagnoses of mental disorders for Medicaid and Medicare patients. According to the lawsuit, Ms. Brandimarte was harassed and finally discharged by Wurtzel for her role in the investigation. The relator's counsel is Marc Raspanti of Miller, Alfano & Raspanti (Philadelphia, Pennsylvania).

<u>U.S. ex rel. Welber v. Med-Atlantic Petroleum Corporation</u> (D DC No. 93-0970)

In March 1995, DOJ intervened in this *qui tam* suit alleging that Med-Atlantic Petroleum Corporation defrauded the U.S. Defense Fuel Supply Center on nine contracts. The company is accused of overcharging the Government more than $18 million for marine fuel supplied at ports in the U.S. and overseas. According to the suit, filed in 1993, Med-Atlantic submitted unreasonably low bids to obtain federal contracts for marine fuel and then charged the Government prices that were significantly higher than the contract price. The relator is an attorney with TransTec Co., a Med-Atlantic competitor. Robert E. Montgomery, Jr. of Paul, Weiss, Rifkind, Wharton & Garrison (Washington, D.C.) is representing the relator.

U.S. v. State of Colorado et al. (D CO No. 95-M-235)

In January 1995, the Government filed suit against Colorado National Guard Adjutant General John L. France, alleging the use of federal planes for hundreds of unauthorized fly-bys costing the Government $3.9 million. The State of Colorado, Governor Roy Romer, and the Guard were also named as defendants. According to the lawsuit, the Guard provided planes for fly-overs or aircraft displays for a Colorado State University football game, a church preschool, the Eagle County Fair, and several other public and private events around the state. The suit claims General France himself piloted the A-7 aircraft on several occasions. Assistant U.S. Attorney Paul J. Johns is handling the case.

U.S. v. Rubber Crafters, Inc. and Zannoni (ED PA No. 95-0784)

In February 1995, the Government filed suit against Rubber Crafters, Inc., alleging that the company knowingly breached safety specifications and reporting requirements for lifeboats and deliberately concealed these failings from the Navy. The company was accused of using defective fabric to make the inflatable lifeboats and of using silicone, gum, and latex to conceal bald spots and other deficiencies. The company also allegedly falsified documents. Rubber Crafters had over $21 million in government contracts to make the lifeboats. An earlier related criminal action involved charges of conspiracy to defraud the Government and obstruction of justice. The FBI began testing the lifeboats after receiving a tip from company employees about shoddy work, and found that 80 percent of the lifeboats did not meet safety specifications.

U.S. v. Harris, Cheiken, Wiseman, and Helzner (ED PA No. 95-970)

In February 1995, the Government filed suit against three physicians and a licensed pharmacist, alleging they accepted kickbacks from a supplier of durable medical equipment to Medicare patients. According to the complaint, from 1987 through 1991 the defendants furnished blank or bogus Certificates of Medical Necessity (CMNs) to Southern Medical Surgical Supply, which in turn submitted them to Medicare for payment. The supplies included such items as bed pads, seat lifts, whirlpool devices, and nerve stimulators. Southern Medical would kick back funds to the defendants, usually in the form of highly inflated "leasing" fees for storage space in properties owned by the defendants. The complaint charges that the "leases" were bogus and just an attempt to disguise the illegal payments. Pursuant to the scheme, Southern Medical billed Medicare and private insurers approximately $38,000 to $50,000 per month. The U.S. Attorney's Office first learned of the operation in 1992 during a debriefing with Southern Medical's owner following his guilty plea to related criminal mail fraud charges. The case is being handled by Assistant U.S. Attorney David F. McComb.

U.S. ex rel. Pogue v. American Healthcorp, Inc., Diabetes Treatment Centers of America, Inc., West Paces Medical Center, et al. (MD TN No. 3-94-0515)

In February 1995, a *qui tam* suit filed by Scott Pogue in 1994 was unsealed. The lawsuit alleges the filing of false claims in connection with a patient referral scheme. According to the complaint, hospitals with whom Diabetes Treatment Centers of America, Inc. (DTCA) contracted filed Medicare and Medicaid claims for services provided to patients referred and admitted to their respective facilities by physicians who had received a fee from DTCA. As of late March, the Government had not intervened in the action but reserved the right to do so. DOJ is reportedly pursuing a criminal investigation of the kickback allegations. Mr. Pogue is a former employee of DTCA, a subsidiary of American Healthcorp, Inc. The relator is represented by Ralph W. Mello and Larry L. Crain (Brentwood, Tennessee).

U.S. ex rel. Jones v. Visiting Nurses Association, Inc. et al. (MD FL No. 94-736-C-ORL-19)

In February 1995, a *qui tam* suit against Visiting Nurses Association, Inc. (VNA) was unsealed. The lawsuit, brought by the former Chairman of the Board of VNA, alleges that VNA fraudulently billed Medicare through use of a third party billing service, BilAmerica. According to the complaint, the fair market value of BilAmerica's services is less than the amount being charged to Medicare. The suit alleges that VNA board members were aware of the scheme and that one VNA Director in particular stood to benefit personally as President and part owner of BilAmerica. The complaint seeks damages in excess of $3 million and penalties in excess of $6 billion. The relator, Mr. Jones, is represented by Alfred L. Frith of Frith,Stump & Storey (Orlando, Florida). The Government has declined intervention in this action.

QUI TAM SETTLEMENTS

U.S. ex rel. Anderson v. Equipment and Supply Inc. *(ED PA No. 92-4739)*

In December 1994, DOJ announced that Equipment and Supply Inc. and its president and owner, Andrew A. Adams,agreed to pay the Government **$1.4 million** to settle this *qui tam* suit. Henry Anderson, a former manufacturing processor at Equipment and Supply Inc. (ESI), originally brought the suit in 1992. Mr. Anderson alleged that the company supplied nonconforming parts, sold old government surplus equipment back to the Government as new, and painted and relabeled old parts to appear new. An amended complaint was filed by the Government in May 1994, adding Anti-Kickback Act allegations. The illegal kickbacks were allegedly paid by ESI to a former Lockheed employee to obtain preferential treatment. In criminal proceedings, ESI pleaded guilty to charges of conspiracy and making false statements. The company filed for Chapter 11 bankruptcy last spring. William J. Hardy of Kleinfield, Kaplan and Becker (Washington, D.C.) represented the relator. The Government was represented by Dennis L. Phillips of the DOJ Civil Division.

U.S. ex rel. Windsor v. DynCorp, Inc. et al. *(ED VA No. __)* and *U.S. ex rel. McBroom v. DynCorp, Inc.* *(ED VA No. __)*

In December 1994, DynCorp agreed to pay the Government **$250,000** to settle two *qui tam* suits alleging that it failed to perform the required hours of preventive maintenance on electrical substations and other buildings at the Army's Fort Belvoir, VA installation. The relators are former company employees. Mr. Windsor was represented by Candace S. McCall (Fairfax, Virginia) and Quentin R. Corrie of Anderson & Corrie (Fairfax, Virginia). Mr. McBroom was represented by Mark Petrovich and Michael S. Arif of Martin, Arif & Soloway (Burke, VA). Assistant U.S. Attorney Margie Smith of the Eastern District of Virginia represented the Government.

U.S. ex rel. Keith and Visauer v. Curative Technologies, Inc., UltraMed Inc. *(WD WI No. 93C-0435C)*

In January 1995, it was reported that the district court dismissed this *qui tam* action and approved the **$2.1 million** settlement agreement reached with the Government in October 1994. The *qui tam* lawsuit, filed in 1993 by two UltraMed customer service representatives, alleged that the company submitted claims to Medicare for home model pneumatic compressors (commonly called lymphedema pumps) that did not meet Medicare's engineering requirements. Under the agreement, Curative, formerly UltraMed's parent company, guaranteed UltraMed's settlement payment. Representing the Government were Ronald H. Clark of the DOJ Civil Division and Assistant U.S. Attorney Mark A. Cameli.

U.S. ex rel. Miller v. Rubbermaid Commercial Products Inc.

In January 1995, Rubbermaid Commercial Products Inc.agreed to pay **$887,000** to settle this *qui tam* suit with the Government and relator Ned Miller. Lewis & Sons Inc., Rubbermaid's sales representative, also will pay the Government **$113,000** as part of the settlement. Mr. Miller, a former employee of Rubbermaid,filed the suit in 1993. According to the complaint, Rubbermaid and Lewis & Sons failed to tell contract negotiators for the General Services Administration that Rubbermaid gave its customers discounts larger than those disclosed to the Government, resulting in higher prices for federal agencies. From 1984 through 1992, Rubbermaid won 16 federal contracts totaling about $5.5 million to provide food service and cleaning products, waste baskets, and trash bins. The relator's share was $185,000.

U.S. ex rel. Flynn v. Blue Cross Blue Shield of Michigan (*D MD No. L93-1794)*

In January 1995, Blue Cross Blue Shield of Michigan agreed to pay **$27.6 million** to settle this *qui tam* suit with the Government and relator Darcy Flynn. Blue Cross Blue Shield was accused of improper billing and submitting false documentation to the Government as the fiscal intermediary for Medicare in Michigan. Under a contract with HCFA, Blue Cross Blue Shield managed the Part A program and was required to audit cost reports of participating hospitals, determine which costs were authorized, and make the appropriate payments. The complaint alleged that the Government was defrauded as a result of cursory and inadequate audits. When HCFA asked to review specific audits, Blue Cross Blue Shield "corrected" the audits and backdated revised work papers to conceal that the original audits were poorly done. Mr. Flynn, a former Blue Cross auditor, filed the *qui tam* action in 1993. The relator's share was 20 percent or $5.5 million. Robert L. Vogel (Washington, D.C.) was the relator's counsel. The Government was represented by Sara Strauss of the DOJ Civil Division.

U.S. ex rel. 4 relators v. General Dynamics Corp. (CD CA No. __)

In March 1995, General Dynamics Corp. agreed to pay **$1.8 million** to settle this *qui tam* suit alleging that it overbilled the Government for testing F-16 fighters. The suit was filed in 1990 by four former company employees who tested the jets at Edwards Air Force Base. They claimed that General Dynamics billed DOD for thousands of hours that were never worked, using falsified time cards from employees who regularly left the plant early. The fraud occurred from 1982 to 1986 and involved about 50 employees. The relators' share was 22.5 percent or $405,000. The relators were represented by William Ramsey. Assistant U.S. Attorney Frank D. Kortum handled the case for the Government.

U.S. ex rel. Wagner and Dehner v. Allied Clinical Laboratories, Inc. (SD OH No. C-1-94-092)

In March 1995, Allied Clinical Laboratories, Inc. agreed to pay the Government **$4.9 million** to settle this *qui tam* suit alleging that it submitted false claims for reimbursement of laboratory tests to Medicare. Ramona Wagner and Jeanine Dehner, former billing clerks for the company, originally brought the suit in 1994. According to DOJ, Allied Clinical defrauded the Government by inserting false diagnosis codes into many of the Medicare billings submitted by the company's Cincinnati and Salt Lake City offices.

By regulation, Medicare will not pay for certain "limited coverage" blood tests such as the prostate-related tests involved in this case unless a physician provides an appropriate diagnosis showing they are medically necessary. In many instances these diagnoses were not provided although they were included in Allied Clinical's billings. According to U.S. Attorney Edmund Sargus, Jr., the Allied Clinical settlement represents the largest ever for Medicare fraud in the Southern District of Ohio. The company also entered into a separate "Corporate Integrity Agreement" with HHS. The relators' share was 17 percent or $833,458. Bruce Whitman and Lynn Pundzak (Cincinnati, Ohio) represented the relators. The Government was represented by Assistant U.S. Attorney Gerald Kaminski of Cincinnati and Jim Ward of the DOJ Civil Division.

Westinghouse Electric

In December 1994, Westinghouse Electric Corporation agreed to pay the Government **$1.88 million** for failing to inform the Air Force about other sales of spare parts for the AWACS radar system that would have lowered the price the military paid for the equipment. According to DOJ, during contract negotiations the company did not disclose that it had also contracted to supply AWACS radar equipment as part of separate commercial sales to the U.K. and France. By not disclosing these sales, Westinghouse avoided giving the Air Force a lower price based on savings from the combined production under the contracts. Although Westinghouse was not required to tell the Air Force of the significance of the European sales, the Government claimed that the Air Force would have sought a lower price if it had known about the sales. Westinghouse reported its conduct in 1992 under the DOD Voluntary Disclosure Program and paid $258,030 to the Air Force as a partial reimbursement for overpricing the 1987 contract. (This payment will be credited toward the settlement obligation.) The December 1994 settlement resolves the company's potential liability under the False Claims Act and Truth in Negotiations Act.

Lockheed

In December 1994, Lockheed Corporation paid the Government **$6.2 million** to settle allegations that it failed to disclose labor cost information during negotiations for the purchase of C-130 aircraft. The company had certified that it provided all material cost information. According to DOJ, Lockheed's nondisclosure of certain labor cost information inflated the contract price in violation of the Truth in Negotiations Act and the False Claims Act. The Government was represented by Patricia L. Hanower of the DOJ Civil Division and Assistant U.S. Attorney Daniel A. Caldwell of the Northern District of Georgia.

AT&T

In December 1994, AT&T agreed to pay the Government **$13.9 million** to settle allegations that it failed to provide accurate and complete pricing information during negotiations for a lease for electronic switches used at 21 of the country's largest air traffic control centers. The switches enable air traffic controllers to speak with each other and with pilots while a plane is en route to its destination. According to the Government, AT&T knowingly did not disclose the net book value of the equipment (the depreciated value on the company's books) while negotiating the lease price. The original lease totaled $23 million with interest. Stephen J. Segreto of the DOJ Civil Division represented the Government.

Blue Cross Blue Shield of Michigan

In January 1995, Blue Cross Blue Shield of Michigan agreed to pay the Government **$24 million** to settle allegations that it unlawfully billed Medicare for thousands of claims that should have been paid from private insurance funds. Blue Cross had contracted with HCFA to manage the Medicare program in Michigan. The settlement resolves a DOJ suit filed against Blue Cross under the Medicare secondary payer laws in 1989. Medicare secondary payer laws require private insurers such as Blue Cross to pay primary benefits in certain circumstances where a person has insurance under both Medicare and an employer health plan. The district court in Detroit had ruled that Blue Cross must reimburse the Government for Medicare payments that Blue Cross should have paid although the size of the reimbursement had not been determined. As part of the settlement, Blue Cross will share data with the Government to prevent future Medicare overpayments.

Southwest Management and Development

In February 1995, a former Federal Deposit Insurance Corporation (FDIC) employee and two officers of Southwest Management and Development, Inc. were ordered by a jury to pay **$13.5 million** for defrauding the regulator of $81,000. The jury found that the company's principals had filed 908 bills for management services that were not provided and that a former FDIC account officer had approved the bills even though he knew they were fraudulent. The corporate defendant, Southwest Management, had previously been defaulted by the court. The FDIC contracted with the company to provide routine maintenance and upkeep on buildings the agency acquired from failed banks and thrifts. According to the U.S. Attorney's Office, the account officer received kickbacks for his role in the fraud. The defendants had been charged with violating the False Claims Act and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). Assistant U.S. Attorney Katherine Savers McGovern, Northern District of Texas, Dallas Division, handled the case.

FCA NOTES

DOJ Issues Health Care Fraud Report

- In March the Department of Justice issued a Heath Care Fraud Report for fiscal year 1994. The Report tracks enforcement accomplishments and initiatives, and reviews case highlights. The publication is available through the Department of Justice, Office of Gerald Stern, Special Counsel for Health Care Fraud.

HHS Voluntary Disclosure Program Uncertain

- The Department of Health and Human Services is reportedly holding off on issuing guidelines for a voluntary disclosure program at this time. The small pilot project under consideration is also said to be in question. According to published reports, U.S. attorneys have voiced opposition to a HHS voluntary program, citing the potential for abuse given available resources. It was expected that Special Counsel Gerald Stern would make a final recommendation at the end of March.

Qui Tam Applied to FIRREA

- Representative Paul Kanjorski (D. PA) has introduced a bill amending the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) to apply the *qui tam* provisions of the False Claims Act to certain violations involving depository institutions. (HR 289, the Savings and Loan Asset Recovery Act, introduced January 4, 1995)

TAF NEWS

1994 False Claims Act & Qui Tam Year in Review

- Copies of TAF's *1994 False Claims Act & Qui Tam Year in Review* are still available at no cost. Requests can be made by phone or mail.

TAF on the Internet

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

Library Resources

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

Qui Tam Attorney Network

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

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