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INSIDE...

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

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

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

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2000 YEAR IN REVIEW

Case Law Recap

CONSTITUTIONALITY

ARTICLE III STANDING

In ***Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 120 S.Ct. 1858 (May 22, 2000)***, **19 TAF QR 1 (July 2000)**, the United States Supreme Court unanimously held that private individuals who bring suit pursuant to the *qui tam* provisions of the False Claims Act satisfy the Constitution's Article III standing requirements. The Court ruled that when the United States has suffered a concrete, redressable injury, "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the *qui tam* relator. In reaching its holding, the Court relied upon the *qui tam* concept's grounding in English and American legal history. Q*ui tam* actions have been a part of the English legal tradition since the 13th century and America's First Congress passed several statutes which utilized the *qui tam* enforcement mechanism. The Court concluded its analysis by stating: "When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing." *See also: Qui Tam Suits Against States and Localities.*

ARTICLE II: "TAKE CARE" AND APPOINTMENTS CLAUSES

In ***U.S. ex rel. Phillips v. Pediatric Services of America, Inc. et al., 123 F. Supp. 2d 990 (W.D.N.C. Nov. 30, 2000)***, a North Carolina district court ruled that the *qui tam* provisions of the FCA are constitutional. Refusing to follow Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999) (holding that the *qui tam* provisions violate Article II) (en banc review pending), the court ruled that the Executive Branch retains sufficient control over the relator's prosecutorial powers so that the *qui tam* provisions do not violate the "take Care" clause of Article II of the Constitution. Section 3 of Article II of the Constitution entrusts the Executive Branch with the responsibility to "take Care that the Laws be faithfully executed." According to the court, when taken "as a whole," the *qui tam* provisions satisfy the test for Article II constitutionality estab-

lished by the Supreme Court in Morrison v. Olson, 487 U.S. 654 (1988). The court also rejected the defendants' contention that the FCA violates Article II's Appointments Clause, holding that since the FCA does not vest relators with governmental authority, they are not Article II "officers." Finally, the court rejected the defendants' assertion that the financial interest of a *qui tam* relator violates due process principles, ruling that relators are not government prosecutors and thus do not owe the same duty to serve the public interest.

In ***U.S. ex rel. Wright v. Cleo Wallace Centers et al.*, *Memorandum Opinion and Order*, *No. 97-D-2517 (D.Col. Dec. 2000)***, a Colorado district court ruled that the *qui tam* provisions of the False Claims Act do not violate either the "take Care" Clause or the Appointments Clause of Article II when the United States does not intervene. The court followed U.S. ex rel. Kelly v. Boeing, 9 F.3d 743 (9th Cir. 1993), which held that pursuant to the Supreme Court's test in Morrison v. Olsen, 487 U.S. 654 (1988), the Executive Branch retains sufficient control over *qui tam* actions. The district court also noted the Supreme Court's recognition of *qui tam*'s history in English and American jurisprudence, indicating acceptance of such actions by the Constitutional Framers. The court declined to follow Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999) (en banc review pending), which declared the *qui tam* provisions unconstitutional under Article II. The court also followed U.S. ex rel. Kelly v. Boeing in ruling that the *qui tam* provisions do not violate the Appointments Clause because the relator lacks primary responsibility over the litigation. *See also: FCA Liability/Implied False Certification.*

See also ***U.S. ex rel. Kozhukh v. Constellation Technology Corp.*, *64 F. Supp. 2d 1239 (M.D. Fla. Sept. 29, 1999)***, **19 TAF QR 13 (July 2000)** (holding that the *qui tam* provisions do not violate Article II of the Constitution).

QUI TAM SUITS AGAINST STATES AND LOCALITIES

States are not subject to *qui tam* liability

States and state agencies are not subject to *qui tam* liability under the FCA pursuant to the Supreme Court's ruling in ***Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, *120 S. Ct. 1858 (May 22, 2000)***, **19 TAF QR 1 (July 2000)**. The Court relied on the longstanding presumption that the term "person" does not include the sovereign, finding no affirmative congressional intent to the contrary in the FCA. In addition, the Court reasoned that states were not intended to be subject to liability since § 3733 of the Act defines "person" to include states while the liability provisions include no such definition, because a contemporaneously passed anti-fraud statute defines "person" not to include states, and because the FCA imposes damages that are "essentially punitive in nature." The Court applied the clear statement rule, which provides that "if Congress

intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Having already determined that Congress did not manifest such an intent, the Court concluded that the clear statement rule was not satisfied. The Court also applied the rule that "statutes should be construed so as to avoid difficult constitutional questions," thereby avoiding the issue of whether an action in federal court by a *qui tam* relator against a state violates the 11th Amendment. *See also: Constitutionality.*

Insurance company that administers Medicaid is an arm of the state

In ***U.S. ex rel. Churchill v. The State of Texas et al.*, *Order*, *No. A 00 CA 527 SS (W.D. Tex. Nov. 14, 2000)***, a Texas district court ruled that National Heritage Insurance Company (NHIC) is an arm of the state and thus entitled to immunity from *qui tam* liability. NHIC administers the Medicaid program for Texas. The *qui tam* suit alleged that NHIC did not comply with contract requirements requiring it to try to recover from 3rd party tortfeasors the amount paid by Medicaid for treatment of tort-related injuries. The court examined the factors established by the 5th Circuit for determining whether an entity is an arm of the state, and ruled the NHIC is entitled to sovereign immunity because: (1) it has been uniformly characterized as an arm of the state by courts within the 5th Circuit; (2) any judgment would be paid, at least in part, with state funds; (3) it is controlled by the state with regard to the tort recovery program at issue; and, (4) it is concerned with statewide rather than local problems.

Counties are immune from *qui tam* actions

In ***U.S. ex rel. Dunleavy v. County of Delaware et al.*, *2000 WL 1522854 (E.D. Pa. Oct. 12, 2000)***, a Pennsylvania district court ruled that the relator could not bring a *qui tam* action against a county because the damages mandated by the FCA are punitive in nature. The court relied upon the Supreme Court's ruling in Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, which stated that the FCA imposes damages that are "essentially punitive." The court therefore determined that local governments are immune from suit under the False Claims Act pursuant to City of Newport v. Fact Concerts, 453 U.S. 247 (1981), which created a presumption that localities are immune from punitive damages. Additionally, the court ruled that it lacked the authority to reduce the damage award except pursuant to § 3729(a)(A-C), which allows such a reduction only if the defendant provides information concerning the violation before learning of any investigation.

In ***U.S. ex rel. Chandler v. The Hektoen Institute for Medical Research et al.*, *118 F. Supp. 2d 902 (N.D. Ill. Nov. 1, 2000)***, an Illinois district court ruled that while the county is a "person" subject to liability under the FCA, the county is immune to the imposition of treble damages. Following Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, the court held that treble damages are punitive rather than compensatory. Furthermore, the court rejected the Government's argument that it has the discretion to reduce the

damages imposed, holding that treble damages are mandatory under the FCA and are eligible for reduction only in limited circumstances not present in this case.

PUBLIC DISCLOSURE BAR AND ORIGINAL SOURCE EXCEPTION

Section 3730(e)(4)(A), broken out by its basic elements, forecloses those actions that are:

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

As defined in § 3730(e)(4)(B), an "original source" is an individual who has:

1. "direct and independent knowledge of the information on which the allegations are based," and,
2. "voluntarily provided the information to the Government before filing an action … which is based on the information."

The following are summaries of how some of the courts addressed these various elements of the public disclosure and original source provisions in decisions rendered in 2000.

"ALLEGATIONS OR TRANSACTIONS"/ "BASED UPON"

In ***U.S. ex rel. Downy v. Corning, Inc. et al., 118 F. Supp. 2d 1160 (D.N.M. Oct. 13, 2000)***, a New Mexico district court ruled that public disclosure of the general subject matter of a *qui tam* lawsuit did not raise the jurisdictional bar. The disclosure at issue was a general public discussion as to whether medical laboratories should be able to charge federally funded health care programs for two separate tests when one might be inclusive of the other. The court ruled that the disclosure did not trigger the bar pursuant to the test established in United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994), which held that Congress intended to prohibit *qui tam* actions "only when either the allegations of fraud or the critical elements of the fraudulent transaction themselves [are] in the public domain." Here, the disclosure was not of the "allegations or transactions" of the fraud because it contained no specific allegation of wrongdoing and involved only questions of policy. The relator's complaint was not "based upon" the public disclosure despite the fact that it involved the same general subject matter. *See also: Statute of Limitations.*

MEANS FOR PUBLIC DISCLOSURE/ "ALLEGATIONS OR TRANSACTIONS"

County agency proceedings are "administrative hearings"

In ***A-1 Ambulance Service, Inc. et al. v. State of California et al.*, *202 F.3d 1238 (9th Cir. Feb. 7, 2000)***, **18 TAF QR 4 (April 2000)**, the 9th Circuit held that county agency proceedings were "administrative hearings" within the scope of § 3730(e)(4)(A). The court rejected the relator's contention that administrative hearings must be at the federal level to invoke the public disclosure bar. 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 court then relied upon U.S. ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994), to rule that the county agency proceedings revealed the essential elments of A-1's fraud claims, raising the jurisdictional bar.

MEANS FOR PUBLIC DISCLOSURE/ "ORIGINAL SOURCE"

Administrative complaint is an "administrative hearing"

In ***U.S. ex rel. Grayson et al. v. Advanced Management Technology et al.*, *221 F.3d 580 (4th Cir. Aug. 3, 2000)***, **20 TAF QR 1 (October 2000)**, the 4th Circuit held that an unsealed administrative complaint which is publicly available upon request to the federal agency constituted an "administrative hearing" under § 3730(e)(4)(A), and that the information contained in the complaint was thus publicly disclosed. The complaint in question was a government contract bid protest. In addition, the court ruled that the attorney relators in the case were not original sources. The relators' specialized experience as government contract lawyers was insufficient to make their knowledge "direct and independent" as required by § 3730(e)(4)(B).

Indictment is a public disclosure

In ***United States v. Reagan v. Marovic et al.*, *2000 WL 1529236 (9th Cir. Oct. 16, 2000)***, the 9th Circuit ruled in an unpublished opinion that a criminal indictment was a "hearing," and thus a public disclosure, for purposes of § 3730(e)(4)(A). The relator's suit was "based upon" the public disclosure because it involved the same claims. Finally, even though the relator was a source of the public disclosure, the court ruled that she could not be an "original source" because she could not have voluntarily provided the Government with her information. According to the court, as Acting Director of the Management Department for government contractor Techco, Inc., it was part of her job duties to report any fraudulent activity to the Navy.

"ORIGINAL SOURCE"

In ***U.S. ex rel. Merena; Spear et al.; Grossenbacher et al. v. SmithKline Beecham Corporation et al.***, *114 F. Supp. 2d 352 (E.D. Pa. Aug. 3, 2000)*, **20 TAF QR 5 (October 2000)**, a Pennsylvania district court reduced a previously awarded $52 million relator's share. The 3rd Circuit ruled in U.S. ex rel. Merena; Spear et al.; Grossenbacher et al v. SmithKline Beecham Corporation et al., 205 F.3d 97 (3rd Cir. 2000), 18 TAF QR 9 (April 2000) that the relators based some of their claims on public disclosures, that each relator's share should be determined on a per claim basis, and that the relators were entitled to no share of any claims barred by public disclosure. On remand, after refusing to grant the Government's request that it impose an extra-textual requirement on the relators -- that they must have provided their information to the Government prior to any public disclosure -- the court ruled that the relators were "original sources." The court reasoned that Congress could have included such a requirement if it had so intended. Pursuant to the § 3730(b)(5) first-to-file bar, however, the court dismissed all the later-filing relators, leaving only Merena. The court reduced Merena's share on the contested claims from 17 to ten percent pursuant to § 3730(d)(1), after concluding that Merena had "primarily based" his allegations on public disclosures. The court awarded Merena the maximum ten percent of § 3730(d)(1)'s zero to ten percent range because of his contributions to the case. On the non-contested claims, the court raised Merena's share from a previously awarded 17 percent to 20 percent. *See also: Section 3730(b)(5) First-to-File Bar*; *Relator's Share.*

In ***U.S. ex rel. Dhawan and Gowie v. New York City Health and Hospital Corp. et al.***, *2000 WL 1610802 (S.D.N.Y. Oct. 27, 2000)*, a New York district court dismissed a *qui tam* suit for lack of subject matter jurisdiction after finding that the relators were not "original sources." The 2nd Circuit test on which the court relied adds an extra-textual "third prong" to the statutory analysis, which requires that a relator have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based. In this case, the relators played no part in the the public disclosures, which were NYC Health and Hospital Corp.'s self-initiated audit reports.

See also (dismissing *qui tam* actions for lack of subject matter jurisdiction):

U.S. ex rel. Hansen v. Cargill, Inc. et al., *107 F. Supp.2d 1177 (N.D.Cal. July 24, 2000)*, **20 TAF QR 2 (October 2000)**;

U.S. ex rel. Coleman v. State of Indiana et al., *2000 WL 1357791 (S.D.Ind. Sept. 19, 2000)*, **20 TAF QR 3 (October 2000).**

Environmental Regulations

In *U.S. ex rel. Shaw v. AAA Engineering & Drafting, Inc. et al., 213 F.3d 519 (10th Cir. 2000)*, **19 TAF QR 4 (July 2000)**, the 10th Circuit affirmed a jury's finding of FCA liability on implied false certification grounds where the defendant failed to comply with environmental regulations. The court ruled that the defendants impliedly certified with each monthly invoice that they complied with the environmental provisions of their contract, and that the Government was paying for environmental compliance. The court found support for the implied false certification theory of liability in § 3729(a)(1) of the statute, which does not require an affirmative false statement for liability to attach, and the legislative history of the 1986 amendments to the Act. The court ruled further that government knowledge of the failure to follow the environmental regulations did not mitigate knowing falsity.

Government Employee Conflict of Interest Regulations

In *U.S. ex rel. Siewick v. Jamieson Science and Engineering, Inc. et al., 214 F.3d 1372 (D.C. Cir. June 30, 2000)*, **19 TAF QR 5 (July 2000)**, the D.C. Circuit ruled that the relator's implied false certification case failed because the Government did not condition its payment upon compliance with the statute at issue.

Regulations Relating to the Medical Standard of Care

In *U.S ex rel. Swafford v. Borgess Medical Center et al., 98 F. Supp. 2d 822 (W.D. Mich. Feb. 18, 2000)*, **18 TAF QR 5 (April 2000)**, a Michigan district court dismissed a *qui tam* action alleging that physicians billed Medicare for the professional interpretation component of ultrasound tests while failing to provide the proper standard of service. The relator based his suit on the implied false certification theory of liability, contending that each invoice submitted by the physicians contained an implied representation of compliance with Medicare regulations relating to the medical standard of care. The court ruled, however, that the standards in the Health Care Financing Administration's Carriers Manual – relied upon by the relator as the standard of care for ultrasound interpretation – did not have the binding effect of law or regulation. According to the court, FCA cases based on implied false certifications can succeed only when the Government conditions payment on compliance with the statutes or regulations at issue, and here the Government did not condition payment upon compliance with the standards in the manual.

State Licensing Requirements

In *U.S. ex rel. Wright v. Cleo Wallace Centers et al., Memorandum Opinion and Order, No. 97-D-2517 (D. Col. Dec. 2000)*, a Colorado district court followed U.S. ex rel. Shaw

v. AAA Engineering & Drafting, Inc. et al. and U.S. ex rel Pogue v. American Healthcorp, Inc., 914 F. Supp. 1507 (M.D. Tenn. 1996), 5 TAF QR 2 (April 1996), in allowing an action based on implied false certification to proceed. The defendant in Wright allegedly billed Medicaid for services provided in unlicensed facilities. In denying the defendants' motion to dismiss, the court stated that "a person who knowingly submits claims to the government for the purpose of acquiring federal Medicaid funds while not in compliance with all relevant laws, rules and regulations may have submitted a false claim under the FCA, even without an affirmative or express false statement of such compliance." *See also: Constitutionality.*

FCA LIABILITY/ VICARIOUS LIABILITY OF EMPLOYER

In ***United States v. Southern Maryland Home Health Services, Inc. et al., 95 F. Supp. 2d 465 (D. Md. May 9, 2000)***, **19 TAF QR 9 (July 2000)**, a Maryland district court held that an employer cannot be held vicariously liable under the FCA for the acts of its employee because the FCA imposes damages which are punitive in nature. The court relied upon U.S. v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966), which held that it would be inappropriate to hold an employer vicariously liable under a statute requiring knowledge or guilty intent. The district court reasoned that the FCA is similar to a criminal statute because its damages and penalties provisions are punitive in nature, and that these principles apply particularly in those cases where the recovery sought by the Government is substantially higher than its actual losses.

STATUTE OF LIMITATIONS

In ***United States ex rel. Downy v. Corning, Inc. et al., 118 F. Supp. 2d 1160 (D.N.M. 2000)***, a New Mexico district court ruled that the three-year limitations period of § 3731(b)(2) begins to run when the relator has actual or constructive knowledge of the facts concerning the FCA violation. This approach was presented by the 9th Circuit in United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211 (9th Cir. 1996), 6 TAF QR 9 (July 1996), and is designed to place relators on the same procedural footing as the United States. In addition, the court ruled that a case commences for purposes of statute of limitations determinations upon the filing of the complaint. *See also: Public Disclosure Bar and Original Source Exception.*

FEDERAL RULE OF CIVIL PROCEDURE 9(b)

In ***U.S. ex rel. Clausen v. Laboratory Corporation of America, Inc., 2000 WL 33152158, (N.D.Ga. Nov. 29, 2000)***, a Georgia district court dismissed an FCA suit pursuant to FRCP 9(b) for failure to plead fraud with particularity. Although the plaintiff had sufficiently pled the fraudulent schemes, the complaint failed to identify a single claim that

was actually submitted pursuant to the schemes. The court distinguished U.S. ex rel. Johnson v. Shell Oil Co., 183 F.R.D. 204 (S.D. Tex 1998), which applied a relaxed 9(b) standard, since the complaint in Johnson identified monthly reports and the specific sections therein containing fraudulent information. The court refused to apply a relaxed standard in this case, ruling that in addition to identifying the report or invoice constituting the potential false claims, the relator must allege that the false claims were submitted within a specific time frame. Stating that it would not give the whistleblower a "ticket to the discovery process," the court gave the relator 30 days to amend the complaint to bring it into compliance with Rule 9(b).

See also ***U.S. ex rel. Walsh v. Eastman Kodak Company et al., 98 F. Supp. 2d 141 (D. Mass. May 31, 2000)***, **19 TAF QR 10 (July 2000)** (dismissing complaint with prejudice for failure to comply with FRCP 9(b)).

SECTION 3730(b)(5) FIRST-TO-FILE BAR

Relator cannot intervene in pending FCA suit

In ***Webster v. United States, 217 F.3d 843 (4th Cir. July 12, 2000)***, **20 TAF QR 8 (October 2000)**, the 4th Circuit denied Webster's motion to intervene in an FCA suit filed by the Government which was based upon the facts underlying Webster's previously dismissed *qui tam* action. The Government declined to intervene in the previously filed *qui tam* suit and Webster, with the Government's consent, dismissed the action. Three months later the Government filed its own FCA suit based on the same underlying facts. The court ruled that the first-to-file bar in § 3730(b)(5) prevents any person other than the Government from intervening in a pending action, and rejected Webster's argument that the bar applies only to suits brought by private persons and not the Government. The circuit court cited to its prior decision in U.S. ex rel. LaCorte v. Wagner, 185 F.3d 188 (4th Cir. 1999), in which it held that "the statute plainly and absolutely prohibits intervention by private parties." Furthermore, the court ruled that a voluntary dismissal without prejudice leaves the situation as though a suit had never been filed, thereby rejecting Webster's argument that she was essentially intervening in her own suit. The § 3730(c)(5) alternate remedy provision was inapplicable because Webster abandoned her rights as a *qui tam* relator upon dismissing her suit.

U.S. ex rel. Merena; Spear et al.; Grossenbacher et al. v. SmithKline Beecham Corporation et al., 114 F. Supp.2d 352 (E.D. Pa. Aug. 3, 2000), **20 TAF QR 5 (October 2000)**
See also: *Public Disclosure Bar and Original Source Exception; Relator's Share*

RES JUDICATA

In ***U.S. ex rel. King v. Hillcrest Health Center Inc., et al*, Order, No. CIV-98-295-W (W.D. Okla. Jan. 4, 2000)**, **18 TAF QR 13 (April 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 found an identity of cause of action in the two lawsuits, even though the suits were based on different legal theories and not grounded in precisely the same set of facts. Applying the 10th Circuit's "transactional approach" to res judicata analysis, 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" because the evidence presented in both lawsuits would substantially overlap.

EMPLOYMENT RELEASE

In ***U.S. ex rel. Chandler v. Swords to Plowshares et al.*, Opinion, No. 99-15725 (9th Cir. Oct. 16, 2000)**, the 9th Circuit in an unpublished opinion affirmed a lower court's ruling that a relator's prior release of claims "arising out" of his employment bar his *qui tam* action. According to the circuit court, the district court correctly applied U.S. ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230 (9th Cir. 1997), 9 TAF QR 7 (April 1997), rather than U.S. ex rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir. 1995), 3 QR 1 (October 1995). Here, like in Hall and unlike in Green, the Government had pre-filing knowledge of the *qui tam* allegations.

COLLATERAL ESTOPPEL

Criminal conviction estops defendant from denying civil liability

In ***United States v. Lamanna*, 114 F. Supp. 2d 193 (E.D.N.Y. Sept. 26, 2000)**, a New York district court held that a criminal conviction for making a false statement to obtain federal employees' compensation collaterally estopped the defendant from denying civil liability under the False Claims Act. However, because the defendant was convicted of making a false statement on only one compensation form, summary judgment could not be granted as to the other 14 forms.

SETTLEMENT

Government has absolute veto over settlements

The 6th Circuit held in ***U.S. ex rel. Doyle et al. v. Health Possibilities, P.S.C. et al.*, 207 F.3d 335 (6th Cir. March 22, 2000)**, **18 TAF QR 1 (April 2000)**, that § 3730(b)(1) grants

the Government an absolute veto power over settlements in *qui tam* actions. The court relied on Searcy v. Phillips Electronics of North Am. Corp., 117 F.3d 154 (5th Cir. 1997), 10 TAF QR 3 (July 1997) in holding that the language, purpose, structure and legislative history of the FCA plainly grant the Government, as the real party in interest, veto power over settlements at any point in the litigation. The court chose not to rely upon Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994), which held that the Government may object to a settlement only for "good cause" when it has not intervened in the action. According to the court, requiring the Government's consent does not raise separation of powers or mootness concerns. *But see* ***U.S. ex rel. Fender v. Tenet Healthcare Corporation et al., 105 F. Supp.2d 1228 (N.D. Al. July 6, 2000)***, **20 TAF QR 10 (October 2000)** (holding that the relator could dismiss or settle the action without the Attorney General's consent when the Government declined to intervene).

District court may modify settlement agreement

In ***U.S. ex rel. Sharma v. University of Southern California, 217 F.3d 1141 (9th Cir. July 10, 2000)***, **20 TAF QR 9 (October 2000)**, the 9th Circuit affirmed a district court's modification of a settlement agreement to bring it into compliance with False Claims Act requirements. Although a clause in the settlement agreement rendered the agreement null and void upon modification, the clause was not effective as both parties contemplated that the FCA would govern the agreement, and the modification was required by the Act. The district court had ruled that attorneys' fees could not be included as part of the proceeds of the action, as they were in the settlement agreement at issue. The 9th Circuit observed that the district court is empowered by the FCA to determine the relator's share of a settlement and to modify settlement agreements if necessary to ensure compliance with the Act.

RELATOR'S SHARE

In ***U.S. ex rel. Thornton v. Science Applications International Corp. et al., 207 F.3d 769 (5th Cir. March 28, 2000)***, **18 TAF QR 8 (April 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 when the Government failed to advise him of the value of the released claims prior to finalization of the settlement.

See also ***U.S. ex rel. Fox v. Northwest Nephrology Associates, P.S. et al., 87 F. Supp. 2d 1103 (E.D. Wash. Feb. 15, 2000)***, **18 TAF QR 11 (April 2000)** (holding that a relator's share is derived from proceeds of the action that are actually received by the Government, and may be paid in installments as the Government is paid).

U.S. ex rel. Merena; Spear et al.; Grossenbacher et al. v. SmithKline Beecham Corporation et al., 114 F. Supp. 2d 352 (E.D. Pa. Aug. 3, 2000)
See also: *Public Disclosure Bar and Original Source Exception*; *Section 3730(b)(5) First-to-File Bar*

ATTORNEYS' FEES

U.S. ex rel. Poulton v. Anesthesia Associates of Burlington, Inc. et al., 87 F. Supp. 2d 351 (D.Vt. March 3, 2000), **18 TAF QR 13 (April 2000)** (holding that the complexity of the *qui tam* case and risks of not prevailing justified increase in the lodestar amount).

U.S. ex rel. Mikes v. Straus et al., 98 F. Supp. 2d 517 **(S.D.N.Y. June 2, 2000), 19 TAF QR 13 (July 2000)** (granting in part and denying in part the defendants' petition for attorneys' fees pursuant to § 3730(d)(4)).

BANKRUPTCY

Qui tam action not stayed by bankruptcy filing

In *U.S. ex rel. Jane Doe 1 et al. v. X, Inc. et al., 246 B.R. 817 (E.D.Va. March 23, 2000)*, **18 TAF QR 2 (April 2000)**, a Virginia district court held that relators could proceed with a *qui tam* action against a defendant who had declared bankruptcy. Although a declaration of bankruptcy under Chapter 11 normally effects an automatic stay of 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 ruled that an FCA suit is unquestionably an action to enforce the Government's "police or regulatory power," and thus falls under the "police powers" exception to the automatic stay.

COLLECTION PROCEDURES/SOVEREIGN IMMUNITY

In *Shaw v. United States et al., 213 F.3d 545 (10th Cir. May 18, 2000)*, **19 TAF QR 6 (July 2000)**, the 10th Circuit ruled that the FCA contains no express or implied waiver of the United States' sovereign immunity with respect to the collection of fees and expenses awarded under the Act. The court quashed a writ of garnishment served by the relator on a federal agency believed to owe money to the *qui tam* defendant pursuant to various government contracts. The court ruled further that the relator was not acting as "counsel to the United States" as that is defined in the Federal Debt Collection Procedures Act, nor could the relator invoke the collection procedures available to the United States under that statute.

PRIVILEGES

Self-Evaluative Privilege

In ***U.S. ex rel. Sanders v. Allison Engine Co., Inc. et al., 196 F.R.D. 310 (S.D. Ohio Aug. 18, 2000)***, **20 TAF QR 17 (October 2000)**, an Ohio Magistrate Judge granted the relator's motion to compel discovery, ruling that the defendant contractor could not withhold from discovery internal investigations establishing non-compliance by invoking the "self-critical analysis/self-evaluative privilege." The court observed that the contractor's self-audit was not performed with the expectation that it would remain confidential, and there is a strong public interest in having government contractors meet their contractual obligations. The court cited to United States v. Southern Bell Tel. & Tel. Co., 915 F. Supp. 308 (N.D. Fla. 1996), which held that the privilege does not exist under the FCA.

Selective Waiver Doctrine

In ***In re: Columbia/HCA Healthcare Corporation, 192 F.R.D. 575 (M.D. Tenn. 2000)***, **19 TAF QR 12 (July 2000)**, a Tennessee district court ruled that Columbia/HCA Healthcare Corp. waived both the attorney-client privilege and the attorney work-product exception as to documents it produced to the Government during an investigation of Columbia/HCA for improper billing practices. The district court rejected Columbia/HCA's claim to the "selective waiver doctrine," which provides that when an entity voluntarily reveals communications to the Government during a Government investigation, the waiver applies as to the Government but not as to all other adversaries. The court ordered Columbia/HCA to produce the audit documents that previously had been provided to the Government.

SECTION 3730(h) RETALIATION CLAIMS

In ***McKenzie v. BellSouth Telecommunications, Inc., 219 F.3d 508 (6th Cir. July 12, 2000)***, **20 TAF QR 11 (October 2000)**, the 6th Circuit affirmed a district court's dismissal of a § 3730(h) retaliation claim, holding that the plaintiff did not engage in protected activity, nor did she put the employer on notice of a possible *qui tam* lawsuit. The court ruled that protected activity is activity "in furtherance of" a *qui tam* action, meaning activity which reasonably could be viewed as leading to a viable *qui tam* suit. According to the court, the plaintiff's internal complaints about alleged fraudulent activity and her refusal to falsify repair records were not activities "in furtherance of" a *qui tam* suit because she did not mention *qui tam*, the FCA, or fraud against the Government. The newspaper article she circulated described consumer fraud but not government contracting fraud, and did not refer to the FCA or *qui tam* litigation. Additionally, the court noted that even if the activity were considered protected, the plaintiff failed to put BellSouth on notice that she was contemplating a *qui tam* suit.

Therefore, since BellSouth did not know of the possible suit, it could not have been motivated by any retaliatory animus.

Court allows dual motive defense

In ***Norbeck v. Basin Electric Power Cooperative*, *215 F.3d 848 (8th Cir. June 15, 2000)***, **19 TAF QR 8 (July 2000)**, the 8th Circuit affirmed a lower court's decision to allow a dual motive defense for an employer sued under § 3730(h). Relying on legislative history, the appellate court interpreted § 3730(h) as exonerating the employer where the employer could prove that retaliation was not the sole cause of the plaintiff's firing. Based on the jury's finding that the employer would have fired the plaintiff regardless of his protected activity, the court reversed the lower court's award of attorneys' fees to the plaintiff.

Emotional distress damages available under § 3730(h)

In ***Hammond v. Northland Counseling Center, Inc. et al.*, *218 F.3d 886 (8th Cir. July 17, 2000)***, **20 TAF QR 13 (October 2000)**, the 8th Circuit reversed and remanded a district court ruling that emotional distress damages and attorneys' fees are not available under § 3730(h). The court reasoned that the FCA makes available "special damages" sustained as a result of discrimination, and that emotional distress damages are exactly the type contemplated by the Act. The court also ruled that in calculating § 3730(h) damages, mitigating pay must be subtracted before back pay is doubled. If back pay were to be calculated first, the purpose of the retaliation section would be frustrated as it is designed to make the plaintiff whole, and instead the plaintiff would receive a windfall when she suffered no monetary damage.

Performance of normal job duties not protected activity

In ***Faldetta v. Lockheed Martin Corp.*, *2000 WL 1682759 (S.D.N.Y. Nov. 9, 2000)***, a New York district court ruled that the plaintiff failed to satisfy any of the required elements for a claim under § 3730(h). The plaintiff alleged that he was fired for refusing to approve defective parts and for refusing to participate in a cover-up of the deficiencies. According to the court, this was not activity subject to protection under § 3730(h) – defined as activity "in furtherance of a *qui tam* action" – because his conduct fell within the context of his normal job responsibilities. In addition, the defendant was not on notice of the protected activity. Finally, since the defendant provided a legitimate non-discriminatory reason for terminating the plaintiff, the plaintiff had failed to show that his firing was "because of" his participation in protected activity.

Arbitration clause does not preclude § 3730(h) suit

In ***Nguyen v. City of Cleveland et al.***, *121 F. Supp. 2d 643 (N.D. Ohio Nov. 21, 2000)*, an Ohio district court ruled that an FCA retaliation claim was not subject to a clause in an employment contract mandating that disputes be settled through arbitration. The court noted that neither the plain text of § 3730(h) nor its legislative history demonstrates congressional intent to exempt retaliation claims from the Arbitration Act, but nevertheless an inherent conflict exists between arbitration and the underlying purpose of the FCA. The court also ruled that a whistleblower could maintain a retaliation action against an employer who discriminates against him at the behest of or on behalf of another.

Plaintiff not engaged in protected activity

In ***Dookeran v. The Mercy Hospital of Pittsburgh et al.***, *Opinion and Order, Civ. No. 99-134 (W.D. Pa. Nov. 27, 2000)*, a Pennsylvania district court dismissed the plaintiff's retaliation claim, holding that the plaintiff was not engaged in protected activity. The court ruled that the plaintiff was not acting in furtherance of an FCA action when he informed his employer about potentially fraudulent information in the employer's application to be designated a clinical study research center. The court determined that the application was not a claim for payment, and therefore the plaintiff's activity could not lead to a viable FCA action. Instead, the court likened the application to a bid, which is not considered a claim for payment if no contract is entered. The application ultimately was not accepted.

See also:
Hoefer v. Fluor Daniel, Inc. et al., *92 F. Supp. 2d 1055 (C.D. Cal. April 7, 2000)*, **19 TAF QR 12 (July 2000)** (holding that FCA does not preempt state wrongful discharge action).

U.S. ex rel. Ackley v. IBM Corp. et al., *110 F. Supp. 2d 395 (D. Md. July 27, 2000)*, **20 TAF QR 14 (October 2000)** (holding that employee properly put his employer on notice of protected activity; statute of limitations in § 3730(h) claims).

U.S. ex rel. Bhatnagar v. Kiewit Pacific Co. et al., *2000 WL 1456940 (N.D. Cal. Sept. 22, 2000)*, **20 TAF QR 15** (October 2000) (dismissing retaliation action against state).

FCA NEWS

HCA Agrees to Pay $840 Million in Government's Largest Fraud Settlement Ever

In December 2000, DOJ reported that the nation's largest for-profit hospital chain, HCA-The Health Company (formerly known as Columbia/HCA) agreed to pay $840 million in criminal and civil fines and penalties to resolve allegedly unlawful billing of federally and state funded health care programs. $745 million, of which $731.4 million will go to the Federal Government and $13.6 million to the States, resolves only a portion of HCA's civil liability. The civil settlement resolves allegations of billing for services provided to ineligible patients, falsifying DRG codes, improperly billing for certain lab tests, and billing for home health services that were medically unnecessary or never provided. The agreement does not resolve allegations that HCA unlawfully included the costs of running its hospitals on cost reports submitted to the Government, or that it paid kickbacks to physicians to get Medicare and Medicaid patients referred to its facilities. The criminal portion of the $840 million consists of a $95 million fine to be paid by HCA subsidiaries. The subsidiaries that have pled guilty will be ineligible to participate in government health care programs.

The $745 million civil settlement includes the following: over $95 million to resolve allegations of fraudulent laboratory billing practices; more than $403 million to resolve allegations of upcoding; $50 million to resolve allegations that the company claimed nonreimbursable marketing and advertising costs disguised as community education; $90 million to resolve allegations of improper charges to Medicare in the purchase of home health agencies; and, $106 million to resolve allegations of billing for home health visits for nonqualified patients.

The settlement is the largest fraud settlement ever reached by the Justice Department and resolves seven of the 27 *qui tam* lawsuits filed in various jurisdictions across the country, but consolidated in Washington, D.C. As part of the settlement, HCA agreed to an eight-year corporate integrity agreement, which according to HHS Inspector General June Gibbs Brown is unprecedented in its scope and level of detail.

Senator Charles Grassley (R-IA), co-sponsor of the 1986 amendments to the False Claims Act, believes that this settlement vindicates those who fought efforts to gut the

Act two years ago. Grassley stated: "Two years ago, hospitals complained that prosecutors were after them for innocent billing mistakes. In response, some legislators tried to gut the False Claims Act. Today's announcement proves two things. One, outright fraud can masquerade as innocent billing mistakes. Two, prosecutors know the difference, and they need a robust False Claims Act to make their case." Former Attorney General Janet Reno described the investigation into HCA's billing practices as "the largest multiagency investigation of a healthcare provider ever undertaken by the U.S."

Significantly, the allegations not resolved by the civil settlement may ultimately lead to HCA's greatest liability. The unresolved allegations, that HCA unlawfully charged for the cost of running its hospitals on cost reports submitted to the Government and paid kickbacks to physicians for referrals, are likely to cost the company close to an additional $1 billion. Many of the unresolved allegations are part of *qui tam* lawsuits filed by John Schilling, a former reimbursement manager, and Jim Alderson, a former hospital CFO. Both cases allege that HCA and its predecessor companies followed a policy of including in their cost reports claims for reimbursement related to medical care that they knew were inflated, unsupportable, or nonreimbursable. A major allegation is that HCA then created "reserve" cost reports that itemized improperly filed claims so that the money could be repaid to the government if the fraud was ever discovered during an audit. In addition, HCA's hospitals allegedly shifted purchase costs for home health agencies into management fees in order to qualify for Medicare reimbursement.

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JUSTICE RECOVERS RECORD $1.5 BILLION IN FRAUD PAYMENTS

HIGHEST EVER FOR ONE YEAR PERIOD

WASHINGTON, D.C. - The United States collected a record $1.5 billion in civil fraud recoveries during the past fiscal year - an increase of almost 50% above the largest previous annual recovery in 1997, Attorney General Janet Reno announced today.

"This new record demonstrates the Department's continued commitment to ensure the proper use of taxpayer monies," said Attorney General Reno. "The Department will continue to pursue those who seek to defraud the United States, whether by providing defective products, billing for services that were not provided or otherwise misusing public funds for private gain."

Approximately $1.2 billion of the Department's settlements and judgments occurred in connection with cases filed under the federal whistleblower statute, which allows individuals who disclose fraud to share in the government's recovery. To date, payments to whistleblowers for the past fiscal year (October 1, 1999 - September 30, 2000) have totaled approximately $173 million.

Health care fraud cases once again topped the list of annual recoveries, totaling more than $840 million. This amount included the largest civil fraud recovery ever - a $385 million settlement with Fresenius Medical Care to resolve sweeping allegations of wrongdoing by its kidney dialysis subsidiary. The Department also recovered $170 million from Beverly Enterprises, Inc., the largest nursing home operator in the United States, for alleged false billings to Medicare involving over 400 nursing homes around the country.

"Health care fraud imposes enormous costs on American taxpayers and decreases the quality of care provided to patients," said Assistant Attorney General David W. Ogden of the Department's Civil Division.

"Although the vast majority of health care providers are honest and provide the highest standard of care, stopping those who prey on the health care system remains one of the Department's top law enforcement priorities."

After health care, the largest category of fraud recoveries involved the production of oil and other minerals from public lands. The Department recovered more than $230 million from companies alleged to have underpaid royalties on such production, including $95 million from Chevron, $56 million from Shell, $32 million from BP Amoco, $26 million from Conoco and $11.9 million from Devon Energy.

The Department's recoveries also included over $140 million in settlements with twenty-five brokerage firms. These companies allegedly sold open market securities with artificially low yields to municipalities refunding tax-exempt bonds, thereby reducing the municipalities' purchase of special low-interest Treasury bonds. Defense procurement fraud accounted for another $100 million in recoveries, including up to $54 million from the Boeing Corporation to resolve allegations that it placed defective transmission gears in army Chinook helicopters.

The Department's record level of recoveries for fiscal year 2000 also included the following:

- $74 million from Anthem Blue Cross and Blue Shield, formerly the Medicare Part A intermediary for Connecticut, to resolve claims that it underreported the total amount of interim payments by hospitals to improve scores on Health Care Financing Administration evaluations;

- $53 million from Gambro Healthcare Patient Services, Inc. to resolve allegations that it billed Medicare for unnecessary laboratory tests;

- $35 million from Jacobs Engineering Group in connection with allegations that it improperly charged overhead costs to various government contracts;

- $33.5 million from Toshiba Corporation to settle claims arising from its sale of defective computer laptops to various federal agencies;

- $31 million from Community Health Systems for allegedly "upcoding" - the improper assignment of diagnostic codes to hospital inpatient discharges for the purpose of increasing reimbursement amounts to various hospital services; and

- $16.6 million from two government contractors, CRSS, Inc. and Metcalf & Eddy, for alleged false billings in connection with the construction of an air defense system in Saudi Arabia.

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Top *Qui Tam* Recoveries of the Year 2000

Company U.S. District Court	Allegations	Government Recovery	Relator Share
Columbia/HCA consolidated D DC	Multiple types of false billing of Medicare and Medicaid, including unbundling and billing for medically unnecessary services, services not provided, and non-reimbursable costs	$731.4 million	Numerous (Shares not yet determined)
Fresenius Medical Care of North America D MA SD FL	Billing of Medicare and other government programs for false lab testing claims, for medically unnecessary services, and for claims arising out of kickback-induced referrals	$385 million	Dana Austin and Ven-A-Care $44.8 million Jay Buford, Russell Davis, and William Schoff $18.1 million Gregory Price and Richard Bradford $2.9 million
Beverly Enterprises, Inc. ND CA	Billing Medicare for labor costs incurred in treating non-Medicare patients at skilled nursing facilities	$170 Million	Domenic Todarello $28.9 million
Quorum Health Group, Inc. ED NY	Cost-shifting and filing of false Medicare cost reports	$95.5 million	James Alderson (Share not yet determined) William Menke (No share)
Chevron Corporation ED TX	Underpaying royalties for oil produced on Federal and Indian land	$95 million	J. Benjamin Johnson and John Martinek (Share not reported)
The Boeing Company SD OH	Knowing installation of defective gears in Army helicopters	At least $54 million (up to $61.5 million pending outcome of appeal)	Brett Roby $6.5 or $10.5 million (pending outcome of appeal)

Top 2000 *Qui Tam* Recoveries cont.

Company U.S. District Court	Allegations	Government Recovery	Relator Share
Gambro Healthcare, Inc. MD FL	False claims for lab services provided to end stage renal disease patients	$53.1 million	Jay Buford, William Schoff and Diane Castano (Shares not reported)
Texaco, Inc. ED TX	Underpaying royalties for oil produced on Federal and Indian land	$43 million	J. Benjamin Johnson and John Martinek (Shares not reported)
Solomon Smith Barney ED NY	Diverting money owed to the Federal Government and municipalities by artificially inflating the price of securities, thereby artificially lowering their yield	$38.8 million	Michael Lissack and Joseph Mooney (Shares not reported)
Jacobs Engineering Group, Inc. CD CA	Billing for inflated lease payments under various government contracts	$35 million	Edwin Bond (dismissed from action in 1999; matter currently on appeal)
BP Amoco ED TX	Underpaying royalties for oil produced on Federal and Indian lands	$32 million	J. Benjamin Johnson and John Martinek $5.4 million
Lifescan Inc. ND CA	Filing false medical device reports with the FDA	$30.6 million	Robert Konrad and John Pumphrey $6.3 million
National Healthcare, Ltd. Partnership MD FL	Filing false Medicare cost reports and billing for services not provided	$27 million	Philip Charles Braeuning $5.4 million

Columbia/HCA

See Spotlight, page 16.

U.S. ex rel. Menke v. Quorum Health Resource, Inc. et al. *(ND AL No. CV-96-P-1638-S)*

In October 2000, DOJ announced that Quorum Health Group, Inc. of Brentwood, Tennessee and its subsidiary QHG of Alabama, Inc. d/b/a Flowers Hospital of Dothan, Alabama agreed to pay **$18 million** to settle a *qui tam* suit alleging that the companies engaged in cost-shifting and false billing of Medicare. Quorum Health Group, Inc. is the nation's largest hospital management company. This settlement is part of an overall $95.5 million settlement announced in September 2000, while this *qui tam* suit remained under seal. At that time, Quorum agreed to pay $77.5 million to resolve a *qui tam* suit (*U.S. ex rel. Alderson v. Quorum Health Group, Inc.*, MD FL No. 99-0413-CIV-24B, 20 TAF QR 43 (October 2000)) alleging that the company included unallowable costs in its Medicare cost reports, and routinely kept a secret set of "reserve" cost reports that specifically identified improper claims in case the fraud was ever discovered. In this case, the lawsuit alleged that from 1988 to 1998, Quorum and Flowers Hospital improperly shifted the hospital's costs onto the Medicare cost reports of Home Care Services (HCS), a home health agency owned by Quorum and Flowers. Quorum and Flowers therefore received more reimbursement than that to which they were entitled. Included in the cost reports were hospital employee salaries and benefits, costs of the hospital's physical therapy department, and hospital medical malpractice insurance premiums. The lawsuit further alleged that Quorum and Flowers charged Medicare for unallowable costs, also through HCS cost reports. Included were the rental costs of a building owned by the hospital's former CEO, sales transaction payments disguised as consulting fees, and kickbacks to physicians. The relator, William Menke, will plead guilty to one felony charge for income tax evasion arising from improper payments he received from an HCS vendor. Menke will not receive any relator's share and is excluded form participating as a provider in the Medicare program for eight years. The matter was investigated by HHS OIG. Peter Chatfield, Stephen Meagher, and Matt Smith of Phillips & Cohen (Washington, D.C. and San Francisco, CA) represented the relator. The Government was represented by Arnold Auerhan of the DOJ Civil Division and Assistant U.S. Attorney Jay Trezevant.

Toshiba Corporation

In October 2000, DOJ announced that Toshiba Corporation agreed to pay **$23 million** to settle a class action lawsuit and FCA allegations that it sold defective laptop computers to government agencies. In addition, Toshiba will provide the Government with $10.5 million in coupon credits for federal agencies. The settlement followed an investigation into allegations that a defect in Toshiba's laptops periodically caused undetected data corruption when data was being transferred to and from a disk. Assistant U.S. Attorney Michael Lockhart represented the Government.

United States v. Anastasio *(D CT No. 3:99cv1163(PCD))*

In October 2000, podiatrist Andrew Anastasio of West Haven, Connecticut agreed to pay **$986,000** to resolve allegations that he sought reimbursement from Medicare for nonreimbursable procedures. Anastasio also will be permanently excluded from participating in any federally funded health care program. This

is the largest civil settlement with an individual health care provider in the history of the District of Connecticut. The matter was investigated by HHS OIG, FBI, and inspectors of the U.S. Postal Service. Assistant U.S. Attorneys David Shelton and Gates Garrity-Rokous represented the Government.

Gateway, Inc.

In October 2000, DOJ announced that Gateway, Inc. agreed to pay the Government **$9 million** to settle allegations that it failed to give required price reductions on computers sold to federal agencies. According to DOJ, under the provisions of Gateway's contract with GSA, Gateway was required to give the Government any price reductions that occurred between the placement of the order and the shipping date. From May 1994 until March 1997, Gateway allegedly had no system in place to ensure compliance with this requirement, and routinely failed to give the Government the required price reductions. The matter was investigated by GSA. The Government was represented by Assistant U.S. Attorney John Holm.

Lafayette General Medical Center, Inc.

In October 2000, DOJ announced that Lafayette General Medical Center, Inc. agreed to pay the Government **$365,000** to settle allegations that it failed to follow billing regulations under Medicare's Prospective Payment System. In order to increase reimbursement, Lafayette General allegedly billed as discharged patients who were actually transferred to other hospitals. The settlement is part of a national initiative launched by HHS OIG to uncover fraud in the Prospective Payment System. Assistant U.S. Attorney Scott Newton represented the Government.

U.S. ex rel. Youker v. Northrop Corporation (CD CA No. CV96-5587-RSWL)

In October 2000, DOJ announced that Northrop Grumman Corporation paid the Government **$1.4 million** to settle a *qui tam* suit alleging that it overcharged the Air Force for instruction and repair manuals for the B-2 Bomber. Northrop, the prime contractor for the B-2 Bomber, allegedly violated the Truth in Negotiations Act by withholding data showing that its cost estimates were inflated. The *qui tam* suit was filed in 1996 by Gary Youker, a worker in Northrop's material procurement organization. The relator's share is 19 percent or $266,000. The Government was represented by Assistant U.S. Attorney Jack Barrett.

Southern Chester County Medical Center

Anesthesia Associates of Chester County

In October 2000, Southern Chester County Medical Center and its professional anesthesia group, Anesthesia Associates of Chester County, reportedly agreed to pay a total of **$700,000** to resolve allegations that the rural Pennsylvania hospital defrauded Medicare. According to DOJ, the medical center billed Medicare for anesthesia services from 1993 to 1998 that did not comply with Medicare Part B rules governing coding, documentation, and reimbursement. In light of the medical center's self-audit and voluntary disclosure and evaluation by HHS OIG of its compliance structure, the settlement agreement provides that SCC Medical Center will continue to implement its corporate compliance program without the need for a corporate integrity agreement overseen by HHS OIG.

***Washington et al. v. CSC Credit Services Inc. et al.* (D DC No. 97-CV-116)**

In October 2000, DOJ announced that CSC Accounts Management Inc., d/b/a CSC Credit Services, Inc. (CAMI) agreed to pay more than **$6.4 million** to settle a *qui tam* suit alleging that it made false claims in connection with defaulted student loans. The loans were distributed pursuant to the Federal Family Education Loan Program and the William D. Ford Direct Student Loan Program. According to the lawsuit, CSC submitted improper claims for payments of commissions and incentive bonuses relating to certain defaulted student loans. The settlement also resolves allegations that CAMI wrongfully claimed commissions of 18.5 percent on certain consolidated loans when it was entitled to a commission of only 10 percent. The *qui tam* suit was filed in 1997 by Wanda Washington, Donald George, and Joseph Molina. DOJ intervened in May 1999. The case was investigated by the Department of Education OIG and the Department of Education Office of Student Financial Assistance, Debt Collections Service. The relator's share is 14 percent or $900,000. Robert Powel Trout of Trout & Richards (Washington, D.C.) represented the relators. The Government was represented by Rebecca Rohr and Sara Winslow of the DOJ Civil Division.

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

In October 2000, DOJ announced that Kerr-McGee Corporation agreed to pay **$13 million** to settle a *qui tam* suit alleging that the corporation had underpaid royalties due for oil produced on federal and Indian lands. The suit, alleging that 14 oil companies engaged in systematic underreporting for millions of barrels of oil, was filed in 1996 by J. Benjamin Johnson and John Martinek, former employees of Atlantic Richfield Co. According to DOJ, Kerr-McGee was required to submit reports reflecting the amount and value of oil the company produced pursuant to leases administered by the Department of the Interior. Instead, the company allegedly submitted reports for a ten-year period that undervalued the oil and, as such, paid fewer royalties than owed. The relator's share from this settlement was not announced.

DOJ previously reached settlement agreements with other defendant oil companies in this action, including a $95 million settlement with Chevron Corporation, a $32 million settlement with BP Amoco, a $26 million settlement with Conoco, Inc., a $11.9 million settlement with Devon Energy Production Company (formerly Pennzoil) and a $7.3 million settlement with Oxy USA. Michael Havard and Reuben Guttman of Provost & Umphrey Law Firm (Beaumont, TX) represented the relators. Representing the Government was U.S. Attorney Mike Bradford.

***U.S. ex rel. Faulkner v. O'Gara-Hess & Eisenhardt Armoring Co. et al.* (SD OH No. 99-CV-243)**

In October 2000, O'Gara-Hess & Eisenhardt Armoring Company agreed to pay **$1.1 million** to settle a *qui tam* suit alleging that the company's subcontractors provided nonconforming vehicle shells to the U.S. Army. The *qui tam* action alleged that the defense contractor used insufficient quality control procedures to oversee the production of more than 1500 armored High Mobility Multi-Purpose Wheeled Vehicles ("Hummers" or "Humvees") for the Army and Air Force between 1996 and 1998. According to the lawsuit, parts supplied by three subcontractors were produced by non-certified welders, allowing inferior parts to be installed on the armored passenger compartments of the vehicles. Subcontractors allegedly substituted

grades of steel and failed to properly mark component parts. The *qui tam* suit was filed in April 1999 by Luke Faulkner, a former employee of the subcontractors. The relator's share is 18.5 percent or $203,500. The relator was represented by James Helmer Jr., Frederick Morgan Jr., and Julie Popham of Helmer, Martins & Morgan (Cincinnati, OH). The Government was represented by Assistant U.S. Attorneys Gerald Kaminski and Sharon Zealey.

***U.S. ex rel. Lissack et al. v. Solomon Smith Barney** (ED NY No. CR-99-566)*

In November 2000, four brokerage firms reportedly agreed to pay nearly **$14.7 million** to settle allegations that they artificially lowered securities' yields by pricing them in excess of fair market value. Under the settlement, the Government will collect from Everen Securities, now First Union Securities Corp, $12.7 million; Kidder, Peabody & Co., $1.7 million; Donaldson Lufkin Jenrette Securities Corp., $104,000; and, Bear Stearns & Co., $94,000. This is the sixth "yield burning" settlement stemming from a *qui tam* suit filed in 1995 by Michael Lissack, a former managing director with Solomon Smith Barney, and Joseph Mooney. Erika Kelton of Phillips & Cohen (Washington, D.C.) represented the relators. The Government's case was handled by the SEC, DOJ, Department of the Treasury, and the IRS.

United Healthcare of Illinois, Inc.

In November 2000, DOJ announced that United Healthcare of Illinois, Inc. agreed to pay **$2.9 million** to settle allegations that the HMO incorrectly categorized Medicare beneficiaries who were institutionalized. According to DOJ, the Chicago-based HMO reported increased periods in which beneficiaries were institutionalized in order to receive enhanced per capita advance payments to which it was not entitled. The improper categorizations were discovered through an HHS OIG audit. Assistant U.S. Attorney Linda Wawzenski represented the Government.

Ashton Hall Nursing and Rehabilitation Center

In November 2000, Ashton Hall Nursing and Rehabilitation Center reportedly agreed to pay **$60,000** to settle allegations that it provided inadequate care to a resident. It was also reported that the settlement requires the Pennsylvania nursing home to spend $100,000 on lighting, air conditioning, flooring, and other facility improvements. The settlement resolves claims arising from a 1998 investigation by HHS OIG and HCFA. The Government was represented by Assistant U.S. Attorney David Hoffman.

The Boeing Company

Space Alliance

In November 2000, DOJ announced that NASA contractors Boeing and Space Alliance agreed to pay **$825,000** and give up rights to $1.2 million in unpaid invoices to settle allegations that subcontractor Omniplan commingled personal expenses with its corporate accounts. In 1993, the United States sued Omniplan and secured a consent judgment, but the company went bankrupt before it was able to pay the full amount. In January 2000, the Government filed a civil suit against Rockwell Space Operations Company (RSOC), which at the time the false claims were submitted had a contract with NASA to manage Omniplan. Between 1986 and 1993, RSOC told NASA that all of Omniplan's costs were reasonable and allowable. However, Omniplan charged to NASA the operating expenses for a

pizza delivery company being run out of a building being billed to NASA and the expenses for phony companies that leased buildings and equipment to Omniplan at inflated values. In addition, personal expenses such as jewelry, vacations and home maintenance were charged to the Government. In 1995, the owner of Omniplan, Ralph Montijo, pleaded guilty to numerous felony violations related to the company's fraudulent practices and served two years in federal prison. The matter was investigated by NASA OIG and DCIS.

U.S. ex rel. Konrad v. LifeScan Inc. *(ND CA No. C-00-20478-JF)*

In December 2000, LifeScan Inc. agreed to pay **$30.6 million** to resolve a *qui tam* suit alleging that the California-based subsidiary of Johnson & Johnson filed false reports with the FDA. The company simultaneously pleaded guilty to three misdemeanor criminal charges and will pay a $29.4 million criminal fine for introducing into interstate commerce a misbranded medical device, failing to furnish appropriate notifications to the FDA, and submitting false reports to the FDA. According to the Government, between May 1996 and late 1997, LifeScan manufactured and distributed defective blood glucose monitoring devices which gave erroneous results to patients measuring their blood sugar levels. The *qui tam* suit arose from LifeScan's failure to file medical device reports with the FDA advising it of the illnesses and injuries reportedly resulting from the defective device. According to DOJ, the reports the company did file with the FDA contained false, incomplete, or misleading information. The *qui tam* suit was filed in 1997 by Robert Konrad and John Pumphrey, two former LifeScan employees. The relators' share is 20 percent or $6.3 million. The Government was represented in the civil settlement by Assistant U.S. Attorney Joann Swanson.

U.S. ex rel. Braeuning v. National Healthcare, Ltd. Partnership et al. *(MD FL No. 97-2715)*

In December 2000, DOJ announced that National Healthcare Corp. agreed to pay **$27 million** to settle a *qui tam* suit alleging that the Tennessee-based nursing home care provider submitted inflated cost reports to Medicare. NHC owns, leases, or provides services to 105 nursing homes nationwide. According to DOJ, the cost reports overstated the number of hours NHC staff spent taking care of Medicare patients, and were contradicted by the nursing staff's time records. In addition, the lawsuit alleged that NHC billed for therapy when it does not do that type of work. The *qui tam* suit was filed in 1996 by Philip Charles Braeuning, a former nursing home administrator at an Orlando facility then managed by NHC. The case was investigated by HHS OIG. The relator's share is 20 percent or $5.4 million. The Government was represented by Marie O'Connell of the DOJ Civil Division.

Advanced Medical Transport

In December 2000, Illinois ambulance company Advanced Medical Transport reportedly agreed to pay **$2.1 million** to the Federal and state governments to settle allegations that it billed improperly for ambulance transport services. AMT allegedly transported Medicare and Medicaid patients by ambulance, improperly claiming that the patients could be moved only by stretcher. Reportedly, most of the patients could be transported by wheelchair van, and therefore AMT was not eligible for Medicare or Medicaid reimbursement. The matter was investigated by the FBI, HHS OIG, the U.S. Postal Inspection Service, and the Illinois State Police Medicaid Fraud Control Unit. Assistant U.S. Attorney Stephen Kubiatowski represented the Government.

***U.S. ex rel. Thornton v. Adventist Health System Sunbelt Healthcare Corporation** (MD FL No. 6:97-CV-146-ORL-31C)*

In December 2000, DOJ announced that Adventist Health System Sunbelt Healthcare Corp. and three affiliated hospitals agreed to pay **$8.7 million** to settle a *qui tam* suit alleging that they overcharged Medicare for ambulance services. According to the Government, from 1992 to 1999 Adventist and its facilities submitted cost reports to Medicare that included inflated management fees for ambulance services. The *qui tam* suit was filed by Mark Thornton, a former director of internal audit for an Adventist subsidiary. The relator's share is 17 percent or $1.5 million. The relator was represented by Robert Vogel of Vogel and Slade LLP (Washington, D.C.). The Government was represented by Justine Draycott of the DOJ Civil Division.

Dr. James Desnick

In December 2000, DOJ announced that ophthalmologist James Desnick agreed to pay a total of **$14 million** to the Federal Government and the State of Illinois to settle allegations that he and his hospital defrauded Medicare and Medicaid in a variety of ways. Desnick is the chairman of the board and principal shareholder of Doctors Hospital of Hyde Park, which paid $4.5 million in May 1999 to resolve FCA allegations that it upcoded pneumonia diagnoses. That agreement was part of a nationwide lawsuit still pending in Federal Court in Philadelphia. Doctors Hospital declared bankruptcy in April 2000. According to DOJ, Desnick engaged in a panoply of health care fraud from 1992 to the present, including paying kickbacks to induce referrals to Doctors Hospital, submitting false cost reports, and submitting claims for medically unnecessary services, improperly coded services, services supported by false documentation, and services resulting from kickbacks. The Federal Government and Illinois will divide the settlement evenly. Assistant U.S. Attorneys Linda Wawzenski and Jacqueline Stern represented the Government.

Dr. Mario Pineda

In December 2000, DOJ announced that psychiatrist Mario Pineda of Jackson, Mississippi agreed to pay **$300,000** to settle allegations that he upcoded claims submitted to Medicare. The case is one of several resulting from a two-year investigation of the Medicare billing practices of Charter Behavioral Services of Jackson and numerous area psychiatrists. According to DOJ, on several hundred occasions Pineda billed for a higher level of service than actually provided, and misused a high-paying billing code reserved only for non-communicative patients. Pineda's records allegedly indicate that the patients were able to communicate with him regarding their treatment. The Government was represented by Assistant U.S. Attorney Cliff Johnson.

***U.S. ex rel. Gold v. Carrier Foundation et al.** (D NJ No. 96-3072)*

In December 2000, Carrier Clinic of Montgomery, New Jersey agreed to pay **$1.94 million** to settle a *qui tam* suit alleging that it overbilled Medicare from 1994 through 1996. Carrier is a private, nonprofit behavioral health system that operates four clinics in New Jersey. According to the lawsuit, Carrier could not properly document services billed, billed separately for procedures that should have been bundled, used unlicensed personnel, and billed for electroconvulsive therapy separately while also receiving payment for it under a research study grant. The *qui tam* suit was filed in 1996 by Arthur Gold,

M.D., then Vice President of Medical Affairs at Carrier Clinic. The relator's share is 11 percent or $216,310. The relator was represented by Robert Conroy of Kern Augustine Conroy & Schoppmann (Bridgewater, NJ). The Government was represented by Assistant U.S. Attorney Stuart Minkowitz.

Renal Care Group

In December 2000, DOJ announced that Renal Care Group (RCG) of Nashville, Tennessee and its wholly-owned subsidiary RenaLab Inc. of Richland, Mississippi agreed to pay **$1.98 million** to resolve allegations that RenaLab billed Medicare for medically unnecessary renal tests. RCG owns and operates 198 dialysis centers in 24 states. Laboratory work in those centers is performed by RenaLab. According to the DOJ, from 1996 through August 2000, RenaLab billed Medicare for tens of thousands of unnecessary prealbumin tests performed on RCG dialysis patients. The Government was represented by Assistant U.S. Attorney Cliff Johnson.

Dr. Donald Dreyfuss

In December 2000, DOJ announced that osteopathic physician Donald Dreyfuss agreed to pay the Government **$2 million** to settle allegations that he and his corporation overcharged Medicare and Medicaid for nursing home and hospice services. According to DOJ, from 1992 to 1996, Dreyfuss billed for higher levels of services than actually provided, for medically unnecessary services, and for services never provided to nursing home patients. Dreyfuss also certified that patients were eligible for Medicare and Medicaid hospice services when they were not. Previously, in a related matter, Dreyfuss pled guilty to three counts of mail fraud and one count of receiving an illegal kickback for more than $500,000 in fraudulent billings to Medicare, Medicaid, and Blue Cross and Blue Shield of Michigan. In April, a federal judge in Detroit sentenced Dreyfuss to five years of probation, including two years of home confinement. He and his family are required to divest any interests in nursing homes and he is barred from participation in any federally funded health care program. He paid $533,000 in restitution and $200,000 in criminal fines. The case was investigated by the HHS OIG and the FBI. The Government was represented by Assistant U.S. Attorney Michael Reardon in the civil settlement.

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.

TAF on the Internet

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

Previous Publications

- Back issues of the *Quarterly Review* are available in hard copy as well as on TAF's Internet site.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). To discuss a potential article, please contact Staff Attorney Amy Wilken.

Anniversary Reports and Video

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

Call for Experts and Investigators

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

Qui Tam Attorney Network

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