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Quarterly Review

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Edited by Cleveland Lawrence III
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The *False Claims Act and Qui Tam Quarterly Review* is published by the Taxpayers Against Fraud Education Fund. This publication provides an overview of major False Claims Act and *qui tam* developments including case decisions, DOJ interventions, and settlements.

The TAF Education Fund is a nonprofit charitable 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). The TAF Education Fund serves to inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions.

The TAF Education Fund 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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Techota, LLC

American Systems Corporation, Anixter International Inc. and Corning Cable Systems LLC

Mohanbhai Ramchandani and Mohan's Custom Tailors

Par Pharmaceutical Companies, Inc.

CH2M Hill Hanford Group Inc.

Fairfax Nursing Center

Steven J. Wasserman

St. Luke's-Roosevelt Hospital Center, Continuum Health Partners, Inc., and SLR Psychiatric Associates

Catholic Health Initiatives

Cooper Health System

Pfizer, Inc. and Endo Pharmaceuticals

FROM THE EDITOR

"It is difficult to get a man to understand something when his salary depends upon his not understanding it." –Upton Sinclair, American author

In an effort to replicate the indisputable success of the federal False Claims Act in ferreting out fraud and returning stolen money to the government, Congress recently created strong whistleblower programs for the Internal Revenue Service, the Securities and Exchange Commission, and the Commodity Futures Trading Commission. As these programs continue to develop, more fraud should be uncovered, and more financial awards to successful whistleblowers are expected. However, the success of these incentive-based whistleblower programs cannot be measured in dollars alone. True success can only be achieved when corporate culture changes and fraudsters are deterred from engaging in misconduct at the outset.

Business interests often argue that the civil and criminal penalties imposed by the Sarbanes-Oxley law on CEOs and CFOs who misrepresent corporate financial data, in conjunction with the use of internal corporate compliance programs, obviate the need for strong whistleblower incentives. But the truth is that whistleblowers are more important now than ever before. For example, the IRS reports that the gap between federal income taxes owed and federal income taxes collected totaled more than $400 billion for fiscal year 2012. Rather than relying solely on tax audits, and instead of waiting for tax dodges to self-report, the IRS can now make use of the more than 10,000 whistleblower submissions it has received, as it works to collect and return much-needed tax dollars to the federal fisc. Similarly, the SEC recently reported that in 2012 it received more than 3000 submissions from whistleblowers, alleging various securities violations that are expected to result in sanctions of at least $1 million. And the CFTC is now considering the more than 100 whistleblower submissions it received last year.

Unfortunately, we cannot simply depend on corporations to play fairly. And internal corporate controls have largely proved to be inadequate solutions. For instance, Sarbanes-Oxley was enacted more than a decade ago, but there have only been a handful of criminal prosecutions under the law—and no noteworthy criminal convictions of any executives connected to the rampant subprime mortgage fraud that caused the debilitating 2008 financial crisis and the resulting global recession from which we're still slowly recovering. Simply put, corporate officers engaging in fraudulent conduct likely have little fear of criminal prosecution. Moreover, while internal compliance programs can be useful tools, they cannot serve as a "one-size-fits-all" solution—if a corporation's culture is rooted in fraud, then complaints through the company's internal reporting channels will likely only serve to harm the whistleblower who dared to deviate from the company's business model. Once it becomes a person's "job"—whether a CEO, CFO, corporate compliance officer, or otherwise—to ignore reports of fraud, because doing so is good for business and/or for the person's own livelihood, then there's little incentive for that person to ensure that any remedial action is taken. Whistleblowers act as a secondary check on corporate behavior, because they provide a very real threat that fraud will not be merely contained within a company. In this way, whistleblowers can affect positive cultural change and level the playing field for the many honest companies with whom we—and our government—would prefer to do business.

As always, the Quarterly Review recognizes and applauds the contributions of whistleblowers who expose fraud. I hope you enjoy this issue.

All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JANUARY 1, 2013–MARCH 31, 2013

FALSE CLAIMS ACT LIABILITY

A. Violations of the Anti-Kickback Statute and/or Stark Law

See *U.S. ex rel. Yarberry v. Sears Holdings Corp.*, 2013 WL 1287058 (S.D. Ill. Mar. 28, 2013), at page 76.

See *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2013 WL 1289260 (S.D. Fla. Mar. 27, 2013), at page 92.

See *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2013 WL 1149255 (M.D. Fla. Mar. 19, 2013), at page 51.

See *U.S. ex rel. Health Dimensions Rehab., Inc. v. RehabCare Group, Inc.*, 2013 WL 992642 (E.D. Mo. Mar. 13, 2013), at page 53.

See *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 2013 WL 821965 (D. Md. Mar. 5, 2013), at page 5.

See *U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc.*, 2013 WL 146048 (M.D. Tenn. Jan. 14, 2013), at page 69.

B. What Constitutes a False Claim

U.S. ex rel. Humphrey v. Hocking, Athens, Perry Cmty. Action Agency, 2013 WL 494035 (S.D. Ohio Feb. 7, 2013)

A relator filed a *qui tam* complaint alleging that an organization misused federal Head Start Program funds. He alleged a claim under the False Claims Act's "reverse" false claims provision. The United States declined to intervene in the lawsuit. The relator moved to file a third amended complaint, seeking to add the organization's attorney and former executive director as defendants. The defendants opposed the motion, arguing that such an amendment would be futile.

The U.S. District Court for the Southern District of Ohio denied the relator's motion. The court held that the relator failed to plead a reverse false claim, since he did not identify an obligation imposed on the defendants to pay or transmit money or property to the government, and since he did not allege a judgment,

retention of an overpayment, or an implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, as required by the False Claims Act. As a result, the court denied the relator's motion to amend his complaint as futile.

JURISDICTIONAL ISSUES

A. Section 3730(B)(5) First-to-File Bar

U.S. ex rel. Palmieri v. Alpharma, Inc., 2013 WL 821965 (D. Md. Mar. 5, 2013)

A relator filed a *qui tam* suit on behalf of the United States and several state governments, alleging that several pharmaceuticals companies improperly marketed a pain medication administered through a patch for off-label purposes. The relator alleged that the defendants improperly induced physicians to prescribe the drug for off-label uses by providing them with kickbacks, in violation of the Anti-Kickback Statute. The relator claimed that as a result of the defendants' marketing scheme, false Medicare and Medicaid claims were submitted to the government entities on whose behalf the relator's suit was filed. None of the governmental entities intervened in the relator's lawsuit. The defendants moved to dismiss the suit, arguing that the false claims act laws' "first-to-file" provisions barred the relator's complaint; that the complaint failed to state a claim for relief under the FCAs; and that the fraud allegations were not pled with particularity.

Holding: The U.S. District Court for the District of Maryland granted the defendants' motion to dismiss, finding that the relator's complaint failed to state a claim. The complaint was dismissed without prejudice, however, which gave the relator an opportunity to amend the complaint.

First-to-File Rule

First the defendants argued that the relator's claims were precluded by the FCA statutes' respective "first-to-file" provisions, which bar *qui tam* actions based on facts underlying other, pending actions. The defendants contended that another *qui tam* suit, raising the same allegations, had been filed four days before the present relator's complaint was filed, and deprived the court of subject matter jurisdiction over the relator's claims. The court first confirmed that the relator's suit was filed while the prior *qui tam* action was still pending in a different district court, that the relators in both cases were former sales representatives for a defendant named in both suits, and that both relators alleged the same fraud scheme on behalf of the federal government and the same group of state governments. The relator, though, argued that the earlier-filed *qui tam* complaint should not bar his claims, because although that earlier case was pending when the present relator filed his *qui tam* suit, the earlier suit had been dismissed and was no longer pending, and therefore, the first-to-file bar did not apply. The defendants countered that the first-to-file rule applies at the time a second relator brings a *qui tam* case that is related to a pending *qui tam* case, and thus, the court's lack of subject matter jurisdiction was determined based on when the two actions were brought. The defendants reasoned that since the present relator's suit was filed while the prior suit was still pending, the court never had jurisdiction over the present relator's complaint. The court, though, determined that after the first *qui tam* complaint was dismissed, the relator filed an amended complaint, and since there was no prior, pending *qui tam* case at the time the present relator amended his complaint, the prior complaint did not preclude the relator's action. The court made clear that the filing of an amended complaint can be deemed an "event of jurisdictional significance," finding support for its view in various circuit court opinions and even in the U.S. Supreme Court's ruling in *Rockwell Int'l Corp. v. United States*. The district court noted that since the relator filed an amended complaint at a time when the prior suit was no longer pending, if the court were to dismiss that amended complaint without prejudice, then the first-to-file rule would not stop the present relator "from filing an identical pleading under a new case number tomorrow." The defendants' first-to-file argument was rejected and the court refused to dismiss the relator's complaint for lack of subject matter jurisdiction.

Failure to State a Claim/Plead Fraud with Particularity

The court then considered the defendants' argument that the relator's fraud claims were not pled with particularity. The defendants argued that the relator's complaint was deficient because it did not allege any particular instance in which a false claim was submitted to the government. The court recognized that the complaint included numerous details regarding the defendants' alleged off-label marketing, but noted that the relator did not detail the submission of any reimbursement claim to any government for the defendants' drug. The relator countered that he did not need to plead the actual fraudulent submissions that resulted from the defendants' alleged misconduct, since he detailed the defendants' improper marketing scheme. The court acknowledged "an emerging circuit split on this issue," but ultimately agreed with those courts that have held that the particularity standard is not satisfied merely by describing a fraud scheme in detail without providing factual support for the corresponding allegation that false claims based on that fraud scheme were submitted to the government. Since the court determined that the relator failed adequately to connect the alleged fraud scheme to the submission of false claims to Medicare and Medicaid, the court dismissed the relator's complaint for failure to state a claim.

The court, though, granted the relator's motion for leave to amend his complaint to cure the deficiencies, noting that this was the first time the sufficiency of the relator's allegations had been challenged and that discovery had not yet commenced.

See *U.S. ex rel. Carter v. Halliburton Co.*, 2013 WL 1092732 (4th Cir. Mar. 18, 2013), at page 47.

B. Section 3730(e)(4) Public Disclosure Bar and Original Source Exception

U.S. ex rel. John Doe v. Staples, Inc., 2013 WL 1192982 (D.D.C. Mar. 22, 2013)

An anonymous relator filed a *qui tam* suit against several companies that, among other things, imported pencils for sale in the United States and violated the False Claims Act by knowingly importing pencils from suppliers in China, and then falsifying the pencils' origin to U.S. Customs and Border Protection in order to avoid applicable tariffs and duties. The relator based his claim on the pencils' price and on his own evaluation of the pencils' physical characteristics. The defendants moved to dismiss the relator's suit, arguing that due to the False Claims Act's public disclosure bar provision, the court lacked subject matter jurisdiction over the relator's claims. Specifically, the defendants argued that the relator based his fraud allegations on publicly-available reports published by a company that compiles information submitted by shippers to Customs.

The U.S. District Court for the District of Columbia agreed with the defendants. The court held that the published reports were public disclosures for False Claims Act purposes, since they were readily available on a company website, which the court held constituted a non-traditional "news media" source. In addition, the court noted that the relator relied on various information that was available to all subscribers to a U.S. Customs service, as well as certain information available on the U.S. International Trade Commission website; the court held that these materials "administrative reports," for FCA purposes. The court rejected the relator's contention that the public disclosure bar did not apply because he provided more details regarding the price and physical appearance of the defendants' pencils. Instead, the court observed that those characteristics were also sufficient to enable the government to investigate the pencils' origin, and therefore, the relator's observation did not add anything new.

Finding that the relator's fraud allegations were based on the prior public disclosures, the court then turned to the question of whether or not the relator qualified for the FCA's "original source" exception to the public disclosure rule. The court held that he did not. The court declared that to qualify for the exception, a relator must have direct and independent knowledge of the information on which the fraud allegations were based, and must voluntarily provide that information to the government before filing the *qui tam* suit. The relator claimed that he had direct and independent knowledge of the defendants' alleged fraud scheme, due to his conversations with industry insiders, his analysis of trade data, and based on information he received from hired investigators. However, the court held that these types of communications do not meet the "original source" standard, liken-

ing the relator to one who "relied on several layers of hearsay," and thus did not have direct, first-hand knowledge.

As a result of these findings, the court granted the defendants' motion and dismissed the relator's suit.

U.S. ex rel. Beauchamp v. Academi Training Ctr., Inc., 2013 WL 1189707 (E.D. Va. Mar. 21, 2013)

Two *qui tam* relators filed suit against a government contractor that provided, among other things, security services to the United States in high-risk environments, such as Iraq and Afghanistan. The relators alleged that the defendant engaged in two schemes to submit false claims under a contract with the U.S. State Department: (1) routinely submitting falsified weapons qualification test scores for security personnel; and (2) submitting false reports and bills for work that was not performed. The defendant moved to dismiss the relators' suit, arguing that the relators were precluded from filing suit pursuant to the False Claims Act's first-to-file and public disclosure rules. They further argued that the relators' complaint failed to state a claim and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendants' motion to dismiss, finding that the relators' complaint was barred by the FCA's first-to-file and public disclosure rules.

First-to-File and Public Disclosure Rules

The defendant asserted that years before the present relators' suit was filed, two other relators filed a *qui tam* action against the defendant's predecessor in interest, alleging that the defendant submitted false claims to the government during an overlapping time period. The prior suit proceeded to trial and the jury returned a verdict in favor of the defendant, which was upheld on appeal. The defendant argued that this prior suit, which was still pending when the present relators' suit was filed, barred the present complaint, pursuant to the first-to-file and public disclosure rules. In addition, the defendant claimed that a second lawsuit, filed by two plaintiffs before the present relators amended their complaint to allege the weapons qualification scheme with more specificity, alleging violations of the False Claims Act's anti-retaliation provision, revealed the alleged scheme to defraud the government; they further argued that an online news publication published a story about the retaliation suit, which discussed the fraud alleged by those plaintiffs. Moreover, the defendant contended that the alleged fraud was disclosed in a State Department report regarding the defendant's performance under its government contract, as well as in statements made during a congressional hearing, in various audit reports commissioned by the State Department and in a congressional memorandum. The court held that, pursuant to the first-to-file and public disclosure rules, the prior *qui tam* lawsuit barred the relators' claims regarding false billing, because that suit was still pending at the time the present relators' suit was filed, and it disclosed the same fraud scheme. The court noted that the prior *qui tam* suit did not allege the weapons qualification fraud scheme, and thus, did not bar those claims. With respect to the public disclosure rule, the court held that neither relator qualified for the "original source" exception, since their purported independent knowledge of the fraud did not materially add to the publicly disclosed information.

After dismissing the false billing claims, the court turned to the weapons qualification claims. While the court held that the State Department reports, and other governmental disclosures did not reveal the fraud alleged by the present relators, and therefore, were not public disclosures for FCA purposes. The court further noted that the anti-retaliation lawsuit did not constitute a public disclosure, since the government was not a party to that suit. However, the court determined that the news article based on the retaliation suit was a public disclosure, as it discussed the alleged fraud scheme through the "news media." Again, the court observed that neither relator satisfied the original source criteria—in this instance, the court held that the relators failed to voluntarily provide the government with information regarding the alleged fraud, since the relators only submitted information to the government pursuant to their statutory obligations to provide the government with a "written disclosure of substantially all material evidence and information" they possessed, which the court held was not "voluntary."

Based on these findings, the court dismissed all of the relators' claims.

U.S. ex rel. Mateski v. Raytheon Co., 2013 WL 692798 (C.D. Cal. Feb. 26, 2013)

A relator brought a *qui tam* action against his former employer—a company contracted by the U.S. government to develop a weather sensor that would be used to collect meteorological, oceanographic, environmental, and climactic data—alleging that during a 10-year period the defendant violated the False Claims Act by submitting 48 false claims to the government, resulting in approximately $1 billion in improper payments. The relator had been assigned to work on the project for about three years. The defendants moved to dismiss the relator's complaint, arguing that the False Claims Act's public disclosure bar provision deprived the court of subject matter jurisdiction over the relator's complaint, among other reasons.

Holding: The U.S. District Court for the Central District of California granted the defendant's motion, finding that the relator's complaint was precluded by the public disclosure bar. The court denied the relator's request for leave to amend the complaint, holding that the deficiencies in the complaint could not be cured.

Public Disclosure Bar

The court determined that the relator's allegations fell into three categories: cost overruns; design, engineering, and manufacturing defects; and mismanagement. The court further determined that each of those issues had been publicly known before the relator's complaint was filed—the court observed that some of the exhibits attached to the relator's complaint were public disclosures—and had been "addressed extensively in government hearings, administrative reports, and news media." The relator argued that the public disclosures lacked the detail contained in his complaint, and therefore should not bar his suit. The court rejected that argument, stating that "there is no particularity requirement for a suit to fall under the public disclosure bar—the phrase 'allegations or transaction' is construed broadly," and noting that "public disclosures need not detail information underlying allegations or transactions so long as they supply enough information for the United States to pursue an investigation." The court found that the United States actually held hearings and conducted investigations into problems with the defendant's weather sensor, and even became more involved in the day-to-day work on the project. The court determined that the public disclosures at issue, while not as detailed as the relator's allegations—"all point to systematic technical and management problems," which was sufficient to bar the relator's complaint.

The court then determined that the "original source" exception to the public disclosure bar did not apply. The court noted that, in the Ninth Circuit, an "original source" must satisfy four criteria: the person must have (1) direct; and (2) independent knowledge of the information on which the allegations are based; the person must have voluntarily provided the information to the government before filing the *qui tam* complaint; and (4) the person must have had a hand in the public disclosure—an element that several other circuits do not require. The court noted that the relator failed to offer any evidence showing that he had a hand in the public disclosures at issue. The court held that republishing the public disclosures was insufficient, stating, "a whistleblower sounds the alarm; he does not echo it." The court continued, finding that the relator failed to demonstrate his direct and independent knowledge of the alleged fraud. The court determined that the relator made generalized statements regarding the alleged fraud, but did not describe how he acquired the information his allegations were based on—particularly since the relator alleged fraud during periods when he was not working on the weather sensor project. Moreover, the court noted that there was no evidence showing that the relator's responsibilities included billing, management, or high-level technical oversight. Thus, the court concluded that while the relator may have witnessed technical failures and non-compliance, he could not demonstrate knowledge that the defendant knowingly committed fraud and could only "jump[] to the conclusion." The court further found no evidence showing that the relator voluntarily provided information regarding the alleged fraud to the government before filing his *qui tam* complaint. Instead, the court determined that the relator first briefed the government on his claims about a month after his suit was filed.

As a result of the above findings, the court held that the relator's complaint was precluded by the public disclosure bar and that he was not an original source. The *qui tam* complaint was dismissed with prejudice.

U.S. ex rel. Conrad v. Abbott Labs, Inc., 2013 WL 682740 (D. Mass. Feb. 25, 2013)

A relator brought a *qui tam* action against twenty-four drug manufacturers, distributors, and labelers, alleging that the defendants fraudulently misrepresented their products as eligible for Medicaid reimbursement, which healthcare providers to seek reimbursement from the Medicaid program for prescriptions for the defendants' products. The relator alleged that Medicaid improperly paid more than $500 million for the defendants' drugs. The United States declined to intervene in the relator's lawsuit. The defendants moved to dismiss the relator's claims, arguing that the relator's suit was barred, pursuant to the False Claims Act's public disclosure provision.

Holding: The U.S. District Court for the District of Massachusetts granted the defendants' motion, as it held that it lacked subject matter jurisdiction over the relator's claims, because the information on which those claims were based had been publicly disclosed before the relator filed his *qui tam* complaint.

Public Disclosure Bar

The defendants argued that the relator's allegations were based on five public disclosures, including drug data, billing code, and drug approval information periodically published by government agencies including Centers for Medicare and Medicaid Services (CMS) and the Food and Drug Administration (FDA), as well as through notices published in the Federal Register. The relator responded that none of the sources disclosed the defendant's allegedly fraudulent scheme. Additionally, she argued that the information at issue did not constitute public disclosures for FCA purposes.

While the defendants did not argue that the alleged public disclosures directly alleged the fraud scheme described in the relator's complaint, they argued that, if the relator's allegations were true, then both the misrepresented facts and the true facts would have been available to anyone who consulted the five public sources, which would have revealed the defendants' alleged false statements, as well as the FDA's list of approved drugs (which did not include the defendants' products). Since both the allegedly false statements and the "true" facts were available in the purported public disclosures, the court agreed that the public disclosure bar would apply—in the event that the sources were deemed "public." Although the court acknowledged that a relator who studied the information available in the sources at issue would still need "substantial expertise in the field in order to find the alleged discrepancy," it ultimately held that "[a] relator cannot bring a *qui tam* suit based on publicly disclosed facts, even if her expertise makes her the first to understand the alleged fraud."

The court also determined that the CMS publications were public disclosures for FCA purposes, as they are available for the public to download via the CMS website and contain thousands of lines of drug data, organized and sorted. Notwithstanding the fact that the CMS data does not include any analysis but only included "raw data," the district court, relying on the U.S. Supreme Court's opinion in *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, held that the CMS data qualified as a public disclosure, since it constituted a federal government report that summarized information in a federal agency's possession, in the same way that an agency's response to a FOIA request does. The court also rejected the relator's argument that the FDA's list of approved drugs should not be deemed a public disclosure; essentially, the relator argued that the public disclosure bar is not implicated when a disclosure by omission occurs. The court concluded that adopting the relator's argument would mean that the FDA would have to include a separate list "everything that is not an approved drug," including the defendants' products. This approach, the court reasoned, was inconsistent with the FCA's language, which the court held "refers broadly to a 'public disclosure,' not narrowly to an 'affirmative public disclosure,'" and that the term "disclosure" is not inherently restricted to affirmative disclosures. The court held that, by listing all FDA-approved drugs, the FDA's list necessarily disclosed the fact that all other products were not FDA-approved drugs. This disclosure, the court said, was sufficient to trigger the FCA's public disclosure bar.

Based on the above findings and the relator's failure to assert that she qualified for the FCA's "original source" exception to the public disclosure rule, the court held that it was without subject matter jurisdiction over the relator's claims, and dismissed the claims on that basis.

Malhotra v. Steinberg, 2013 WL 44140 (W.D. Wash. Feb. 5, 2013)

Two relators filed a *qui tam* action alleging that a former bankruptcy trustee violated the False Claims Act by orchestrating an illegal kickbacks scheme in which he undervalued real estate in bankruptcy proceedings—including the relators' own bankruptcy proceeding—and then engaged in straw-man real estate transactions with real estate agents with whom he had partnered. The defendant moved to dismiss the relators' complaint, arguing that the fraud claims were barred by the False Claims Act's public disclosure bar provision.

Holding: The U.S. District Court for the Western District of Washington granted the defendant's motion to dismiss.

Public Disclosure Bar

The court held an evidentiary hearing to resolve factual disputes regarding the defendant's public disclosure bar argument. During the hearing, the court learned that the relators had a negative gut reaction to the defendant's handling of their bankruptcy estate and conducted a six-month investigation of the defendant's handling of numerous other bankruptcy estate properties; the relators' investigation involved searching and reviewing thousands of documents and interviewing other debtors, witnesses, and the defendants business associates. At the start of their investigation, the relators also had multiple meetings with the defendant's supervisor at the Office of the United States Trustee (OUST) and shared their suspicions about—and their dissatisfaction with—the defendant. Notably, the supervisor did not recall the relators making any allegations that the defendant was secretly profiting from illegal kickback arrangements with real estate agents. The supervisor testified that he encouraged the relators to continue their investigation, but stated that the relators' information did nothing to help uncover the defendant's alleged fraud. Instead, the supervisor noted that years after the relators' meetings with him, OUST received a letter from one of the defendant's former employees that described the defendant's fraudulent scheme and provided documentary evidence regarding specific transactions reflecting illegal kickbacks. OUST then began investigating the defendant and suspended him from his work. OUST later deposed one of the real estate agents who was allegedly involved in the defendant's scheme, as part of the relators' bankruptcy proceeding; OUST could only conduct the deposition as part of an open bankruptcy case involving both the defendant and the deponent, and the relators' case was the only one that fit the criteria. The relators were allowed to attend the deposition, and the deposition testimony corroborated their suspicions of an alleged illegal kickbacks scheme.

The defendant argued that the deposition constituted a public disclosure under the False Claims Act, and thus, the court did not have subject matter jurisdiction over the relators' fraud claims under the False Claims Act, as they were merely attempting to capitalize on information the government—OUST—already knew. The relators disagreed with the defendant's characterization of the deposition as a public disclosure, and also argued that even if there was a prior public disclosure of their fraud allegations, they qualified for the False Claims Act's "original source" exception to the public disclosure rule. The court considered each argument in turn.

The court first determined that the deposition triggered the False Claims Act's public disclosure bar provision, since: (1) it was given as part of a government (OUST) investigation; (2) it was made "public," as the relators—who were outsiders to the OUST investigation—were present and sought to take advantage of the information by filing a *qui tam* suit; and (3) the relators' allegations were "based on" the public disclosure, as the allegations involved "identical subject matter" and relied on information revealed during the deposition.

The court then rejected the relators' "original source" argument. The court, relying on Ninth Circuit authority, stated that an original source must: (1) have direct and independent knowledge of the information on which the allegations were based; (2) must voluntarily provide the information to the government prior to filing the *qui tam* complaint; and (3) must have had a hand in the public disclosure. Since the parties did not dispute that the relators' satisfied the second factor, the court focused on the first and third factors. With respect to the first factor, the court held that the relators did not demonstrate "true knowledge" of the defendant's fraud until OUST began its investigation and conducted the deposition at issue. Before then, the court held, the relators merely had suspicions and speculations of fraud, and even admitted that they had a "gut feeling." In addition, the court held that the third factor—which is unique to the Ninth Circuit—was not satisfied, since the relators did not have a hand in the public disclosure, since the OUST representative testified that the relators did not trigger the OUST investigation and subsequent deposition.

As a result of these findings, the court dismissed the relators' complaint pursuant to the public disclosure bar.

U.S. ex rel. Schumann v. Astrazeneca Pharms. LP, 2013 WL 300745 (E.D. Pa. Jan 25, 2013)

A relator filed a *qui tam* suit against a group of pharmaceuticals companies, alleging that the defendants violated the federal False Claims Act and various state counterparts by providing improper kickbacks to a large pharmacy benefit management company (PBM) that acted as a middleman between pharmaceutical companies and government entities that purchase prescription drugs. The claims against several of the defendants were dismissed, pursuant to the False Claims Act statutes' public disclosure bar provisions. The remaining defendant moved to dismiss the relator's remaining claims on the same basis.

Holding: The U.S. District Court for the Eastern District of Pennsylvania granted the defendant's motion.

Public Disclosure Bar

The defendant argued that the relator's allegations had been publicly disclosed before he filed his *qui tam* complaint, through various complaints, government investigations, and media reports. The relator, though, argued that the prior disclosures were fundamentally different from his claims, since his claims described alleged kickbacks between the defendant and its PBM, and introduced additional allegations regarding the participation of two other managed care plans. The court agreed with the defendant, finding that the alleged fraud had been previously disclosed in a class action lawsuit, as well as in other previous cases and in media reports—and that the participation of the PBM was specifically mentioned. The relator argued that since these disclosures did not also describe the managed care plans involved in the alleged kickback scheme. The court rejected the relator's argument, finding that the "nature of the fraud was not changed with the addition of two more named participants," and further found that some of the public disclosures mentioned the involvement of additional parties.

After finding that the public disclosure bar applied to the relator's claims, the court evaluated whether or not the relator qualified as an original source of his allegations. The court held that he did not. The court determined that the relator's contention that he learned of the alleged kickback scheme in the course of his employment was insufficient to establish direct knowledge for original source purposes, noting that the relator must acquire direct knowledge "without deriving that information from others." The court determined that the relator failed to adequately describe how he learned of the defendant's alleged fraud, and that this failure was fatal to his original source argument. The court stated that it was "left to guess how he obtained knowledge of the fraud," and therefore held that the relator was not an original source.

Consequently, the court dismissed the relator's claims with prejudice, finding that allowing the relator to file an amended complaint would be futile.

U.S. ex rel. Lockey v. City of Dallas, TX, 2013 WL 268371 (N.D. Tex. Jan. 23, 2013)

Two relators filed a *qui tam* suit against the city of Dallas, TX and the city's housing authority. The relators alleged that they proposed to the city to convert a vacant high-rise office building in downtown Dallas into a large affordable housing project for low-income tenants. The relators further alleged that they met with the city's economic development director and explored the possibility of using federal funds from the US Department of Housing and Urban Development (HUD) to help fund the project, since the defendants were already receiving grant funds from HUD. They claimed that city officials indicated that they did not want low-income housing—much of which would be occupied by African American and Latino individuals and families—in downtown Dallas. Consequently, the city imposed various hurdles that hindered the development of the relators' proposed project. The relators alleged that they subsequently conducted a 15-month investigation that confirmed their suspicions that the defendants "actively discouraged the development of low-income housing and minority residents in certain sectors of the City, particularly in Downtown Dallas." The relators alleged that the defendants violated the False Claims Act when they requested HUD funds while falsely representing to HUD that they were in compliance with federal civil rights certifications—which were a precondition for eligibility to receive the HUD funds the defendants requested. According to the relators, the defendants' representations to HUD were false because the defendants did not take necessary measures to affirmatively further fair housing, as required by the applicable HUD regulations. In fact, the relators alleged that the various impediments to fair housing imposed by the defendants, segregation within the city remained the same or even increased. The defendants moved to dismiss the relators' claims, arguing that the court lacked subject matter jurisdiction over the claims, due to the FCA's public disclosure bar provision, and that the relators failed to state a claim for relief under the FCA.

Holding: The U.S. District Court for the Northern District of Texas granted the defendants' motion to dismiss for lack of subject matter jurisdiction.

Public Disclosure Bar

Before evaluating the substance of the defendants' public disclosure argument, the court first noted that about a year before the relators filed their *qui tam* complaint, the public disclosure bar provision was amended by Congress, as part of the Patient Protection and Affordable Care Act (PPACA). The relators argued that the new provision applied to their complaint and, more significantly, that the new provision does not deprive courts of subject matter jurisdiction. While the relators agreed that the prior version of the public disclosure bar provision created a jurisdictional bar—as it specified that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions..."—they argued that the amended public disclosure bar provision—which states that "court[s] shall dismiss an action or claim under this section, unless opposed by the Government..."—created an affirmative defense and shifted the burden of proving all elements of that defense to the defendants. Moreover, the relators argued that this amendment was merely a procedural change, and therefore applied retroactively to claims based on the defendants' conduct both before and after the amendment's effective date; other amendments to the provision reflected substantive changed and only applied to claims based on the defendants' alleged conduct after the effective date.

The court declined to reach either jurisdiction question, finding that "even assuming Relator is [sic] correct, Defendants would meet this burden of proof of the public disclosure bar provision." The court, though, agreed with the relators that the other, substantive changes to the public disclosure bar provision only applied prospectively, and stated that the relators' claims regarding alleged misconduct that occurred before the amendments effective date would be evaluated under the old public disclosure bar provision, while claims regarding alleged misconduct that occurred after the amendments became effective would be evaluated under the new provision.

Old Public Disclosure Bar

The court first analyzed the relators' claims based on alleged fraud that occurred before the public disclosure bar provision was amended. The defendants claimed that all of those claims were based on information that had already been publicly disclosed, including "HUD published guidelines, census data, publicly disclosed reports, information disclosed by news media, and other information disclosed in statutory sources." The relators dismissed these purported public disclosures as "innocuous information" that did not constitute "allegations or transactions" when compared to the relators' complaint. The court noted that the U.S. Supreme Court has held that under the FCA's public disclosure bar provision, "allegations or transactions" is to be given a broad meaning. In addition, the district court observed the Fifth Circuit's guidance to consider whether or not the relator "could have produced the substance of the complaint merely by synthesizing the public disclosures' description of the scheme." (internal citation omitted) Applying these principles, the court concluded that the relators' fraud claims were based on public disclosures. The court held that a news article published before the relators' complaint was filed specifically questioned whether the city "scammed" HUD by submitting false claims, and explained that the city was required annually to certify that it was using HUD funds to further fair housing; the court held that this disclosure was sufficient to also implicate the housing authority. The court also determined that several other prior disclosures, when taken together, led to the inference that the defendants had submitted false claims to HUD. Among those findings, the court held that the relators' complaint to HUD that the defendants' conduct resulted in violations of the Federal Fair Housing Act could have led to an inference that the defendants submitted false claims, and thereby could constitute a public disclosure. In addition, the court held that a prior lawsuit, in which the housing authority and HUD were both parties, disclosed information on which the relators' fraud allegations were based, as it alleged that the defendants were not affirmatively furthering fair housing and implied that the defendants were submitting false claims to the government.

The court then considered whether or not the relators qualified for the "original source" exception to the public disclosure bar provision. The defendants argued that they did not qualify, as the allegations in their complaint had been a matter of public discussion, the relators did not have direct and independent knowledge of their fraud allegations, and the relators did not disclose the fraud to the government prior to filing their *qui tam* suit. The relators countered that they did qualify as original sources, arguing that the acquired direct and independent knowledge of the alleged fraud through their personal involvement with the public housing project they proposed, from their meeting with the city's economic development director, and as a result of their independent investigation of the defendants. The court agreed with the defendants that the relators were not original sources, finding that the relators did not have direct and independent knowledge of the alleged fraud. The court determined that the relators' knowledge was not "direct," to the extent that it was acquired from second-hand sources. The court also discounted the relators' independent investigation, finding that it only amounted to "looking through public documents detailing racial and ethnic housing information in Dallas," as well as researching the city's financial information and budget, and rules and policies regarding affordable housing. While the court accepted the relators' contention that the news article was not a public disclosure for FCA purposes, since they were the sources of the information included in the article, the court still held that the relators' did not qualify for the original source exception, finding that the information contained in the news article still did not reflect the relators' "direct" knowledge, and that the other public disclosures—which did not originate with the relators—were sufficient to bar their *qui tam* suit. Since the court held that the relators did not satisfy the "direct and independent knowledge" element of original source status, it declined to address the second element, namely, whether or not the relators disclosed the fraud to the federal government prior to filing their complaint.

As a result of these findings, the court dismissed the relators' claims alleging fraud that occurred before the PPACA amendments to the public disclosure bar took effect.

New Public Disclosure Bar

Next, the court examined the relators' claims regarding alleged fraud that occurred after the PPACA amendments took effect. The court noted that the post-PPACA public disclosure bar provision limited the sources of public disclosures to federal sources and to the news media. Again, the court concluded that the relators' claims were based on public disclosures and that the relators' did not meet the criteria for original source status. The court again combined the questions of whether or not the relators' allegations had been previously publicly disclosed and if so, whether or not the relators' allegations were based upon those prior disclosures. The court concluded that the same prior disclosures discussed earlier—most notably, the news article and lawsuit mentioned above—qualified as public disclosures under the new public disclosure bar provision, since the disclosures were made in the news media and in civil proceedings in which the federal government was a party. Consequently, the court held that the relators' fraud claims were based on public disclosures.

The court then determined that the relators did not qualify for the FCA's amended original source exception to the public disclosure rule. The court first noted that the post-PPACA FCA offers relators two separate ways to qualify as original sources: (1) they must voluntarily disclose the fraud to the government prior to any public disclosure; or (2) they must have independent knowledge of the fraud that materially adds to the public disclosure and they must voluntarily disclose the fraud to the government before filing their *qui tam* suit. The relators argued that they qualified as original sources under both tests. The court, however, held otherwise. First, the court found that the relators did not voluntarily disclose the defendants' alleged fraud to the government prior to any public disclosure. The relators argued that their complaint to HUD qualified as such a disclosure to the government, but the court observed that public disclosures of the alleged fraud had been made before the relators filed their complaint with HUD. In addition, the court held that under the FCA, for original source purposes, relators' voluntary disclosures to the government must be in the form of "[a] copy of the complaint and written disclosure of substantially all material evidence and information the [relator] possesses." The court held that the relators' HUD complaint did not meet these requirements, noting that the relators conceded that they did not submit their confidential disclosure to the government, as described in the statute, until after public disclosures had occurred. Therefore, the relators did not meet the first test for original source status. In addition, applying the same rationale as discussed above, the court held that the relators did not fulfill the second standard for original source status, since their knowledge of the defendants' alleged fraud was not independent of the public disclosures—the court mentioned that the relators did not specify how their purportedly independent knowledge of the fraud materially added to the public disclosures.

Thus, the court dismissed the relators' claims regarding the defendants' alleged post-PPACA misconduct, pursuant to the public disclosure bar.

See *U.S. ex rel. Yarberry v. Sears Holdings Corp.*, 2013 WL 1287058 (S.D. Ill. Mar. 28, 2013), at page 76.

FALSE CLAIMS ACT RETALIATION CLAIMS

Cabotage v. Ohio Hosp. for Psychiatry, LLC, 2013 WL 1281940 (S.D. Ohio Mar. 26, 2013)

A plaintiff filed suit against two affiliated healthcare companies, alleging claims for retaliation under the False Claims Act and the Ohio Nurses' Whistleblower Act. She claimed that she had been employed as a registered nurse by one of the defendants—an entity that was operated by the other defendant. She further alleged that during the course of her employment, she became concerned that her employer's medical director was falsifying documents and engaging in Medicare and Medicaid fraud. She claimed that at the suggestion of her chief nursing officer, she gathered evidence to support her suspicions, which she turned over to the chief nursing officer. Subsequently, both the plaintiff and the chief nursing officer met with their employer's human resources vice president. Less than two weeks later, the chief nursing officer was fired, which caused the plaintiff to worry that her complaints would be ignored. She took copies of the evidence she collected to her home, in case she needed the documents to prove that her concerns were legitimate. She also contacted the Medicare Fraud Hotline and reported her concerns. The next day, the state conducted an on-site investigation. The plaintiff claimed that few days later, a patient told her that the medical director had not treated her and that she did not want to take the medicine that he had prescribed. The plaintiff alleged that the patient asked her to call and inform her daughter of the situation—the plaintiff claimed that she had the patient's written consent to contact her daughter. The plaintiff then called the patient's daughter during her drive home from work. A few weeks later, the plaintiff was terminated from her job for violating her employer's policy against "fraternizing with patients' families outside of work." The defendants claimed that the plaintiff did not have the necessary written consent to communicate with the patient's family outside of work and that the plaintiff improperly removed patient-identifying information in order to call the patient's daughter.

The defendants moved for summary judgment on the plaintiff's claims, arguing that the medical director at the heart of the case was not their employee and thus, any investigation the plaintiff conducted could not constitute protected activity under the False Claims Act.

The U.S. District Court for the Southern District of Ohio granted the defendants' motion. The court determined that while the plaintiff alleged that she believed that her former employer was improperly billing Medicare and Medicaid for the medical director's services, she did not allege that she ever investigated whether

any fraudulent claims were ever actually submitted to the government. The court concluded that the relator "assumed that [her former employer] billed for [the medical director]'s services, and she took no action to substantiate this ultimately incorrect assumption." In addition, by her own admission, the plaintiff's investigation was focused on the allegedly dangerous and substandard care the defendants provided to patients. Thus, the court concluded that although the defendants may have been aware of the plaintiff's investigation, the plaintiff could not show that she engaged in protected activity because she did not allege that she ever characterized the defendants' alleged conduct as fraudulent or illegal in her communications with her supervisors. Consequently, the court held that the plaintiff failed to create issues of material fact regarding whether or not she engaged in protected conduct and whether or not the defendants were aware of any such conduct. Correspondingly, the court concluded that the plaintiff could not establish that she was terminated from her job in retaliation for engaging in protected conduct.

Moreover, the court held that even if the plaintiff could establish a *prima facie* case of retaliation, the defendants met their burden of showing that she was terminated from her job for a non-retaliatory reason, namely, the plaintiff's alleged violation of the defendants' patient confidentiality policies. The court rejected the plaintiff's argument the defendants' proferred reason for terminating her employment was pretextual, since the plaintiff did not dispute that she contacted a patient's relative outside of work, and could not provide documentation showing that she had proper authorization from the patient to do so. The court stated that the "Defendants' employment policies are facially legitimate and, as such, will not be 'second-guessed' by this Court. As a result, the court granted the defendants' summary judgment motion and dismissed the plaintiff's False Claims Act claim with prejudice.

The court then declined to exercise supplemental jurisdiction over the plaintiff's state law claims, which were dismissed without prejudice.

Clayton v. District of Columbia, 2013 WL 1154098 (D.D.C. Mar. 21, 2013)

A plaintiff brought several federal, state and common law employment claims against the District of Columbia and the D.C. National Guard, including claims for retaliation under the False Claims Act and the D.C. Whistleblower Protection Act. She also alleged constitutional violations. Specifically, the plaintiff alleged that she was appointed to a career service position and charged with leading the D.C. Government Operations Division of the D.C. National Guard—an agency of the D.C. government. In her role, the plaintiff reported to the Commanding General of the Joint Force Headquarters of the D.C. National Guard—a federal employee of the Department of Defense. Among the plaintiff's job duties were

investigating and disciplining wrongdoing and reporting fraud, waste, and abuse. She alleged that she reported several incidents of unlawful conduct within the D.C. National Guard, including another employee's report of sexual harassment by the commanding general. The plaintiff claimed that after she reported the sexual harassment claim, the commanding general threatened to terminate her employment—which occurred on multiple occasions over a year-plus period. The plaintiff further alleged that she reported a human resources supervisor's wrongdoing to the commanding general, including the supervisor's alleged improper use of a D.C. National Guard credit card and other financial misconduct.

The plaintiff claimed that while she was reporting these instances of alleged misconduct to the commanding general, the general was seeking advice from the D.C. Attorney General regarding his authority over personnel decisions with respect to employees within the plaintiff's division. The attorney general replied that the plaintiff's division was a subordinate of the D.C. Mayor and that the commanding general was free to collaborate with the mayor and other D.C. government officials on significant personnel matters. One month later, the plaintiff was informed that her position was being converted from a career position to an at-will position. After learning that no career positions were vacant, the plaintiff alleged that she accepted the change to her job description. However, less than a month after accepting her new at-will position, she was given two weeks' notice that she was being terminated from the position without cause. The plaintiff subsequently filed her complaint against the defendants. The defendants moved to dismiss the plaintiff's claims for failure to state a claim. In addition, the D.C. National Guard moved to dismiss for lack of subject matter jurisdiction, arguing that neither it nor Congress waived sovereign immunity from the plaintiff's suit.

Holding: The U.S. District Court for the District of Columbia granted the D.C. National Guard motion and dismissed the plaintiff's claims against that defendant. However, the court denied the city's motion and allowed the plaintiff to maintain her FCA and DCWPA claims against that defendant.

Retaliation

The D.C. National Guard argued that, as a federal entity, it enjoyed sovereign immunity from the plaintiff's suit, and thus, the court lacked subject matter jurisdiction over the plaintiff's claims against it. The plaintiff did not dispute that the this defendant was a federal entity, but argued that the court had subject matter jurisdiction over her claims because federal courts have jurisdiction to hear claims regarding military personnel decisions, where constitutional wrongs are alleged. The court acknowledged that federal courts have jurisdiction to hear claims alleging constitutional violations with respect to military personnel decisions, but held that this authorization does not disrupt "the well-settled principle that sovereign immunity bars claims against federal agencies for *damages* caused by constitutional violations." (emphasis in original) Since the plaintiff failed to show that the D.C. National Guard's sovereign immunity was waived, the court held that it lacked subject matter jurisdiction over her claims against that defendant. As a result, the plaintiff's claims against the D.C. National Guard were dismissed.

The court then turned to the plaintiff's claims against the District of Columbia. The city argued that the plaintiff failed to allege sufficient facts to establish a causal connection between her alleged protected conduct and the adverse employment action taken against her. The court observed that, at the motion to dismiss stage, alleging retaliation presents "a low hurdle." The plaintiff argued that she adequately pled that the reclassification of her job to an at-will position and her eventual termination from that job constituted retaliation for her protected conduct—particularly given the close temporal proximity of about two months between the time of her final complaints regarding alleged misconduct and the adverse employment actions taken against her. The court held that the plaintiff's allegations were sufficient to state a claim and denied the city's motion to dismiss on that basis. The court then considered the city's argument that the plaintiff's claim under the D.C. Whistleblower Protection Act alleging that the reclassification of her job to an at-will position should be dismissed for untimeliness. The city contended that by statute, the plaintiff's DCWPA claims expired three years after the alleged violation occurred or one year after the plaintiff first became aware of the violation, whichever occurred first. The plaintiff's complaint was filed about 11 months after she was terminated from her job, but about 13 months after her position was reclassified. Thus, there was no dispute that the plaintiff's claim based on the termination was timely, but there was a dispute regarding the timeliness of the DCWPA claim based on the job reclassification. The court found that the parties implicitly agreed that a one-year limitations period applied to the plaintiff's DC-WPA claim regarding the reclassification of her job to an at-will position. However, while the defendants argued that the year-long period began to run when the plaintiff first learned about the reclassification, the plaintiff argued that the period did not begin to run until she was terminated from her job two months later and first realized that the reclassification was retaliatory. The court sided with the plaintiff and held that if the plaintiff did not discover that the reclassification was retaliatory until she was terminated from her job, then her corresponding claim was not untimely. The court denied the city's motion to dismiss the DCWPA claim on that basis.

Glynn v. EDO Corp., 2013 WL 1150523 (4th Cir. Mar. 21, 2013)

A plaintiff filed an action under the False Claims Act's anti-retaliation provision, alleging that his former employer and its parent company fired him in retaliation for reporting the former employer to the government for what he believed was fraudulent conduct. Specifically, the plaintiff alleged that his former employer manufactured counter-improvised explosive devices (C-IEDs) for the U.S. government. He claimed that he was hired as an engineer for the company and that he raised concerns to his supervisor regarding his perception that the company's de-

vices did not function properly at elevated temperatures, which in his opinion, may have resulted in non-compliance with contract specifications. The plaintiff alleged that the defendant eventually began testing for the elevated temperatures issue and eventually placed a corrective component into the system to fix the problem the plaintiff discovered. However, the plaintiff claimed that the fix was only applied to units that the defendants had in stock, and not to the 800 units that were in the field—which the defendants refused to recall. Subsequently, the plaintiff contacted an Assistant United States Attorney and reported his concern that his former employer was shipping units that put U.S. troops in jeopardy. He later shared his concerns with an FBI agent and an agent with the Department of Defense Criminal Investigative Service. Eventually, the government conducted two rounds of testing on the units—including tests on units in the field. While the units from the field did not test as well as those the defendants had in stock, the government concluded that the reduction in quality was not significant and concluded that the field units passed the testing. The plaintiff, though, continued to maintain that the field units had failed the test. Weeks later, the plaintiff's former employer made the decision to terminate his employment, effective two months later—after the plaintiff completed his work on a final project. The plaintiff then filed his lawsuit. Both parties moved for summary judgment. The U.S. District Court for the District of Maryland granted the defendants' motion, finding that the plaintiff did not engage in "protected conduct" under the False Claims Act, and thus, was not entitled to protection under the anti-retaliation provision. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

Holding: The Fourth Circuit affirmed the district court's ruling.

The circuit court first noted that in order to prove his retaliation claim, the plaintiff must show that he: (1) engaged in protected activity by acting in furtherance of a *qui tam* claim; (2) his former employer was aware of his conduct; and (3) his former employer took adverse action against him as a result of his conduct. With respect to the first element, the plaintiff argued that he engaged in protected conduct by investigating and opposing his former employer's provision of allegedly defective units to the government; that he investigated and opposed the company's allegedly false certifications of compliance with contractual requirements; and that he initiated a government investigation of the company's allegedly fraudulent conduct. The circuit court, though, relying in part on the government's own testing and corresponding conclusions, held that the issues about which the plaintiff complained did not rise to the level of a contractual violation, and thus, did not result in the defendants' alleged false certifications of compliance. Consequently, the circuit court held that the plaintiff's "purported investigation activities did not raise a distinct possibility of a viable FCA action and are not protected."

The court clarified that its conclusion was not based on the fact that the plaintiff has not reviewed the contracts at issue and thus, could not necessarily articulate

that the defendants falsely certified compliance with contractual specifications. With respect to that issue, the court stated that "such a requirement would allow employers to insulate themselves by prohibiting employees from ever accessing contractual documents. Circumstantial evidence can raise a distinct possibility of a viable FCA action even where an employee does not have access or has not actually viewed the contractual documents." Still, the Fourth Circuit ultimately held that the plaintiff did not engage in protected conduct because the defendants' allegedly false certification to the government was not "material" under the False Claims Act, since the defendants—through the plaintiff—actually conducted the testing required under the contract, and the contract did not require the defendants to do more. Thus, the defendants' certifications of compliance with the contract's requirements were true.

The circuit court also rejected the plaintiff's assertion that he engaged in protected conduct since his complaints resulted in a government investigation of the defendants' practices. For the reasons discussed above, the court held that the plaintiff's complaints to various government agencies did not create the distinct possibly of a viable FCA claim. As a result, the circuit court affirmed the district court's decision to dismiss the plaintiff's retaliation claim.

Guerrero v. Total Renal Care, Inc., 2013 WL 1136672 (W.D. Tex. Mar. 18, 2013)

A plaintiff—a registered nurse—alleged that his former employer—a renal care facility—terminated his job in retaliation for his internal report of another nurse's Medicare and Medicaid fraud. The defendant claimed that there was no unlawful retaliation, but instead, that the plaintiff was fired because of his history of disciplinary problems at work. Both parties moved for summary judgment, among other pre-trial motions.

Holding: The U.S. District Court for the Western District of Texas denied both parties' motions, finding that disputed issues of material fact precluded summary judgment in favor of either party.

Retaliation

The plaintiff claimed that he had worked for the defendant for about 6.5 years and provided in-patient dialysis and related services pursuant to contracts the defendant had with local hospitals. He further alleged that he discovered that another nurse misreported the type of treatment he (the other nurse) had performed on documents the defendant used for billing purposes. The court determined that the defendant would not have directly submitted the other nurse's documentation to the federal government as part of a Medicare or Medicaid reimbursement claim, but acknowledged that defendant would use applicable nurses' records when preparing Medicare and Medicaid bills. The relator claimed that he discussed the matter with two members of the defendant's senior staff, and that he was terminated from his job in part because he reported this matter. The defendant denied that the plaintiff ever discussed this incident with any senior staff members, and claimed to have discovered the incorrect reporting independent of the plaintiff. The defendant stated that it concluded that the inaccurate reporting was merely a mistake, since the employee accurately reported the type of treatment on other documentation.

According to the defendant, the plaintiff was fired because of continuing disciplinary problems. The defendant pointed to an incident in which a patient complained about the plaintiff's unprofessional behavior during a treatment. This complaint was eventually relayed to the defendant's senior staff—including one of the staff members to whom the relator allegedly complained about the other nurse's misreporting. The court determined that the defendant investigated the complaint and that the senior staff employee interviewed a few witnesses, but the results of the investigation were inconclusive. However, after the senior staff member met with the complaining patient, he went to speak to the plaintiff about the issue. The senior staff member claimed that the plaintiff changed the subject from the patient's complaint about him to other nurses' alleged misconduct that resulted in patient deaths. The plaintiff agreed that he changed the subject to other nurses' misconduct, and that during that discussion, he alleged that the alleged misreporting discussed above. After the conversation ended, the plaintiff claimed that he then contacted the other senior staff member to discuss the alleged reporting fraud. Both senior staff members deny ever speaking to the plaintiff about his allegation that other nurses committed Medicare or Medicaid fraud. About a week after these conversations occurred, the two senior staff members called the plaintiff into a meeting and informed of their decision to terminate his employment. The plaintiff received an unsigned letter that did not provide a reason for the termination; neither senior staff member verbally explained to the plaintiff why he was being terminated either. The plaintiff alleged that the termination was retaliatory, while the defendant claimed that the decision was made due to the plaintiff's history of disciplinary problems, including the most recent patient complaint.

Both parties moved for summary judgment. The district court denied both motions. First, the court concluded that "[r]easonable minds could differ as to whether a preponderance of the evidence show that Plaintiff made an internal complaint regarding a falsified record related to a claim for payment from the government." The court rejected the defendant's contention that since the plaintiff never made a complaint through the defendant's internal compliance program, he did not engage in protected activity, for FCA purposes. Instead, the court held that, at the summary judgment stage, it would draw all reasonable inferences in favor of the non-moving party—here, the plaintiff—and would not make credibility determinations. The court also held that it was irrelevant that the plaintiff did not threaten to file a *qui tam* action, since the complaints the plaintiff allegedly made would have put the defendant on notice that the plaintiff was investigating fraud.

The court also determined that there were issues of disputed fact regarding why the plaintiff was fired. The plaintiff offered evidence in support of his allegation that the decision to fire him was retaliatory, including the fact that he was fired only a week after allegedly reporting his concerns about Medicare/Medicaid fraud to the defendant, the fact that the decision to fire him was made by the two senior staff members to whom he allegedly complained, and the fact that the defendant's termination letter provided no reason for the termination. The defendant offered evidence of non-retaliatory reasons for firing the plaintiff, namely, his history of disciplinary problems, which included "write-ups" over three consecutive years and the plaintiff's purported general "attitude problem."

Based on these findings, the court denied both parties' summary judgment motions.

Winston v. Academi Training Ctr., Inc., 2013 WL 989999 (E.D. Va. Mar. 13, 2013)

Two plaintiffs filed a claim against their former employer, a company that had been contracted by the U.S. Department of State, alleging that the company wrongfully retaliated against them when they reported the company's allegedly false claims and false records to the government. They alleged causes of action under the False Claims Act's anti-retaliation provision, as well as under state law. Specifically, they alleged that the defendant's contract with the government required periodic weapons qualification recertification reports. The plaintiffs further claimed that the defendant hired both of them as independent contractors to serve as firearms instructors, and that in that capacity, they witnessed other contractors submitting false firearm certification records for shooters they were instructing—one of the plaintiffs also claimed that he was asked to complete a weapons qualifications report using made-up numbers. The plaintiffs alleged that they were fired from their jobs one day after reporting this misconduct to their supervisor and were placed on the State Department's "Do Not Use" list, which prevented them from obtaining future employment under State Department contracts; the defendant claimed that the two were fired for failing to report the fraud in a timely manner and for participating in the fraud themselves. The defendant moved to stay or dismiss the plaintiffs' action, claiming that the parties' dispute was subject to arbitration.

Holding: The U.S. District Court for the Eastern District of Virginia denied the defendant's motion.

Retaliation

The court first noted that, as a cause of action that arises under federal law, the plaintiffs' claim under the False Claims Act's anti-retaliation provision was presumably subject to arbitration under the Federal Arbitration Act. However, the court also noted that arbitration must not be compelled in "cases which are inarbitrable—where arbitration could not vindicate a federal statutory cause of action." In resolving disputes over whether or not arbitration is required, the court looked not to "the conditions under which the agreements were signed, only to whether the terms of the agreement describe a sufficient forum for vindicating the plaintiff's right." The court, relying on Fourth Circuit precedent, further found that arbitration agreements will not be enforced where the arbitration provision gives the defendant the unilateral right to select the group from which the arbitrator will be selected and/or allowed the defendant to establish the rules and procedures by which the arbitration would be conducted. In the present case, the court found that although the arbitration provision did not give the defendant sole discretion to choose the arbitrator, it did "preclude the effective vindication of the Plaintiffs' rights under the FCA" because it eliminated all discovery—which the court stated would make the plaintiffs' claims nearly impossible to prove, and it required the plaintiffs to pay the defendants' fees and costs, regardless of the outcome—which contradicted the FCA's fee-shifting provision, which requires defendants to pay successful plaintiff's fees and costs. Not only did the court determine that these provisions restricted the plaintiffs' ability to vindicate their rights, it held that the arbitration provision was unconscionable. The court further held that severing the unconscionable terms of the arbitration clause and leaving in the remaining terms was not proper, since doing so would "create[] an incentive to get away with as many 'bad' arbitration provisions as possible, knowing that the worst case scenario is a court sending the case to arbitration with some of [the bad provisions] stripped out. Consequently, the court refused to enforce the arbitration provision in its entirety and denied the defendant's motion.

U.S. ex rel. Howze v. Allied Physicians Inc., 2013 WL 950536 (N.D. Ind. Mar. 11, 2013)

A plaintiff brought a race discrimination claim against his former employer—a group of affiliated physicians and the sleep center they operated. The parties entered into a settlement and release agreement and the plaintiff's suit was dismissed with prejudice. While the plaintiff's suit was still pending, however, he filed a *qui tam* complaint against the defendants on behalf of the United States and the State of Indiana. The *qui tam* suit also included a claim under the False Claims Act's anti-retaliation provision. The United States declined to intervene in the *qui tam* action, but did not make its decision—which allowed for the *qui tam* complaint to be unsealed and served on the defendants—until after the settlement agreement had been reached in the race discrimination case. The defendants moved to dismiss the *qui tam* complaint, arguing that the retaliation claim was barred by *res judicata* and that the plaintiff could not proceed with his fraud claims as a *pro se* relator.

The U.S. District Court for the Northern District of Indiana granted the defendant's motion to dismiss the retaliation claim, but denied the motion to dismiss the fraud claims.

The court agreed with the defendants that *res judicata* applied to the retaliation claim. First, the court observed that the same parties were involved in both the plaintiff's race discrimination case and his FCA retaliation claim—a fact the parties did not dispute. Next, the court held that a final judgment on the merits was reached in the race discrimination case, since the case was resolved by the parties' stipulation of dismissal. Finally, the court concluded that there was an identity of causes of action between the two suits, since both employment law claims arose out of the same operative facts. In addition, the court held that the settlement agreement "irrevocably and unconditionally" released the defendants from all liability—and specifically stated that the plaintiff would not pursue any additional claims related to his prior employment with the defendants. The court held that the agreement barred the plaintiff's FCA retaliation claim. The court rejected the plaintiff's argument that the settlement agreement was void for lack of consideration, since the evidence showed that the plaintiff received a monetary payment in exchange for the release—the court would not inquire into the adequacy of the consideration the plaintiff received. Consequently, the court dismissed the retaliation claim. Additionally, the court granted the defendants' request for attorneys' fees, as the settlement agreement explicitly provided for that remedy.

The defendants also moved to dismiss the plaintiff's fraud claims, brought under the federal and Indiana false claims acts, arguing that the plaintiff's *qui tam* counsel had withdrawn from the case and that he could only proceed as a false claims act relator through counsel. The court, though, observed that the plaintiff had secured new counsel, noting that the court had granted another attorney's application to appear *pro hac vice* in the *qui tam* suit. As a result, the court held that the relator was represented by counsel and could proceed with his *qui tam* claims.

Leggins v. Orlando Housing Auth., 2013 WL 937739 (M.D. Fla. Mar. 11, 2013)

A plaintiff brought several employment law claims against her former employer—a municipal housing authority—including a claim under the False Claims Act's anti-retaliation provision. The plaintiff alleged that she had been employed as the defendant's finance director for eight years and took over the job duties of the defendant's CFO, when he became ill and later passed away. She alleged that she requested to receive the CFO's salary, but that her request was denied. She claimed that during her employment, she discovered that the defendant was misusing federal funds. She alleged that she reported her discovery to the defendant's COO and CEO multiple times and tried to stop some of the abuses. However, she said that after she raised her concerns, she was transferred to another housing authority, her computer access was restricted, and she was again not promoted to the permanent CFO position. Her employment was terminated months later. The defendant moved to dismiss the plaintiff's claims, arguing that her claim under

the False Claims Act should be dismissed because she could not obtain punitive damages under that statute.

Holding: The U.S. District Court for the Middle District of Florida granted the defendant's motion to dismiss the False Claims Act retaliation claim, to the extent that the plaintiff sought punitive damages with respect to that claim.

Retaliation

The court began its analysis by noting that the Eleventh Circuit has not yet commented on the availability of punitive damages under the FCA's anti-retaliation provision. However, after looking to the plain language of the statute, the court observed that while the statute lists specific forms of relief available to plaintiffs—namely, reinstatement with the same seniority status, twice the back pay owed, interest on the back pay, and "compensation for special damages" which includes costs and attorneys' fees—it does not include punitive damages. The court further noted that the FCA does allow for the imposition of punitive damages—in the form of civil penalties—against those who violate the statute's anti-fraud provisions. Consequently, the concluded that "Congress did not intend for a prevailing employee to receive punitive damages under [the anti-retaliation] section."

Huang v. Rector and Visitors of Univ. of Va., 2013 WL 865845 (W.D. Va. Mar. 7, 2013)

A plaintiff brought a claim against two doctors affiliated with the state university that had previously employed him, alleging that the defendants violated the False Claims Act's anti-retaliation provision. The university was also named as a defendant. The plaintiff claimed that he was hired by the university as a research assistant professor and that he performed research in a lab run by one of the individual defendants (Dr. Li)—whom the plaintiff alleged was his supervisor and mentor. The other individual defendant (Dr. Johnson) was the chairman of the department within the university that oversaw the plaintiff's research. The plaintiff alleged that he applied for federal grant funds from the National Institutes of Health (NIH) for a proposed research project and received approval from the individual defendants and from NIH to serve as the "principal investigator" on the project, even though the work would be performed in Dr. Li's lab. The plaintiff claimed that shortly after he began working on the project, he became concerned that someone else had taken control over the grant funds, as he had not been receiving monthly status reports regarding the grant. He alleged that he contacted Dr. Johnson with his concerns and eventually received the status reports, which revealed that Dr. Li had made unauthorized changes on the grant that inaccurately reflected the work that was being performed on the project—Dr. Li's changes allegedly allocated inappropriate salaries and expenses to the plaintiff's project,

resulting in a misappropriation of grant funds to work that was not performed on the plaintiff's grant project. The plaintiff alleged that he reported Dr. Li's conduct to Dr. Johnson, who denied that Dr. Li had done anything wrong, but assured the plaintiff that Dr. Li's changes would be adjusted so that any grant funds that had been withdrawn would be returned. Soon after, the plaintiff alleged that he was informed by Dr. Johnson that the university would not renew his employment contract. The plaintiff believed that this decision was made in retaliation after he raised concerns about the appropriation of the grant funds. He subsequently filed his lawsuit alleging retaliation. After a four-day jury trial, Drs. Li and Johnson were found liable and judgment was entered in favor of the plaintiff—the plaintiff was awarded more than $150,000 in lost wages and $500,000 in compensatory damages. The individual defendants then moved for judgment as a matter of law or for a new trial; and for a new trial *nisi remittitur*—which challenged the award to the plaintiff as excessive. The plaintiff moved for equitable relief in the form of front pay, *in lieu* of reinstatement to his prior position.

Holding: The U.S. District Court for the Western District of Virginia denied the defendants' motion for judgment as a matter of law, but granted their motion for a new trial *nisi remittitur*. In addition, the plaintiff's compensatory damages award was reduced from $500,000 to $100,000, and the plaintiff's motion for front pay was denied.

Retaliation

The individual defendants first argued that they were entitled to judgment as a matter of law because the False Claims Act's anti-retaliation provision does not provide for individual liability. The court observed that prior to 2009, the FCA clearly did not provide for individual liability, but noted that in 2009, Congress amended the statute and removed references to retaliation "by an employer." The court held that this change "arguably expand[ed] the universe of possible defendants to include individual supervisors," which would affect the present case, since the alleged retaliation occurred in late 2009, months after the retaliation provision was amended. The defendants then argued that the court should re-visit the individual liability question, stating that if there is no individual liability under the FCA's anti-retaliation provision, then the court did not have subject matter jurisdiction to hear the plaintiff's case. The court disagreed, finding that the "[d]efendants' argument about the availability of individual liability does not raise a jurisdictional question; rather it goes to whether Plaintiff can state a claim and to the merits of his case." Thus, the court held that the defendants did not raise a non-waivable jurisdictional argument. The court then rejected the defendants' argument that they had not waived their individual liability argument because there was an intervening change in the law regarding that issue. Instead, the court found, in light with the defendants' own arguments, that for nearly 150 years, the False Claims Act's anti-retaliation clearly did not provide for individual liability. Thus, the court reasoned, the defendants could have raised the individual liability issue at an earlier stage of the litigation. The court held that there was no "intervening change in the law that would excuse Defendants' failure to raise the issue of individual liability before or during trial, and they have therefore waived that argument." The court then refused to decide the issue as moot.

The court then considered the defendants' argument that they were entitled to a new trial because the court allowed the plaintiff to argue to the jury a claim that was different from that alleged in his complaint and which was not supported by the jury instruction filed before the trial. They argued that they were unfairly surprised by the jury instructions the plaintiff proposed during the trial, which specified that a violation of the FCA's anti-retaliation provision would include "knowingly making, using, or causing to be used, a false record or statement material to a false or fraudulent claim." The defendants argued that this instruction transformed the plaintiff's case from a dispute over the alleged misappropriation of federal funds to a case that only required the creation of a false record that could potentially have resulted in the submission of a false claim. The court, though, concluded that the jury instruction was proper, since the FCA's anti-retaliation provision specifically protects individuals from retaliation when they engage in lawful acts in furtherance of an FCA case or to stop violations of the statute, and since the jury instruction was taken directly from one of the FCA's anti-fraud provisions—and it was the violation of that same provision that the plaintiff alleged he was trying to stop.

In addition, the court held that the evidence presented to the jury supported their verdict in favor of the plaintiff, rejecting the defendants' arguments that: (1) the jury unreasonably found that the plaintiff suffered retaliation because he was going to be fired anyway for a non-retaliatory reason; and (2) neither defendant knew that a false claim would be submitted to NIH, and thus, could not have retaliated against the plaintiff for engaging in protected activity under the False Claims Act. The court held that the jury had a reasonable basis to conclude that the plaintiff was fired for a retaliatory reason, given the temporal proximity between when he raised his concerns to the defendants and when the decision was made not to renew his contract. The court further noted that the plaintiff's retaliation claim was not dependent on proof that the defendants defrauded NIH, stating that "Plaintiff did not need to prove that Defendants knowingly presented to the government false or fraudulent claims or even that they knowingly made false records or statements material to a false or fraudulent claim. All he had to prove is that Defendants retaliated against him [in violation of the FCA's anti-retaliation provision]." The court held that the plaintiff presented sufficient evidence to support the jury's finding that all elements of the retaliation claim had been satisfied, namely, that (1) the plaintiff engaged in protected activity, based on his reasonable belief that the defendants had improperly allocated a portion of the NIH grant funds to a different project, resulting in a fraud on the government; (2) the defendants had knowledge of his protected activity, since he pled that Dr. Li had personal knowledge of the false records and since the plaintiff directly told Dr.

Johnson about the alleged fraud; and (3) the defendants took an adverse action against the plaintiff in retaliation for his protected activity, since, as mentioned above, there was evidence suggesting that the plaintiff's contract was not renewed, at least in part, because he engaged in protected activity.

The court then turned to the defendants' argument for a new trial *nisi remittitur,* in which they asserted that the $500,000 award to the plaintiff for compensatory damages was excessive. The defendants requested that the plaintiff accept $10,000 in compensatory damages or submit to a new trial. The court began its analysis by reviewing similar cases within the circuit. First, the court determined that the Fourth Circuit has not announced a bright-line rule regarding the appropriateness of six-figure compensatory damages awards in the absence of medical evidence, and has even allowed plaintiffs' awards to be based solely on a plaintiff's testimony. However, the circuit court has also made clear that plaintiffs who seek large compensatory damages awards for emotional distress "must reasonably and sufficiently explain the circumstances of the injury and not resort to conclusory statements." In addition, the Fourth Circuit had indicated that past awards should serve as guidelines to assist judges in determining whether to grant a new trial *nisi remittitur*. After reviewing the damages awards in several past cases, and after considering whether or not the jury's compensatory damages award was proportional to the injuries the plaintiff's alleged he suffered, the court concluded that "the specific amount of compensatory damages awarded was against the weight of the evidence. Plaintiff did not present any medical evidence of his emotional distress, nor did he testify that he ever sought any medical attention or psychiatric or psychological treatment." However, the court did find that the plaintiff presented evidence showing that after his university contract was not renewed, which ended his career at the university and caused the NIH research project to fail, the plaintiff's ability to receive future NIH grant funds was damaged and thus, his career options were limited. The plaintiff also alleged, without contradiction, that he lost 50 pounds as a result of the distress he suffered, his sleep pattern was disrupted, and his marriage suffered when his wife was forced to find a job to support him. The court balanced these considerations and granted the defendants' motion for a new trial *nisi remittitur,* reducing the compensatory damages to award to the plaintiff from $500,000 to $100,000. The court gave the plaintiff the options to either accept the new compensatory damages award or to proceed to a new trial.

Finally, the court denied the plaintiff's motion for more than $600,000 in front pay. The plaintiff argued that such an award was proper because the parties agreed that reinstatement of the plaintiff's job was not a viable option. The court noted that front pay is an equitable remedy that is not designed to halt a present or continuing violation of federal law, but rather, seeks prospective relief. As such, the court held, the remedy of front pay was barred in this instance by the Eleventh Amendment, since the two individual defendants, in their official capacities, were synonymous with a state-owned university.

Master v. LHC Group Inc., 2013 WL 786357 (W.D. La. Mar. 1, 2013)

A plaintiff brought a claim against her former employer, a healthcare consulting firm, alleging retaliation under the False Claims Act. The plaintiff alleged that the defendant had been hired to perform a Medicare compliance audit for a healthcare company and that the relator worked on that project. She further alleged that her employment was terminated a few months after she was hired. Soon after, she filed a *qui tam* action against the healthcare company that was subject to the audit, and the United States intervened in and eventually settled some of her claims, resulting in a multi-million dollar award to the relator. The plaintiff's former employer learned of the *qui tam* suit when it was unsealed and served on the healthcare company, and then filed its own suit against the plaintiff in Texas state court, alleging that she violated her employment contract by using records obtained during the course of the audit as evidence in her *qui tam* suit. The plaintiff then amended her *qui tam* action to add the present FCA retaliation claim against the former employer. She alleged that the company retaliated against her by firing her, and also filed the state court action against her in retaliation for being unwillingly implicated in her *qui tam* suit, which damaged the company's relationship with the *qui tam* defendant. In addition, she sought a declaratory judgment proclaiming that the defendant's state law claims were preempted by federal law, namely the False Claims Act. She also sought to remove the defendant's state law claim to federal court, arguing that the case involved the resolution of significant issues of federal law. Her request to remove the defendant's suit was denied, however.

The defendant moved to dismiss the retaliation claim, arguing that the claim was barred under principles of *res judicata* and collateral estoppel; that her claims for pre-termination retaliation were barred by the FCA's three-year statute of limitations; and that she could not state a claim for post-termination retaliation, since the False Claims Act does not provide a remedy for such claims.

Holding: The U.S. District Court for the Western District of Louisiana granted the defendant's motion to dismiss.

Retaliation

The Louisiana district court first considered the defendant's *res judicata*/collateral estoppel argument. The defendants argued that the retaliation claim had been previously litigated and resolved in their favor, when the relator's request to transfer the defendant's Texas state court suit to federal court was denied—the defendant argued that the Texas district court rejected the plaintiff's theory of liability. But the Louisiana district court held that its sister court in Texas did not make any findings with respect to the retaliation claim, and merely found that it lacked subject matter jurisdiction over the defendant's state law claim. Thus, neither *res judicata* nor collateral estoppel barred the plaintiff's retaliation claim. Moreover, the court noted that the defendant had already waived its right to assert these defenses by failing to amend its answer to include those defenses before the deadline for doing so expired.

The court then turned to the defendant's argument that the claims for pre-termination retaliation were untimely—they argued that the False Claims Act establishes a three-year statute of limitations, but that the plaintiff's *qui tam* suit was not amended to include the retaliation claim until four and a half years after any such retaliation was alleged to have occurred. The plaintiff countered that her claim was saved by the Texas savings statute or by Louisiana's prescriptive rules. The court agreed with the defendants. First, the court found that the Texas savings statute only applies to counterclaims and cross-claims, and thus, could not save the plaintiff's FCA claim, which was a separate claim in a different lawsuit, and not a counterclaim in the Texas state court action. The court also found that Louisiana's prescriptive rules could not save the plaintiff's claim. The plaintiff argued that the filing of her *qui tam* action interrupted prescription for all other claims arising out of that cause of action—including her FCA retaliation claim. The court, though, found that the statute of limitations was not interrupted, since the original *qui tam* filing did not include any claims against her former employer. The court reasoned that the plaintiff's former employer was not put on notice of any legal demands by the plaintiff until after it filed its state law claim and was subsequently added as a defendant to the plaintiff's FCA suit. Since the plaintiff did not bring any claims against the defendant until more than four years after any pre-termination retaliation was alleged to have occurred, the court granted the defendant's motion to dismiss those claims.

The court also dismissed the plaintiff's post-termination claims. The plaintiff argued that the FCA provides a remedy for post-termination retaliation, relying on a single district court case that recognized the "potential" for such relief. The court rejected the plaintiff's argument, finding that "all courts to have addressed this issue have . . . held that [the FCA's anti-retaliation provision] does not provide a remedy for post-employment retaliation."

Once the retaliation claims were dismissed, the court likewise dismissed the plaintiff's request for declaratory judgment, finding that the court had no independent ground for jurisdiction to consider the motion.

Watts v. Lyon County Ambulance Serv., 2013 WL 557274 (W.D. Ky. Feb. 12, 2013)

A plaintiff brought employment claims against a county fiscal court and a county ambulance service. The plaintiff alleged that he was contracted to serve as the director of the county ambulance service, and that the county fiscal court approved the contract. He further claimed that during his employment, he was instructed by members of the ambulance service's board to overcharge Medicare and Medicaid for ambulance services, and when he refused to do so and made his decision known to the ambulance service's board members, the defendants conspired to

induce a former ambulance service employee to falsely claim that he sexually harassed them, in exchange for reemployment. After the sexual harassment claim was made against him, the board terminated his employment. As a result of this alleged conduct, the plaintiff brought several claims against the defendants, including a claim under the False Claims Act's anti-retaliation provision. The defendants moved to dismiss, with the fiscal court arguing that it was never the plaintiff's employer, and therefore, the plaintiff could not maintain his employment claims against it, and the ambulance service arguing that the plaintiff failed to state a claim under the False Claims Act.

Holding: The U.S. District Court for the Western District of Kentucky granted the fiscal court's motion to dismiss—which was ultimately converted into a motion for summary judgment—but denied the ambulance service's motion to dismiss.

Failure to State a Claim

The district court first converted the fiscal court defendant's motion to dismiss into a motion for summary judgment, noting that the fiscal court introduced affidavits and facts outside the pleadings in support of its contention that it was not the plaintiff's employer and took no adverse employment action against him. The district court determined that summary judgment was appropriate, since even after drawing all reasonable inferences and construing all facts in favor of the plaintiff, there were no genuine factual disputes regarding the fiscal court's relationship to the plaintiff. The fiscal court presented evidence supporting its claim that it exercised no oversight or control over the ambulance service and its employment decisions, and that ambulance service employees are not employed by the county. In addition, the fiscal court argued that, pursuant to state law, only the ambulance service's board—not any governmental unit—was authorized to employ personnel and compensate them. The court further found no evidence to support the plaintiff's contention that the fiscal court reviewed his employment contract; the plaintiff was not referenced in the fiscal court's meeting minutes immediately before and immediately after his hiring. Finding no issues of disputed material fact regarding whether or not the fiscal court could be deemed the plaintiff's employer, the court held that summary judgment in favor of the fiscal court was warranted, and dismissed the plaintiff's claims against that defendant.

The district court then turned to the ambulance service's motion to dismiss, and determined that "[t]o establish a prima facie case of retaliation under § 3730(h), a plaintiff must show: (1) he is engaged in a protected activity; (2) his employer knew he was engaged in the protected activity; and (3) his employer took adverse action against him as a result of the protected activity." The district court examined each element in turn. First, the court noted that, in the Sixth Circuit, "protected activity" under the False Claims Act must relate to exposing fraud against the government or otherwise be connected to "a false claims disclosure"—the court reasoned that, under Sixth Circuit precedent, reporting wrongdoing to supervisors, urging compliance with applicable laws and regulations, and making a "one-time verbal challenge to [an] employer's alleged unlawful conduct" is not enough to meet the "protected activity" standard. The court concluded that the plaintiff's alleged refusal to overcharge Medicare and Medicaid and his alleged notification to the ambulance service board was "based on a single event," and was akin to a "one-time verbal challenge." The court noted that the plaintiff did not alleged that he submitted a report or any other communication to his employer alleging fraud against the government or that he took any other action in furtherance of a *qui tam* action. In addition, the court noted that the plaintiff never alleged that the ambulance service actually submitted false Medicare or Medicaid claims. Consequently, the court held that the plaintiff could not prove the first element of an FCA retaliation claim, and granted the ambulance service's motion to dismiss the plaintiff's FCA claim.

Solano-Reed v. Leona Group, LLC, 2013 WL 501612 (E.D. Mich. Feb. 11, 2013)

A plaintiff filed an action against her former supervisors at a charter high school where she worked as a guidance counselor, as well as the company that owned and operated the school. The plaintiff alleged that she had been hired under a contract that provided for annual renewals. She alleged that after five years, her contract was not renewed, in retaliation for her efforts to investigate her suspicions that the school was improperly administering a state-required standardized exam only to a select group of eligible students, in order to receive federal and state funding under the No Child Left Behind Act. She alleged that she repeatedly reported her concerns to one of her supervisors –a defendant in the case—which caused her relationship with that supervisor to deteriorate. She later sent a memo to two other supervisors—also defendants—informing them that she felt threatened, harassed, and intimidated by the first supervisor. She eventually sent an anonymous email to the state's department of education, inquiring about the legality of the school's testing protocol with respect to which students would be given the standardized test. The government official did not take issue with the school's testing practices, but indicated that, at some point, the school would be required to test the students who did not receive the test the first time. The plaintiff also contacted the CEO of the school's parent company, and complained of the alleged harassment she experienced on the job. However, the CEO determined that her complaints were unfounded. When she later received a poor performance review, she refused to sign it and instead drafted a rebuttal in which she detailed why the review was "malicious." After her contract was not renewed, she filed a complaint against the defendants, alleging, among other things, violations of the False Claims Act and the Michigan Whistleblower's Protection Act. The defendants moved for summary judgment on these claims, arguing that the plaintiff did not engage in protected activity under either statute and thus, could not show that any such activity led to the retaliation she allegedly suffered.

Holding: The U.S. District Court for the Eastern District of Michigan granted the defendants' motion and dismissed the plaintiff's claims.

Retaliation

The plaintiff argued that she tried to stop the school from defrauding the No Child Left Behind Act, and thus, engaged in protected activity under the False Claims Act and the Michigan Whistleblower's Protection Act. The court disagreed, finding that the plaintiff offered no evidence that any of her actions were motivated by concerns about the government's allocation of funds to the school or the school's use of those funds; instead she could only show that she objected to the school's practices because of her ethical obligations as a guidance counselor. Since her actions did not further a viable *qui tam* action, the court held that they did not constitute "protected activity" under either statute.

The court also determined that the plaintiff "failed to show that he retaliation was motivated at least in part by her engaging in protected activity," as the court found that the plaintiff failed to show that the defendants believed that she was contemplating a *qui tam* action against the school. As a result, she could not prove causation under either statute.

As a result of these findings, the court dismissed the plaintiff's retaliation claims under the False Claims Act and the Michigan Whistleblower's Protection Act.

Ross v. Bob Dean Enter., Inc., 2013 WL 393108 (E.D. La. Jan. 30, 2013)

A plaintiff filed a claim under the False Claims Act's anti-retaliation provision against her former employer, a nursing home. She alleged that the nursing home treated about thirty Medicare or Medicaid patients who required wound care services. She further alleged that, as a licensed nurse, she provided the wound care services on the weekends and eventually discovered that the nursing home was billing Medicare and Medicaid for wound treatments that had not occurred and even for wounds that did not exist. She alleged that she reported the fraud to the state board of nursing, but asked the board not to pursue the claim after the defendant fired a major participant in the fraud. However, she allegedly began to suffer retaliation in the workplace, and after again complaining to the board, she was terminated from her job; according to the plaintiff, the defendant claimed that she was fired so that full-time nurses could work the weekend shifts, although another weekend nurse was subsequently hired. About two and a half years later, the plaintiff filed a *qui tam* suit against the nursing home, alleging healthcare fraud. Her complaint also included the present claim for retaliation. The *qui tam* suit was filed under seal. After the government successfully moved the court to extend the seal three times and after the case was reassigned to a different judge, the government informed the court of its decision not to intervene in the suit and the court

ordered that the complaint be unsealed. Months later, a summons was issued and the defendant was served with the complaint a few weeks later.

The defendant moved to dismiss the plaintiff's claim, arguing that the claim was time-barred under the False Claims Act's statute of limitations and that service of the complaint was not timely. The defendant argued that, at the time the plaintiff was terminated from her job—in 2007—the False Claims Act did not include a statute of limitations for retaliation claims, and that, pursuant to a U.S. Supreme Court ruling, courts were directed to apply "the most closely analogous state limitations period." The defendant argued that the state's one-year limitations period applicable to personal injury actions applied to the plaintiff's retaliation claim. In addition, the defendant argued that the plaintiff's complaint was timely served, because the plaintiff was obligated to serve the complaint within 120 days after the court unsealed it, but the complaint was served more than 270 days after unsealing—and more than two years after the complaint was filed. The defendant claimed that the plaintiff did not show good cause for the delay in serving the complaint or request an extension of time, as required by Rule 4 of the Federal Rules of Civil Procedure.

Holding: The U.S. District Court for the Eastern District of Louisiana granted the defendant's motion to dismiss the retaliation claim.

FCA Retaliation Claims

Service of Process

The plaintiff countered that, pursuant to statute, her complaint was filed under seal, and she was not permitted to serve the complaint "until the court so orders." She further argued that after the complaint was unsealed, the court merely ordered that it be served on the defendant—without specifying a service date. The plaintiff argued that the defendant's assertion of a 120-day deadline was mistaken, as there is no rule that requires service of a complaint within 120 days of unsealing. The court turned to the plain language of the False Claims Act, and found that the statute "contemplates the application of Rule 4(m)," as the FCA states that "defendant[s] shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure." The court was not persuaded that, after unsealing, the plaintiff's nearly ten-month delay in serving her complaint on the defendants was justified, merely because the court did not order service within a specified time. However, the court refused to dismiss the complaint on that basis, pursuant to its discretion, noting that, after the docket call, the court did specify that service should be accomplished within 30 days, and the plaintiff effected service on the 23rd day. The defendant's motion to dismiss the complaint on the basis of untimely service was denied.

Statute of Limitations

Ultimately, the court dismissed the plaintiff's retaliation claim with prejudice on statute of limitations grounds, finding that a one-year limitations period applied. The plaintiff, who filed her complaint about two and a half years after she was terminated, conceded that the claim was untimely.

Dillon v. SAIC, Inc., 2013 WL 324062 (E.D. Va. Jan. 28, 2013)

A plaintiff sued his former employer—a company that provided scientific and technical products and services—under the False Claims Act's anti-retaliation provision. The plaintiff alleged that he had been employed by the defendant as an engineering and manager for sixteen years. He claimed that in his managerial capacity, he supervised two other employees, but that—although his salary and benefits remained the same—his supervisory responsibility was taken away and he was demoted in retaliation for alerting his employer that his supervisor had instructed him to improperly bill time spent on non-billable, administrative tasks to a billing code used to bill the government; as well as for reporting that staff had improperly billed the government for unbillable "remedial" work that needed to be performed because of a major failure at one of the defendant's facilities. Subsequently, the plaintiff was terminated from his job. According to the defendant, the termination resulted from customer complaints, but the plaintiff alleged that he was fired in retaliation for complaining about time charging discrepancies. After he was terminated from his job, the plaintiff, for the first time, raised his concerns with the defendant's "employee ethics council." The defendant moved for summary judgment on the plaintiff's claim.

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendant's summary judgment motion.

FCA Retaliation Claims

The plaintiff alleged that he engaged in four distinct acts that should be considered "protected activity" for purposes of the FCA's anti-retaliation provision, namely: (1) investigating his superior's instructions to bill purportedly non-billable administrative time to the government; (2) investigating the superior's instructions to other employees to directly bill the government for non-billable remedial work; (3) investigating employees who allegedly billed one client code for work that was done for a different client, with respect to the remedial project; and (4) filing an ethics complaint with his former employer. The defendant argued that none of the protected activity claimed by the plaintiff qualified for protection under the False Claims Act, since none of the plaintiff's alleged conduct put the defendant on notice that *qui tam* litigation was a reasonable possibility. The defendant noted that, while the plaintiff was employed by the defendant, his complaints did not threaten potential FCA action or otherwise inform the defendant about possible fraud against the government, but merely presented questions about proper time-keeping procedures. The court agreed with the defendant, finding that the plaintiff "failed to tie his opposition [to the defendant's time-keeping instructions] to fraudulent behavior." Moreover, the court held that the plaintiff's complaint to the defendant's ethics department—which occurred after the plaintiff had been terminated—was not protected under the FCA, since it occurred after the alleged retaliation. Thus, the retaliation could not have resulted from the ethics complaint.

The court also found that the decisions to demote and to eventually terminate the plaintiff from his job were "based on a sound business decision and not the product of retaliatory motives." The court observed that the plaintiff conceded that before being reassigned, he informed the defendant that he felt underutilized in his managerial role, which echoed comments that his two direct reports had made, wherein they reported to superiors that the plaintiff's supervision was unnecessary. In addition, the court held that defendant had a legitimate reason for firing the plaintiff, relying on evidence the defendant presented that showed that the plaintiff was fired as a result of a customer's request.

The court held that there were no genuine issues of material fact regarding the circumstances surrounding the alleged retaliation, and concluded that "no protection is owed to [the plaintiff] based on his activities." Consequently, the court granted the defendant's motion for summary judgment on the plaintiff's retaliation claim.

See *U.S. ex rel. Marquis v. Northrop Grumman Corp.*, 2013 WL 951095 (N.D. Ill. Mar. 12, 2013), at page 79.

See *U.S. ex rel. Isley v. Lockheed Martin Corp.*, 2013 WL 772810 (N.D. Ga. Feb. 28, 2013), at page 82.

See *U.S. ex rel. Pecanic v. Sumitomo Elec. Interconnect Prods., Inc.*, 2013 WL 774177 (S.D. Cal. Feb. 28, 2013), at page 60.

See *U.S. ex rel. Herron v. Indianapolis Neurosurgical Group, Inc.*, 2013 WL 652538 (S.D. Ind. Feb. 21, 2013), at page 62.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Arbitration

Deck v. Miami Jacobs Bus. Coll. Co., 2013 WL 394875 (S.D. Ohio Jan. 31, 2013)

A class of plaintiffs filed a putative class action against a private college, two of its successive corporate companies, and an investment company with an ownership interest in one of the successor, alleging that they paid tuition and incurred significant debt, and lost wages and earning capacity in the pursuit of education and degrees that the defendants falsely represented as accredited marketable degrees. The plaintiffs brought several claims against the defendants under state and federal law. In addition, three members of the class filed a non-class, *qui tam* claim against the defendants, alleging a False Claims Act violation, the United States declined to intervene in the *qui tam* claim. The defendants moved to dismiss the action or to stay the action pending arbitration—including the FCA claim—arguing that the all members of the putative class were required to pursue their claims through arbitration, pursuant to the terms of the enrollment agreement they signed.

Holding: The U.S. District Court for the Southern District of Ohio granted the defendants' motion in part and denied it in part. The court ordered the plaintiffs to arbitrate the FCA claim in accordance with the provisions of their enrollment agreements. The court, though, declined to dismiss the claim, and instead stayed the claim, pending the arbitration.

Arbitration of FCA Claims

The defendants argued that the plaintiffs' claims—including the claim under the False Claims Act—were subject to arbitration. The plaintiffs argued that their claims were not subject to arbitration, and noted that the United States did not consent to arbitrate the FCA claim, which was brought by three individual plaintiffs and which was a non-class claim. The court noted that the Supreme Court has repeatedly enforced arbitration agreements to resolve federal statutory claims and has held that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." The court then examined whether or not Congress intended for claims brought under the FCA to be subject to arbitration and determined that most other courts had rejected the plaintiffs' contention that arbitration clauses conflict with the underlying purpose of the FCA. In addition, the court observed that the United States—which filed a statement of interest in the case—informed that court that any settlement of the FCA claim required the consent of the Attorney General, and asserted that since the government was not a party to the enrollment agreement any arbitration ruling would only serve as a non-binding recommendation to the government. As a result, the court held that "[e]ven if mandatory arbitration of the Plaintiffs' FCA claim is not binding on the United States, arbitration is appropriate given the substantive and procedural posture. Moreover, as the United States has affirmatively elected not to intervene, it cannot prevent the arbitration of Plaintiffs' FCA claims against the Defendants." The court held that since the plaintiffs' *qui tam* claim was brought "for the person and for the United States," it represented a claim belonging to the plaintiffs themselves, and therefore, fell within the scope of the arbitration agreement the plaintiffs signed. Consequently, the court enforced the arbitration agreement and granted the defendant's motion to compel arbitration with respect to the *qui tam* claim, but refused to dismiss the claim. Instead, the court stayed the case pending the arbitration and stated that after arbitration of the FCA claim, "the parties shall either request that the Attorney General consent to the resolution of the FCA claims as determined at arbitration or resume litigation on the FCA claims in this Court."

B. Not Knowingly False

United States v. Fadul, 2013 WL 781614 (D. Md. Feb. 28, 2013)

The United States brought an action against a doctor and the mobile diagnostic company he created, alleging, among other things, violation of the False Claims Act. The government alleged that the defendants knowingly submitted fraudulent Medicare claims by improperly billing for multiple services that would not generally be performed on the same patient on the same day. The government alleged that although the type of billing the defendants allegedly engaged in should occur only rarely, the defendants routinely engaged in such improper billing over 10,000 times over a five-year period, costing the federal government hundreds of thousands of dollars in improper reimbursement payments. The defendants admitted much of the government's basic facts, and the government moved for summary judgment on its claims.

Holding: The U.S. District Court for the District of Maryland denied the government motion for summary judgment on its False Claims Act claims.

The court noted that the government presented sufficient evidence showing that the doctor was responsible for the company's healthcare claims, and that when he enrolled the company in the Medicare program, he certified that he was familiar with applicable Medicare laws and regulations and would not present or caused to be presented false or fraudulent claims. The defendant, though, denied that he knowingly submitted false Medicare claims, stating that he usually was not involved in billing, but turned those tasks over to others within the company. He also claimed that he relied on a software system provided by a third party, for his company's billing needs and that his staff consulted with counsel to ensure that their billing practices were in accordance with applicable laws and regulations. The government, however, presented evidence—including testimony from the defendants' former employees—showing that the defendant doctor was involved with the defendant company's billing activities. Moreover, the government offered evidence showing that the doctor was aware that the company's billing practices were improper—the government noted that he various employees informed the doctor of this, and that private insurance companies had rejected similar claims that were submitted to them.

The court, however, refused to grant the government's summary judgment motion, finding that there were still issues of disputed fact regarding the doctor's knowledge of the allegedly false Medicare claims. First, the court rejected the government's attempt to argue that the "collective knowledge" of the doctor and his employees was sufficient to establish scienter under the False Claims Act, noting that the Fourth Circuit had not adopted that approach. And although the government presented evidence to demonstrate the doctor's level of knowledge, the court noted that some of the events upon which the government relied pre-dated many of the allegedly false claims the defendants submitted, and thus, could not provide the basis for the doctor's knowledge regarding the alleged fraud during the entire time period. In addition, although the court determined that a reasonable jury could conclude that the doctor had actual knowledge of the alleged falsity of the company's Medicare claims, it could not hold, as a matter of law, that the government satisfied the scienter element of FCA liability. The court concluded that the doctor's assertions that: he delegated responsibility over billing to other employees; he and his staff consulted with legal advisors; he purchased billing manuals each year so that his staff could have updated information and could be made aware of rules changes; and he made use of third-party software that was designed to handle the company's coding and billing, were sufficient to create disputes of fact regarding whether he even acted recklessly with respect to the truth or falsity of his company's claims.

As a result, the court held that summary judgment on the government's fraud claims against either defendant was inappropriate. The government's motion was denied.

U.S. ex rel. Armfield v. Gills, 2013 WL 371327 (M.D. Fla. Jan. 30, 2013)

Two relators filed a *qui tam* suit alleging that two doctors violated the False Claims Act by knowingly submitting false Medicare claims. Specifically, the relators alleged that the defendants fraudulently billed Medicare for lens rotations disguised as lens repositions, and for duplicative evaluations and management services. The defendants moved for summary judgment on the relators' claims, arguing that their Medicare claims were not false, and that even if the claims were ultimately erroneous, they were not knowingly false, since they were based on objectively reasonable interpretations of ambiguous regulatory provisions. The relator argued that summary judgment was not proper, since there were disputed issues of material fact.

Holding: The U.S. District Court for the Middle District of Florida agreed with the relators, finding that the parties' competing experts created disputed issues of material fact regarding the proper coding and medical necessity of the procedures for which the defendants billed Medicare. The court rejected the defendants' argument that, as a matter of law, they could not have knowingly submitted false Medicare claims, since their submissions were based on objectively reasonable interpretations of the applicable regulations. Instead, the court held that, based on the evidence and all reasonable inferences to be drawn from the evidence, a jury could determine that that the defendants acted with deliberate ignorance or reckless disregard of whether or not its Medicare claims were false—such a finding would satisfy the FCA's scienter requirement.

The defendants' motion for summary judgment was denied.

C. *Pro Se* Relators

Hopson v. Weinburg Attorneys At Law, 2013 WL 557263 (W.D. Ky. Feb. 12, 2013)

A *pro se* relator filed a complaint against a law firm and several individuals, alleging, among other things, a violation of the False Claims Act. The relator alleged that the defendants presented false testimony against him and conspired to blackmail his family. The U.S. District Court for the Western District of Kentucky dismissed the relator's complaint. The court, relying on 28 U.S.C. § 1654—which prohibits plaintiffs from appearing "*pro se* where interests other than their own are at stake"—held that since the relator was proceeding *pro se* on behalf of the United States, his complaint would be dismissed. Moreover, the court noted that, it was empowered, at any time, to dismiss a complaint for lack of subject matter jurisdiction, when the complaint was frivolous and devoid of merit. The court held that the relator's complaint fell into that category and dismissed the complaint on that basis as well.

U.S. ex rel. Prather v. Ewert, 2013 WL 500864 (C.D. Ill. Feb. 11, 2013)

A *pro se* relator filed a *qui tam* action alleging that a county treasurer violated the False Claims Act by illegally retaining more than $40,000 from taxes that were overpaid. The United States declined to intervene in the relator's suit and subsequently moved to dismiss the *qui tam* action on the grounds that the complaint did not state a claim under the False Claims Act, and that the relator could not proceed on behalf of the United States without counsel.

The U.S. District Court for the Central District of Illinois agreed with the government and dismissed the relator's complaint. The court held that the relator's allegations did not involve property owned by the United States, nor did he allege that the United States had any interest in the money the defendant allegedly illegally retained, which had been collected by a county treasurer's office. As a result, the court held that the relator's allegations did not state a claim under the False Claims Act, and should be dismissed on that basis.

The court further stated, in accordance with Seventh Circuit precedent, that "non-attorney pro se litigants may not proceed in a *qui tam* action on behalf of the United States." Consequently, the court granted the government's motion to dismiss on that basis as well.

U.S. ex rel. Pantoja v. Citigroup, Inc., 2013 WL 444030 (E.D.N.Y. Feb. 5, 2013)

A *pro se* relator filed a *qui tam* action against a bank and two of its subsidiaries, alleging that the defendants made false representations to unqualified mortgagees, knowingly failed to comply with Freddie Mac requirements, and made false statements and certifications to the Federal Housing Administration and other federal agencies in order to receive payments from the government. Notably, the relator did not claim that he was suing on behalf of the federal government. Instead, he alleged that the defendants' actions caused him to be criminally prosecuted and convicted and subject to more than $1 million in restitution. He requested that judgment be entered in his favor.

The U.S. District Court for the Eastern District of New York noted that although relators are permitted to control FCA litigation, *qui tam* claims still belong to the United States. Moreover, the court recognized that, pursuant to 28 USC § 1654, *pro se* plaintiffs are only allowed to litigate their own claims. Consequently, the court dismissed the relator's complaint.

See *U.S. ex rel. Howze v. Allied Physicians Inc.,* 2013 WL 950536 (N.D. Ind. Mar. 11, 2013), at page 27.

D. Statute of Limitations

U.S. ex rel. Carter v. Halliburton Co., 2013 WL 1092732 (4th Cir. Mar. 18, 2013)

A relator filed a *qui tam* suit against a group of affiliated government defense contractors, alleging that the defendants violated the False Claims Act by fraudulently billing the United States for services provided to military forces in Iraq in 2005. The U.S. District Court for the Eastern District of Virginia dismissed the relator's suit with prejudice, finding that it lacked subject matter jurisdiction over the *qui tam* claims, pursuant to the False Claims Act's first-to-file rule. The district court also held that the *qui tam* action was untimely, as it was filed beyond the FCA's six-year statute of limitations—the court held that the limitations period was not tolled by the Wartime Suspension of Limitations Act (WSLA), as the court concluded that the WSLA does not apply to non-intervened *qui tam* cases. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

Holding: The Fourth Circuit reversed the district court's decision and remanded the matter, holding that the district court had subject matter jurisdiction over the relator's complaint and that the WSLA applied to the relator's suit.

First-to-File Rule

The relator filed his initial *qui tam* complaint on February 1, 2006. The suit was dismissed in January 2009 for failure to plead the alleged fraud with particularity. The relator then amended and re-filed his complaint. Subsequently, some of the relator's claims were dismissed, and others were allowed to go forward. The case then proceeded through discovery. One month before trial, the U.S. Department of Justice informed the parties of the existence of another *qui tam* suit that contained similar allegations against the defendants, and which was filed in December 2005—about two months before the present relator filed his complaint. The defendants argued that this prior *qui tam* suit precluded the present relator's suit, pursuant to the first-to-file rule. The relator argued that the prior suit was not a "related" action for first-to-file purposes, because the two suits alleged different frauds—the relator contended that the earlier suit alleged that the defendants overbilled the government by systematically billing for twelve hours of work per day without regard for the actual number of hours worked, but that his suit alleged that the defendants submitted fraudulent bills to the government that falsely represented that they had performed certain work that had not actually been performed. The district court agreed with the defendants and dismissed the present relator's suit.

The relator appealed the district court's ruling. While the appeal was still pending, the relator re-filed his *qui tam* suit in a different district court and sought to dismiss his appeal. The appeal was dismissed, but soon after, the relator's second *qui tam* action was also dismissed, on the grounds that the relator's second suit was filed while the appeal regarding the first suit was still pending, and therefore, pursuant to the first-to-file rule, the relator's first suit barred the filing of his second suit. The relator chose not to appeal this ruling, but instead, re-filed his complaint yet again. Once the complaint was unsealed and served, the defendants moved to dismiss the action, pursuant to the FCA's first-to-file bar, statute of limitations, and public disclosure provisions.

With respect to the first-to-file argument, the defendants alleged that two related *qui tam* actions were pending when the relator's most recent complaint was filed. The district court agreed that at least one of those suits barred the relator's action and dismissed the relator's suit with prejudice. The relator argued that the district court erred, because his suit alleged frauds involving different employees in different divisions of the defendants' business. The appeals court disagreed and concluded that the allegations in the two actions were substantially similar. The circuit court then turned to the relator's argument that the prior suit could not preclude his complaint since the action had been voluntarily dismissed months after his complaint was filed and thus, was not "pending," as required by the first-to-file rule. The court stated that "we look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar," and concluded that the earlier suit barred the relator's action. The relator then argued that the earlier suit, which was no longer pending, could not forever bar his present suit. The Fourth Circuit agreed and held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." Since the earlier suit had been dismissed and since the first-to-file bar allows relators to bring their claims at a later time, the appellate court held that there was no obstacle to the relator's suit once the earlier suit was dismissed and no longer pending, and thus, the district court's dismissal of the relator's action with prejudice was erroneous. The Fourth Circuit reversed the district court's ruling with respect to the first-to-file bar.

Statute of Limitations

The district court also found that the relator's most recent suit—which was filed in 2011—was untimely, since the alleged fraud occurred in 2005, more than six years before the most recent suit was filed. On appeal, the relator argued that the statute of limitations was tolled by the WSLA—a statute that tolls applicable statutes of limitations for offenses involving frauds against the United States while the United States is "at war." The Fourth Circuit determined that the United States was "at war," for purposes of the WSLA when the alleged fraud occurred—and was still "at war" when the relator's complaint was filed—and therefore, the WSLA tolled the statute of limitations governing the relator's claims. The circuit court reasoned that the WSLA does not require a formal declaration of war and stated that "[t]he purpose of the WSLA—to combat fraud at times when the United States may not be able to act as quickly because it is engaged in 'war'—would be thwarted were we to find that the United States must be involved in a declared war for the Act to apply." Moreover, the court concluded that when, in October 2002, Congress authorized the President to use military force in Iraq, the United States was "at war," for WSLA purposes. In addition, the circuit court held that the United States was still at war for WSLA purposes when the relator's operative complaint was filed, since the hostilities in Iraq had not been terminated pursuant to a Presidential proclamation or Congressional resolution. The Fourth Circuit rejected the defendants' argument that the WSLA only applied to criminal cases, finding that "offenses" involving fraud against the United States, as used in the WSLA, also applies to civil claims, since Congress did not specify otherwise. Moreover, the circuit court rejected the defendants' argument—which the district court had accepted—that the WSLA only applies to actions in which the United States is a party. While the appellate court recognized that the FCA contains specific limitations periods for claims brought by relators and claims brought by the government, that distinction had no bearing on the applicability of the WSLA to *qui tam* actions. Instead, the court simply stated that "whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case." Consequently, the circuit court reversed the district court's ruling and held that the relator's action was not time-barred.

Public Disclosure Bar

The district court did not address the defendants' public disclosure rule argument, as it found alternate grounds on which to dismiss the suit. The defendants argued to the circuit court that the relator's suit should be dismissed on the alternative ground that the district court lacked subject matter jurisdiction, due to the FCA's public disclosure bar provision. The Fourth Circuit declined to address the defendants' argument, finding that the district court should have the first opportunity to address the issue. As a result, the circuit court remanded the public disclosure bar issue to the district court.

See *U.S. ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 2013 WL 870651 (N.D. Ill. Mar. 6, 2013), at page 57.

FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 9(b) and Pleading Fraud with Particularity

U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc., 2013 WL 1149255 (M.D. Fla. Mar. 19, 2013)

A *qui tam* relator alleged that two health management companies violated the False Claims Act by presenting false healthcare claims to the federal government, by using false statement to cause the federal government to pay false claims, by using false statements to avoid repayment obligations to the government, and by conspiring to submit false claims to the government. The relator's fraud allegations were based on his claims that the defendants violated the Anti-Kickback Statute and the Stark Law by providing improper kickbacks to physicians—including sham payments to neurosurgeons to be on-call even though the defendant provided no neurosurgery services, and free travel on a corporate jet, free car rentals and free all-access badges to the 2008 Masters Golf Tournament—in exchange for future patient referrals. The relator alleged that, even though the defendants provided proper healthcare to patients physicians improperly referred, the defendants' subsequent Medicare and Medicaid claims for those services were false, since the claims included the defendants' false certifications of compliance with all applicable healthcare laws and regulations, including the Anti-Kickback and Stark laws. The defendants moved to dismiss the relator's complaint, arguing that the alleged fraud was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Middle District of Florida granted the defendants' motion and dismissed the relator's complaint with prejudice.

Failure to Plead Fraud with Particularity

The relator's first cause of action alleged that the defendants falsely certified their compliance with healthcare laws and regulations in three ways: (1) in each patient-specific Medicare/Medicaid reimbursement claim they submitted to the government; (2) in three specifically-identified Medicare Hospital cost reports submitted to the government, covering the years 2007, 2008, and 2009; and (3) in three specifically-identified Medicaid cost reports, covering the years 2007, 2008, and 2009.

The court determined that the relator's allegation that the defendants' reimbursement claims included false certifications was not pled with sufficient particularity, since the relator provided "no specific information" regarding essential details, such as "who submitted the forms, when they were submitted, which patients' forms were involved, or what defendants received as a result." Thus, to the court dismissed the relator's claims, to the extent that they were based on alleged false certifications contained in Medicare/Medicaid reimbursement claims.

Next, the court considered the relator's contentions regarding the defendants' Medicare and Medicaid cost reports. The court observed that although the relator alleged more detail with respect to these submissions—including "the type of documents submitted, the dates of presentments, the time period the claims covered, and who signed the claim forms," his allegation was still deficient because he did not "adequately allege which portions of the claims forms were false and what defendants gained as a result of the false claims." The court observed that one of the cost reports at issue covered calendar year 2007. Since the relator alleged that the improper kickbacks to physicians included a trip to the 2008 Masters Golf Tournament—which occurred after the period covered by the defendants' 2007 cost reports—the court held that, to the extent the relator alleged that the defendants' 2007 cost reports were tainted by the alleged golf tournament kickbacks. The only remaining allegation that could impact the 2007 cost reports was the claim that the defendants paid neurosurgeons for unnecessary on-call physicians for services in order to induce future patient referrals back to the defendants. While the court determined that the relator identified the forms the defendants submitted, it ultimately held that the relator's allegation failed because he did not specifically identify any patients these physicians referred to the defendant in exchange for the alleged sham payments, and correspondingly, he failed to describe what the defendants received as a result of the alleged fraud. The court held that he relator's allegations that the defendants made false certifications in their 2007 cost reports were deficient, and dismissed his claims based on those allegations.

The court then turned to defendants' respective 2008 and 2009 Medicare and Medicaid cost reports. First, the court noted that both allegations of illegal kickbacks—the alleged sham payments to neurosurgeons as well as the golf tournament provisions—applied to the 2008 cost report, but that the golf outing allegations did not apply to the 2009 cost report. The court did not explain why the 2009 report was not implicated by the 2008 trip, even though the relator alleged that the trip was designed to serve as an inducement of future referrals. Ultimately, though, the court held that the allegations concerning both sets of cost reports lacked the requisite particularity to overcome the defendants' motion to dismiss, since the relator "fail[ed] to specifically identify a single patient referred to defendants for whom services were provided in 2008 or 2009, fail[ed] to identify a single referred patient whose services were included in the 2008 or 2009 Hospital Cost Reports, fail[ed] to identify the individual or cumulative amounts involved in the claims submitted in reference to referred patients, and fail[ed] to identify what defendants gained as a result." As a result, the court dismissed the relator's claims that were based on alleged false certifications contained in the defendants' 2008 and 2009 cost reports.

The court then turned to the relator's second count, in which he alleged that the defendants made false statements to obtain payment from the government. The court observed that the relator could maintain this cause of action without showing that the defendants actually presented false claims to the government. However, the relator was required to show that the defendants' alleged false statements caused the government actually to pay a false claim. The court held that the relator's allegations regarding the defendants' purported false statements were inadequate, since the relator "fail[ed] to specifically plead any actual payment by the government with the requisite specificity," and instead merely alleged that the government paid the defendants' allegedly false claims, without "provid[ing] the dates, amounts, or any other identifying detail of any of these alleged payments." Consequently, the dismissed the second count of the relator's complaint.

Next, the court considered the relator's third cause of action, which alleged that the defendants made false statements to avoid their obligations to repay money to the government. This "reverse false claim" allegation was based on the defendants' alleged false certifications of compliance associated with their initial and interim claims for payments. The court held that this allegation was also lacking, since the relator "fail[ed] to specifically allege any monetary obligation by the defendant to the government." The relator's third count, alleging a violation of the FCA's reverse false claim provision, was dismissed.

Finally, the court evaluated the relator's fourth count, alleging a conspiracy to defraud the government. Again, the court held that the claim could not be maintained, due to a lack of particularity. The court concluded that not only did the relator's conspiracy claim fail Federal Rule of Civil Procedure 9(b)'s particularity requirement, it did not even satisfy Rule 8's notice pleading requirement, as it did not include any "factual support as to any actual agreement among the defendants or others to get a false or fraudulent claim paid by the United States or any specific allegations that put defendants on notice as to the allegations brought against them. Thus, the court dismissed the relator's fourth count as well.

The court dismissed the relator's complaint—his third amended complaint—with prejudice.

U.S. ex rel. Health Dimensions Rehab., Inc. v. RehabCare Group, Inc., 2013 WL 992642 (E.D. Mo. Mar. 13, 2013)

A corporate relator filed a *qui tam* action alleging that a rehabilitation therapy company, two of its subcontractor companies, and a nursing home management company violated the False Claims Act by submitting false Medicare/Medicaid claims or caused others to do so. Specifically, the relator alleged that the majority owner of the rehabilitation therapy services company was also an owner of the management company. The relator further alleged that the rehabilitation company entered into an agreement with the two subcontractors, whereby the subcontractors would provide rehabilitation services at more than 60 facilities managed by the nursing home management company, in exchange for a one-time $600,000

payment, plus a percentage of the profits received as a result of those rehabilitation services. The relator indicated that soon after the agreement was reached, the rehabilitation services company ceased operations, except for collecting its profits under the terms of the agreement with the subcontractors—which resulted in the rehabilitation company collecting more than $10 million. The relator alleged that the agreement constituted an illegal kickback scheme in which payments were made in exchange for referrals of business. The relator claimed that the parties violated the Anti-Kickback Statute, which rendered their Medicare and Medicaid claims false, for purposes of the False Claims Act. The government intervened in the relator's suit and added its own common law claims.

The defendants moved to dismiss the plaintiffs' allegations, arguing that the subcontractor agreement at issue comported with federal guidelines. They contended that: (1) since the rehabilitation company ceased operations soon after the agreement was executed, it could not have been paid in exchange for future referrals of business; (2) the plaintiffs failed to plead the alleged fraud scheme with particularity, as required by Federal Rule of Civil Procedure 9(b); and (3) the Anti-Kickback Statute, as applied the facts at issue, was void for vagueness—they claimed that the plaintiffs were attempting to apply the statute to an ordinary subcontract for healthcare services.

The U.S. District Court for the Eastern District of Missouri denied the defendants' motion to dismiss. First, the court found that the plaintiffs satisfied Rule 9(b)'s requirements by pleading sufficient facts regarding the alleged fraud scheme. The court stated that "[s]pecific details of every alleged false claim need not be alleged, but some representative examples of false claims must be provided." The court ultimately determined that the plaintiffs' complaint "include[d] enough detail to inform Defendant[s] of the core factual basis for the fraud aspect of the claims." In addition, the court concluded that there was not a "logical inconsistency" between the government's allegation that the rehabilitation company continued to receive illegal kickback payments from its subcontractors even after it ceased operations, and its claim that the defendants violated the Anti-Kickback Statute. Instead, the court found that the government's theory of liability was sufficient to state a claim under the False Claims Act. Finally, the court held that, while the plaintiffs would still need to demonstrate that the Anti-Kickback Statute was violated, in order to maintain their fraud claims, the statute itself was not void for vagueness with respect to the facts of the case. Thus, the court denied the defendants' motions to dismiss.

U.S. ex rel. Lisitza v. Par Pharm. Cos., Inc., 2013 WL 870623 (N.D. Ill. Mar. 7, 2013)

A relator alleged that three pharmaceutical companies—consisting of two affiliated foreign generic drug companies and a pharmaceutical distribution compa-

ny—violated the False Claims Act by causing the submission of Medicaid claims. Specifically, the relator alleged that the two generic drug companies developed and sought FDA approval for a generic version of a prescription drug, in advance of the expiration of the patent for the original drug. The relator claimed that while the patent was effective, only one company manufactured the drug, and thus, Medicaid only developed reimbursement caps on one form (capsules) and dosage (20 mg) for the drug. The relator alleged that the generic version of the drug was manufactured in a different form (tablet) and in both 10-mg and 20-mg dosages. Once the generic drug received FDA approval, the generic drug companies directed the distribution company to undertake an aggressive marketing campaign that included providing illegal kickbacks to pharmacies and inducing pharmacies to switch the form and/or dosage of the drug to avoid Medicaid's reimbursement cap—since there was no cap on reimbursements for other forms or dosages of the drug, the pharmacies were able to obtain overpayments from Medicaid. The relator alleged that the pharmacies' Medicaid claims included a false certification to the government that the pharmacies had complied with applicable Medicaid laws and regulations, and therefore, the claims were false under the FCA. The relator also alleged that the defendants conspired to defraud the government.

The United States partially intervened in the relator's suit and brought FCA claims against the distribution company. Related claims against the pharmacies alleged to have been involved were settled. The claims against the two generic drug companies remained. Those two defendants moved to dismiss the relator's complaint, arguing that the alleged fraud was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion and dismissed the relator's complaint with prejudice.

Failure to Plead Fraud with Particularity

The relator argued that Rule 9(b)'s heightened pleading standard should be relaxed, given the size and complexity of the fraud scheme he alleged. The court disagreed, finding that the defendants' Rule 9(b) challenge was not based on whether or not the relator could identify specific false claims; rather, the defendants argued that the relator failed to sufficiently allege their participation in the fraudulent scheme. The court determined that the relator offered no reason why he could not describe the defendants' role in the alleged fraud, simply due to the size and duration of the scheme. Thus, the court held that Rule 9(b)'s pleading requirements would not be relaxed. The two generic drug companies alleged that they could not be held liable for the alleged misconduct of the drug distributor who allegedly marketed the drug to pharmacies on their behalf.

The relator argued that his *qui tam* complaint satisfied Rule 9(b)'s requirements, as it alleged that the two companies directly caused the submission of false Medicaid claims, through their control of the drug distribution company—the relator had alleged that the generic drug companies supervised the distribution company's Sales & Marketing Division, were aware of the relevant regulations governing drug pricing, and knew about and stood to benefit from the alleged prescription switching. The court held that these allegations were insufficient to meet Rule 9(b)'s particularity standard. First, the court noted that the relator's claim that the defendants were aware of the drug switching scheme was not enough to state an FCA claim, since "knowledge of a fraud is not a basis for FCA liability." The court held that the relator's allegations that the defendants caused the submission of false claims were similarly deficient, finding that the relator's description of the defendants' corporate relationship—which included allegations that the generic drug companies and the distribution company had common parentage—were inadequate to establish the generic drug companies' FCA liability, since the FCA does not alter the general rule that parent companies are not liable for the wrongdoing of their subsidiaries. While the court recognized that the relator specifically alleged that the generic drug companies "controlled" and "directed" the distribution company, the court determined that the relator's complaint did not allege sufficient facts to support that conclusion. The court concluded that "the complaint does not allege facts that the scheme itself was controlled or directed by [the generic drug companies,] just that they had control over [the distribution company] in a general sense." The court determined that the relator's allegations that the generic drug companies participated in the selling and marketing of their product did not demonstrate their participation in the fraud allegedly perpetrated by the distribution company and the pharmacies. The court, therefore, dismissed the relator's claims that the generic drug companies caused pharmacies to submit false Medicaid claims.

Similarly, the court dismissed the relator's conspiracy claim, finding that the relator failed to alleged with particularity the elements of conspiracy under the FCA, namely, "that the defendants had an agreement, combination or conspiracy to defraud the government by getting a false or fraudulent claim allowed or paid and that they did so for the purpose of obtaining or aiding to obtain payment from the government or approval of a claim against the government." While the court acknowledged that the defendants had financial incentives to market their drug aggressively, it held that the relator failed to identify any affirmative actions they took that showed that they caused false claims to be submitted. According to the court, "[a]t most, the relator alleges that the companies knew of [the distribution company's] fraud and failed to stop it; this is not enough to plausibly allege that these companies 'caused' the false claims within the meaning of the FCA."

The court noted that the relator had twice amended his *qui tam* complaint and determined that there was "little reason to believe that further amendment is likely to cure the complaint's failure to allege the participation of these defendants in the allegedly unlawful scheme." As a result, the relator's complaint was dismissed with prejudice.

U.S. ex rel. Goldberg v. Rush Univ. Med. Ctr., 2013 WL 870651 (N.D. Ill. Mar. 6, 2013)

Two relators filed suit under the federal False Claims Act and the Illinois state law equivalent, alleging that a university teaching hospital and an affiliated surgical center, as well as an orthopedic center and six individual physicians, conspired and defrauded Medicare and Medicaid by billing the programs for simultaneous and overlapping surgeries. The U.S. District Court for the Northern District of Illinois dismissed the relators' complaint, finding that it lacked subject matter jurisdiction due to the False Claims Act's public disclosure bar provision. The U.S. Court of Appeals for the Seventh Circuit vacated the district court's ruling and remanded the dismissal. The relators then filed their fourth amended complaint, in which they alleged that the hospital provides care to Medicare patients and also receives compensation from the government for the use of its facilities for teaching and for expenses incurred in training residents. They alleged that, pursuant to applicable regulations, in order for the hospital to be reimbursed for surgeries, a teaching physician must: (1) have been present during all "key and critical" portions of the procedure; and (2) must have been "immediately available" for the entire procedure, and not involved in another procedure from which he/she could not return. The relators claimed that over an 8-year period, the defendants submitted claims to Medicare and Medicaid that violated the above-referenced regulations, since the claims sought reimbursements for simultaneous and overlapping surgeries and thus, could not have complied with the rules requiring the availability of teaching physicians. While the relators acknowledged that, in the event that a teaching physician could not be immediately available as required, the regulations permitted the teaching physician to arrange for another qualified surgeon immediately to assist residents, they claimed that the defendants failed to comply with that rule as well, and simply lied in medical records about the availability of teaching physicians—the relators further claimed that nurses at the facility helped to cover up the misconduct. By engaging in these practices, the relators alleged, the defendants increased the number of surgeries they performed to justify millions of dollars in kickbacks they received from a company that manufactured surgical implants. Both the federal and state governments' declined to intervene in the relators' *qui tam* suit.

The defendants again moved to dismiss the relators' complaint, arguing that the court lacked subject matter jurisdiction. In addition, the defendants argued that the relators' allegations did not state a claim for relief under the False Claims Act and that the fraud allegations were not pled with particularity. Some defendants also argued that the relators' claims against them were time-barred.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendants' motion in part and denied it in part.

Failure to Plead Fraud with Particularity

The defendants argued that the relators only made "conclusory allegations" of fraud, which failed to provide sufficient detail to satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements. The court first noted that the relators' fraud claims with respect to the orthopedic center and the individual defendants included "specific details," but that the fraud allegations against the hospital and its surgical center did not. Thus, the court dismissed the fraud claims against the hospital and the surgical center.

The court then examined the fraud claims against the remaining defendants. First, those defendants argued that the relators' allegations were deficient because the relators pled some facts "on information and belief." The court rejected that argument, finding that the relators only made such allegations with respect to their claim that the defendants actually submitted false claims to the government. The court noted that the relators did not have access to this information and that none of their other allegations were pled on information and belief. Moreover, the court observed that the relators pled that they believed that the defendants submitted the allegedly false claims to Medicare, since it was their pattern and practice to submit their claims to the government. This allegation, the court held, created a reasonable inference that the defendants submitted false claims. Consequently, the court accepted the relators' allegations that were pled on information and belief.

The court then scrutinized the relators' specific allegations of fraud. The defendants argued that the relators did not plead the alleged fraud scheme with particularity, claiming that the relators failed "to specify the surgeries, and the dates and locations of the surgeries, for which fraudulent Medicare claims were submitted." The court, though, held that the relators' allegations answered the "newspaper questions." The court determined that the relators properly alleged "who" submitted false claims to the government, by identifying the defendants; as an aside, the court accepted the relators' explanation that they did not identify the specific patients who received the surgical procedures at issue so as to protect those patients' confidentiality. Next, the court held that the relators' alleged "what" fraudulent activity occurred. The defendants argued that the relators' reliance on surgery schedules was misplaced, since the relators did not specifically identify the procedures that were performed or the false claims that were submitted. They further noted that overlapping surgeries alone do not constitute a Medicare violation. The court observed that the relators not only alleged that overlapping surgeries occurred, but also that the defendants failed to comply with regulations requiring that teaching physicians document their presence during such procedures and arrange for another qualified surgeon to be immediately available to assist, when needed. The court found that the relators pled "where" the fraud occurred by describing the locations of the surgical procedures at issue and the operating rooms used. Similarly, the court held that the relators adequately alleged "when" the fraud occurred by providing examples of fraud that occurred on specific dates. Finally, the court concluded that the relators sufficiently pled "how" the fraud occurred, as they alleged that the defendants failed to document teaching physicians' entry and exit times and knowingly submitted Medicare claims for overlapping surgeries that did not comply with applicable rules. Ultimately, the court held that relators' complaint 'satisfies Rule 9(b) by providing the general outline of a fraudulent scheme and detailed representative examples." The court denied the orthopedic center and the individual physicians' motions to dismiss the fraud claims.

The court did dismiss the relators' conspiracy claim, finding that the relators "fail[ed] to describe a single instance of discussion, agreement, or conspiracy among Defendants." In dismissing that claim, the court stated that "[t]he Complaint may allege who conspired, but it fails to allege with any specificity what they conspired to do, when, where, or how."

Failure to State a Claim

The court again dismissed the claims against the hospital and surgical center, finding that the relators failed to state a claim. The court noted that those two defendants only received Medicare payments under Part A of the program, which provides reimbursements to cover the use of the facilities—not under Part B of the program, which provides reimbursements to teaching physicians. Since the relators did not allege any fraud on Medicare Part A and since they did not allege that the hospital or surgical center defrauded Medicare part B, the court held that the relators failed to state a claim against either of those defendants. Thus, the claims against the hospital and surgical center were dismissed for failure to state a claim.

The remaining defendants argued that the relators' complaint should be dismissed because the relators did not plead and specific false claims that were submitted to the government, and therefore, could not allege a fraud scheme. The court disagreed, noting that, as outlined in the discussion above, the relators adequately pled the fraud scheme and linked the defendants' alleged conduct to the submission of false claims. Moreover, the court observed that applicable Medicare regulations indeed require teaching physicians to document their presence during procedures and must be immediately available or arrange for a replacement in the case of overlapping surgeries.

Statute of Limitations

Three of the six individual defendants moved to dismiss the relator's claims, arguing that the claims were time-barred, pursuant to the false claims acts' statute of limitations provisions. These defendants argued that the relators only alleged claims against them that occurred more than six years before their *qui tam* complaint was filed, and therefore, their claims were time-barred. Although both false claims acts' statutes of limitations include tolling provisions that can extend the limitations periods to ten years, the defendants argued that those provisions only apply when the government intervenes in a *qui tam* suit—which did not occur in the present case. The court noted that the Seventh Circuit has not ruled on whether or not the FCAs' tolling provisions are limited to intervened cases, but agreed with the relators that their *qui tam* complaint only included representative examples of the defendants' alleged fraud and that the defendants continued to participate in the scheme within the six-year limitations period. The court held that the relators' claims were not limited to the specific examples of alleged fraud cited in their complaint and denied the defendants' statute of limitations defense as "premature."

U.S. ex rel. Pecanic v. Sumitomo Elec. Interconnect Prods., Inc., 2013 WL 774177 (S.D. Cal. Feb. 28, 2013)

A former sales representative for an electric products company filed a *qui tam* suit in which he alleged that his former employer, an affiliated company, and three individuals who served in senior management positions with the two companies violated the False Claims Act by submitting false claims and by making false certifications to the government in connection with the sale of two groups of its products to the United States, for use in military aircraft, weapon systems, and other applications. The relator alleged that before the defendants' products could be sold to the United States or to its contractors, the products were required to be tested and placed on a list of products approved for purchase. In addition, the relator claimed that after the products were approved, the defendants were required periodically to certify that the products were still being manufactured in the same way and still met applicable specifications. The relator alleged that the defendants' certifications to the government were false, because the defendants concealed product defects; falsely claimed that the products were being manufactured in the U.S., when in fact they were being manufactured in Mexico, using parts from China, and the "Made in Mexico" stickers were removed; and cherry-picked the components that were tested in order to improve test results, among other things. The relator further alleged that, for years, he repeatedly complained to his superiors about these issues, but nothing was done to remedy the problems; instead, the relator claimed that he was threatened with termination, and eventually, was fired was from his job. Based on these allegations, the relator alleged violations of multiple provisions of the False Claims Act's anti-fraud and anti-retaliation provisions. The defendants moved to dismiss the fraud claims, arguing that the relator failed to plead those claims with particularity, as required by Federal Rule of Civil Procedure 9(b). In addition, the defendants moved to dismiss the relator's retaliation claim for failure to state a claim.

Holding: The U.S. District Court for the Southern District of California granted the defendants' motion to dismiss the fraud claims, but denied the motion to dismiss the retaliation claim.

Pleading Fraud with Particularity

The court first noted that the relator's fraud allegations were not specific as to the defendants, and that the two corporate defendants were treated as the same entity throughout the complaint. While the relator argued that the two corporate defendants were "sometimes" referred to collectively in the *qui tam* complaint, the court found that they were referred to in this way "almost exclusively," which made it difficult to determine each defendant's respective role in the alleged fraud. In addition, the court held that the relator's characterization of the corporate defendants as a parent and wholly-owned subsidiary, whereby the parent maintained control over the subsidiary with respect to the products at issue, was insufficient to support the relator's treatment of the two companies as one. The court held that the relator must either describe each defendant's specific role in the alleged fraud scheme, or properly allege an alter ego theory of liability. Since the fraud allegations against the two corporate defendants were not specific to either defendant, the court held that they were not pled with particularity. Thus, the fraud claims against the corporate defendants were dismissed on that basis, although the relator was granted leave to amend those claims.

The court then turned to the relator's fraud claims against the three individual defendants. The court quickly disposed of the claims against one of the defendants, as that defendant had not been served with the relator's complaint. The court then determined that the fraud claims against the other two individual defendants had not been properly pled with particularity. The court held that the relator only made "wholesale allegations" regarding the individual defendants' roles in the alleged fraud scheme, and did not provide sufficient detail to support his claims that those defendants directed the alleged false certifications and the alleged sales of defective products to the government—particularly since the individual defendants held high-ranking positions within the two corporate defendant companies, and the relator failed to specify how the two companies were involved in the alleged fraud. As a result, the court dismissed the fraud claims against the two remaining individual defendants. Once again, the relator was granted leave to amend the claims.

Retaliation

The court then considered the defendants' motion to dismiss the relator's retaliation claim for failure to state a claim. The court noted that, unlike fraud claims, retaliation claims brought under the False Claims Act are not subject to Rule 9(b)'s heightened pleadings requirements, but rather, "need only satisfy Rule 8's general pleading standard." The court held that the relator's retaliation claim sufficiently stated a claim under the False Claims Act, since the relator described a variety of the defendants' practices and products defects that he believed led to the submission of false claims and false certifications to the government. In addition, the court found that the relator alleged that he engaged in protected conduct under the False Claims Act, as he alleged that he investigated the defendants' alleged misconduct by confronting co-workers and assisting government investigators. Furthermore, the relator alleged that the defendants were aware of his protected conduct, as he made numerous complaints to his superiors, informed management that he had been collecting evidence that showed that the defendants' certifications to the government were false, and encouraged the defendants to contact the government so that the allegedly defective products in question could be recalled. Finally, the court held that the relator properly pled that he was terminated from his job in retaliation for his protected conduct, as he claimed that he was fired "solely because of his opposition and objections to [the corporate defendants'] unlawful practices." The court noted that the relator also argued that he was terminated in part because of his refusal to sell certain products and because he kept raising issues about quality and safety, but rejected the defendants' argument that these allegations undercut his retaliation claim. The court stated that it was "not convinced that [the relator] has failed to state a claim because he included in his complaint that he was both retaliated against for investigating fraudulent practices and terminated for refusing to sell the products underlying these practices." Consequently, the court denied the defendants' motion to dismiss the retaliation claim.

U.S. ex rel. Herron v. Indianapolis Neurosurgical Group, Inc., 2013 WL 652538 (S.D. Ind. Feb. 21, 2013)

Two relators filed a *qui tam* suit alleging that a medical facility and multiple physicians who had practiced medicine there violated the federal and Indiana false claims acts by knowingly falsely billing the Medicare program and Indiana's Medicaid program at higher rates than allowed and for services that were not covered. Both relators had been previously employed by the facility and in addition to their fraud allegations, they both alleged claims under the federal and state statutes' antiretaliation provisions. The defendants moved to dismiss the relators' fraud claims, arguing that those claims were not pled with the requisite particularity and that subsets of the claims were untimely or otherwise deficient. In addition, the defendants moved to dismiss one of the relators' retaliation claims, on multiple grounds.

Holding: The U.S. District court for the Southern District of Indiana granted the defendants' motions in part and denied them in part.

Failure to Plead Fraud with Particularity

The defendant argued that the relators' fraud allegations were not pled with specificity, claiming that the relators treated them as a "homogeneous unit" and failed to pled specific facts regarding each defendant's alleged conduct. The relators countered that their allegations satisfied Federal Rule of Civil Procedure 9(b)'s particularity requirement, arguing that they described the defendants' fraud schemes in detail and that the claims alleged against all of the defendants were adequate because the fraud was widespread across the defendants' entire practice. The court agreed with the relators, finding that in some instances, they alleged detailed claims against individual defendants. Moreover, although the relators also alleged some fraud claims without giving specific examples of every defendant's conduct, they did so when alleging widespread fraud schemes and provided multiple, detailed examples. The court, however, ordered the relators to prepare a claim table that specified which claims were attributable to which defendants; the claim table would be used "as a benchmark for future discovery, motion practice, and potentially jury instructions."

The court also dismissed claims the relators asserted under the Indiana False Claims Act against two of the individual defendants, whose entire conduct pre-dated the enactment of the statute. However, the court refused to dismiss the relators claims against the other defendants purely on that basis, noting that the relators generally alleged a widespread and continuing course of conduct against those defendants; however, the court cautioned that since the Indiana statute does not include a retroactivity provision, the relators would only be allowed to maintain their claims under that law if they could present specific evidence of statutory violations that occurred after the Indiana statute was enacted. Additionally, the court dismissed the relators' fraud claims based on false claims submitted more than six years before the relators filed their original complaint, pursuant to the False Claims Act's six-year statute of limitations for *qui tam* suits.

Retaliation

The court then turned to the defendants' motions to dismiss one of the relators' retaliation claims. The court first dismissed the retaliation claims against two of the individual defendants who did not work at the facility at the time the relator was fired from his job. The remaining defendants argued that the retaliation claim failed because the relator did not plead that they actually knew that he was preparing for a *qui tam* action. Ultimately, the court agreed with the defendants. The court noted that the relator alleged sufficient facts to show that he believed that the defendants were engaged in Medicare and Medicaid fraud, and that he communicated his concerns to the defendants—he even alleged that the defendants warned him not to discuss his concerns with physicians—but since the relator was employed in what the court deemed was a "fraud-alert" position, the court determined that in order to be protected under the false claims acts' anti-retaliation provisions, he was required under Seventh Circuit law to explicitly indicate to the defendants that he intended to file a *qui tam* suit or otherwise report the alleged fraud to the government. Since the relator made no such allegation, the court granted the defendants' motion to dismiss his retaliation claim. The court noted that the relator could seek leave to amend his complaint to add the necessary allegations to cure the deficiencies in his claim.

U.S. ex rel. Dittman v. Adventist Health Sys./Sunbelt, Inc., 2013 WL 615820 (M.D. Fla. Feb. 19, 2013)

Two relators filed a *qui tam* action against a company that operates several hospitals, alleging that the company violated the False Claims Act by over-billing federal government healthcare programs. Both relators formerly worked at the defendant's facilities. After the U.S. District Court for the Middle District of Florida denied the defendant's motion to dismiss the relator's complaint, the relators amended their complaint and added more allegations of billing fraud. The defendant moved to dismiss this additional claim, arguing that the relators did not demonstrate that they had personal knowledge of the billing activities in connection with their additional claim and thus, could not plead the alleged fraud with particularity. The court, though, determined that the relators' allegations regarding the defendant's billing were supported by their claims of personal knowledge stemming from one of the relators having previously worked in the defendant's revenue management department. As a result, the court held that the relators' allegations "provide[d] the indicia of reliability that is necessary in a complaint alleging a fraudulent billing scheme." The defendant's motion to dismiss the relators' additional claim was denied.

U.S. ex rel. Jajdelski v. Kaplan, Inc., 2013 WL 520418 (9th Cir. Feb. 13, 2013)

A relator filed a *qui tam* suit against his former employer—a for-profit college—alleging that the defendant submitted false claims to the U.S. Department of Education. Specifically, the relator alleged that the defendant submitted financial aid claims for students who were not genuinely in attendance, claiming that school officials told him in confidence that instructors were required to keep attendance records and to produce diplomas for students who had not completed—or never even began—the curriculum. He further alleged that the defendant made false representations to the government regarding its accreditation status. The defendant moved to dismiss the relator's complaint and the U.S. District Court for the District of Nevada granted the motion, holding that the fraud allegations did not state a claim under the False Claims Act and were not pled with particularity. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit.

Holding: In a 2-1 decision, the Ninth Circuit affirmed the district court's ruling in part and reversed it in part. The relator's claim based on student enrollment was reinstated, but the claim based on accreditation was dismissed.

The court found that the student enrollment claim was properly pled, since the relator alleged sufficient details of a scheme to submit false financial aid claims

to the government, and provided indicia of reliability that the defendant actually submitted claims to the government. The court noted that the relator claimed to have first-hand knowledge of the alleged fraud and described the fraudulent scheme "in detail, including the date, place, and participants." The court held that these allegations were sufficient to overcome the defendant's motion to dismiss.

The court, though upheld the dismissal of the accreditation claim, finding that the claim was time-barred, pursuant to the False Claims Act's six-year statute of limitations. That claim was dismissed with prejudice.

U.S. ex rel. Earl v. Chase Home Fin., LLC, 2013 WL 423099 (N.D. Okla. Feb. 1, 2013)

A relator filed a suit under the False Claims Act, alleging that a bank and its successor company defrauded the U.S. Department of Agriculture's Rural Development Rural Housing Service—which provides guaranties of mortgage loans to make homeownership more obtainable for lower-income rural families. The relator alleged that he applied for and received a guaranty through the government program, and then obtained a mortgage loan from the defendant's bank. A few years later, the defendant commenced foreclosure proceedings against the relator and received a judgment against him. The bank then purchased the home at auction and submitted a claim to the rural development program to recover its losses. The government paid the bank over $35,000 and then commenced collection actions against the relator to recover that amount. The relator argued that before submitting its claim to the federal government, the bank was required to seek a deficiency judgment against him; he claimed that since the bank failed to complete this step, it was not entitled to submit a claim to the federal government, and thus, the bank's claim was false, for False Claims Act purposes. The defendant moved to dismiss the relator's claim for failure to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Oklahoma granted the defendant's motion to dismiss, but granted the relator leave to amend his complaint.

Failure to Plead Fraud with Particularity

The relator alleged that after the defendant foreclosed on his home, the defendant was required to seek a deficiency judgment against him before submitting a claim to recover its losses through the federal government's rural development program. The court, though, determined that the regulation relied on by the relator only requires mortgage lenders to first seek a deficiency judgment "if the current situation provides a reasonable prospect of recovery." Thus, the court concluded, the applicable regulations require lenders to consider the possibility of obtaining a deficiency judgment, but ultimately "suggest[] that the lender is not required to obtain a deficient if doing so would be fruitless." The court held that the relator's complaint did not allege sufficient facts regarding whether or not the defendant considered the possibility of a deficiency judgment before submitting its claim to the government. In fact, the court determined that the relator's complaint was devoid of information "about the terms of [the defendant bank]'s guaranty with Rural Development, nor does [the relator] allege that [the bank]'s actions were in violation of any of the terms of that guaranty." Consequently, the court agreed with the defendant that the relator's complaint failed to plead the alleged fraud with particularity. The court dismissed the complaint, but granted the relator's request for leave to file an amended complaint.

U.S. ex rel. Dickson v. Bristol Myers Squibb Co., 2013 WL 360299 (S.D. Ill. Jan. 30, 2013)

A relator alleged that a group of pharmaceuticals companies violated the federal False Claims Act, twenty five state statutes (including state false claims act statutes), and one city false claims act ordinance by manipulating clinical trial data to support fraudulent claims regarding the efficacy of one of their drugs and sought to use its sales force to mislead and confuse physicians into believing that the defendants' drug was their best option. The relator claimed that the defendants' false information in turn caused physicians and pharmacists to falsely certify the drug's efficacy and the drug's medical necessity for their patients' treatment—including patients with prescriptions for the drug that were paid for by government-funded healthcare programs. The defendants moved to dismiss the relator's claims, arguing that the relator's complaint was barred by the FCAs' public disclosure bar provisions and that the relator failed to state a claim, as his allegations were not pled with the requisite particularity.

Holding: The U.S. District Court for the Southern District of Illinois granted the defendants' motion in part, but denied it in most respects. The court allowed the relator to maintain his causes of action under the federal FCA, twenty four of twenty five state false claims act laws, and the city false claims act statute. One claim brought under a state law provision that did not provide a private right of action was dismissed.

Public Disclosure Bar

First, the court considered the defendants' public disclosure bar argument, in which the defendants' argued that the court did not have subject matter jurisdiction over the relator's claims because the information on which his claims were based had been publicly disclosed before the relator filed his *qui tam* suit. The court first noted that the defendants raised their jurisdictional argument, not by citing to the FCAs' public disclosure bar provisions directly, but rather by arguing for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). In denying the defendants' motion, the court held that "the record in this case [was] not adequate to make such a factual determination at this stage in the proceedings," and noted that the defendants would be allowed to renew their arguments at a later time.

Failure to State a Claim/Plead Fraud with Particularity

Likewise, the court denied the defendants' motion to dismiss the relator's claims for failure to state a claim or for failure to plead the alleged fraud with particularity. The court held that the relator properly alleged that the defendants instructed its employees—including the relator—to falsely promote their drug to physicians, which caused those physicians to submit false claims to government healthcare programs. Notably, the relator alleged how the defendants' clinical trial data was allegedly manipulated, discussed the defendants' alleged scheme to target physicians whose patients relied on government-funded healthcare, and provided specific dates and locations related to the alleged misrepresentations. These facts, the court held, were sufficient to satisfy Rule 9(b)'s particularity standard. The court held that the specifics regarding which physicians received the defendants' alleged misrepresentations, and which of the defendants' employees were instructed to make those misrepresentations could be gathered during discovery. Consequently, the court denied the defendants' motion to dismiss the vast majority of the relator's claims—including the claim under the City of Chicago False Claims Act—for failure to state a claim.

The court, however, dismissed the relator's claim under a state law that did not provide for a private cause of action.

U.S. ex rel. Long v. GSD & M Idea City LLC, 2013 WL 214590 (N.D. Tex. Jan 18, 2013)

A relator filed a *qui tam* suit against his former employer—a government contractor—alleging violations of the False Claims Act. The relator alleged that he had been employed as the defendant's contracts manager and negotiated and finalized a contract with the Air Force for advertising services. He claimed that, when negotiating with the government, he used figures for overhead costs and for profits that were supplied by the defendant, and certified to the government that those numbers were current, accurate and complete. After his company was awarded the advertising contract, the relator alleged that he discovered significant discrepancies with regard to the cost and profit figures he submitted to the government. After conducting his own investigation, the relator filed his *qui tam* suit, alleging that the defendant presented false claims to the government and used false records that were material to false claims. The relator proceeding on two theories of FCA liability: (1) the defendant falsely certified to the government that its overhead costs and profit numbers complied with applicable regulations; and (2) the defendant used false records to fraudulently induce the Air Force to award the advertising contract. The defendant moved to dismiss the relator's complaint, arguing that

the relator failed to state a claim under the False Claims Act and failed to plead the alleged fraud with particularity.

Holding: The U.S. District Court for the Northern District of Texas granted the defendant's motion and dismissed the relator's complaint without prejudice.

Failure to State a Claim/Plead Fraud with Particularity

The relator alleged that he and previous contract mangers for the defendant inflated and then falsely certified the defendant's costs and profit numbers to the government, in violation of applicable regulations. The defendant argued that this allegation did not state a claim under the False Claims Act, since the relator failed to connect the alleged false certification to the submission of any false claim to the government. The court agreed with the defendant, finding that the relator's false certification theory of liability was not pled adequately, since the relator failed to establish that compliance with the regulation at issue was a prerequisite to the defendant receiving payment under its contract with the Air Force. The court also held that the relator's allegation was not pled with sufficient particularity, as required by Federal Rule of Civil Procedure 9(b), since the relator did not describe how the defendant's alleged misrepresentations led to false claims. Thus, the court dismissed the relator's claims based on the false certification theory.

The court also dismissed the relator's claims based on the fraud-in-the-inducement theory. The court held that the relator's complaint properly alleged an "objective falsehood"—the defendant's alleged false costs and profit numbers that were used to negotiate the Air Force contract—and that he alleged that the defendant's accounting manager cautioned the defendant's management about the numbers discrepancy (establishing scienter), he alleged that the misrepresentations had the natural tendency to influence the government's decision to award the advertising contract to the defendant (which established materiality), and he alleged that the defendant made false claims for payment to the Air Force and that the Air Force made payments. Based on these findings, the court held that the relator stated a claim for relief under the FCA. However, the court held that his claim did not plead the alleged fraud with particularity, since the complaint only refers to anonymous "higher ups" within the defendant's company who had knowledge of the alleged fraud and provided the relator with the false costs and profits information. Moreover, the court determined that the relator's complaint did not specify when the alleged misrepresentation was made or the contents of the any of the alleged misrepresentations he made or prior contracts managers made to the government. As a result, the court dismissed the relator's fraud-in-the-inducement claims for failure to plead fraud with particularity.

U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc., 2013 WL 146048 (M.D. Tenn. Jan. 14, 2013)

A relator filed a *qui tam* action on behalf of the United States and the State of Tennessee, alleging that healthcare management company and its subsidiary medical center defrauded Medicare and Medicaid by submitted claims for reimbursement that were tainted with violations of the Stark Law and the Anti-Kickback Statute (AKS). Specifically, the relator alleged that the medical center operated a hospital and recruited physicians—including himself—to work at the hospital by entering into recruitment agreements that improperly based the physicians' financial remuneration on their referrals of patients to the hospital, and that provided the physicians with office space at below market rents, free personnel services and other improper kickbacks. The relator alleged that although the recruitment agreement included a provision that stated that compensation was not based on referrals, that provision was merely "empty lip service," and that soon after he relocated his practice to the defendants' hospital, he was pressured to comply with an annual patient referral requirement and was punished when he did not. He claimed that he began referring all patients to the hospital in an attempt to meet his referral requirement and prevent a breach of his recruitment agreement, but the defendants terminated the agreement nonetheless. Moreover, in support of his kickbacks allegations, the relator alleged that the defendants provided various benefits to another doctor at the hospital, including payments in excess of fair market value and free office space.

Neither the United States nor the State of Tennessee intervened in the relator's suit. The defendants moved to dismiss his complaint, arguing that the fraud allegations were not pled with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Holding: The U.S. District Court for the Middle District of Tennessee granted the defendants' motion and dismissed the relator's *qui tam* complaint. The complaint was dismissed without prejudice, however, and the relator was given an opportunity to amend it.

Failure to Plead Fraud with Particularity

The court first determined that the analysis of the relator's claims under the federal False Claims Act would apply equally to his claims under the corresponding provisions of the Tennessee Medicaid False Claims Act. The court then examined the relator's FCA claims one-by-one, beginning with the relator's allegation that the defendants knowingly presented false claims to the government.

The court held that, in order to properly allege a claim under this provision of the FCA, a plaintiff must plead two elements with particularity: (1) a fraudulent scheme; and (2) a misrepresentation presented to the government in the form of a false claim.

The court held that the relator failed to plead either element with particularity. The court concluded that the relator's allegation of a fraudulent scheme based on the recruitment agreement was deficient, as it determined that the agreement did not require physicians to make illegal referrals. Instead, the court, relying on caselaw from another district court and guidance from the Centers for Medicare and Medicaid Services, decided that the agreement was not improper, as it merely required physicians to maintain "active" staff status, which involved admitting at least one patient per month to the hospital and an average of twenty patients each month. Similarly, the court held that the alleged fraudulent scheme based on improper kickbacks was deficient. The court stated that, in order to maintain his illegal kickbacks claim, "the relator must sufficiently allege that the defendants submitted claims that relied upon false certifications of compliance with the AKS or Stark Law. The mere allegation that a defendant violated the AKS or Stark Law does not create FCA liability unless the defendant knowingly submitted claims that falsely certified compliance with those laws, where such compliance was a prerequisite to payment." The court held that the relator's allegations did not adequately describe the defendants' scheme of false certifications of compliance and AKS and Stark Law violations, since the *qui tam* complaint failed "to specify who made the certifications, what was in them, and why they were false." The court further held that the relator's complaint included conclusory and anecdotal allegations, but failed "to allege specific facts that could establish an AKS or Stark violation," either by failing to adequately support his claims of payments in excess of fair market value, or by failing to tie purported improper financial relationships between the defendants and their physicians to false Medicare and Medicaid claims—notably, the relator did not even allege that any of his own referrals to the hospital resulted in the submission of false claims to the government.

The court then addressed the second element, namely, a misrepresentation presented to the government in a false claim. The court again held that the relator's complaint was deficient, noting that the complaint primarily focused on the alleged fraudulent scheme and "makes only very general and conclusory allegations regarding the submission of claims by the defendants." The court observed that the complaint failed to offer details regarding "the presentation of allegedly false claims for payment, such as when the claims were submitted to the government, or what payment from the government was obtained as a result of such claims. In sum, the relator fails to identify a single false claim for reimbursement that was actually presented to the government for payment." On the basis of those findings, the court dismissed the relator's allegations that the defendants presented false claims to the government.

Next, the court turned to the relator's allegation that the defendants violated the FCA by knowingly using false records and/or statements in support of false claims. The court determined that this claim was also deficient, as the relator failed to identify any false claims, as noted above. However, even if the relator had identified specific false claims, the court held that his cause of action would fail, since he did not plead, with particularity, details regarding the defendants' allegedly false records and/or statements, including the time, place, and content of the statements, and any corresponding claims for payment. Therefore, the court dismissed that claim as well. The court then considered the relator's conspiracy claim, which was also dismissed for failing to satisfy Rule 9(b)'s requirements. The court dismissed this claim due to the lack of "supporting facts to show when, where or how the alleged conspiracy occurred." Finally, the court dismissed the relator's "reverse" false claim allegation, in which the relator alleged that the defendants improperly avoided an obligation owed to the government. Again, the court found that the relator's allegation was devoid of factual support regarding "what fraudulent record or statement the defendants made that caused them to avoid or decrease an obligation to pay the government, who made such a record or statement, when it was made, where it was made, or its contents. Nowhere in the amended complaint does the relator allege any obligation owed by the defendants to the government that the defendants sought to conceal or avoid." Consequently, the court held that the claim was not pled with particularity and that dismissal was warranted.

Although all of the relator's claims were dismissed, the court dismissed the claims without prejudice and afforded the relator an opportunity to file an amended complaint.

U.S. ex rel. Saint Joseph's Hosp, Inc. v. United Distrib., Inc., 2013 WL 142700 (S.D. Ga. Jan. 11, 2013)

Two hospitals filed a *qui tam* suit against a distribution company, its insurance benefits providers, and multiple individuals, alleging that the defendants violated the False Claims Act by submitting improper Medicare claims. The relators alleged that one of the distribution company's truck drivers was injured while on the job. While being treated for his injury at the relators' facilities, doctors discovered an unrelated colon rupture that required surgery. The man developed a widespread infection following the surgery, fell into a coma, and later died. The relators further alleged that when the employee was initially hospitalized, he provided documentation showing that his employer's plan provided his primary insurance coverage. However, the relators claimed that after the employer's workman's compensation claims were denied, the defendants concocted a scheme and falsely claimed that the employee did not take leave from his job under the Family Medical Leave Act and was therefore covered by continuing COBRA insurance coverage. Notably, since the man was over 65 years old, by electing continuing COBRA coverage, Medicare became his primary health insurance and the COBRA plan became his secondary insurance. But the relators alleged that the defendants knew that the employee had not elected COBRA coverage, and thus Medicare was not his primary payer. The relators claimed that the defendants intentionally misled the relators—who billed more than $300,000 to Medicare for the man's care—in order to avoid covering the man's treatment under their own health plan. The United States intervened in the relator's suit and the defendants moved to dismiss the plaintiffs' claims, arguing that the fraud claims were not pled with particularity.

Holding: The U.S. District Court for the Southern District of Georgia granted the defendants' motion in part and denied it in part.

Pleading Fraud with Particularity

The court held that the plaintiffs provided sufficient details to support their allegation that the defendants knowingly caused the relators to submit false claims to the government, noting that the plaintiffs alleged the time, place, and substance of the defendants' allegedly false statements—including the defendants instructions to the relators to submit the employee's claims to Medicare—that led to the submission of false Medicare claims that were paid by the government. The court further rejected the defendants' argument that the plaintiffs failed to allege that the Medicare claims at issue were false. The defendants had argued that the claims were not false as a matter of law, since the workman's compensation claim had been denied and thus, Medicare was authorized under the Medicare Secondary Payer Statute to pay the employee's claims because there was no expectation that the defendants' health plan would make payment promptly. The court, though, accepted as true the plaintiffs' contention that since the workman's compensation claim was denied due to the defendants' "fabricated COBRA election," the subsequent Medicare claims were false. The court denied the defendants' motion to dismiss these fraud allegations.

The court then examined the plaintiffs' allegation that the defendants knowingly made false statements material to false claims, and concluded that those claims were pled with specificity as well. In reaching its holding, the court rejected the defendants' argument that the plaintiffs failed to show how the defendants' alleged misconduct was material to the government. Instead, the court agreed with the plaintiffs that the defendants' alleged false statements caused providers to submit Medicare claims and that the representations included within those Medicare claims—that the employee's coverage had been transferred to COBRA, making Medicare his primary payer—influenced the government's decision to pay the claims. Consequently, the court denied the defendants' motion to dismiss this claim.

Finally, the court granted the defendants' motion to dismiss the plaintiffs' conspiracy claim, finding that the plaintiffs failed to plead that claim with the requisite particularity, since the plaintiffs did not allege the particulars of an alleged agreement among the defendants to change the employee's primary coverage to COBRA. Since the plaintiffs did not "provide factual allegations concerning the statements or specific conduct made as part of the conspiracy," the conspiracy claim was dismissed. However, the court dismissed this claim without prejudice and granted the plaintiffs' request for leave to amend its complaint to cure the pleading deficiencies.

U.S. ex rel. Nathan v. Takeda Pharms. North Am., Inc., 2013 WL 136030 (4th Cir. Jan. 11, 2013)

A relator brought a *qui tam* action against his former employer—a pharmaceutical company—and one of its affiliates, alleging that the defendants violated the False Claims Act by causing false healthcare claims to be submitted to the government. More specifically, the relator alleged that the defendants marketed one of their drugs to treat gastroesophogeal reflux disease (GERD)—an off-label use that had not been approved by the Food and Drug Administration. In addition, the relator alleged that prescriptions for the drug that were written for such off-label uses were not reimbursable under the federal health insurance programs, and that the defendants' alleged misconduct caused false claims for prescriptions for the defendants' drug to be submitted to the federal government. The relator alleged that the defendants engaged in this alleged misconduct because the patent for another of its drugs—a drug that had been approved for treating GERD—was set to expire and the defendants were looking to fill the void that would be left when the patent expired. After the relator amended his original complaint twice and filed a third amended complaint, the defendants moved to dismiss the complaint, arguing that the complaint failed to state a claim under the FCA. The U.S. District Court for the District of Maryland granted the defendants' motion. The relator appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit, arguing that the district court erred when holding that the relator did not sufficiently allege that false claims had been presented to the government or that the defendants caused any such claims to be presented. The relator also argued that the district court abused its discretion when it denied his request to amend his complaint again.

Holding: The Fourth Circuit affirmed the district court's rulings. First, the circuit court rejected the relator's argument that, in order to satisfy Rule 9(b)'s pleading requirements, he was only required to allege the existence of a fraudulent scheme that supported the inference that false claims were presented to the government. Instead, the Fourth Circuit stated that the FCA is not intended to punish every type of fraud committed on the government, but specifically imposes liability on those who cause false claims to be presented to the government. Thus, the court held, a relator's *qui tam* complaint must include allegations of that false claims were presented to the government, and if those allegations are not pled with particularity, then Rule 9(b)'s requirements have not been met. The court observed that Rule 9(b)'s requirements may be satisfied if an FCA plaintiff provides "some indicia of reliability" that actual false claims were presented to the government, and concluded that "when a defendant's actions, as alleged and a reasonably inferred from the allegations, *could* have led, but *need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were submitted to the government for payment." (emphasis in original) The circuit court held that the relator's allegations of the defendants' fraud scheme did not necessarily result in the presentment of false claims to the government, and therefore, the relator could not satisfy Rule 9(b) without identifying specific false claims. The court held that the relator's complaint did not include the necessary level of specificity, because his complaint focused on the defendants' alleged off-label drug marketing, but generally failed to allege that off-label prescriptions were filled by patients and that corresponding claims were submitted to the government. Further, in the instances in which the relator did allege that claims for the drug at issue were presented to the government, he failed to adequately allege that the prescriptions were for off-label uses. The circuit court concluded that "the Relator essentially has alleged that some claims must have been presented to the government for payment, because prescriptions of this kind frequently and routinely are obtained by persons who participate in health care programs sponsored by the federal government or because federally insured patients received off-label prescriptions. As we have explained, allegations of this type are insufficient because they are inherently speculative in nature." As a result, the Fourth Circuit affirmed the district court's dismissal of the relator's complaint.

The circuit court also affirmed the district court's denial of the relator's request for leave to file a fourth amended complaint, holding that "granting of leave to file another amended complaint, when Relator was on notice of the deficiencies before filing the most recent amended complaint, would undermine the substantial interest of finality in litigation and unduly subject [the defendants] to the continued time and expense occasioned by Relator's pleading failures."

U.S. ex rel. Salvo v. Central Georgia Foot & Ankle Ctr., P.C., 2013 WL 84101 (M.D. Ga. Jan. 7, 2013)

A relator filed a *qui tam* action against a healthcare center and others, alleging that the defendants violated the federal False Claims Act and the Georgia False Medicaid Claims Act. In addition to her fraud claims, the relator alleged a personal claim for retaliation under the False Claims Act. The defendants moved to dismiss the relator's complaint, arguing that the complaint failed to state a claim and did not satisfy Rule 9(b)'s heightened pleading requirements. The U.S. District Court for the Middle District of Georgia denied the defendants' motion, finding that the relator's fraud claims were pled with particularity, since the relator "set[] forth specific dates of the alleged fraud, where the alleged fraud occurred, the substance of the Defendants' alleged fraud, and specific amounts the Defendants were paid because of the alleged fraud." The court held that Rule 9(b)'s pleading requirements did not apply to the relator's retaliation claim, and further held that the relator's complaint adequately alleged the elements of a False Claims Act retaliation claim—namely, that the relator protested the defendants' illegal activity at a time when there was a distinct possibility that the relator or the government would sue the defendants under the False Claims Act; and that the defendants' retaliatory conduct occurred after the relator's protests. As a result of these findings, the court denied the defendants' motion to dismiss.

See *U.S. ex rel. Palmieri v. Alpharma, Inc.*, 2013 WL 821965 (D. Md. Mar. 5, 2013), at page 5.

B. Rule 12(b)(6) Failure to State a Claim upon which Relief can be Granted

U.S. ex rel. Yarberry v. Sears Holdings Corp., 2013 WL 1287058 (S.D. Ill. Mar. 28, 2013)

A relator filed a *qui tam* complaint alleging that two retail companies' pharmacies defrauded the federal government healthcare programs—Medicare, Medicaid, TRICARE, and CHAMPUS—by providing unreported kickbacks—in the form of gift cards—to patients who filled prescriptions with them, in violation of the Anti-Kickback Act. The relator asserted claims on behalf of the United States and 13 states. According to the relator, claims for reimbursement under the federal healthcare programs that are based on the defendants' alleged underlying illegal kickbacks were necessarily false, making the defendants ineligible for payment. The defendants moved to dismiss the relator's complaint, arguing that the relator failed to state a claim for relief and failed to plead the alleged fraud with particularity. The defendants also argued that the relator's claims were barred by the False Claims Act's public disclosure provision.

Holding: The U.S. District Court for the Southern District of Illinois denied the defendants' motion.

Failure to State a Claim/Plead Fraud with Particularity

First, the defendants argued that the plaintiff's complaint was deficient because it did not identify any false statement they allegedly made. The court disagreed, finding that the *qui tam* complaint detailed "the 'who, what, when, where, and how' of the 'kickback.'" Although none of the alleged kickbacks was linked to specific healthcare claims, the court held that the plaintiff's "broad allegation that compliance with federal and state statutes prohibiting kickbacks is a material condition to payment under federal and state government healthcare programs" was sufficient to support his fraud claims. In addition, the court noted that in 2010, as part of the Patient Protection and Affordable Care Act, Congress confirmed what some courts had already recognized—that violations of the Anti-Kickback Act can form a predicate for False Claims Act liability. Thus, the court held that the plaintiff adequately pled the defendants' allegedly false statements.

Next, the defendants argued that the *qui tam* complaint should be dismissed for failing to allege that they submitted or caused to be presented to the government any facially false claims, statements, or records—the defendants argued that the relator's allegations only concern Anti-Kickback Act violations, not violations of the False Claims Act. The court, though, held that the relator's allegation that the defendants' eligibility to receive payments from the federal healthcare programs was conditioned on their compliance with the Anti-Kickback Act, "provide[d] the essential link between the AKA violation and the FCA claim," and "explain[ed] why the false statements would have 'caused the government to keep the funding spigot open." Based on that finding, the court held that the relator sufficiently alleged that the defendants submitted false claims to the government.

The defendants then argued that the relator's complaint failed to plead a violation of the Anti-Kickback Act, and that the alleged kickback allegations were not pled with enough specificity, since the relator did not plead the details of particular transactions. In addition, the defendants argued that the relator alleged nothing more than happenstance—that ineligible prescription customers received improper gift cards. The court, though, sided with the relator, who contended that the defendants "were merely like ostriches with their heads in the sand creating plausible deniability," noting that the relator alleged that the defendants instructed pharmacists not to police whether ineligible patients received gift cards and that the defendants allegedly delayed implementing a computer program that would have prevented federal healthcare program patients from receiving the gift cards. The court held that, at the motion to dismiss stage, the relator's allegations were sufficient to plead the defendants knew that their gift card promotion was improperly inducing federal healthcare program customers to fill prescriptions with the defendants' pharmacies. The court further held that, contrary to the defendants' contention, the AKA does not include a safe harbor provision under which the defendants' $10 or less gift cards would be considered *de minimis*.

The court denied the defendants' motion to dismiss for failure to state a claim and for failure to plead fraud with particularity.

Public Disclosure Bar

Finally, the court addressed the defendants' public disclosure argument, in which they asserted that information on which the relator's fraud allegations were based had been publicly disclosed before the relator filed his *qui tam* complaint. The defendants contended that the public disclosure bar was triggered when allegations of a nationwide incentive program were announced in the media, and that the relator added little to what had already been made public. The court held that the fraud alleged by the relator was not publicly disclosed before the relator's *qui tam* suit was filed. The court observed that although the defendants' gift card promotions had been publicized, the alleged fraud could not be inferred from that information, and that "the addition of Relator's knowledge of the covert policy and practice of ignoring [the federal healthcare programs] members' ineligibility is the key ingredient in the fraud allegation." Thus, the court held that the public disclosure bar did not apply, as there was no public disclosure. Consequently, the court denied the defendants' motion to dismiss for lack of subject matter jurisdiction.

U.S. ex rel. Folliard v. Govplace, 2013 WL 1092859 (D.D.C. Mar. 18, 2013)

A relator filed a *qui tam* action against a government contractor, alleging that the defendant violated the False Claims Act by listing and selling four products to the United States that originated in non-designated countries, as defined by the Trade Agreements Act (TAA). After discovery, the defendant moved for summary judgment on the relator's claim, arguing that it justifiably relied on its distributor's confirmations that the products in question were TAA-compliant, and thus, could not have knowingly presented false claims to the government. The relator countered that the defendant had a non-delegable duty to verify that its products were TAA-compliant. In addition, the relator argued that the defendant possessed information that undermined the distributor's representations of TAA-compliance, and therefore, the defendant acted recklessly by relying solely on the distributor.

Holding: The U.S. District Court for the District of Columbia granted the defendant's motion and dismissed the relator's claims with prejudice.

The court determined that the relator's fraud claim included three elements: (1) the defendant presented a claim to the government for payment or approval; (2) the claim was false or fraudulent; and (3) the defendant had knowledge, as defined by the FCA, that the claims were false. The court considered each element in turn. First, the defendant did not dispute that it made sales to the government, and consequently, the court held that the first element was conceded. The court then turned to the "falsity" element. In support of his argument, the relator submitted a declaration from an expert witness. The court, though, observed that, pursuant to Federal Rule of Civil Procedure 56(c)(4), affidavits submitted in opposition to motions for summary judgment must be based on personal knowledge. The court expressed doubts that the affidavit prepared by the relator's expert witness could satisfy Rule 56's requirements and could be considered in opposition to the defendant's summary judgment motion. In addition, the court noted that the relator obtained the defendant's sales data through two Freedom of Information Act requests, and obtained country of origin data from its expert witness, who had conducted similar analysis during the course of a prior, different lawsuit. The court raised concerns that the relator's fraud allegations were based upon prior public disclosures, and therefore, the claims were subject to dismissal for lack of subject matter jurisdiction, since the relator was not an original source of either disclosure. The court did not decide whether or not the defendant's claims to the government were false, finding that dismissal of the *qui tam* action was warranted because the relator failed to offer evidence showing that the defendant acted knowingly.

With respect to the "knowing" element, the defendant contended that it reasonably relied on its distributor's country of origin representations, and therefore, did not knowingly sell products to the government that were not TAA-compliant.

The relator responded that the defendant had access to inconsistent country of origin information it received from the products' manufacturer and from third parties. The relator contended that the defendant's failure to investigate the products' country of origin further satisfied the FCA's knowledge, since the defendant deliberately ignored or recklessly disregarded the truth. The court, though, held that "knowledge," for FCA purposes "must amount to gross negligence-plus." Ultimately, the court held that the defendant's conduct fell short of this standard, noting that while the defendant agreed to provide TAA-compliant products to the government, it did not affirmatively represent that it would verify the country of origin information provided by its distributor—and the court noted that it made no sense for the defendant to double-check each of the distributor's representations. Moreover, the court held that the defendant acted reasonably by not relying on country of origin information received from third parties—assuming that the defendant ever even read those materials, the defendant would likely not have relied on the information, since it included a broad disclaimer of reliability.

After drawing all reasonable inferences in favor of the relator, the court held that a reasonable jury could not conclude that the defendant knowingly submitted false claims to the government. Since the court concluded that there was no issue of material fact regarding the defendant's level of knowledge, it granted the defendant's summary judgment motion. The relator's claims were dismissed with prejudice.

U.S. ex rel. Marquis v. Northrop Grumman Corp., 2013 WL 951095 (N.D. Ill. Mar. 12, 2013)

A relator filed a *qui tam* action alleging that his former employer—a defense contractor—defrauded the United States Air Force, in violation of the False Claims Act. Specifically, the relator alleged that the defendant's contract with the Air Force included an exclusivity clause that required the defendant to have a director oversee the project. He further alleged that the defendant charged the government for work performed in violation of the contract. The relator's claims arose when he claimed that he had been employed by the defendant as the director charged with overseeing the Air Force project, but that after the defendant undertook a reorganization, his director position was demoted, which he believed violated the contract. He alleged that over the course of two years, he informed the defendant that he believed that the contract's exclusivity clause was being violated, but he was subsequently demoted again and was eventually terminated from his job. He added employment law claims to his *qui tam* allegations, including a claim under the False Claims Act's anti-retaliation provision. The United States declined to intervene in the relator's *qui tam* case.

Holding: The U.S. District Court for the Northern District of Illinois granted the defendant's motion.

Failure to State a Claim/Plead Fraud with Particularity

The defendant moved to dismiss the relator's fraud claim, arguing that the claims failed because the government had already been made aware of the alleged contractual violations by another employee, but continued to pay the defendant under the contract. The court first examined the contract—which had been attached to the relator's complaint—and concluded that the contract did not specify that the defendant's reorganization resulted in a breach. The court stated that the relator's "FCA claim would be weak regardless of whether the Government was made aware of the purported Contract violations." The court further found that the relator's own allegations indicated that he informed Air Force personnel of his concerns with the contract on more than one occasion, but that the government continued to pay the defendant under the contract. Since the relator did not specifically allege that the defendant's claims to the government for payment under the contract were submitted before the government was notified of the alleged breaches of the exclusivity clause, the court held that the relator's fraud allegations failed to state a claim under the False Claims Act.

The court further found that the fraud claim was not pled with particularity, as required by Federal Rule of Civil Procedure 9(b). The court noted that since the relator was the director in charge of the project at issue throughout the time the fraud allegedly occurred and asserted that he was privy to the details of the alleged fraud, Rule 9(b)'s heightened pleading standard would not be relaxed when applied to his fraud claims. The court then determined that while the relator "provided detailed allegations relating to his belief that [the defendant] violated the Contract," he did not "provide[] any specific allegations relating to any allegedly false claims presented to the Government," which the court held was fatal to the relator's claims. Thus, the relator's fraud claim was dismissed for lack of particularity as well.

Retaliation

The court then turned to the defendant's argument that the FCA retaliation claim should be dismissed, because the defendant had no knowledge of any protected conduct by the relator. The relator countered that he repeatedly reported to his superiors that he believed that the defendant was violating the Air Force contract. The court, though, determined that the relator failed to put the defendant on notice of any protected conduct under the False Claims Act, since he did not allege that he ever informed the defendant that he believed that a fraud against the government was occurring or that false claims were being submitted to the government; the court concluded that the relator failed to put the defendant on notice that "a potential lawsuit [was] brewing." Consequently, the court held that the relator failed to allege that the defendant had notice of protected activity, and dismissed the retaliation claim on that basis.

U.S. ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Group, Inc., 2013 WL 856370 (S.D.N.Y. Mar. 5, 2013)

A relator filed a *qui tam* action against a group of affiliated healthcare consulting companies and two affiliated health insurance companies that served as Medicare intermediaries, alleging violations of the federal False Claims Act and the New York False Claims Act. The relator alleged that after the merger of a group of New York hospitals, the board of the new hospital entity retained a consulting firm to rectify its financial problems. The consulting firm convinced the hospital to adopt a 33% increase in its charges, as the entity had been losing money by charging for services at rates that were below its costs. The decision to increase charges resulted in the hospital receiving increased outlier reimbursements from Medicare. The hospital considered whether or not to report these increased reimbursements to Medicare, but concluded that it was not obligated to do so, since the payments resulted from appropriate price increases. The relator alleged that the consulting company defendants—who, according to the relator were responsible for the hospital's actions—knowingly submitted charges to Medicare that would "game the outlier system," by unilaterally increasing the hospital's charges and falsely certifying the hospital's compliance with the applicable rule that such charges should only be increased in proportion to increases in costs. The relator further alleged that the Medicare intermediary defendants improperly and recklessly authorized payment of the hospital's claims, in contravention of their contractual obligations to the Medicare program. Both groups of defendants moved for summary judgment on the relator's claims.

The U.S. District Court for the Southern District of New York granted the defendants' motions. The court held that the relator could not provide legal support for his theory of False Claims Act liability, noting that the relator failed to cite any regulation that specified that outlier payments can only be made when increased charges are related to costs. Instead, the court noted that the applicable regulations created "an outlier reconciliation process empowering the government to claw back excessive outlier payments, plus interest, once cost reports are finalized." The relator's complaint was dismissed with prejudice.

U.S. ex rel. Upton v. Family Health Network, Inc., 2013 WL 791441 (N.D. Ill. Mar. 4, 2013)

Four relators brought a *qui tam* action on behalf of the United States and the State of Illinois, alleging that a healthcare company and two individuals, submitted false Medicaid claims. The relators claimed that the defendant healthcare provider received a pre-determined Medicaid payment for each patient enrolled in its family health program. The relators alleged that the defendant's defrauded Medicaid because they failed to comply with their contractual requirement to accept every

potential Medicaid enrollee who requested enrollment, regardless of medical history and current or future medical needs. The relators claimed that instead of complying with this requirement, the defendants cherry-picked patients and refused to enroll patients who appeared to have high-cost medical needs, thereby increasing their profits. The U.S. District Court for the Northern District of Illinois dismissed the relators' second amended complaint without prejudice, the relators filed a third amended complaint, and the defendants moved to dismiss that complaint for failure to state a claim and to plead fraud with particularity.

Holding: The U.S. District Court for the Northern District of Illinois denied the defendants' motion.

Failure to State a Claim/Plead Fraud with Particularity

The court noted that in their second amended complaint, the "Relators provided only conclusory allegations that the [defendants'] certifications in order to receive payments from the Governments," and failed to allege a fraudulent inducement theory of FCA liability—a prerequisite for maintaining their claim that the defendants' enrollment requirements constituted a condition of payment under Medicaid. The court held that these deficiencies were cured in the third amended complaint, as the relators "added specific allegations outlining a fraudulent inducement theory," described multiple instances in which the defendants discriminated against patients based on health status and submitted Medicaid claims to the U.S. and to Illinois in which they certified that they would not engage in such behavior, and identified the statutory provisions with which the defendants failed to comply. The relators further alleged that the defendants' failure to comply with the enrollment requirements would have had a material effect on the federal and state government entities' decision to make Medicaid payments, had those entities known the truth. Consequently, the court held that the relators' third amended complaint stated a claim for relief under the FCA statutes and properly pled the fraud scheme alleged with particularity. The defendants' motion to dismiss was denied.

U.S. ex rel. Isley v. Lockheed Martin Corp., 2013 WL 772810 (N.D. Ga. Feb. 28, 2013)

Two relators filed a *qui tam* action against their former employer, a defense contractor, alleging that the defendant knowingly allowed its employees to manipulate the labor recording system used by hourly employees, which resulted in the government being billed for employees' sick leave and vacation time, Family Medical Leave Act days, and for "ghost overtime" hours—hours that were billed at the higher overtime rate for employees who had not worked a full 40-hour week. The relators, who had been tasked with reducing employment costs for the defen-

dant, alleged that they reported their discovery to the defendant, and even created a PowerPoint presentation that outlined a way to fix the problem. The relators claimed that the defendant encouraged them to continue their work, until the relators informed the defendant that they believed that the deficiencies in the defendant's time recording system, coupled with the defendant's billing practices, resulted in substantial overbilling to the government—in fact, the relators alleged that the improper billing at three of the defendant's sites resulted in the government overpaying about $10 million to the defendant. The relators further alleged that once they began emphasizing the potential liability to the government, the defendant's attitude towards them began to change, resulting in one relator being terminated without reason, and the other being constructively discharged after she refused to assume another employee's duties without additional compensation. The relators brought claims alleging that the defendant violated both the anti-fraud and anti-retaliation provisions of the False Claims Act. The defendant moved to dismiss the relators' allegations, arguing that the relators failed to state a claim for relief and failed to plead their fraud claims with particularity.

Holding: The U.S. District Court for the Northern District of Georgia granted the defendant's motion to dismiss the fraud charges, granted the defendant's motion to dismiss the retaliation claim of the relator who claimed that she was constructively discharged, but denied the defendant's motion to dismiss the retaliation claim of the other relator, who was terminated from his job.

Failure to State a Claim/Plead Fraud with Particularity

The defendant contended that the relators failed to plead their fraud claims with particularity, saying that the relators did not describe how the defendant's alleged billing practices resulted in improper charges to the government, and that the relators did not identify which government contracts were affected by the defendant's alleged fraud scheme, and how those contracts were affected. The relators countered that their complaint described the types of improper charges the defendant billed to the government and detailed how the defendant's time recordation system failed to report accurately the number of labor hours the defendant's employees spent on projects for the government. The relators further asserted that the defendant's billing system violated the defendant's own policies, as well as the Federal Acquisition Regulations (FARs) and the Fair Labor Standards Act (FLSA).

The court agreed with the defendants that the relators' fraud allegations failed to state a claim. First, the court determined that the defendant had not violated its own time-keeping policies, noting that while the relators disagreed with the defendant's reading of the policy, they could not "provide a convincing alternative." In addition, the court held that the defendant's practices did not violate the FARs or the FLSA, observing for example, that the government calculates overtime in a manner similar to the defendant. The court concluded that the relators failed to explain why or how the defendant's alleged conduct—including billing overtime for employees who had not yet worked 40 hours in a week—was fraudulent under applicable regulations. The court, therefore, granted the defendant's motion to dismiss the relators' fraud allegations.

Retaliation

The court then turned to each relator's retaliation claim. The first relator alleged that he had previously been lauded by the defendant for discovering problems with the defendant's time-keeping system, but that after he began emphasizing that the defendant's billing practices were resulting in overpayments from the government, the defendant began investigating him for improprieties. Although the investigation yielded nothing, the first relator alleged that he was subsequently informed that his employment was being terminated—he claimed that the defendant offered no reason for the termination. The defendant argued that the first relator did not plead that he engaged in protected conduct under the False Claims Act or that he was fired in retaliation for any such conduct, and thus, failed to state a claim under the FCA's anti-retaliation provision. The court disagreed, finding that the first relator pled sufficient facts to show that he engaged in protected conduct, as he alleged that he informed management within the defendant corporation on multiple occasions that the billing scheme at issue led to excessive charges on government contracts. In addition, the court determined that the relator pled sufficient facts to show a causal connection between his protected conduct and his termination. The court based its conclusion on the fact that the relator stated that after he expressed his concerns about overbilling the government to the defendant, the defendant initiated an investigation regarding whether or not he was "fit for duty"—the first such investigation he ever experienced—and that when he was exonerated, he was told that the defendant's human resources vice president would be disappointed. Moreover, the court observed that the first relator was never given a reason for his termination, that he had recently received awards from the defendant for his work, and that his staff disagreed with the defendant's decision. Based on these findings, the court held that the first relator pled adequate facts to state a retaliation claim under the False Claims Act. The defendant's motion to dismiss the first relator's retaliation claim was denied.

The second relator alleged that about a month after the *qui tam* complaint was unsealed, she was informed by the defendant that she would need to assume the job duties of another employee who was leaving the company, with no additional compensation. She alleged that she had previously performed those job duties and had made it clear to her superiors that she was not interested in re-assuming that work. She stated that her attorney informed the defendant that her new assignment amounted to a constructive discharge, and that when the defendant failed to respond to the attorney's letter, she tendered her resignation. The defendant argued that the second relator was not constructively discharged and that her reassignment did not amount to an adverse employment action. The court agreed with the defendant that the second relator did not allege sufficient facts to show that her reassignment was an objectively adverse action, since she could not show that the reassignment "altered the compensation, terms, conditions, or privileges of her employment," or would make her workload unmanageable. The court concluded that "a reasonable employee in [the second relator]'s circumstances would not have found the reassignment of duties adverse, especially considering the outgoing employee's resignation and [the second relator]'s prior experience with the specific duties. Consequently, the court granted the defendant's motion to dismiss the second relator's retaliation claim.

U.S. ex rel. McLain v. KBR, Inc., 2013 WL 710900 (E.D. Va. Feb. 27, 2013)

A relator brought an action under the False Claims Act against his former employer—the United States Army's largest contractor—alleging that the company defrauded the government on a contract to provide combat support and combat service support in Iraq. The defendant hired the relator to work as an electrician, and he alleged that when he arrived to the work site, he noticed that there was no equipment available to perform necessary testing in accordance with the terms of the defendant's contract with the Army. He further claimed that although he made the defendant aware of the problem, nothing was done to fix it for the two-year period he was at the site. Instead, the relator alleged, the defendant began producing documents that falsely indicated that the defendant had implemented a new testing program, although the defendant had not performed any such testing and did not have the equipment to do so. Subsequently, the defendant conducted an internal assessment in preparation for a government audit, and the assessment revealed multiple deficiencies, which caused the defendant to develop a corrective measures plan. In response to the announcement of the defendant's new plan, the relator alleged that he notified his supervisors of the history of other deficiencies. Soon after, the relator was terminated from his job. Afterwards, he alleged that he learned about other failures by the defendant to comply with the requirements of its government contract, including unresolved testing problems at another work site in Iraq. The relator then filed his *qui tam* suit. The defendant moved to dismiss the action, arguing that the relator failed to state a claim under the False Claims Act and failed to plead his fraud allegations with particularity, as required by Federal Rule of Civil Procedure 9(b).

Holding: The U.S. District Court for the Eastern District of Virginia granted the defendant's motion to dismiss, on both grounds.

Failure to State a Claim

First, the court considered the defendant's argument that the relator's allegations failed to state a claim under the FCA. The court observed that, in order to maintain a fraud claim under the False Claims Act, plaintiffs must demonstrate four elements: (1) that there was a false statement or a fraudulent course of conduct; (2) that the false statement or misconduct was carried out with the requisite scienter; (3) the false statement or misconduct was material to the government's payment decision; and (4) the false statement or fraudulent conduct caused the government to pay out money or to forfeit money it was due. The court further noted that the relator's claim could only fall into one of two categories—the claim was either based on a fraudulent inducement theory of liability or it was based on a false certification theory of liability. The court noted that the four elements described above apply to both theories.

The court determined that the relator's allegations did not state a claim under the fraudulent inducement theory, because he failed to allege that the defendant submitted a false claim for payment to the government, which the court stated is "the central question in an FCA case." While the court noted that the relator alleged that the defendant falsified reports to show that certain had testing occurred when it had not, that allegation was not sufficient to overcome the defendant's motion to dismiss, since the relator did not link the allegation to the submission of an actual claim to the government. The court further determined that the relator's allegations could not support a claim under the false certification theory either, noting that the relator failed to allege that payments to the defendant were conditioned upon the defendant's certifications of compliance with various testing requirements. The court observed that the relator conceded that the defendant's allegedly false testing reports only went to the defendant's internal quality control officials and never made it to the government officials who processed the defendant's claims for payment. In addition, the court noted that, unlike some other circuit courts, the Fourth Circuit does not recognize an "implied false certification" theory of FCA liability, which could have subjected the defendant to liability for merely accepting payment from the government that it knew it was not eligible to receive. Moreover, the court held that the relator's allegations did not state an FCA claim because the relator could not show that any of the defendant's alleged false representations were material to the government's payment decisions, since the relator could not demonstrate that the defendant's alleged false statements regarding testing ever made it to the government.

The court granted the defendant's motion to dismiss the relator's complaint for failure to state a claim.

Failure to Plead Fraud with Particularity

The court then turned to the defendant's argument that the relator's allegations did not plead the alleged fraud scheme with particularity. The court agreed, again noting that the relator failed to allege the existence of a false claim submitted by the defendants. The relator, relying on caselaw from outside the Fourth Circuit, argued for a relaxed pleading standard in that regard, but the court rejected that argument, stating that "the Complaint's deficiency is not a failure to produce invoices but rather a failure to plead any specific payments or claims by [the defendant] or even sufficient facts to infer the existence of such a scheme." As the court held that the relator's only substantive allegation is that the defendant falsified test reports—not that the defendant submitted false claims to the government for payment that were based on falsified test reports—the court held that the relator's complaint failed to satisfy Rule 9(b)'s pleading requirements. Consequently, the court granted the defendant's motion to dismiss the relator's complaint for failure to plead fraud with particularity.

U.S. ex rel. Zeman v. USC Univ. Hosp., 2013 WL 603920 (C.D. Cal. Feb. 19, 2013)

A Medicare patient filed a *qui tam* complaint in which she alleged that a hospital submitted false Medicare claims. More specifically, the relator alleged that she underwent a series of foot surgeries at the hospital and subsequently received bills for post-operative visits within 90 days of a surgery and for medical services that were not provided at a hospital facility—both of which the relator alleged violated Medicare regulations. The hospital moved to dismiss the relator's complaint, arguing that the relator did not state a claim for relief under the False Claims Act.

Holding: The U.S. District Court for the Central District of California granted the defendant's motion and dismissed the relator's complaint. The court, however, granted the relator leave to amend the complaint.

The court stated that "[i]t is a fairly obvious notion that a False Claims Act suit requires a false claim," and held that the relator's complaint failed to state a claim because it "[did] not allege that the Hospital submitted any claims to the United States." The court noted that the fact that the relator was a Medicare patient and received bills from the hospital "[did] not necessarily establish that the service was covered by Medicare in the first instance or indicate that the Hospital submitted any claims, let alone false or fraudulent claims, to the United States."

LITIGATION DEVELOPMENTS

A. Calculating Damages and Civil Penalties

United States v. Anchor Mortgage Corp., 2013 WL 1150213 (7th Cir. Mar. 21, 2013)

The United States alleged that a mortgage company and its CEO violated the False Claims Act by fraudulently applying for federal loan guarantees. Following a bench trial, the U.S. District Court for the Northern District of Illinois found the defendants liable and ordered them to pay the government about $2.7 million in treble damages and civil penalties. The defendants appealed the district court's decision to the U.S. Court of Appeals for the Seventh Circuit, arguing that they did not possess the state of mind required for FCA liability. They contended that the district court inferred their knowledge of the alleged fraud, and that the district court's finding was clearly erroneous. The defendants also argued that the district court erred by calculating treble damages using a gross approach.

Holding: The Seventh Circuit affirmed the district court's finding of liability, but reversed and remanded the district court's damages calculation and instructed the district court to apply net trebling.

With respect to the defendants' FCA liability, the circuit court determined that the defendants submitted two types of false statements to the government—false certifications that borrowers' relatives had supplied down payments, as well as misrepresentations regarding the fact that the mortgage company had paid for client referrals. The defendants argued that the CEO has no knowledge of the allegedly false certifications, and therefore, they were not subject to FCA liability. The circuit court, though, agreed with the district court's finding that since the head of one of the mortgage company's branches was made aware of the alleged fraud as part of his job duties—this employee was alleged to have submitted at least some of the false certifications in question to the government—his knowledge of the alleged fraud could be imputed to the company, to establish FCA liability. Similarly, the appeals court rejected the defendants' argument that the company's CEO did not knowingly misrepresent improper referral fees. The CEO asserted that he believed that the referral payments were proper under applicable federal regulations that allow for compensation of certain joint ventures, called "controlled business arrangements," but the circuit court affirmed the district court's holding that the CEO actually knew that no such business relationship had been established, since the final paperwork had never been signed. Moreover, the circuit court agreed with the district court that even if a controlled business arrangement existed, the referral fees at issue were still improper, since those payments were made to a dif-

ferent entity than the purported joint venture. Consequently, the Seventh Circuit affirmed the district court's finding of liability.

The circuit court then turned to the district court's damages assessment. The defendants first claimed that the CEO reported some of the mortgage company's false submissions, and therefore argued that any FCA liability should be limited to double damages, pursuant to the FCA's provision that reduces liability when a fraud is self-disclosed. They argued that the district court erred when it imposes treble damages. The circuit court affirmed the district court's ruling, stating that the FCA "does not cap damages for *every* violation just because *any* violation has been reported." (emphasis in original) In addition, the court determined that the United States gave the defendants credit for self-reporting some of the false claims, by not seeking any civil penalty for those false claims. The Seventh Circuit therefore held that the district court did not err when it imposed treble damages with respect to the false claims that the defendants did not self-report. The defendants then argued that the district court erred by trebling the government's gross damages, as opposed to the government's net damages. They claimed that the real estate mortgaged as security for the loans in question was sold, resulting in recoveries for the government, and that the district court should have subtracted the amounts the United States realized from the sale of that collateral before—not after—trebling the government's damages. The circuit court ultimately agreed with the defendants regarding this point, noting that the False Claims Act does not specify either a gross trebling or net trebling approach, but that net trebling is the norm when calculating damages, as it recognizes the "almost universal" doctrine on mitigation of damages. Consequently, the Seventh Circuit remanded the damages calculation issue to the district court, with instructions "to recalculate the award under the net trebling approach."

B. Costs and Attorneys' Fees

U.S. ex rel. Perez v. Williams, 2013 WL 1181487 (N.D. Ill. Mar. 19, 2013)

A *qui tam* relator filed suit against her landlord, alleging that the defendant collected excess security deposit and rent amounts in violation of the False Claims Act, a city ordinance, and state law. The United States declined to intervene in the relator's suit. The relator then tried unsuccessfully to serve her complaint on the defendant multiple times. Eventually, the U.S. District Court for the Northern District of Illinois entered a default judgment against the defendant and determined that the defendant committed 26 violations of the False Claims Act, among other violations. The relator was awarded more than $90,000—representing 30% of the civil penalties and damages awarded to the United States pursuant to the FCA claim. The relator then timely filed a petition seeking attorneys' fees and costs, pursuant to the FCA's fee-shifting provision. The defendant did not object to the relator's fee petition. The court then considered the petition.

The relator's fee petition sought attorneys' fees for three attorneys, totaling nearly $37,000. The court applied the lodestar method to determine whether the attorneys' fees were reasonable, based on the attorneys' respective hourly rates and the number of hours they expended. The court held that each attorneys' hourly fee was reasonable, based on the attorneys' experience levels and the prevailing market rate in their community—Chicago. However, the court determined that the senior-most attorney on the relator's team—a lawyer who had more than 28 years of experience while working on the relator's case—claimed fees for several tasks that are usually performed by attorneys with less experience and skill, or by non-attorneys. These tasks included handling mail, uploading materials, scanning and preparing exhibits, and downloading time records and case management notes. The court reduced this attorney's total hours by 5.2 hours to account for these tasks. In addition, the court reduced that attorney's hours by another 1.3 hours, to account for time spent drafting duplicative motions. The court accepted the hourly rates and number of hours submitted by the relator's other two attorneys without any adjustment.

The court also granted the request for more than $1000 in costs, to cover court costs and expenses the relator incurred while trying to serve her complaint on the defendant.

C. False Certifications of Compliance

U.S. ex rel. Osheroff v. Tenet Healthcare Corp., 2013 WL 1289260 (S.D. Fla. Mar. 27, 2013)

A relator filed a *qui tam* complaint alleging that a healthcare company violated the Anti-Kickback Statute and the Stark Law, which in turn resulted in the submission of false Medicare and Medicaid claims. Specifically, the relator alleged that the in addition to providing healthcare services, the defendant leased space to physicians in several of its medical office buildings. The relator claimed that the defendant offered different leases to doctors, based on whether the doctors referred patients to the defendant—doctors who provided referrals were offered leases at rates below fair market value. The relator alleged that the defendant's leasing practices violated the Anti-Kickback Statute and the Stark Law, and that all the defendant's Medicare and Medicaid claims that stemmed from those violations were false, for False Claims Act purposes. The defendant moved to dismiss the relators' claims, arguing that the relator failed to state a claim under the FCA, since: (1) his allegations of Stark and Anti-Kickback Act violations alone did not establish that they knowingly defrauded Medicare and Medicaid; (2) he did not allege a benchmark of fair market value for the defendant's rental space; and (3) he did not adequately plead that the defendant attempted to induce its physician-tenants to refer Medicare and Medicaid patients back to the defendant.

Holding: The U.S. District Court for the Southern District of Florida denied the defendant's motion.

False Certifications of Compliance

The relator argued that the defendant's healthcare claims to the government were false because they included the defendant's false certification of compliance with the Anti-Kickback Statute and the Stark Law. The relator alleged that the defendant falsely certified compliance in three ways: (1) in past corporate integrity agreements with the U.S. government; in the defendant's provider agreement and application for enrollment in the Medicare program; and (3) in annual hospital cost reports. The court held that the relator's claims based on the defendant's alleged misrepresentations in its provider application and agreement and in its cost reports were sufficient to state a claim for relief under the FCA.

With respect to the provider application and agreement, the court, relying on Eleventh Circuit precedent, explained that "[t]he language contained in the Provider Agreement makes readily apparent that the federal Medicare program will not pay claims if the underlying transaction that gave rise to the claim violated the Anti-Kickback Statute or Stark. Thus, if a healthcare provider requests payment from Medicare notwithstanding the fact that the transactions underlying the claims were in violation of the Anti-Kickback Statute and Stark, the healthcare provider has committed a fraud against the government." The defendant argued that its provider application and agreement amounted to nothing more than promises of future compliance, and that it could not be held liable under the FCA on that basis. But the court noted that the defendant's promise not only allowed the defendant to participate in Medicare—it also was "a prerequisite and the *sine qua non* of federal funding." Thus, the court held that the defendant's representations in its provider application and agreement could serve as the basis for FCA liability. The relator also argued that the defendant falsely certified its compliance with all applicable healthcare laws and regulations when it submitted annual hospital cost reports to the government. The defendant argued that the wording contained in its cost reports was too broadly worded to constitute a certification of compliance with any particular law or regulation, and that allowing such a broad certification to serve as a basis of FCA liability would subject all providers who submit cost reports to FCA liability each time they violate any healthcare law or regulation. The court rejected the defendant's argument, noting that the FCA only imposes liability for materially false statements. The court then held that, at the motion to dismiss stage, it could not determine whether or not the defendant's alleged misrepresentations to the government were material—"*i.e.*, capable of influencing Medicare's decision to pay the claim"—but would draw all reasonable inferences in favor of the relator and accept that the defendant's cost report representations were material to the government and could serve as the basis of FCA liability.

Violations of the Anti-Kickback Statute and the Stark Law

The court then turned to the defendant's argument that the relator could not establish their alleged Anti-Kickback and Stark Law violations, because he did not plead with particularity a benchmark fair market value with which the defendant's leases could be compared. The court, though, held that the relator's complaint included enough facts to lead one to reasonably infer that the defendant entered into below-market-rate leases with referring physicians. In fact, the court observed that the relator provided specific examples of the defendant misrepresenting the square footage of the office space it leased to referring physicians, so as to reduce the price per square foot those tenants paid. In addition, the relator based his claims on empirical analysis he undertook, which indicated that in various U.S. markets, the defendant charged its referring physician-tenants far less than the average prices in those markets. Ultimately, the court held that the relator may, at some point, be required to plead a benchmark fair market value in order to prove his claims. But at the motion to dismiss stage, the court stated that it was not its role to "weigh the merits of Relator's and [the defendant]'s respective positions." Thus, the court accepted the relator's allegations as true, for purposes of the defendant's motion to dismiss.

The court then held that the relator adequately pled that the defendants knowingly engaged in its alleged illegal leasing practices in order to induce physician-tenants to refer Medicare and Medicaid patients to the defendant, and that physicians actually were induced to refer such patients to the defendant. First, the court declared that the relator was not required to allege that the defendant's physician-tenants were induced to refer patients to the defendant; rather, the relator was only required to allege that the defendant knowingly offered tenant below-market rates as an inducement to make improper referrals. The court determined that the relator satisfied that requirement by alleging that the defendant engaged in its leasing practices, at least in part, to induce physicians to make patient referrals, and that the relator made specific allegations that non-referring physicians were required to pay a higher price per square foot than referring-physicians. The court determined that these allegations were sufficient to support the relator's claim that the defendant violated the Anti-Kickback and Stark Laws, since it was reasonable to infer "that a landlord would not enter into a lease agreement for a price that fell below the fair market rate if some other consideration were not involved."

The defendant's motion to dismiss was denied.

See *Glynn v. EDO Corp.*, 2013 WL 1150523 (4th Cir. Mar. 21, 2013), at page 22.

See *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 2013 WL 1149255 (M.D. Fla. Mar. 19, 2013), at page 51.

See *Winston v. Academi Training Ctr., Inc.*, 2013 WL 989999 (E.D. Va. Mar. 13, 2013), at page 26.

See *U.S. ex rel. Lisitza v. Par Pharm. Cos., Inc.*, 2013 WL 870623 (N.D. Ill. Mar. 7, 2013), at page 54.

See *U.S. ex rel. Pecanic v. Sumitomo Elec. Interconnect Prods., Inc.*, 2013 WL 774177 (S.D. Cal. Feb. 28, 2013), at page 60.

See *U.S. ex rel. McLain v. KBR, Inc.*, 2013 WL 710900 (E.D. Va. Feb. 27, 2013), at page 85.

See *U.S. ex rel. Lockey v. City of Dallas, TX*, 2013 WL 268371 (N.D. Tex. Jan. 23, 2013), at page 15.

See *U.S. ex rel. Long v. GSD & M Idea City LLC*, 2013 WL 214590 (N.D. Tex. Jan 18, 2013), at page 67.

See *U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc.*, 2013 WL 146048 (M.D. Tenn. Jan. 14, 2013), at page 69.

D. FCA Seal/Service Issues

U.S. ex rel. Griffith v. Conn, 2013 WL 620259 (E.D. Ky. Feb. 19, 2013)

Two relators brought a *qui tam* action against an administrative law judge for the Social Security Administration and an attorney, alleging that the defendants conducted sham proceedings for the attorney's clients—resulting in the clients receiving benefits to which they were not entitled—and then the attorney collected attorney's fees for the claims. After receiving five extensions of the seal on the relators' complaint, the United States declined to intervene in the relators' suit. The government then moved for a 60-day stay of the proceedings.

Holding: The U.S. District Court for the Eastern District of Kentucky denied the government's motion for a stay of the proceedings.

The court held that, under the False Claims Act, once the United States declines to intervene in a *qui tam* suit, the relator takes over the case; the United States is not a party to a *qui tam* suit unless it intervenes. The court further held that although the False Claims Act grants the United States some rights even when it declines to intervene in a *qui tam* suit, the statute does not grant the government the right to seek a stay of an entire *qui tam* action. The government argued that the court need not look to the False Claims Act, and instead has inherent authority to stay any litigation on its docket. The court, though, held that the United States is not authorized to ask the court for a stay. Consequently, the court denied the government's request.

E. Leave to Amend *Qui Tam* Complaint

U.S. ex rel. Sharp v. Eastern Okla. Orthopedic Ctr., 2013 WL 766183 (N.D. Okla. Feb. 28, 2013)

A relator filed a *qui tam* suit alleging that a medical facility violated the False Claims Act by presenting false claims to the government, using false records to get false claims paid by the government, using false records to conceal its obligations to the government, and discharging her from her job in retaliation for her whistle-blowing activity. The relator later moved for leave to amend her complaint, to add more FCA violations stemming from the defendant's alleged failure to include appropriate code information when submitting Medicare claims to the government. In the alternative, the relator moved the court to conform her complaint to include the additional claim, arguing that the defendant had impliedly consented to the inclusion of that claim.

Holding: The U.S. District Court for the Northern District of Oklahoma denied the relator's motion.

The court noted that, pursuant to Federal Rule of Civil Procedure 15(a)(2), courts should freely grant parties leave to amend when justice requires. However, the court also noted that motions for leave to amend pleadings should be denied upon a "showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." The court examined these elements and then denied the relator's motion to amend. The court found that the relator's motion for leave to amend was filed "nearly seventeen months after the deadline for amendments to the pleadings and six months after the deadline for discovery." The court held that the relator's delay in filing her motion was "undue," since the relator failed to explain her untimeliness, and even conceded that her new allegation was not based on recently discovered evidence, but rather, on information that she'd possessed for at least two years.

In addition, the court denied the relator's attempt to amend her complaint through a motion to conform the complaint to the evidence. In denying this request, the court noted that Federal Rule of Civil Procedure 15(b)(2) provides two mechanisms by which plaintiffs may amend a complaint to conform to the evidence: (1) when "an issue not raised by the pleadings is tried by the parties' express or implied consent;" and (2) when "the non-moving party cannot demonstrate that it will be prejudiced by the amendment." The court considered each basis in turn.

First, the court rejected the relator's argument that the defendant had impliedly consented to the inclusion of the additional claim. The relator contended that the defendant consented to the additional claim because it conducted discovery regarding the coding allegations at issue and moved for summary judgment on that claim. However, the defendant countered that the relator never asserted a separate claim based on the defendant's allegedly missing codes until included the claim in her motion for summary judgment, and that throughout the litigation, the relator had insisted that the coding issues were encompassed in the claims that she had previously brought. The court agreed with the defendant, finding that the defendant had routinely objected to the introduction of a separate claim based on the code, that the defendant questioned the relator and other deponents about the relevance of the coding issue, and that the relator testified that she was not asserting a separate claim based on the missing code information. The court determined that the defendant did not have a fair opportunity to gather evidence and defend itself against the new allegation, and thus, did not consent to the inclusion of the additional claim.

Next, the court held that allowing the relator to amend her complaint would prejudice the defendant, stating that "[i]f Relator desired to change her strategy, she should have requested amendment much sooner," but instead waited for more than two years to do so. The court held that the fact that the defendant questioned the relator regarding the missing codes did not demonstrate a lack of prejudice to the defendant, since those questions were asked in the context of the relator's existing claims, due to the relator's insistence that the allegedly missing codes did not give rise to a separate claim. Consequently, the court denied the relator's request.

U.S. ex rel. Kirk v. Schindler Elevator Corp., 2013 WL 655080 (S.D.N.Y. Feb. 22, 2013)

A relator brought a *qui tam* action in the U.S. District Court for the Southern District of New York, alleging that an elevator company violated the False Claims Act by knowingly filing false reports with the U.S. Department of Labor regarding its eligibility for government contract opportunities reserved for companies that employed certain required numbers of Vietnam War veterans. The relator had previously alleged that the defendant not only filed false reports, but had also failed to file reports altogether—although the reports were required—for various years. The relator's failure-to-file allegations were ultimately dismissed, however, after the district court determined that those claims were precluded by the False Claims Act's public disclosure bar provision, namely, the relator's FOIA requests to the Labor Department. The U.S. Court of Appeals for the Second Circuit vacated the district court's order, but the U.S. Supreme Court agreed with the district court and the claims were dismissed. The case was remanded to the district court for resolution of the relator's allegations that the defendant filed false labor reports. The relator then moved to amend his complaint to provide additional specificity and evidence demonstrating why the defendant's reports were false, and to restate some of his prior failure-to-file claims to reflect newly discovered evidence that for some of those years the defendant actually filed false reports as well. The defen-

dant opposed the relator's motion for leave to amend his complaint, arguing that the relator was acting in bad faith, that the amendments were being offered after an unreasonable delay that resulted in undue prejudice to the defendant, and that the amendments were futile because the relator's current complaint was subject to dismissal for failing to state a claim.

Holding: The U.S. District Court for the Southern District of New York granted the relator's motion for leave to amend his complaint.

Leave to Amend

The defendant had argued that the proposed amendments were offered in bad faith, claiming that the relator failed to make use of documents already in his possession that contradicted his assertions regarding the manner in which the defendant acquired and submitted information regarding employees' veteran status. The court rejected that argument, finding that the relator was not bound by the defendant's characterization of the documents, since at the motion to dismiss stage all reasonable inferences must be made in the relator's favor. In addition, the court held that relator's delay in moving to amend his complaint was not undue and did not unduly prejudice the defendant either. The court noted that although four and one half years passed between the filing of the relator' operative complaint and his motion to amend it, the delay was not unreasonable, since the relator's action was moving through the circuit and Supreme Court stages, and then back to the district court—and discovery had been stayed that entire time, resulting in the relator not receiving documents on which his new claims were based. Similarly, since the defendant had not yet provided any discovery to the relator, the court held that the defendant was not unduly prejudiced by the relator's motion.

The court then turned to the defendant's argument that the relator's proposed amendments were not futile. The defendant's futility argument was based on its claims that: (1) the relator's new allegations did not relate back to the relator's earlier pleadings, and thus, were untimely; (2) all of the relator's claims were preempted because the U.S. Department of Labor had primary jurisdiction over the defendant's alleged non-compliance with applicable regulations, and that the Labor Department had already investigated the relator's claims in an administrative proceeding; (3) all of the relator's claims were implausible on their face and subject to dismissal as a matter of law; and (4) none of the relator's claims were pled with particularity.

First, the court held that the relator's new claims did relate back to his earlier pleadings, holding that the new claims did not constitute a new, distinct set of facts as the defendant had argued; instead, the court found that the "general fact situation alleged in the original pleading certainly provided [the defendant] with adequate notice of the matters raised" in the proposed amended complaint. Thus, the court held that the relator's new claims were timely. Next, the court held that the Department of Labor did not have primary jurisdiction over the defendant's alleged noncompliance with labor regulations. The court, though, concluded that the question at issue was whether or not the defendant was so far out of compliance with applicable regulations that its claims for payment under government programs were false—and noted that courts routinely adjudicate such issues. The court held that the primary jurisdiction doctrine was inapplicable, finding that courts have generally declined to invoke the doctrine in the context of False Claims Act cases, even when resolving an FCA case might require interpretation of a regulatory scheme that is governed by an administrative agency. The court further found that the relator was estopped from bringing his claims merely because he made a prior complaint to the Labor Department that resulted in an investigation. The court held that the agency's investigation could not estop the relator since it did not amount to an "adjudication," as "there was no hearing, no testimony, no subpoenaed evidence, no argument, [and] no opportunity to test any contention by confrontation."

The court then held that the relator's claims were plausible, again referencing the defendant's argument that certain documents in the relator's possession undermined his claims that the defendant knowingly submitted false reports to the government—the defendant argued that the relator's allegation that it failed to implement a system to track the number of veterans it employed resulted in the defendant failing to report veterans that it did employ, which the defendant argued was inconsistent with the relator's allegations. The court held that the documents relied on by the defendant did not render the relator's claims implausible, noting that the relator presented other evidence in support of his claims and claimed to have personal knowledge that contradicted the defendant's characterization of the documents at issue. Lastly, the court held that the relator's claims had been pled with particularity, observing that the relator pled sufficient facts to support his allegation that the defendant's reports to the government were contrived and that the defendant recklessly disregarded or deliberately ignored the truth or falsity of its reports—which could have resulted in the defendant actually under-reporting the number of veterans it employed—because the defendant wanted to save the money required to devise and implement a mechanism for accurately counting and reporting veterans.

As a result of these findings, the court granted the relator's motion for leave to amend his complaint to add new claims.

F. Relators' Share Issues

U.S. ex rel. Roberts v. Accenture, LLP, 2013 WL 764734 (8th Cir. Mar. 1, 2013)

Two relators filed a *qui tam* action against a group of technology companies, alleging that the defendants engaged in two fraudulent schemes with respect to the sale of computer equipment to the United States, namely a defective pricing scheme and an illegal kickbacks scheme. They alleged that these frauds cost the government hundreds of millions of dollars. The United States intervened in the relators' suit and reached a $55 million settlement with one of the defendants. Of the settlement amount, $9 million was attributed to the kickbacks scheme, and $46 million was allocated to the defective pricing scheme. Following the settlement, the relators sought a share of the government's recovery and the U.S. District Court for the Eastern District of Arkansas awarded the relators a 21% share of the kickback settlement and a 15% share of the defective pricing settlement. The United States appealed the district court's award with respect to the defective pricing claim, arguing that the relators' defective pricing allegations were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b), and therefore could not serve as a basis for rewarding the relators. In addition, the government contended that the settlement did not resolve the relators' defective pricing claim, but rather, resolved different claims that only arose after the settling defendant made a voluntary self-disclosure to the government and the government conducted its own separate investigation.

Holding: In a 2-1 decision, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's ruling.

Relators' Share

The circuit court found that the defendant who self-disclosed defective pricing fraud to the government only conducted its internal audit after learning of the relators' *qui tam* allegations and responding to extensive subpoenas the relators drafted at the government's request. Consequently, the appeals court determined that the settling defendant's self-disclosure was not purely voluntary and that he government's attempt to minimize the relators' role in uncovering the fraud was unwarranted. Addressing the government's Rule 9(b) argument, the appellate court stated:

> We reject the contention that Rule 9(b) plays a part in determining whether a relator is entitled to share in the settlement proceeds resulting from a *qui tam* action in which the government elects to intervene. Rule 9(b)'s standards are meant to test the sufficiency of a complaint at its outset. If a defendant challenges the sufficiency of a

> complaint's allegations at the outset of a case, a plaintiff still has the opportunity to cure the deficiency. In contrast, section 3730(d) [the FCA's section that provides for relators' shares] only comes into play at the conclusion of a case, after the action has already proceeded to a judgment or settlement. If the government is allowed to contend at the conclusion of a case that a relator's initial allegations were insufficient, even though the government implicitly acknowledged the legal sufficiency of the pleadings by choosing to intervene, the relator no longer has the opportunity to cure the deficiency. We find nothing in the FCA's statutory text to support this type of *post hoc* use of Rule 9(b) to deny a relator the right to a share of the settlement proceeds in an action in which the government intervenes.

In addition, the Eighth Circuit affirmed the district court's holding that the pricing scheme alleged by the relators was the same as that settled by the government, noting that the fact that the claim was more fully developed after the government intervened in the relators' suit was not sufficient to deprive the relators of a share of the government's recovery. The court further noted that the government had not commenced an investigation into the settling defendant's pricing scheme; the government chose to intervene in the relator's suit; there was a temporal connection between the relators' subpoenas and the settling defendant's internal investigation; and the settlement was reached in the relators' action. As a result of these findings, the court reasoned that the relators' *qui tam* suit served its intended purpose, as it provided the government with sufficient information to pursue an investigation into allegedly fraudulent practices. The Eighth Circuit affirmed the district court's award to the relators.

U.S. ex rel. Saidiani v. Next Care, Inc., 2013 WL 431828 (W.D.N.C. Feb. 4, 2013)

Relator 1 filed a *qui tam* suit on behalf of the United States, alleging that a healthcare company and several of its affiliates violated the False Claims Act by billing the federal healthcare programs for unnecessary medical tests. The federal government investigated the relator's claims and began settlement discussions with the defendants. Relator 1 eventually filed an amended complaint to add causes of action under multiple state false claims act statutes. On the same day that Relator 1's amended complaint was filed, Relator 2 filed a *qui tam* complaint against the same defendants, on behalf of the United States and on behalf of several states—including the states represented in Relator 1's suit. The United States, the state attorneys general involved and the defendants entered in settlement talks to resolve the federal and state claims. The two relators participated in those discussions, and after a settlement was reached, the United States intervened in and dismissed Relator 1's suit. Since Relator 1's *qui tam* action was filed first, Relator 1 was awarded a share

of the governments' $10 million recovery. In addition, the defendants paid Relator 1's costs and attorneys' fees, pursuant to the statutes' fee-shifting provisions. The United States also intervened in Relator 2's suit for the purpose of dismissing the action, given the settlement. Relator 2 then moved for his attorneys' fees and costs.

The U.S. District Court for the Western District of North Carolina denied Relator 2's request, finding that the federal and state false claims act statutes only allow relators who have obtained a relator's share following a court award or settlement to collect attorneys' fees and costs from a defendant. Since Relator 2 was not awarded a share of the governments' recovery, the court held that he was not entitled to recover his attorneys' fees and costs. Relator 2 argued that he should be entitled to recover his attorneys' fees and costs because he did share in the governments' recovery, as he and Relator 1 reached a separate agreement between themselves to share any proceeds from the litigation—thus, Relator 2 received a percentage of Relator 1's award. The court rejected that argument, which was not supported by caselaw, and held that Relator 2 "is not a successful Relator who has secured a Relator's share through the Settlement Agreements entered into with the federal and state governments. The fact that he may have received a share of the proceeds through a separate private agreement with [Relator 1] does not change this conclusion."

U.S. ex rel. Babalola v. Sharma, 2013 WL 431821 (S.D. Tex. Feb. 1, 2013)

Two relators brought a *qui tam* suit on behalf of the United States and the State of Texas, alleging that two physicians and several healthcare facilities they operated fraudulently billed Medicare and Medicaid for patient visits and medical services that never occurred, and for medically unnecessary tests. Both relators previously worked for the two physicians. Nine months before the relators filed their suit, the United States obtained an indictment against the two physicians, both of whom pleaded guilty to conspiracy and healthcare fraud charges. The physicians were ordered to pay criminal restitution, but the district court's order was vacated by the circuit court and the matter was remanded for a re-calculation of the restitution amount. The United States declined to intervene in the relator's suit and moved for a summary judgment determination that the relators were not entitled to a share of the physicians' criminal restitution payment, and were restricted to any recovery they might receive in their *qui tam* action. The relators opposed the government's motion, arguing that they were entitled to a share of the criminal restitution payment, pursuant to the False Claims Act's "alternate remedy" provision.

Holding: The U.S. District Court for the Southern District of Texas granted the government's summary judgment motion and held that the relators were not entitled to a share of the criminal restitution payment.

Alternate Remedies

The False Claims Act's "alternate remedy" provision—31 USC § 3730(c)(5)—recognizes the government's ability to "pursue its claim through any alternate remedy available to the Government, including an administrative proceeding to determine a civil money penalty." However, should the government resolve *qui tam* claims through an alternate means, then the relator who filed the *qui tam* case "shall have the same rights in such proceeding as such person would have had" if the *qui tam* action would have continued. The government urged the district court not to address the question of whether criminal actions are "alternate remedies" for purposes of the False Claims Act, arguing that such an analysis was unnecessary. Instead, the government argued that the alternate remedy provision was not implicated in this case, and contended that the government could not have "pursue[d] its claim through any alternate remedy," in lieu of joining the relators' *qui tam* suit, because the *qui tam* complaint was not filed until November 2011 (note that the court's opinion includes a typographical error and incorrectly states that the *qui tam* complaint was filed in 2001, not 2011), well after the physicians were criminally convicted (2010) and ordered to pay restitution (February 2011). The relators countered that criminal proceedings are indeed alternate remedies under the FCA, and further asserted that the alternate remedy provision was triggered in their suit, since their *qui tam* complaint was filed before the government's judgment in the criminal proceeding became final—they argued that the judgment was not final because the proper restitution amount had not yet been determined.

The district court agreed with the relators that the judgment in the physicians' criminal case was not yet final, but held that this was not a determinative factor, since application of the FCA's alternate remedy provision "does not depend on whether a judgment is final but on the sequence of the *qui tam* complaint and the United States' election to pursue a non-FCA remedy." After analyzing the plain language of the alternate remedy provision, the court concluded that § 3730(c)(5) establishes a "required sequence of actions," which begins with the filing of a *qui tam* suit, followed by the government seeking to pursue its claim through some other means "notwithstanding" the *qui tam* action. Moreover, the court noted that under the alternate remedy provision, relators retain the same rights in alternate proceedings that they would have had if their *qui tam* actions had resolved the claims, and held that the relators had no rights to retain in the criminal proceeding, since they had not yet filed their *qui tam* suit. Thus, the court held that the alternate remedy provision is only triggered when the United States chooses an alternative to joining a *qui tam* suit, stating that "the filing of a valid *qui tam* action is a prerequisite to the operation of the 'alternate remedy' provision." The court stated that while its ruling was in line with decisions from multiple other circuit courts—even though the Fifth Circuit has not yet addressed the issue—the relators did not cite to any caselaw in support of their argument that that relators are entitled to a share of the government's recovery in non-FCA proceedings that occurred before the relators' *qui tam* suits were filed.

As a result of these findings, the court granted the government's motion for summary judgment and ruled that the relators were not entitled to a share of the government's criminal restitution recovery.

Judgments & Settlements

JANUARY 1, 2013–MARCH 31, 2013

CDW-Government LLC (S.D. Ill. Mar. 29, 2013)

CDW-Government LLC, a reseller of information technology and office supplies and equipment, agreed to pay the United States $5.66 million to settle allegations that it submitted false claims with respect to a U.S. General Services Administration contract from 1999 to 2011. According to the settlement, CDW sold products to the United States that were manufactured in countries prohibited by the Trade Agreements Act, underreported sales in order to avoid paying a GSA administrative fee, and improperly charged government purchasers for shipping. The settlement resolves a lawsuit filed by former CDW sales representative John Liotine, who will receive $1.56 million as a whistleblower award. Liotine was represented by TAFEF members Dale Aschemann and Tim Keller of Aschemann Keller, LLC, as well as Jim Helmer, Paul Martins and Robert Rice of Helmer, Martins, Rice & Popham Co., LPA.

California Board of Regents (C.D. Cal. Mar. 27, 2013)

California Board of Regents has agreed to pay the United States $1.2 million to settle allegations that the University of California-Irvine (UCI) performed anesthesia services in a manner inconsistent with federal healthcare program documentation requirements. Allegedly, anesthesia was routinely administered at UCI by Certified Registered Nurse Anesthetists or residents, but without a required supervisory anesthesiologist present or available—in some instances, the supervisor was alleged to have been in a different building during the procedures, and anesthesia records were completed in advance to make it appear as though the supervisor was present. In addition, post-operative evaluations were allegedly routinely performed by unsupervised or unlicensed residents, in violation of federal regulations. The settlement resolved a *qui tam* suit was filed by UCI Professor and Anesthesiologist Dr. Dennis O'Connor, who will receive $120,000 for his role in the proceedings in securing the government's recovery. O'Connor was represented by TAFEF members Louis Cohen, of Louis J. Cohen, PC; Mark Simpson of the Simpson Law Firm, LLC; and Michael Sullivan of Finch McCranie LLP.

Caddell Construction (M.D. Ala. Mar. 25, 2013)

Alabama-based Caddell Construction agreed to pay the United States $1,150,000 to resolve claims that it violated the False Claims Act by falsely reporting to the Army Corps of Engineers that it had hired a Native American-owned company to work on construction projects contracted with the Army Corps between 2003 and 2005. As part of these contracts, Caddell represented that it would hire and mentor Mountain Chief Management Service, a Native American-owned company, under the Department of Defense's Mentor-Protégé and Indian Incentive Programs, which reimburse companies for the time and cost of mentoring disadvantaged businesses. During this time period, Caddell allegedly falsely represented in its invoices and other documents that it was mentoring Mountain Chief, when in reality Mountain Chief was a pass-through entity used by Caddell to claim false payments, while no Mountain Chief employees actually worked on the projects.

Hospice of Arizona L.C., American Hospice Management LLC, and American Hospice Management Holdings LLC (D. Md. Mar. 20, 2013)

Hospice of Arizona L.C., related entity American Hospice Management LLC, and their parent corporation American Hospice Management Holdings LLC agreed to pay the federal government $12 million to resolve allegations that they violated the False Claims Act by submitting false claims to Medicare for ineligible hospice services between September 2002 and December 2010. Allegedly, Hospice of Arizona submitted false Medicare claims for patients who did not need end of life care, of for whom the hospice company billed at a higher reimbursement rate than was lawful. In addition, Hospice of Arizona and its related entities allegedly pressured staff to find patients eligible for Medicare, and discouraged discharging ineligible patients in order to inflate bills to the government. The settlement resolved a lawsuit filed by whistleblower Ellen Momeyer, a former Hospice of Arizona, L.C. employee. Momeyer, who was represented by TAFEF member Andy Stone of Stone Law Firm LLC, will receive a $1.8 million reward.

Techota, LLC (M.D. Ala. Mar. 13, 2013)

Techota, LLC, a home healthcare company, has agreed to pay the United States $150,000 to resolve allegations that it violated the False Claims Act by making false claims for payment to Medicare. Techota allegedly billed Medicare for home health services that were not eligible for reimbursement, not medically reasonable, or not necessary. Under the terms of the settlement, Techota will also enter into a Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services. The case against Techota was initially filed by whistleblower Veronica McDonald, a former Techota employee who will receive $22,500 as her share of the government's recovery. McDonald was represented by TAFEF member Jim Barger of Frosin and Barger.

American Systems Corporation, Anixter International Inc. and Corning Cable Systems LLC (E.D. Va. Mar. 7, 2013)

American Systems Corporation, Anixter International Inc. and Corning Cable Systems LLC—all CIA contractors—agreed to pay the United States $3 million to settle allegations that they violated the False Claims Act and the Anti-Kickback Act by bidding on a CIA contract that was awarded to American Systems in 2009; American Systems allegedly teamed with Anixter to bid on the contract, while using Corning as a supplier. Allegedly, the three contractors provided meals, entertainment, and gifts to CIA employees in order to influence contract specifications in their favor. The lawsuit against the companies was initiated by a former Anixter sales representative, William Jones, who will receive an $585,000 reward for his role as whistleblower. Jones was represented by TAFEF members Stephen Hasegawa and Colette Matzzie of Phillips & Cohen LLP.

Mohanbhai Ramchandani and Mohan's Custom Tailors (S.D.N.Y. Mar. 5, 2013)

Mohanbhai Ramchandani, a tailor commonly known as "Mohan," of Mohan's Custom Tailors, has agreed to pay $5.5 million in back taxes and penalties to settle allegations that he knowingly failed to pay at least $1.7 million in state and local sales taxes that he nevertheless charged to customers since 2002. In addition, from 2007 to 2009, Mohan allegedly knowingly failed to pay at least $256,000 in state and local personal income taxes as well. The suit was brought by a whistleblower, who was represented by TAFEF members Stephen Weiss and Asa Danes of Seeger Weiss, and who will receive a $1.1 million reward. The settlement marks the first time that the New York State False Claims Act has been used to resolve a tax case.

Par Pharmaceutical Companies, Inc. (D.N.J. Mar. 5, 2013)

Par Pharmaceutical Companies, Inc. pled guilty in federal court and agreed to pay $45 million to resolve its criminal and civil liability regarding its promotion of prescription drug Megace ES for uses that were not covered by the federal health care programs nor were approved as safe and effective by the Food and Drug Administration. The settlement resolves allegations that Par caused false claims to be submitted to Federal healthcare programs by promoting the sale of Megace ES for unapproved uses and improperly targeting sales to elderly nursing home residents with the knowledge that harmful side effects would be increased in an elderly population. Par was fined $18 million and ordered to pay $4.5 million in a criminal forfeiture. The company will also pay $22.5 million to the federal government and various states to resolve its civil liability stemming from false claims act violations. In addition to civil and criminal resolutions, Par will enter into a five-year corporate integrity agreement with the Office of the Inspector General of the Department of Health and Human Services. Michael McKeen and Courtney Combs, former Par sales representatives, were the relators in the *qui tam* suit filed against Par, and they will jointly receive an award of $4.4 million. Combs was represented by TAFEF members Brian Kenney and Tavy Deming of Kenney & McCafferty, LLP.

CH2M Hill Hanford Group Inc. (E.D. Wash. Feb. 28, 2013)

CH2M Hill Hanford Group Inc. has entered into a settlement and non-prosecution agreement with the federal government. Between 1999 and 2008, the company had a contract with the Department of Energy to manage 177 underground storage facilities containing radioactive and hazardous waste, and allegedly allowed hourly employees at the facilities regularly to overstate the hours they worked, which caused the government to overpay on the contract when CH2M management at the facilities submitted claims to the Department of Energy that contained the fraudulently inflated hours. Pursuant to the settlement agreement, the company will pay a total of $18.5 million, will commit an additional $500,000 towards accountability systems, will consent to a corporate monitor, and will continue cooperating with the government's ongoing fraud investigation. The agreement resolves claims initially brought by relator Carl Schroeder, a former employee of CH2M Hill, who was barred from receiving a whistleblower reward because he was criminally convicted as a result of his participation in the fraud.

Fairfax Nursing Center (E.D. Va. Feb. 13, 2013)

Fairfax Nursing Center (FNC), a Virginia-based skilled nursing facility, has agreed to pay $700,000 to resolve allegations that it violated the False Claims Act by submitting false claims to Medicare for non-reimbursable rehabilitation therapy services from January 2007 to December 2010. The company allegedly performed therapy services that were excessive, duplicative, or performed without clear goals or direction in order to capture higher reimbursement rates. The allegations arose from a lawsuit filed by three therapists, Christine Ribik, Nadine Kelly and Stephanie Beauregard, who will collectively receive $122,500 as their share of the government's recovery. The relators were represented by TAFEF member Jim Barger of Frohsin & Barger, LLC.

Steven J. Wasserman (M.D. Fla. Feb. 12, 2013)

Steven J. Wasserman, a dermatologist from Florida, agreed to pay $26.1 million to settle claims that he violated the False Claims Act by accepting illegal kickbacks from Tampa Pathology Laboratory (TPL), and billed Medicare for medically unnecessary services. Starting in 1997, Wasserman allegedly sent biopsy specimens for Medicare patients to TPL for testing, and in exchange, TPL would provide him with a pathology report that made it seem to Medicare that he—not TPL—had performed the work. Wasserman then allegedly billed Medicare for the laboratory's work, and received more than $6 million in Medicare payments until 2005. He also allegedly increased the number of unnecessary skin biopsies and skin surgeries he performed on Medicare patients in order improperly to obtain Medicare reimbursements for them. The False Claims Act suit against Wasserman was filed by whistleblower Alan Freedman, who worked as a pathologist at TPL. Freedman will receive a $4 million reward for his role in reaching the settlement agreement.

St. Luke's-Roosevelt Hospital Center, Continuum Health Partners, Inc. and SLR Psychiatric Associates (S.D.N.Y. Feb. 7, 2013)

St. Luke's-Roosevelt Hospital Center, Continuum Health Partners, Inc., and SLR Psychiatric Associates (collectively, "St. Luke's") agreed to pay the federal government and the State of New York a total of $2.3 million to settle claims that they violated the False Claims Act by improperly billing Medicare and Medicaid for outpatient services at their mental health clinics from 1998 to 2010. During that period, St. Luke's allegedly received reimbursement from Medicare for non-reimbursable costs relating to outpatient psychiatric visits, and improperly billed out-patient psychiatric services to Medicaid. The relator who filed the *qui tam* suit alleging St. Luke's fraud, Lois Dorman, was represented by TAFEF member David Koenigsberg, of Menz Bonner Komar & Koenigsberg LLP.

Catholic Health Initiatives (D. Md. Feb. 7, 2013)

Catholic Health Initiatives, a hospital which has since been sold to the University of Maryland Medical System, has agreed to pay $4.9 million to the federal government and the State of Maryland for overbilling Medicare and Medicaid by keeping patients in the hospital longer than necessary. The alleged overbillings were discovered by a routine audit conducted by the hospital's new ownership, which did not take on the Catholic Health's liabilities when it purchased the hospital in December 2012. Under the terms of the settlement, the federal government will receive $4.75 million and the state of Maryland will be paid $152,406.

Cooper Health System (D.N.J. Jan. 24, 2013)

Cooper Health System has agreed to pay a total of $12.6 million to the United States and the State of New Jersey to settle allegations that it violated the federal False Claims Act and the New Jersey False Claims Act by making improper payments to physicians from October 2004 through December 2010. Cooper was alleged to have recruited outside physicians to serve on the Cooper Heart Institute Advisory Board (CHIAB)—the doctors were paid upwards of $18,000 a year to watch four annual lectures that consisted of pro-Cooper marketing. Allegedly, the payments were designed to induce the physicians to refer patients to Cooper, resulting in violations of federal and state anti-kickback and self-referral laws, and in turn, violations of the false claims act laws. The settlement resolves a *qui tam* suit brought by Nicolas L. DePace, a cardiologist who had been recruited to take part in CHIAB. DePace was represented by TAFEF members Marc Raspanti, Michael Morse, and Pamela Brecht, of Pietragallo Gordon Alfano Bosick & Raspanti, LLP.

Pfizer, Inc. and Endo Pharmaceuticals (W.D. Tex. Jan. 4, 2013)

Pfizer, Inc. and Endo Pharmaceuticals agreed to pay $18.17 million each—a total of $36.34 million—to the State of Texas to settle claims that they defrauded Medicaid by misreporting the price of generic drugs. Under state law, drug manufacturers must file reports with Medicaid that disclose the prices they charge pharmacies or other distributors for their products. Allegedly, Pfizer and Endo Pharmaceuticals improperly reported inflated market prices for their drugs, which caused Medicaid to reimburse pharmacies at vastly inflated rates, thereby unlawfully encouraging pharmacies to purchase Pfizer and Endo products. The alleged improper price reporting was first identified by Ven-A-Care of Florida Keys, Inc., a pharmacy that filed a whistleblower lawsuit against the companies under the Texas Medicaid Fraud Prevention Act. Ven-A-Care of Florida Keys, Inc. was represented by TAFEF member James Breen of the Breen Law Firm.