LEGAL BRIEFS

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Key words: ***Qui tam*, retaliatory discharge, Tax Equity and Fiscal Responsibility Act (TEFRA).**

The difficulties of complying with TEFRA

In a remarkable coincidence, 2 cases were decided a day apart, on January 17 and 18, 2002, which had as their underlying cause anesthesiologists' attempts to cover up their failure to comply with Medicare reimbursement criteria. In both cases it was claimed that anesthesiologists ignored the limitations on their billing imposed by Health Care Financing Administration (HCFA, now "Centers for Medicare and Medicaid Services" or CMS). In the first case, *Minnesota Association of Nurse Anesthetists v Allina Health System Corp.* (2002 W.L. 59279), with which many nurse anesthetists are familiar, the Minnesota Association of Nurse Anesthetists (MANA) had brought an antitrust suit against hospitals and anesthesiologists in the Minneapolis/St Paul area, claiming that the anesthesiologists in the area, their practice groups, and the hospitals in which they practiced conspired to terminate the employment of CRNAs, to compel CRNAs to work for and under the control of anesthesiologists, and to exclude CRNAs as lower-cost competitors.

Qui tam lawsuit

Following the antitrust suit, MANA also brought a *qui tam* suit. In the *qui tam* case, MANA alleged that many of these same defendants had overcharged the Medicare system for anesthesia services and, in accordance with the *qui tam* statute, MANA brought suit to force these defendants to repay the amount overcharged. Under the *qui tam* legislation, in the event that they were successful, a portion of the settlement (30%) would be paid to them for bringing the suit. The trial court dismissed both the antitrust and the *qui tam* lawsuits. An appeal of the antitrust lawsuit was denied on April 13, 2000. On January 17, 2002, the 8th Circuit Court of Appeals ruled that the district court had improperly dismissed the *qui tam* case. The *qui tam* case will go back to the trial court for further proceedings.

Several issues were raised by the appeal. The major issue related to the fundamental purpose of *qui tam* acts and the interpretation of the federal statute. *Qui tam*, or "in the place of the king," refers to a series of statutes that authorize private citizens to bring suit on behalf of the federal government for damages. The acts allow ordinary citizens to supplement efforts of understaffed US attorneys. *Qui tam* suits in the United States began during the Civil War and were used to punish suppliers of inferior goods for the Union War effort. For more than 100 years, the US Congress has struggled to balance an effort to reward those who benefit the government by bringing suits that would not otherwise have been brought with eliminating suits by those who had nothing to do with the discovery of the wrongdoing but merely saw a chance to secure a reward for converting newspaper articles into lawsuits.

To avoid paying inappropriate rewards, the federal government placed certain restrictions on those bringing *qui tam* actions. If the information underlying the suit was public at the time of the suit, then the plaintiff had to have direct, independent knowledge and had to voluntarily provide the information to the government before the suit was filed.

After filing its antitrust suit, MANA had notified the federal government prior to filing the *qui tam* suit. The defendants contended that having filed an antitrust lawsuit, the allegations in the *qui tam* case were public and MANA was not eligible to file a *qui tam* case. Was this the kind of suit based on public information Congress was trying to eliminate? Under the statute, if the *qui tam* suit was based upon the disclosures in the antitrust suit, MANA could not bring a *qui tam* action unless MANA was the "original source" of the information. Unpredictably, a very difficult preliminary question arose as to whether or not the disclosures in the *qui tam* case were based upon the antitrust suit. What Congress was trying to avoid was a parasitic suit, for example, someone who reads in a newspaper that a physician has been dismissed for Medicare fraud and quickly brings a *qui tam* action to get the reward for recovering amounts paid as a result of the fraud. Surely, this concern had nothing to do with MANA.

"Based upon" usually means "derived from." In MANA's case, the information in the *qui tam* case was not derived from the antitrust suit. The 2 accounts were very similar, but that was because the people who had provided the information for the antitrust suit also provided the information for the *qui tam* suit. They were using facts from their personal experience to frame both complaints, not newspaper articles describing their antitrust case. In their efforts to avoid parasitic *qui tam* actions, a majority of the courts have interpreted "based upon" to mean not "derived from" but "supported by." That is, if the facts in the *qui tam* case are "supported by" disclosures that are already public, a *qui tam* case cannot be brought unless the plaintiffs are the original source of the information. How could the courts come up with such an unusual interpretation of "based upon"? The test imposed by the statute was that if the *qui tam* case was based on public disclosure, the plaintiff had to be an original source. But if "based upon" only meant "derived from," then why would Congress require that the plaintiff be an original source? As long as the complaint was not directly copied from the public disclosure, anyone could bring a *qui tam* action, whether or not they were the original source. Courts do not interpret congressional statutes in a way that makes Congress look like it did not know what it was doing. If "based upon" means "derived from," then the provision of the statute that allowed suit to be brought by an original source would have no meaning. Therefore, Congress must have meant something else. The courts have interpreted "based upon" to mean "supported by" because only that interpretation gives meaning to the original source language.

What difference did this awkward interpretation make to MANA? MANA was nervous that if the 8th Circuit Court of Appeals interpreted "based upon" to mean "supported by," MANA would not be able to meet the original source test. The knowledge underlying the *qui tam* complaint had come not from MANA but from its members who directly viewed the alleged fraud of the defendants. The 8th Circuit Court of Appeals acknowledged that MANA's *qui tam* action was not the type of parasitic action that Congress was trying to prohibit. It ruled that the knowledge of individual members of MANA was the knowledge of the Association and that the Association was, in fact, an original source of the information in the antitrust and *qui tam* complaints.

Summary judgment

There were several other issues involved in the case. The trial court had entered summary judgment against MANA. Summary judgment is a remedy when there are no facts in dispute that would support a finding in favor of one of the parties. In order to bill Medicare for a case as personally performed, the anesthesiologists had to "satisfy seven requirements in each case [The Tax Equity and Fiscal Responsibility Act (TEFRA) requirements]. One of those requirements was personal participation in 'the most demanding procedures in the anesthesia plan, including induction and emergence.'" The trial court had ruled that the anesthesiologists had satisfied this requirement even though MANA had produced witnesses that "emergence" occurred when the breathing tube was removed and the patient woke up. MANA also had evidence that there were many instances when breathing tubes were removed after anesthesiologists had left the hospital or when anesthesiologists only spoke to patients via telephone, sometimes when they were in the recovery room and sometimes hours or even days after their procedures. The defendants claimed that they were nonetheless "present for emergence" because emergence "goes on for days." The 8th Circuit Court of Appeals pointed to testimony by a former employee of HCFA who had participated in drafting the regulations. He testified "that the regulations were based on advice from the American Society of Anesthesiologists that emergence was a particularly demanding part of the anesthesia process and that it occurred at 'the end of the case when the surgical procedure has been completed and the patient was being prepared by the anesthesiologist to be turned over to a nonanesthesia provider.'" The 8th Circuit Court of Appeals pointed out that the trial court should not have granted summary judgment when so much conflicting evidence had been offered by MANA.

Retaliatory discharge lawsuit

On January 18, 2002, the day after the MANA decision was issued, the US Court of Appeals for the 7th Circuit issued its opinion in *Brandon v Anesthesia and Pain Management Associates* (2002 W.L. 63796), in which the 7th Circuit Court of Appeals reinstated the lawsuit of an anesthesiologist who claimed that he was wrongfully discharged by an anesthesiologist group for complaining about the anesthesiologist group's billing practices. Specifically the anesthesiologist claimed that the group did not meet the test for medically directing CRNAs and was not entitled to payment for medical direction.

Dr Brandon began working in the anesthesiologist group in September 1993. After 2 years he became an associate and was responsible for filling out the Medicare billing reports. According to the court, he became concerned that the anesthesiologists were improperly billing Medicare. While testimony was disputed, the jury found for the anesthesiologist and, therefore, the court assumed that his story had been believed. The anesthesiologist claimed that he had brought the attention of the shareholders to their improper billing practices in July 1996 (the shareholders claimed that the anesthesiologist only brought this up in November after he had already been fired). After the shareholders' meeting, Dr Brandon was given an unsatisfactory rating on his job performance. In the fall, the anesthesiologists group offered him the chance to resign or be fired. On November 4, 1996, his employment was terminated. Ten months after his termination he reported the group's billing practices to the US attorney and shortly after that he brought suit against his former employers alleging retaliatory discharge under Illinois law. He claimed he was fired for complaining about the group's fraudulent billing practices. A jury awarded him $1 million for lost earnings and $1 million for pain and suffering and emotional distress. Notwithstanding the jury verdict, the trial court reversed and entered a judgment in favor of the defendant anesthesiologist group on 2 grounds. First, the trial court claimed that Dr Brandon had not shown that he was fired for taking actions that are protected by the public policy of Illinois, a required element in a retaliatory discharge case. Second, even if there was such a policy, the trial court said that there were ways of carrying out public policy other than through allowing former employees to bring suit for retaliatory discharge.

There is supposed to be an old adage in medicine, "When in doubt, diagnose in someone else's specialty." This case is the judicial equivalent. The trial court does not want to hear a retaliatory discharge suit because it says there are other methods by which the public policy of keeping people from making fraudulent claims can be enforced. One of these alternative remedies is the ability to file a *qui tam* action, yet, as we know from the MANA *qui tam* case, it is not easy to bring a *qui tam* suit, either. MANA had a very difficult time convincing the courts that they should be allowed to bring a *qui tam* case. Dr Brandon may have decided to bring his case as one of retaliatory discharge instead of a *qui tam* because in a retaliatory discharge case there is no requirement that the employee had to have reported the alleged illegal conduct to the authorities as long as the employee had reported it to the employer. Moreover, in a retaliatory discharge case, the employee does not have to be correct about the illegal activity to be protected. It is sufficient that the employee has a good faith belief that the activity was unlawful.

In general, an employee can be discharged at any time, for any reason or none at all. In many states, there are exceptions to this rule. For example, there are certain characteristics, such as race and religious creed, that we do not allow employers to use as a basis for discrimination in hiring. There would be no way to prohibit discrimination in hiring on racial grounds if an employer was free to discharge any employee, even those of a different race. To prevent discrimination in hiring, it also is necessary to protect employees from being fired on the basis of the protected status. We require employers to permit employees to serve on juries, to take advantage of labor laws, to tell the truth in trials, and to engage in other activities that society thinks promote public policy, even if an individual employer might not always be as supportive. Therefore, many states prevent employers from firing employees who engage in these activities, even if it restricts their rights to terminate employment at-will.

While the 7th Circuit Court of Appeals could not find an Illinois case that had protected an employee for reporting violations of the Medicare regulations, the Appeals Court found other examples where Illinois courts had protected the rights of individuals who complained about fraud. Even though Dr Brandon did not have an employment contract, he was nonetheless protected for having engaged in an activity the court found society viewed as worthy of protection. It should be noted that the question of just what is "public policy" and how you find it can be difficult to discern, even for experienced lawyers.

Public policy is not what it used to be

In contrast to the *Brandon* case is a Massachusetts case where a nurse was fired for telling a hospital survey team that there were morale and communications problems between doctors and nurses at a facility (*Wright v Shriner's Hospital*, 412 Mass. 469, April 1992). She brought suit for retaliatory discharge when her employment was terminated, only to be told that she had not followed a public policy protected by Massachusetts law. The Massachusetts court could find no statute that required a nurse to report problems to a survey team, even those affecting patient care.

It is interesting to see cases about the difficulty of complying with TEFRA finally reach the courts. The American Association of Nurse Anesthetists has complained to Congress and CMS on numerous occasions that the TEFRA rules are unneeded, unnecessarily restrictive, and unlikely to be followed. At first it seemed that those who violated the rules might escape punishment. However, these 2 appellate cases suggest that there may be more judicial support to those who are punished for bringing their employer's attention to the employer's failure to comply with TEFRA.