

Defense Contract Litigation

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**SHEPARD'S
MCGRAW-HILL**

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11/16/89

FVI

With best regards,
Bob V.

Both Thomas Gunn and McDonnell Douglas distinguished its case from the failed Unisys appeal by arguing that some of the individuals mentioned in the Unisys affidavit already had been indicted or pled guilty and that some of the information had been released to the public in another district.

However, the names of the three key Unisys executives targeted by the investigation were revealed for the first time when that affidavit was released, and the only information contained in the affidavit that had been previously released was a history of the Ill Wind investigation and some information about a few of the consultants. All of the information concerning the Unisys search in Minneapolis had never before been made public.

Since neither the defense contractor nor the newspaper has seen the search warrants and affidavits in question, the material and the names of the individuals McDonnell Douglas says were previously released in the Unisys case, might also appear in their own affidavits.

The newspaper is arguing that the press' First Amendment right of access to court documents supersedes these other arguments. The Post-Dispatch says the public has a right to know how one of the country's largest defense contractors was operating during the largest military build-up in American history.

McDonnell Douglas is using four law firms in St. Louis and one in Washington, D.C. The attorneys in St. Louis are Donald Stohr and Lawrence Friedman with Thompson & Mitchell; Norman London; Barry Short with Lewis and Rice; Veryl Riddle, James Murphy, Francis Gaffney and Michael Biggers with Bryan, Cave, McPheeters and McRoberts. The Washington attorney is John Bray with Schwalb, Donnenfeld, Bray and Silbert.

The St. Louis Post-Dispatch's attorneys are Jim Shoemake and Kirk Crowder with Guilfoil, Petzall and Shoemake in St. Louis. ■

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are issued or the writ is entered into a court proceeding through testimony.

Textron woes go beyond bad engines thanks to Aerospatiale whistleblower

(Justice has right to defendant's evidence before intervening in qui tam suit)

The Textron Lycoming Division of Avco Corp. faces a civil qui tam complaint that the Justice Department is likely to enter, and a grand jury investigation expected to bring indictments later this year, according to sources familiar with the case. And if that weren't trouble enough, the engine that's at the center of it all has been cited in a number of fatal crashes.

The engine maker's troubles began with a high tech turbine engine, the LTS-101 that didn't live up to everyone's expectations for reliability. Among other things, the popular engine was used by Aerospatiale in a helicopter sold to the Coast Guard.

About the time the Coast Guard realized it had a problem with the sophisticated new engine in the 96 HH-65A helicopters it was buying from Aerospatiale, Robert Ballew, an Aerospatiale materials expert, stepped forward with accusations of inspection fraud by Textron Lycoming. Ballew has since left Aerospatiale and now works for Turbomeca Engine Corp, an Aerospatiale subcontractor next door to the Grand Prairie, Texas company.

Ballew's tip went to the Department of Transportation Inspector General who investigated and substantiated some of Ballew's claims and more. Last year, the IG referred the results of that investigation to the Justice Department for prosecution.

Justice Department sources say U.S. Attorney Marvin Collins for the Northern District of Texas is preparing an indictment for submission to a grand jury there. The case is being handled in the Northern District because that where Aerospatiale is.

Sources familiar with the case won't say precisely what Ballew reported. But they say, at the very least, he charged that Textron used alloys cheaper than those specified by the contract.

Textron Lycoming accused of inspection fraud by Aerospatiale materials expert

Ballew filed his own *qui tam* complaint last year against Textron Lycoming according to sources who've talked to Ballew and his attorney, Jim Morgan of Fort Worth. That complaint is still under seal. In any case, sources say the IG investigation went beyond Ballew's initial allegation, and that some of the result of that investigation found its way into Ballew's *qui tam* complaint, which was filed late last year. That raises the possibility that Justice may try ultimately to whittle down Ballew's share of a recovery.

Further complicating Textron's problems is uncertainty over Aerospatiale's position. Sources close to the helicopter maker say the firm is trying to keep options open. So it could end up being an adversary instead of a co-defendant. Aerospatiale is working with the Coast Guard on a project to re-engine the helicopters. Moreover, Aerospatiale is the biggest buyer of Turbomeca where whistleblower Ballew is now employed, and Ballew himself says he's not a "whistleblower," a term he considers to have a negative connotation of disloyalty.

One of the reasons for Textron's problems with the LTS-100 series engine according to sources who studied it was the concurrent startup of production on two other ambitious, high-tech engines. The other two engines were the ALF-502, sold to Canadair to go in the Challenger aircraft, and the AGT-1500 which powers the United States Army M-1 "Abrams" main battle tank. The result was that Lycoming fell seriously behind, especially on the helicopter engines.

But the real snowball effect of Ballew's original tip might commence after the details of the official investigation become public. If allegations of fraud are sufficiently damning, they may precipitate a blizzard of product liability claims.

Aside from the Coast Guard helicopters and Army tanks, Textron has the LTS-101 engine in about 1500 commercial helicopters built by Aerospatiale, Bell (another Textron subsidiary) and Messerschmidt Boelw-Blohm. According to the *Fort Worth Star-Telegram*, the engine has been cited in "at least 12 deaths and dozens of accidents," and has brought one \$8-million suit by a civil operator who says the maintenance costs bankrupted him.

Referring to the *qui tam* case that is still sealed, Textron spokesman Louis Savenelli said, "Because there is litigation going on we're not at liberty to discuss any aspects of this situation."

Textron knows about the *qui tam* complaint and its relator because as soon as it was filed late last year, the Justice Department civil frauds unit, headed by Mike Hertz, served four "civil investigative demands" on Textron.

Textron quickly petitioned the D.C. District Court in January to set aside the CIDs, and Justice disclosed to Textron the existence of the *qui tam*.

According to Hertz at Justice, the case has remained sealed ever since even though defendant Textron is actively litigating it. As a result, Hertz said he could not comment publicly on whether Justice will intervene. But the *Star-Telegram* quotes Justice sources saying intervention is likely.

Textron lost the dispute over the CIDs at the District Court, but gained valuable time appealing it to the Circuit Court. (*Avco Corporation, Textron Lycoming Williamsport v. U.S. Department of Justice, No. 89-5033, Court of Appeals for the D.C. Circuit; text of Circuit Court opinion begins on A-1341*).

That case was framed as a petition by Textron metallurgist Dr. Yoon Sam Kim, on whom one of the four CIDs had been served. It was argued May 23, and on Sept. 8, the Circuit Court rejected Textron's argument.

Kim had said the attorney general lacked authority to issue the CID because the *qui tam* action precluded it. According to Kim, if the CID were enforced, it would allow Justice to conduct civil discovery in the pending action through *ex parte* investigative demands.

According to the Circuit Court, the plain language of the False Claims Act, empowers the Attorney General to issue CIDs. So the Attorney General is only precluded from issuing a CID when the Department of Justice itself institutes civil proceedings.

Section 3733(a)(1) of the Act provides that "whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such a person, a civil investigative demand." 31 U.S.C. § 3733 (a)(1).

But, as Kim pointed out, the Attorney General never "commences" a civil proceeding, when a *qui tam* relator starts the case. So if the language were read literally, it would mean the Attorney General could intervene in the *qui tam* litigation and continue to use the CID as an *ex parte* means of discovery.

But the appeals court choked on Kim's conclusion that the language should not apply even before Justice Department intervention since the consequences after intervention would be absurd.

The Court of Appeals decided that the word "commencing" should be construed to encompass "intervening" by the Attorney General, so that in cases where a qui tam action has been brought, the Attorney General is permitted to issue CIDs only before intervening in the qui tam action. The Court of Appeals concluded that nothing in the legislative history of the False Claims Act required a departure from the natural reading of § 3733(a)(1).

Aerospatiale is represented by Duke and Riley of Dallas. The company would not say whether it was cooperating with relator Ballew's case against Textron.

Textron Lycoming is a division of Avco Corp., which in turn, is a subsidiary of Textron Corp. The company is represented by Michael Scheininger of McKenna, Conner, and Cunico in Washington. ■

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Micronics to reopen and sue Pentagon for hounding it about bad missile fuzes

By Steve France

Bankrupt, shut down, under criminal suspicion and cut off by the Pentagon because of troubled missile parts in August, Micronics International, Inc. is starting back up on a sub-contract for Hughes Aircraft Co. and preparing to sue the Pentagon for \$20 million (*Text of Micronics agreement with Hughes Aircraft to resume AMRAAM work begins on page A-1331; text of confidential Navy memo describing consequences of Micronics shutdown begins on A-1330*).

Micronics, La Brea, California, subsidiary of Precision Aerotech, Inc., of La Jolla, is the sole supplier of "safe and arming fuzes" for the bulk of the military's tactical missile inventory, including the Phoenix and AMRAAM missile systems. Fuzes protect those who fire a missile from premature detonation. Micronics fuzes are also used in Sidewinder, HARM, HARPOON and Sparrow missiles, but are not the Pentagon's sole source.

They are the only source for Phoenix and AMRAAM fuzes. And as a result, the problems at Micronics could substantially delay those two weapons.

In a September 7 internal Navy memo, published for the first time in this issue of DCLR, Vice Adm. J.B. Wilkinson, commander of the Naval Air Systems Command, said the Micronics shutdown means no further fleet delivery from production or retrofit of Phoenix missiles for up to six months.

He also predicted delays in AMRAAM and Sparrow deliveries. Navy spokespersons have said the delays will not affect the fleet's combat readiness, a claim doubted by other knowledgeable sources.

Micronics closed its doors Aug. 29 after the Defense Contractor Administrative Service, which was supervising its performance, imposed a "Method D" order, withdrew DCAS inspectors from the plant and barred acceptance of Micronics fuzes by the government.

DCAS maintains it could no longer work with the company to resolve deficiencies in the devices. The agency claims tests revealed the fuzes were not being manufactured according to specifications and that Micronics was employing substandard materials and processes. It also charges the company failed to test and measure the \$4500 devices properly and keep adequate production records.

Doubts about the reliability and durability of the fuzes are alleged to be the reason the Navy has bunkered 500 Phoenix missiles worth almost \$1 million each.

The Defense Criminal Investigative Service has been investigating Micronics since early 1988. Gay Maund, a DCAS spokesman confirmed DCIS is still actively pursuing the investigation. Other sources close to the case say it is being given high priority and several indictments are expected.

Micronics officials confirm they are feeling the heat.

The DCIS has been investigating Micronics since 1988 and sources close to the case say several indictments are expected.

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