BNA

HEALTH CARE FRAUD REPORT

BNA 50 Years of Employee Ownership

VOL. 2, NO. 11 PAGES 387-430 JUNE 3, 1998

HIGHLIGHTS

Partial Hospitalization Programs Coming Under Increased Scrutiny
Given that Florida is one of law enforcement's premier "labs" for testing new targets of health care fraud enforcement, providers should take note that partial hospitalization programs increasingly are coming under the federal government's microscope, a Miami attorney says. **Page 396**

Ninth Circuit Finds Qui Tam Plaintiffs Fail to Prove Clinic Acted 'Knowingly'
A federal appeals court finds two doctors who filed a qui tam "whistleblower" action against a Los Angeles Veterans Administration clinic and some of its physicians alleging improper billing of physicians' time to the Veterans Health Administration failed to present enough evidence to show the defendants "knowingly" presented false claims to the government. **Page 417**

Blue Cross and Blue Shield Plans Serious on Zero Tolerance for Fraud
From overseas investigations to high-tech hotlines on the Internet, Blue Cross and Blue Shield plans across the country are demonstrating zero tolerance for those who defraud public and private health insurance programs, according to company officials. **Page 391**

HHS IG Tells HCFA to Improve Oversight of Medicare Managed Care Plans
The Health Care Financing Administration needs to strengthen and expand its monitoring and evaluation of Medicare managed care plans and increase the number of staff members performing those functions, the Department of Health and Human Services Office of Inspector General says in two reports. **Page 405**

Pitfalls Exist in Offering Physicians Financial Incentives for Training
Financial incentives offered by hospitals to physicians who refer patients to their facility to undergo compliance training could raise anti-kickback concerns, participants at a health care fraud conference say. **Page 391**

Managed Care

ENFORCEMENT: The HHS IG plans to release guidelines before the end of summer that will spotlight managed care organizations that fail to authorize emergency treatment. **Page 396**. . . As the government sets its enforcement sights on managed care fraud, HCFA will be carefully scrutinizing managed care plans' adjusted community rate in the coming year, former HCFA official Bruce M. Fried says. **Page 403**. . . Health care cases involving denial of care and denial of payment for services rendered that are medically necessary are the "next frontier" of health care fraud enforcement, law enforcement officials tell managed care executives. **Page 398**

ALSO IN THE NEWS

MANAGED CARE: A former Blue Cross and Blue Shield of Massachusetts official is acquitted by a federal jury of charges she lied to HCFA during a 1996 application for approval of a Medicare health maintenance organization. **Page 417**

FLORIDA: Florida Gov. Lawton Chiles (D) signs into law an anti-fraud health bill requiring background checks on the senior managers, owners, and financial officers of 25 types of health facilities. **Page 411**

NEW YORK: The New York Senate approves a bill to prevent patient abuse by requiring that criminal background checks be performed on nurse's aides and certain home health care workers. **Page 412**

HOME HEALTH: The U.S. Supreme Court will review a decision saying an individual cannot claim that the owner of a home health company conspired to discharge him in retaliation for his cooperation with a Medicare criminal investigation. **Page 420**

ANALYSIS

WHISTLEBLOWERS: Attorneys Marc Raspanti and David Laigaie examine qui tam relator Robert J. Merena's fight with the Department of Justice over his right to his share of the SmithKline settlement. **Page 424**

 1092-1079/98/$0+$1.00

Analysis&Perspective

The SmithKline Settlement

A Case Study: Department of Justice v. Qui Tam Relators

By Marc S. Raspanti and David M. Laigaie

In February 1997, SmithKline Beecham Clinical Laboratories agreed to pay the federal government $325 million, plus an additional $9 million in interest, to settle allegations of Medicare fraud, including allegations contained in three whistleblower suits. The settlement culminated over three years of investigation.

Robert J. Merena, the relator who had the most direct involvement in the government investigation, actively assisted the government, first as a SmithKline "insider" who provided valuable information to the government and later (after he left SmithKline) as a defacto member of the task force assembled in Philadelphia to investigate the case. Merena spent hundreds of hours reviewing SmithKline documents, briefing government investigators and performing computer analyses of SmithKline's billing practices.

The government similarly called upon the other relators—a San Antonio pathologist, Dr. Charles W. Robinson, and a salesman for a competing laboratory, Kevin Spear—to provide focused assistance to its investigation.

At first blush, the SmithKline case appears to be a perfect billboard for the whistleblower provisions of the False Claims Act. As Congress intended in 1986 when it substantially strengthened the role of the whistleblower, Merena, an insider with specialized knowledge of SmithKline's billing practices came forward, documented and explained his allegations, and contributed to the government's investigation into those allegations.

The result was historic: SmithKline, while denying any wrongdoing, paid $325 million to the United States Treasury. Yet, instead of showcasing the tremendous potential of whistleblowers to boost the government's formidable anti-fraud efforts, the SmithKline case ultimately exposed the Department of Justice's lingering agenda of attacking whistleblowers.

Merena Substantially Assisted Government. In the summer of 1993, Merena first contacted the government to disclose his concerns about SmithKline's billing practices. He had worked for SmithKline since 1986 at its national headquarters and had unique access to and understanding of the company's national billing data. When he first came forward, the government was in the earliest stages of an industry-wide review of clinical laboratories.

Merena's timing was superb; his insight as a corporate insider enabled the government to focus significantly its investigation into SmithKline. For example, with Merena's input, the government supplemented the broad industry-wide subpoena that it served on SmithKline and seven other national clinical laboratories with two additional subpoenas, tailored specifically to SmithKline's practices and procedures.

In response to the initial, industry-wide subpoena, SmithKline dumped hundreds of boxes, containing hundreds of thousands of pages of documents, on the government. This mountain of documents was virtually impenetrable, especially for government agents who had no prior first-hand experience reviewing SmithKline's documents. Merena, with his wealth of knowledge about SmithKline, understood and explained documents that any outsider would have difficulty deciphering.

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Three Phases of Assistance. Merena's assistance to the government can be divided into three stages. First, before he even filed his complaint, and while the government was still assembling its team of investigators, Merena attended a series of meetings where he explained his allegations to numerous government attorneys and agents. These meetings culminated in a formal "kick-off" session on June 22, 1994, in Philadelphia, where Merena met with the members of the newly constructed "Philadelphia Task Force," formed specifically to investigate SmithKline.

When the Philadelphia Task Force began its investigation, it regularly called upon Merena and his counsel to provide a variety of information, including background on SmithKline's practices, information about potential interview subjects, descriptions of SmithKline's billing systems and computer capabilities, and explanations of SmithKline documents.

During this second phase of his involvement, Merena remained an employee of SmithKline. While the strain of acting as both an employee and a whistleblower took its toll on Merena, his wife, and their two small children, he stayed on the job in an effort to provide the government with continuing assistance.

After Merena's identity as a whistleblower was divulged to SmithKline, it no longer became practicable for him to keep his position. Merena used this period of unemployment constructively, intensifying his involvement in the investigation. Between April 1995 and February 1996, when the case was settled in principle, Merena regularly traveled to the government's offsite "war room" in Media, Pa., and personally assisted the investigators in reviewing documents, preparing them for interviews, and providing whatever assistance needed.

During settlement discussions between the government and SmithKline, Merena provided valuable information and insight that enabled the government to test and to challenge, where appropriate, various settlement positions advanced by SmithKline.

Throughout the investigation, government investigators assigned to the Philadelphia Task Force appreciated the value of Merena's assistance and made him feel like an integral member of the team. The partnership between the government, the whistleblower, and his counsel envisioned by Congress when the statute was amended in 1986, in this case, succeeded beyond everyone's expectations.

DOJ Forces Merena to Fend Off Late Plaintiffs. Merena did not stop assisting the government when SmithKline settled. Three additional plaintiffs filed actions against SmithKline after the investigation was completed and the case was settled in principle. Notwithstanding its statutory right to do so, the government did not seek to dismiss these late-filed complaints. Instead, it left that job to Merena, the other relators, SmithKline, and ultimately a federal district court judge.

Between March and July 1997, Merena, Robinson, Spear, and SmithKline challenged the late-filing plaintiffs' claim to entitlement to a portion of the SmithKline settlement. After exhaustive briefing and a lengthy hearing, Senior District Court Judge Donald W. VanArtsdalen dismissed the late-filing plaintiffs from the case. See *U.S. ex rel. Merena v. SmithKline Beecham Clinical Laboratories Inc.*, No. 93-5974, E.D. Pa., 7/23/97).

To the surprise of many, including the trial judge, after the late-filing plaintiffs' claims were dismissed, the Department of Justice turned on Merena and the other relators. In September 1997, Merena learned for the first time that the government intended to limit his share to significantly less than the 15 percent minimum mandated by Congress.

The government designed a two-pronged assault on Merena. First, it allocated unilaterally more than $270 million of the settlement proceeds to a specific set of issues that it called the "automated chemistry issues." Then, it argued that, for a variety of reasons, Merena was not entitled to any portion of the settlement proceeds related to those issues.

The government was well aware that Merena had exhausted his family's savings, borrowed heavily to support his family during the pendency of the case, and was unable to find work after his role as the SmithKline whistleblower became public. DOJ apparently concluded that Merena, given his dire financial condition, would choose the path of least resistance and accept its low-ball offer. DOJ underestimated, however, the personal insult felt by Merena, who had sacrificed so much for the investigation.

After all he had done, and all that his family had endured, Merena refused to accept DOJ's unsupportable claim that he was of little assistance to the investigation. Merena now was forced to fight with his most formidable and contentious adversary — the Justice Department.

Merena's Substantial Assistance Forgotten. In November 1997, Merena moved VanArtsdalen to award him an appropriate relator's share consistent with his assistance and awards received by other relators. In his motion, Merena set forth in great detail the nature and extent of his involvement in the case, and described how that involvement "substantially contributed" to the settlement.

Pursuant to statute, the court could award between 15 percent and 25 percent of the settlement proceeds, "depending upon the extent to which the [relator] substantially contributed to the prosecution of the action" 31 U.S.C. § 3730(d)(1). To Merena, the dispute was quite narrow: how much did he do and did his involvement aid the government's investigation?

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In response, the government filed what has become known as its "kitchen sink" motion, aptly named because it raised every conceivable claim or defense that could possibly limit or defeat Merena's claim to an appropriate relators' share. The government argued strenuously that Merena was entitled to no portion of the settlement proceeds it unilaterally allocated to the "automated chemistry" issues because:

- these allegations had been publicly disclosed and Merena based his complaint on public disclosures (and not on his nine years at SmithKline);
- Merena's complaint did not raise the "automated chemistry" issue with requisite specificity (despite the fact that the allegations were specific enough for SmithKline to settle and for the government to be included in the settlement agreement without ever filing its own complaint); and
- Merena's complaint did not raise a claim upon which relief could be granted (regardless of the fact that SmithKline settled those claims for $325 million).

Raspanti and Laigaie are attorneys with Miller, Alfano & Raspanti P.C., Philadelphia.

DOJ Calls Merena Greedy. In its motion, DOJ needlessly attacked Merena personally, claiming in essence that he was greedy and of little use to the government.

Although less than six months earlier the government had refused to dismiss cases that had been filed years after Merena's and for which the government had openly proclaimed were of no value to its investigation, the government now sought to dismiss Merena.

The government argued that the "first to file bar" that had precluded the late-filing plaintiffs somehow also precluded Merena (even though he had filed his complaint before any other relator). This attack was especially disingenuous since, at the government's specific request, Merena, Robinson, and Spear had mutually agreed not to challenge each others' claims to a share of the settlement proceeds, in an effort to eliminate contentious and wasteful litigation.

In its "kitchen sink" motion, the government conceded that Merena was entitled to a share of the portion of the settlement proceeds unrelated to the "automated chemistry" issues. This share, the government argued, should be 16 percent, one percent over the minimum.

Thus, the government offered Merena a total of 3.1 percent of the settlement, far less than the 15 percent minimum guaranteed by Congress. Merena asked the government to pay this undisputed amount. Although the government had conceded it owed Merena some money, it refused to pay him the money unless he dropped all other claims for payment. When Merena filed a motion for partial summary judgment, the government informed the court that it would delay paying Merena what it admitted owing him by tying the matter up in lengthy appeals.

Partial Summary Judgment. VanArtsdalen was not persuaded by the government's untenable position and ordered partial summary judgment for $9,736,324, the amount the government admitted that it owed to Merena (*U.S. ex rel. Merena v. SmithKline Beecham Clinical Laboratories Inc.*, E.D. Pa., No. 93-5974, 2/23/98). Despite its earlier threat to delay payment with frivolous appeals, DOJ paid Merena the partial judgment in March.

Between mid-February and mid-March, the parties engaged in a grueling, bicoastal deposition schedule. The government deposed the relators and their counsel, notwithstanding the fact that the government had spent years dealing with these same individuals. Indeed, DOJ assigned more attorneys to litigate against the relators than it did to build the case against SmithKline.

When the relators sought to depose the government agents and investigators who investigated SmithKline, the government erected a series of procedural road blocks and raised various privileges. The government refused the relators' request to depose the U.S. Attorney for the Eastern District of Pennsylvania, despite the fact that he personally negotiated the settlement with SmithKline.

Judge VanArtsdalen was not impressed by these tactics and ordered the government to produce the U.S. attorney for deposition. Ultimately, despite the government's resistance, the relators built a formidable record detailing their assistance to the investigation.

The [evidentiary] hearing resembled a federal criminal trial with the relators cast by the government in the role of defendants.

Discovery culminated in a seven-day evidentiary hearing before Judge VanArtsdalen. The hearing resembled a federal criminal trial with the relators cast by the government in the role of defendants. Arguing that their assistance "substantially contributed to the prosecution of the action," the relators sought an award of 18 percent of the settlement proceeds, the average awarded to relators in all cases since the 1986 amendments to the False Claims Act.

By stark contrast, DOJ paraded a bevy of witnesses who testified about the so-called LABSCAM Investigation. None of these witnesses had ever met Merena or knew much of his assistance to the investigation. These witnesses minimized the role of the Philadelphia Task Force as well as the relators in the investigation and settlement.

VanArtsdalen denied the government's motion to dismiss and awarded the relators 17 percent of the settlement proceeds, or $52 million. In a seventy-five page opinion, VanArtsdalen noted: "I am left with the impression that the attorneys in charge of the LABSCAM Investigation, conducted largely from San Diego and Washington, D.C. by the [Department of Justice] seek to take far more credit for the overall success of the proceedings than is rightly due . . . . and the government wants to minimize the contributions of the Relators in order to lower their ultimate award." *U.S. ex rel. Merena v. SmithKline Beecham Clinical Labs Inc.*, No. 93-5974, E.D. Pa. 1998.

Judge VanArtsdalen was "convinced that the government through the [Department of Justice] has greatly underestimated and minimized the help provided by the Relators." Although the process took a heavy toll on Merena and his family, he felt vindicated by VanArtsdalen's ruling.

Final Act to Unfold. The final act in this tragedy is soon to unfold. DOJ must determine whether it will continue to advance its ill–fated agenda by appealing VanArtsdalen's decision to the U.S. Court of Appeals for the Third Circuit. Of course, by appealing, DOJ will deliver on its threat to delay payment to Merena and the other relators. Since post-judgment interest on $42 million adds up quickly, however, the government (and the taxpayer) will pay a high price to further DOJ's agenda.

The Merena case is but the latest example of DOJ's mercurial relationship with whistleblowers. Notably, in each of these high-profile clashes with relators, DOJ lost at trial. For example, in an early case, it attacked a relator, Jack Gravitt, whose information led to a $3.5 million recovery. See *U.S. ex rel. Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), appeal dismissed, 848 F.2d 190 (6th Cir.), cert. denied, 488 U.S. 901 (1988).

In that case, DOJ precluded Gravitt from taking discovery and agreed to settle the matter with General Electric for $234,000. When Gravitt challenged the settlement as grossly inadequate, DOJ threatened to preclude him entirely from the recovery. The district court undid DOJ's proposed settlement and allowed Gravitt to litigate the case. Ultimately, he and his attorneys increased the settlement value from $235,000 to $3.5 million.

Similarly, in another case against General Electric that resulted in a $76 million recovery, DOJ viciously attacked the relator, Chester Walsh, claiming he was responsible for the fraud. The district court rejected the government's arguments, upbraided it for treating whistleblowers "as adversaries rather than allies," and awarded Walsh a share of the proceeds. See *U.S. ex rel. Walsh v. General Electric Co.*, 808 F. Supp. 580 (S.D. Ohio 1992).

Finally, in a case that resulted in a $34 million recovery from NEC Corp., the government had the relator's case dismissed, then settled his allegations without informing him. After litigating the case to the U.S. Court of Appeals for the Eleventh Circuit three times, the whistleblower's family (sadly the whistleblower died during the litigation) ultimately received a share of the settlement. See, e.g., *U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991); *U.S. ex rel. Williams v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1994); *U.S. ex rel. Neher, as personal representative of the Estate of Arthur P. Williams v. NEC Corp.*, 53 F.3d 1284 (11th Cir. 1995) (unpublished).

Unfortunately, as these cases illustrate, DOJ has established a curious track record of attacking relators. Those relators, like Walsh, Gravitt, Williams and Merena, who have the fortitude to fight, have succeeded in repelling DOJ's attacks. The sad fact is, however, most relators do not have the patience, wherewithal, or intestinal fortitude to fight such a formidable opponent. In those cases, the relators accept whatever rewards are offered by DOJ.

Lessons for the Future. The rancorous and completely unnecessary relators' share dispute in this case offers many lessons for the future. The first and most obvious lesson is that the government must be more open about its intentions with relators. In this case, the government used Merena's help to investigate SmithKline for over three years. The government then used Merena to fend off the late-filing plaintiffs, intervened in his case without qualification or limitation, and after the settlement agreement was signed, had his case dismissed with prejudice.

Throughout this entire chain of events, the government never advised Merena that it would ultimately attempt to limit severely his share of the proceeds.

In the future, if the government plans to challenge relators, it should state its intentions at the earliest possible date. In that way, relator issues might be resolved without lengthy and bitter litigation.

If health care fraud is truly Attorney General [Janet] Reno's top enforcement priority, her Justice Department should embrace, and not repulse whistleblowers.

Relators and their counsel can also learn from this case. First, relators must be wary of allowing the government to maintain a matter under seal any longer than necessary. As Merena learned, while the case remains under seal, additional plaintiffs may file claims. The government might for "policy reasons" be unwilling to seek dismissal of these late-filed claims, leaving it to the relator to do so.

In addition, relators and their counsel must document their activities, so they can later objectively establish their assistance to the investigation.

Finally, relators should determine the government's position on the relator's share before agreeing to the "fairness, adequacy and reasonableness" of a settlement between the government and the defendant.

Finally, DOJ must exorcise itself of its lingering animosity toward relators. The fact of the matter is the qui tam statute has been an unqualified success, returning billions to the U.S. Treasury in the last 10 years alone.

If health care fraud is truly Attorney General Reno's top enforcement priority, her Justice Department should embrace, and not repulse whistleblowers.