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THE GOLD WAR

The inside story of the $1.25 billion settlement between Holocaust victims and Swiss banks

Plus: The looming struggle over how to distribute the money

By Susan Orenstein

THE Whistleblower Wanted More

SOMETIMES THE FBI AGENT LIKED TO tease him. Just how much money, the agent would ask, was he going to make from this case? Robert Merena, a whistle-blower who sued health care giant SmithKline Beecham for fraud under the federal False Claims Act, said the FBI agent's ribbing made him bashful—that he would respond by "playing stupid." In fact, while testifying in federal court in Philadelphia last March, the goateed, heavyset Merena explained that "to me, it was kind of embarrassing to even mention any money in this case."

Russell Kinner, the Justice Department attorney cross-examining him, seemed to lose patience for a moment. "Mr. Merena," Kinner deadpanned, "why do you think we're here?"

Why, indeed? At stake in U.S. district judge Donald Vanartsdalen's courtroom were tens of millions of dollars. The case against SmithKline had settled a year earlier for a whopping $325 million, one of the largest health care fraud settlements ever. And under the False Claims Act, the whistle-blower, or "relator," who sues on behalf of the government is entitled to collect a percentage of the proceeds. Merena and a second relator, Charles Robinson, Jr., had already received about $10 million from the government. But they wanted more—more than $50 million in all. And the government was balking.

On one level, the fight over relators' fees in the SmithKline case exposes the contradictions at the heart of the False Claims Act, which was passed during the Civil War to combat war profiteering, then dusted off and amended in the 1980s. Essentially, by offering a reward to whistle-blowers, the act harnesses private greed for the public interest. The relationship between prosecutors and witnesses is often a strange one, but *qui tam* cases, as the False Claims Act suits filed by whistle-blowers are also known, are uniquely fraught with complications. Because the relators have a stake in the outcome, former allies can be suddenly at odds over the spoils of a successful case.

In this instance, for the two camps of lawyers involved, it was more than just a fight over money. The whistle-blowers' counsel—Marc Raspanti of Philadelphia's Miller, Alfano & Raspanti and John Clark of San Antonio's Goode, Casseb & Jones—were outraged that the Justice Department had apparently turned on them. On the other side were career Justice attorneys with their own proprietary claim: They had figured out how to pursue a whole new genre of health care fraud, then spent years making cases. Indeed, the government hadn't needed either Merena or Robinson to tell them to look for fraud at SmithKline; both whistle-blowers filed their suits *after* an investigation of SmithKline had begun and been reported in the media.

When Robert Merena sued SmithKline under the False Claims Act, he felt entitled to a landmark award from the $325 million settlement. The federal government thought otherwise. And then things got nasty.

Certainly, Merena and Robinson deserved a generous reward for coming forward to help the government. But more than $50 million?

Of Blood And Bucks

The roots of the SmithKline case date back to 1987, when another laboratory company, National Health Laboratories, Inc. (NHL), began adding extra tests to a standard blood chemistry profile, the kind run on an automated machine, and telling doctors that the new tests would be virtually free. True enough, bills that went to doctors' offices usually showed no additional charge. But if the tests were billed to a third-party payer—such as Medicare—NHL would include separate, substantial charges for the extra tests. Suddenly Medicare was paying, say, $45 for each profile instead of $15.

In 1991 a grand jury investigation of NHL began in San Diego, just as a sales manager from a competing lab sued NHL under the False Claims Act. In 1992 NHL settled with the government for $110 million. But money wasn't the only windfall. During the negotiations NHL had turned over to the government a binder of documents from competitors—the so-called snitch book—that showed other labs engaging in the same billing practices. The assistant U.S. attorney who had led the NHL investigation, Carol Lam, formed a special government task force to probe other labs: Operation Labscam.

On August 24, 1993, the Labscam task force launched its first strike, sending subpoenas to seven major clinical labs, including SmithKline. The probe received widespread publicity in *The New York Times*, *The Wall Street Journal*, and newspapers across the country, making it clear that the government was investigating the same kind of billing fraud that it had in the NHL case. Nearly a month later, *60 Minutes* ran a piece on the NHL fraud, "Blood Money," in which correspondent Lesley Stahl submitted a blood sample to SmithKline for an automated chemistry profile and received a bill for a test that she hadn't ordered.

As the government probe was getting under way, Robert Merena was mulling over a complaint of his own. Then 31, he was working as a computer consultant at SmithKline's Collegeville, Pennsylvania, offices, in a unit that handled most of SmithKline's

PHOTOGRAPHS BY DOUGLAS LEVERE

Of two whistle-blowers in the SmithKline case, Robert Merena was the first to make it to the courthouse.

billing. Merena, who had been employed at SmithKline since 1986, says that he was bothered by a change in the company's culture after a 1987 merger. "Our whole focus was shifted [to] how much money could we get," he recalls, adding that some new practices struck him as dubious. In August 1993 he dialed a government fraud hot line, got bounced around a few times, and wound up speaking—anonymously—to assistant U.S. attorney James Sheehan in Philadelphia.

As Sheehan recalled in later testimony, his nameless caller was a SmithKline employee who was concerned about "improper billing" but wanted to know more about what happens to whistle-blowers. Sheehan mentioned the False Claims Act and suggested that his caller get a lawyer. Merena took his advice. On September 24 Merena called Marc Raspanti, and two weeks later Merena and Raspanti sat down with Sheehan for the first time. During a seven-hour meeting, Merena fingered SmithKline for a long list of problems, including billing for tests not performed, granting discounts to doctors as a form of kickback, and altering test codes to ensure payment. He also mentioned the charge that the government's Labscam task force was already investigating: unbundling added tests from the automated blood chemistry profiles.

Sheehan was enthusiastic enough to help draft Merena's False Claims Act complaint. Raspanti filed the suit in federal court in Philadelphia in mid-November 1993, adding the written disclosure statement required by law on December 14, just one day later. On December 15, another whistle-blower—pathologist Charles Robinson—filed a second *qui tam* suit in federal court in San Antonio. Robinson, 63, a white-bearded North Carolina native, was a former medical director of SmithKline's San Antonio lab. His suit covered some of the same automated chemistry allegations that Merena made, but gave more specific details. In February 1993, when the lab's billing director was on vacation, Robinson glanced at a bill tacked to her closed door and noticed additional charges being exploded from an automated chemistry profile. Confronted, the lab's general manager told Robinson, "I can assure you that we're not doing what National Health Labs did." Robinson wasn't satisfied. By June 1993 he had resigned his post—which he had held as an independent consultant—and had spoken with federal investigators about what he had seen.

At the time neither Merena nor Robinson knew of the other's existence. Nor did SmithKline know about their suits. All False Claims Act suits are filed under seal, and usually remain sealed until the government decides whether to intervene. Robinson even took an extra precaution and asked an attorney, San Antonio solo practitioner Glenn Grossenbacher, to serve as the relator, so that Robinson's name did not appear in his suit at all.

Meanwhile, the government's own investigation was progressing. The boxes of documents—202 in all—that SmithKline was producing in response to the Labscam subpoena slowly filled a storeroom at the U.S. attorney's office in San Diego. An FBI agent spent December 1993 through June 1994 combing through them.

Splitting The Take

As San Diego prosecutor Carol Lam later testified, the papers that the agent pulled -- what became known as the "hot documents" binder—made a strong case for fraud, indicating that SmithKline had been charging extra for tests added to automated chemistry profiles without informing doctors. In summer 1994 the Labscam investigation of SmithKline was transferred to the office in Philadelphia, closer to company headquarters. A copy of the hot documents binder also went to another Labscam task force member, trial attorney Laurence Freedman at the Justice Department in Washington, D.C.

Assistant U.S. attorney James Sheehan took the call when Merena contacted a government hot line.

Freedman, then 32, was no stranger to lab billing fraud, having negotiated the civil portion of the NHL settlement. Cautious and exact, he had a flair for numbers that had buttressed the government's position in the NHL negotiations. Now he would play a central role in the SmithKline case, handling automated chemistry claims while Sheehan oversaw everything else from Philadelphia. As Freedman later testified, he and Sheehan agreed to split responsibility for the case because the automated chemistry allegations were already developed, while Merena's "new allegations," such as his kickback claims, demanded more investigation. Their division of labor seemed trivial at the time, but four years later it would become a hotly contested issue in the dispute between the government and the relators. Just how much of the automated chemistry case was made in Philadelphia, and how much in San Diego and Washington?

Certainly, the Philadelphia investigation was busy enough, and Raspanti made sure that his client, Merena, was right at the center of it. Thin, dark-haired, and sharp-featured, a self-described "junkyard dog" in court, Raspanti was a former assistant district attorney turned white-collar criminal defense attorney, and he was excited about Merena's revelations. "This is a billion-dollar case," he told Sheehan. One measure of his enthusiasm: Over the course of the investigation, Raspanti and Merena turned over 47 separate disclosure statements to the government. They also kept the U.S. attorney's office supplied with printouts of SmithKline billing records, and helped Sheehan draft two more subpoenas. The resulting flood of paper was housed in rented office space in a Philadelphia suburb that became designated as the "war room."

Merena was still working at SmithKline. After May 1994, Merena says, he would hear rumors that someone had informed on the company. "Different names were batted around, people who left," he recalls, but his name was not one of them. In March 1995, though, Merena's complaint was partially unsealed, letting SmithKline know the whistle-blower's identity. Merena never went back to work. He spent several months on paid leave, bolstered afterward by a 16-month severance package that Raspanti negotiated for him. In the meantime, at Sheehan's request, Merena began making almost weekly visits to the war room, helping agents sort documents and suggesting witnesses to interview, among other things. Over the course of a year Merena logged 257 hours there.

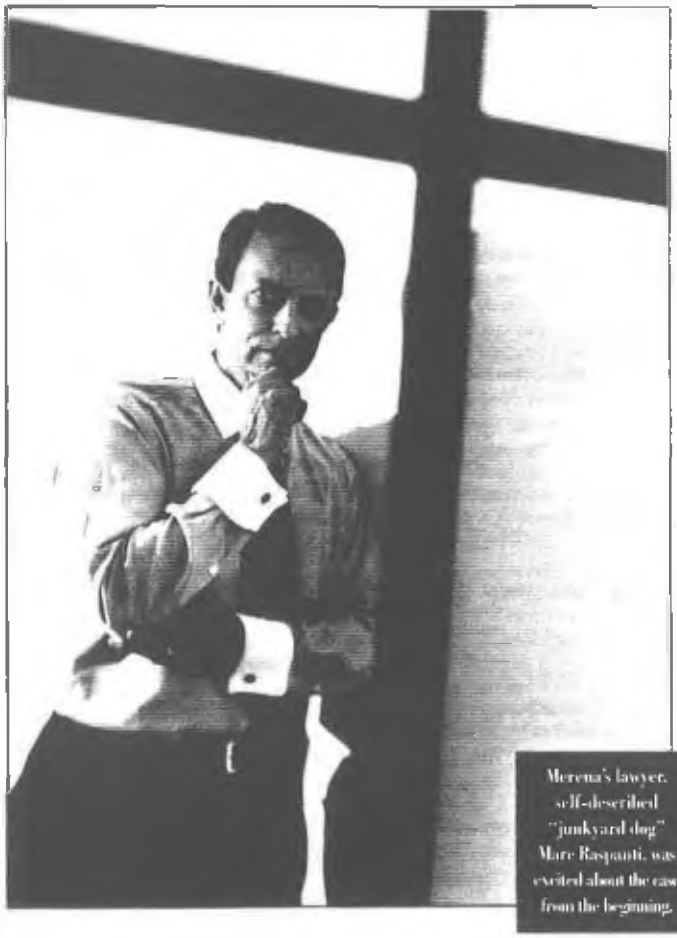
It was not until September 1995, six months after Merena's complaint was unsealed, that settlement negotiations between SmithKline and the government began in earnest. The government's two lead negotiators, Sheehan and Freedman, divvied up the job, as they had agreed earlier. Sheehan did the talking on Merena's kickback claims and other new allegations. Freedman handled the automated chemistry issues. As he took the train up from Washington each time, Freedman later testified, he brought only a few key materials, such as the "hot documents" binder from San Diego. In the negotiations he used relatively little evidence developed by the Philadelphia team, except for a 54-page spreadsheet of SmithKline's Medicare billings. "The documents told the story," Freedman testified.

After six months of talks, the final settlement boiled down to a single number. In February 1996 SmithKline CEO Jan Leschly sat down with U.S. Attorney Michael Stiles and agreed to pay a flat $295 million to settle all the government's allegations through 1994. SmithKline did not admit wrongdoing or liability. (A few months later, that amount jumped to $325 million when the company agreed to pay $30 million more to cover claims through September 1996.) It would take another year to work out all the details, but the end was in sight.

What wasn't settled was the relators' share. How much would they get, and how would it be divided among them? The relators' share would also affect how much Raspanti and Clark were paid, since, like most relators' counsel, they were working on contingency. (Both decline to specify their share of their client's award, but Raspanti notes that most *qui tam* contingency arrangements range from 33 percent to 45 percent. In addition, Raspanti and Clark eventually will be paid several hundred thousand dollars by SmithKline in statutory attorneys' fees under the False Claims Act.)

Under the False Claims Act, whistle-blowers collect 15–25 percent of the recovery in suits that the government joins. One rather murky exception exists, however. According to one clause, if a *qui tam* suit is based on previously disclosed information—for example, facts in a news article—a relator is entitled to 0–10 percent of the recovery. Confusingly, another clause completely bars *qui tam* suits based on publicly disclosed information, unless the relator is an "original source," someone with direct knowledge of the fraud.

At a March 1996 meeting with the relators' counsel, Freedman acknowledged that the case law reconciling the two provisions was scanty, but suggested that the 0–10 percent provision might apply in the SmithKline case. He stressed the early media coverage, including Lesley Stahl's *60 Minutes* story. It was a broad hint that Robinson's and Merena's suits might fail the public disclosure test—perhaps limiting their share to less than 10 percent. In another warning, Freedman cited the "first to file" rule: If two whistle-blowers file the same allegations, the first to sue wins. Robinson had gone to the government with his allegations first, but Merena had beaten him to the courthouse. Freedman suggested that the two might want to settle the matter between themselves.



Merena's lawyer, self-described "junkyard dog" Marc Raspanti, was excited about the case from the beginning.

Apparently, then, there would be some gray areas in determining the relators' share. Freedman was trying to prep the relators for negotiating a settlement—standard practice for the Justice Department nowadays. (Of 263 *qui tam* cases in which relators have collected an award as of October 1997, only nine had been resolved through litigation.) Raspanti and Clark followed some of the government's advice, striking a deal to share all proceeds from the settlement on an undisclosed basis. In retrospect, Raspanti says, it was a smart move for the relators—but for reasons different than the Justice Department expected. Ultimately, he says, "the government's urging us to work things out turned to their detriment." By reconciling their differences, the whistle-blowers would be able to present a united front to the Justice Department.

A Falling-Out With The Feds

In February 1997 SmithKline handed the U.S. government a check for $325 million, plus $9 million in interest: $334 million in all. The Justice Department proposed paying a 15 percent share, or about $2 million, to two other relators with a small, discrete claim that had netted $13 million, and in April the Justice Department gave Merena a $100,000 advance when his severance package ran out. But Merena and Robinson's overall claims were unresolved. Three more relators had filed *qui tam* suits and wanted a share of the settlement. Not until July 1997 did Judge Vanartsdalen dismiss their claims on "first to file" grounds.

In September 1997, the remaining parties finally met in Philadelphia to talk about the relators' share. But the 90-minute meeting only soured relations between the government and the whistle-blowers. Raspanti says he was disappointed at what he considered the government's high-handedness: "We were *told* what they were going to give us." He declines to specify the amount, except to say that it was far too small. Robinson's counsel Clark, a former U.S. attorney who still refers to the "Department of Justice Family," says that he began to feel betrayed.

Raspanti and Clark decided to force the government's hand by filing a motion with Judge Vanartsdalen to determine the relators' share. They sought at least 18 percent of the total settlement (minus the $13 million from the two other whistle-blowers' allegations)—a total of about $58 million. It was an audacious move, since the largest previous relator's award was $22.5 million.

The Justice Department took an equally strong stand. The government agreed that Merena could share in *part* of the SmithKline recovery—the $65 million they netted from Merena's "new allegations"—and was willing to pay $10 million. But it moved to dismiss altogether Merena's and Robinson's claims to the automated chemistry allegations, which in the government's estimation made up $241 million of the settlement. Neither Merena nor Robinson was entitled to any money from those claims, the Justice Department argued, because both had filed suit after public disclosure of the allegations. Nor could they squeeze in under the exception for "original source" relators. The government contended that Merena had little or no firsthand knowledge of the alleged automated chemistry fraud. Robinson *did*—but because he had first filed his suit under his lawyer's name, he wasn't the original relator in the San Antonio suit.

If the judge didn't buy that line of reasoning, Justice had a second argument ready: Award the relators 0–10 percent of the $241 million automated chemistry recovery. The government recommended 1 or 2 percent, or less than $5 million.

While staking hard-line positions in court papers, the two sides continued negotiating. According to Joyce Branda, deputy director of the fraud section of the Justice Department's civil division, the government eventually offered an undisclosed sum somewhere above $22.5 million. (Raspanti declined to comment on the settlement negotiations.) But it wasn't enough for the whistle-blowers. Judge Vanartsdalen set a hearing for March 16.

The seven-day hearing in Vanartsdalen's courtroom took on a surreal, mildly incestuous quality at times. Like a theater troupe short on actors, the participants had to double up on parts, some playing both lawyers *and* witnesses. On a single day, for instance, Raspanti questioned Freedman about the March 22, 1996, meeting, which both had attended; next, Clark examined his partner, Rand Riklin, about his notes from that meeting; finally, Riklin was back in front of the witness stand questioning assistant U.S. attorney Carol Lam.

The main thrust of the whistle-blowers' case was simple: Show that the contributions of Merena, Robinson, and their lawyers were integral to making the SmithKline case and that their share should be based on the entire $334 million settlement. Raspanti, in particular, tried to drive a wedge between the U.S. attorney's office in Philadelphia and Main Justice in Washington by arguing that the Philadelphia team deserved most of the credit for the case. Robinson and Merena testified about uncovering what they believed to be evidence of fraud, and Merena told of the hundreds of hours of work that he had put into the case. His account was confirmed by depositions from Philadelphia assistant U.S. attorney Sheehan and several agents, who agreed that Merena had been "helpful" (although Sheehan shied away from Raspanti's suggestion that Merena had been "particularly helpful").

On the government's side, Freedman told how he had negotiated the automated chemistry portion of the settlement using mostly documents seized by the original Labscam subpoena. Trial attorney James Ward, one of two lawyers arguing the case for the Justice Department, maintained that while billing expert Merena could describe how the automated chemistry tests were billed, he brought no direct knowledge of the deceptive marketing to doctors that made it fraud. Robinson's more detailed allegations involved SmithKline's San Antonio lab only, the government contended.

During Ward's closing argument, Judge Vanartsdalen peppered him with questions. "Are you arguing that if there had been no *qui tam* actions filed . . . that the government would have settled with SmithKline for $325 million?" the judge asked.

"I think it's possible, Your Honor," Ward replied.

Judge Vanartsdalen took less than two weeks to rule. On April 8 he awarded Robinson and Merena $52 million—17 percent of the $306.5 million that remained from the settlement after $13 million was deducted to settle other whistle-blowers' allegations and $14.5 million was paid to state programs. In making the award, the judge avoided directly tackling the thorny question of prior disclosure.

Instead, Vanartsdalen simply ruled that he had no jurisdiction to dismiss the relator's automated chemistry claims, as the Justice Department had requested. Those claims had already been dismissed with prejudice when the case against SmithKline settled, he found. The Justice Department could not move to dismiss them a second time.

In addition, the judge found that Merena and Robinson "provided very valuable and substantial assistance to the government." And in a direct slap at Lam and Freedman, he added, "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 DOJ, seek to take far more credit for the overall success of the proceedings than is rightly due."

A Chilling Effect?

For the Justice Department, the fallout from its battle with Merena and Robinson has been little but embarrassment. The fight put the government in the awkward position of attacking former allies—and appearing, as Raspanti charged, to disparage one of its own, the U.S. attorney's office in Philadelphia. "We simply set forth the facts about the government investigation," Freedman says. "To us, this is not in any way a matter of credit." But as the judge's opinion shows, that stance didn't have much audience appeal.

Vanartsdalen's opinion may not be the final word on the subject, however. In June the Justice Department filed a notice of appeal; at press time solicitor general Seth Waxman, who must authorize the appeal, had not yet made a decision. If the judge's decision in favor of the relators on jurisdictional grounds is overturned, a new hearing might decide the bigger issue of public disclosure: What does it mean for *qui tam* relators, exactly, if they file their suit after a government investigation is already public?

It is possible that the SmithKline case could chill the Justice Department's relationship with whistle-blowers—perhaps by encouraging the government to raise such objections as public disclosure issues earlier. Under Vanartsdalen's reasoning, the Justice Department would have been better off challenging Merena and Robinson before settling with SmithKline. Indeed, the judge's decision puts a key Justice Department policy into question. "It is typically our practice not to challenge *qui tam* actions early on if there's a defect," says Freedman. "Our view generally has been, that would not be productive. . . . It diverts us from going after defendants." In the SmithKline case, however, that policy backfired.

If Judge Vanartsdalen's opinion is upheld, the Justice Department may have to rethink the way it does business with relators. In the 12 years since the False Claims Act was revived, the government has recovered about $1.5 billion with the help of relators, and paid out some $244 million to them. The law is a fabulous success story, something that even a taxpayer could admire. But in some ways, as the SmithKline case shows, the Justice Department is still figuring out how to use it. ■

BIG WINNERS

Robert Merena and Charles Robinson's $52 million award was the largest ever to a relator in a *qui tam* case, but it is far from the first big win in such a case. Here, according to the Justice Department, are the five runners-up to the SmithKline award:

- ***U.S. ex rel. Keeth v. United Technologies Corporation* (1994). Recovery: $150.5 million. Relator's share: $22.5 million.**
- ***U.S. ex rel. Knoob v. Health Care Service Corp.* (1998). Recovery: $140 million. Relator's share: $21 million plus possible additional amount to be determined through mediation.**
- ***U.S. ex rel. Dowden v. National Health Laboratories, Inc., MetPath, Inc., and MetWest* (1992, 1993). Recovery: $139.8 million. Relator's share: $20.97 million.**
- ***U.S. ex rel. Taxpayers Against Fraud and Muehlhausen v. Teledyne Industries, Inc.* (1994). Recovery: $85 million. Relator's share: $18.51 million.**
- ***U.S. ex rel. Copeland v. Lucas Western, Inc.* (1995). Recovery: $88 million. Relator's share: $18.48 million.**