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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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FROM THE EDITOR

"There is no kind of dishonesty into which otherwise good people more easily and more frequently fall than that of defrauding the government." –Benjamin Franklin, Founding Father

Ben Franklin spoke the words above more than 200 years ago. Unfortunately, those words still ring true today—possibly now more than ever. As our government does more business with private contractors, more and more "good people" will be faced with opportunities to defraud the government. In these times of threatened government shutdowns, budget crises, and debt ceiling debates, America literally cannot afford to be victimized by fraud. Fortunately, more and more tools are in place to combat frauds against government agencies. And many of these tools rely heavily on whistleblowers, since it has been proven time and again that whistleblowers are an essential asset in the fight against fraud.

This year marks the 25th anniversary of the 1986 amendments to the federal False Claims Act—the country's most effective weapon in the war on fraud against the federal fisc. Those amendments strengthened the statute by guaranteeing monetary rewards to whistleblowers who come forward with information that assists the government's efforts to prosecute fraudsters and recover stolen funds. By any measure, the False Claims Act has been a resounding success, bringing back, on average, more than $1 billion to the Treasury each year. And whistleblowers now have even more tools at their disposal, as the IRS has begun paying rewards under its new whistleblower program to combat tax fraud, and the Securities and Exchange Commission and the Commodity Futures Trading Commission have announced their respective whistleblower programs, which will reward those who assist in prosecuting frauds on the markets those Commissions regulate.

Since we know that "good people" will always be tempted to defraud the government, the response to fraud schemes should be twofold. It goes without saying that recovering stolen funds is a worthwhile endeavor. However, combating fraud shouldn't always require the government to wait until the money is stolen and then go after it—a system that often takes years. Rather, it is also necessary to place significant efforts and resources into deterring fraud schemes before they ever gain any momentum, thereby dissuading good people from making bad decisions. Thus: (1) whistleblowers must be encouraged and incentivized to continue coming forward with valuable information, to show liars, cheats, and thieves that they will not go unpunished if they selfishly choose to steal from the American taxpayers; (2) fraudsters must be severely penalized—through monetary sanctions and, when appropriate, imprisonment—in order to make it apparent that cheating the government is not good business; and (3) our

fraud-fighting programs and the penalties they impose must be better publicized—both to whistleblowers and to fraudsters. Only then will we effectively deter such fraud and actually change the culture of doing business with the government.

The law journal you're reading chronicles all important legal opinions on False Claims Act matters and regularly touts the success of the federal and state government attorneys (and their whistleblower partners) in recovering fraudulently stolen funds. This is one of the many ways Taxpayers Against Fraud Education Fund works to deter fraud against the government. For more information about TAFEF or to submit an article for publication, please contact me. I can be reached at:

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All the best,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JULY 1, 2010–JUNE 30, 2011

FALSE CLAIMS ACT LIABILITY

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

U.S. ex rel. Wilkins v. United Health Group, Inc., 2011 WL 2573380 (3rd Cir. June 30, 2011)

Two relators brought a *qui tam* action against a health care service provider and two of its subsidiaries, alleging that the defendants' sales representatives violated the False Claims Act by offering illegal kickbacks to a medical clinic and to doctors, while falsely certifying their compliance with Medicare/Medicaid marketing regulations and the Anti-Kickback statute (AKS). The government declined to intervene. The defendants moved to dismiss the relators' complaint for failure to state a claim. The United States District Court for the District of New Jersey granted the defendants' motion, concluding that the relators failed to identify a single false claim that the defendants submitted to the government and that the defendants' compliance with the healthcare laws and regulations at issue was not relevant to the government's decision to pay their Medicare claims. The relators appealed the district court's decision to the U.S. Court of Appeals for the Third Circuit. The Third Circuit affirmed the district court's decision in part, finding that the district court properly dismissed the relators' claims based on allegedly false certifications of compliance with Medicare/Medicaid marketing regulations, because the government's payments were not conditioned on compliance with those regulations. However, the appeals court also held that the district court erred in dismissing the relators' claims based on alleged false certifications of compliance with the AKS, as it determined that compliance with that statute was a condition for payment under the healthcare programs.

The circuit court adopted the implied false certification theory for liability in analyzing the relators' claims related to alleged violations of applicable marketing regulations. The court stressed that this theory of liability is not to be used as a blunt instrument to enforce all healthcare law, but rather should only be used when the alleged falsity is material to the government's decision to make a payment. To that end the court clarified that under the implied false certification theory of FCA liability, "a plaintiff must show that if the Government had been aware of the defendant's violations of the Medicare laws and regulations that are the bases of a plaintiff's FCA claims, it would not have paid the defendant's claims." The court found that the relators failed to cite any regulation showing that the defendants' compliance with the marketing regulations at issue was a condition for payment under Medicare or Medicaid. Further, the court noted that the regulations allowed claimants a 30-day opportunity to correct any deficiencies with any mar-

keting requirements, which tends to show that compliance with these regulations is a condition of participation in the healthcare programs—which could be addressed through administrative means—but not a condition of payment. As such, the court concluded that the defendants' alleged non-compliance with those regulations was not material to the government's payment decision, and accordingly, the appellate court affirmed the district court's decision and held that the relators' claims based on false certification of compliance with marketing regulations were properly dismissed for failure to state a claim under the FCA.

The court then analyzed the relators' claims based on the defendants' alleged false certification of compliance with the AKS. The relators argued that the defendants submitted healthcare claims to the federal government when they knew that they were violating the Anti-Kickback statute—and that compliance with the AKS was a condition of payment under the federal healthcare programs. The government filed an *amicus curiae* brief in support of the relators, urging the circuit court to reverse the district court's ruling on the relators' AKS claims. The defendants argued the district court's holding was correct, because the relators failed to allege the nexus between compliance with the AKS and the government's decision to pay. The Third Circuit stated that "[i]n order to avoid FCA liability under an implied certification theory, participants making claims to the Government under the federal health care programs have to ensure that they are not violating the federal health care laws which they agreed to follow when they entered into contracts with CMS." The court noted that the relators had pled the existence of such an agreement, as they alleged that that the defendants entered into an agreement with the Centers for Medicare and Medicaid Services in which compliance with all CMS Guidelines—which included the AKS—was a condition of payment. Moreover, the court noted the relators' allegation that, each month, the defendants certified compliance with all the CMS Guidelines in order to receive monthly capitalized payments. Therefore, the court held the relators had properly pled an FCA violation based on an implied false certification of compliance. As a result, the Third Circuit held that the district court erred in dismissing the relators' AKS claims. The district court's dismissal of the relators' AKS claims was reversed, and those claims were reinstated.

U.S. ex rel. Hutcheson v. Blackstone Med., Inc., 2011 WL 2150191 (1st Cir. June 1, 2011)

A relator brought a *qui tam* action against her former employer, a medical manufacturer, alleging that the company violated the False Claims Act by offering illegal kickbacks to physicians to induce them to use its products, which caused those doctors and their hospitals to submit false claims to Medicare, Medicaid, and other government-funded healthcare programs—the claims were false, since they falsely certified compliance with the Anti-Kickback law. The defendant moved to

dismiss, arguing that the relator's complaint was barred under the FCA's first-to-file and public disclosure provisions, that the complaint failed to state a claim, and that the complaint failed to plead the alleged fraud scheme with particularly, as required by Rule 9(b). The United States District Court for the District of Massachusetts granted the defendant's motion. The court held that the relator was not jurisdictionally barred by the first-to-file rule because the relator's complaint was sufficiently different from the previously filed action. The district court also rejected the defendant's public disclosure argument, finding that the relator qualified for the "original source" exception to that rule. However, the district court dismissed the relator's complaint, as it held that the relator failed to state a claim because her compliant failed to identify any specific claim that was materially false or fraudulent under the FCA. The relator appealed the district court's ruling to the First Circuit, which reversed the district court's decision and remanded the matter.

The circuit court began by examining whether or not the relator demonstrated that the defendant caused the submission of false claims, and if so, whether those claims were materially false. The court noted the parties' dispute over whether or not a claim can be false when it includes an implied legal condition of payment that is not found in a statute or regulation. In addition, the parties disputed whether or not a defendant's representations of its own compliance with applicable regulations can encompass a legal precondition of payment applicable to third parties.

With respect to the first issue, the circuit court disagreed with the district court's conclusion that an implied certification claim can only be deemed false or fraudulent if the legal condition at issue was expressly stated in a statute or regulation. Instead, the First Circuit held that non-compliance with contract terms—such as the terms contained in a provider agreement—can also give rise to false or fraudulent claims, even if the contract does not specify that compliance with the specific contract term is a condition of payment. With respect to the second issue, the appeals court rejected the district court's holding that unlawful actions taken by a third party that does not submit claims to the government cannot be incorporated into a certification of compliance with legal requirements that another submits to the government. The appellate court noted that the Supreme Court has long held that a non-submitting entity may be liable under the FCA for knowingly causing a submitting entity to submit a false or fraudulent claim, and it has not conditioned this liability on whether the submitting entity knew or should have known about a non-submitting entity's unlawful conduct. Simply stated, the FCA imposes liability on those who "cause" false claims to be submitted, regardless of whether or not the submitter knows that the claims are false. As a result, the First Circuit reversed the district court's finding that the relator did not demonstrate the defendant caused the submission of false claims.

The court then examined whether the relator demonstrated that the claims at issue were materially false, under the FCA. The relator argued that the provider

agreement and hospital cost forms identified in the *qui tam* complaint made it clear that compliance with the anti-kickback statute was a precondition of payment under Medicare. The court concluded that the two documents made clear that compliance with the anti-kickback law was a precondition of Medicare payment and made no exception for violations caused by third parties. Thus, the court held that the relator's allegations of misrepresentations were sufficient to state a claim under the FCA. The court rejected the defendant's arguments that: (1) the hospital and physician misrepresentations were not material and that the payment mechanism in effect rendered any non-compliance with the kick-back law irrelevant to the payment of hospital claims; and (2) that the physicians actually submitted claims for medically necessary surgeries, and not for the devices used as a result of alleged improper kickbacks. The court rejected these arguments because the intricacies of the payment systems did not alter the clear language of the provider agreement and hospital cost forms. Additionally, the fact that physician claims sought payment for services rather than devices did not render the fact that they accepted kickbacks irrelevant. The court found the relator's allegations sufficient to show that the kickbacks were capable of influencing Medicare's decision to pay the hospital and physician claims. As a result, it held the relator stated a claim for materially false and fraudulent submissions under the FCA, and reversed the district court's decision.

U.S. v. Ctr. for Diagnostic Imaging, Inc., 2011 WL 1304727 (W.D. Wash. Apr. 4, 2011)

Two relators brought a *qui tam* action against a national radiology and imaging company (CDI), an association of radiologists who perform professional services for CDI patients (MSCPA) and an investment firm, alleging violations of the FCA based on Anti-Kickback Statute (AKS) and Stark law violations. In Count I, the relators alleged that CDI knowingly violated the AKS, by entering into illegal lease and joint venture arrangements with physicians who were part of the MSCPA group, whereby CDI would pay money and provide free and discounted services to those physicians in exchange for referrals. In Count II, they alleged that CDI violated the Stark Act by inducing referrals from physicians through improper financing relationships. In Count III, they alleged that CDI knowingly violated the FCA by failing to obtain written orders prior to providing services.

As an initial matter, the United States District Court Western District of Washington observed that although the relators' fraud claims were asserted against the "defendants," it was unclear which allegations, if any, were specific to defendant MSCPA. The relators alleged that MSCPA was "a knowing and voluntary participant in CDI's scheme to submit false claims toe [sic] the United States," but the court noted that the relators failed to identify any false claims submitted by MSCPA or to "allege any other details, including where the claims were submit-

ted, when, by whom, or any facts to support" that claim. Consequently, the court dismissed the claims against MSCPA as deficient.

The court then addressed Count I. In response to the relators' allegations, CDI argued that the relators failed to offer details about the alleged improper arrangements, or to identify the participating physician groups, their location, the dates or amounts billed, the identity of the patients involved, the dates contracts were entered into, or the dates of the allegedly improper actions. However, the court found that the relators' allegations were sufficient to state a claim that CDI designed and used lease arrangements to induce referrals from physician groups in violation of the AKS. The court also found the relators alleged that all of the groups that participated in the lease arrangements received kickbacks. Further, the court held the relators sufficiently alleged CDI willingly participated in the alleged arrangements, based on statements of CDI's former Chief Development Officer and financial documents reflecting the amount of potential kickbacks. As a result, the relators were allowed to maintain their claim that CDI violated the AKS and the FCA by offering kickbacks to physicians in the form of lease arrangements.

The relators had also argued that CDI violated the AKS and the FCA by offering physicians free or reduced fee services to induce referrals. CDI argued that these allegations were vague and failed to include specifics, such as the identity of any physicians who were induced to make referrals CDI, or whether any such physicians were aware that they were receiving free or discounted services. The court also found the relators failed to allege that the discounted prices for services were not commercially reasonable. Accordingly, the court held the relators failed to state a claim with respect to their free and reduced services allegations, and those claims against CDI were dismissed.

With respect to the Stark Law claims in Count II, the relators alleged that CDI's lease arrangements violated the Stark law because they reflected CDI's improper financial relationships with the physicians groups, and because CDI was an "entity" for purposes of the Stark law, since it performed services and billed the government for patients who were referred by the physicians. The court, though, held that for purposes of the Stark law, CDI was not an "entity," since it did not bill and receive payments from Medicare for patients the physicians group referred—the physicians did. Thus, the relator's Stark law claims against CDI in Count II were dismissed.

With respect to the claims in Count III, the relators alleged that CDI submitted claims for radiological exams without first obtaining a written order from the treating physician. The court found that, pursuant to the applicable regulations, CDI could have still fulfilled its obligations by obtaining supplemental documentation after the fact, and that the relators did not allege that CDI failed to obtain such supplemental documentation prior to submitting Medicare claims. Therefore, the court held that Count III failed to state a claim and that Count was dismissed.

U.S. ex rel. Nehls, et al. v. Omnicare, Inc., 2011 WL 1059148 (N.D. Ill. Mar. 21, 2011)

A relator brought a *qui tam* action on behalf of the United States and the States of Florida and Illinois, alleging that a healthcare company and two individuals violated the False Claims Act, when the healthcare company submitted claims for Medicare and Medicaid reimbursements, even though the defendants had engaged in an illegal kickback scheme. Specifically, the relator alleged that the healthcare company provided the individual defendants with an illegal kickback when it purchased their interest in a pharmaceutical company, in exchange for long-term contracts with nursing homes owned or controlled by the individual defendants. The relator alleged that when the healthcare company submitted claims for Medicaid/Medicare reimbursement for services provided to the individual defendants' nursing homes, it was required to certify its compliance with all laws and regulations related to the two healthcare programs, and that those certifications included the Anti-Kickback statute. The relator claims that the healthcare company's claims were false, because although the company had engaged in an illegal kickback scheme with the other defendants, it falsely certified its compliance with the Anti-Kickback statute. One of the individual defendants moved to dismiss the relator's complaint for failure to state a claim, arguing that the alleged false certifications were not material to the government's decision to pay the healthcare company's claims. The United States District Court for the Northern District of Illinois denied the motion.

The defendant argued that in order to plead the FCA's materiality element and maintain her *qui tam* claims, the relator must allege that the health care company's compliance with the anti-kickback statute was necessary to receive payment, either because the defendant company expressly agreed to such a requirement, or some statute or regulation makes payment conditional on compliance. The court held that the defendant's view of materiality under the False Claims Act was too restrictive, and noted that his argument had already been "flatly rejected" by the Seventh Circuit in *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008), which announced its view of FCA's materiality standard, saying that "a statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." Applying that standard, the court held the relator's complaint properly and sufficiently stated a claim under the False Claims Act, as it claimed that the defendants' alleged illegal kickback scheme and subsequent false certifications of compliance to the federal and state governments were material to those government entities' reimbursement decisions. The defendant's motion to dismiss was denied.

U.S. v. Campbell, 2011 WL 43013 (D. N.J. Jan. 4, 2011)

The government filed an action under the False Claims Act against a doctor, alleging that he violated the Stark Law and the Anti-Kickback Statute by improperly referring patients to a hospital with which he had a financial relationship. The government alleged that the hospital needed a certain amount of cardiac procedures to remain a licensed trauma center, had failed to meet the required number in the previous year, and decided, as part of a recruitment initiative, hired the doctor on a part-time basis to help with teaching, lecturing, and researching. However, according to the government, the doctor also began improperly referring patients to the hospital for cardiac-related procedures, and that this became the primary service the doctor performed under his contract with the hospital. The doctor argued that when he was hired, hospital representatives assured him that his employment contract did not violate the law. However, a federal monitor performed an investigation and found that the hospital illegally paid cardiologists for patient referrals in order to maintain its cardiac surgery license. The hospital settled that case with the government. The government then filed its action against the doctor. The doctor, in turn, answered the complaint and also filed a third-party complaint against the hospital and two hospital representatives, as third party defendants. In his third-party complaint, the doctor pled contribution, indemnification, and damages for allegedly false representations concerning the legality of his employment contract. The government moved for partial summary judgment on the issue that the doctor presented false healthcare claims to the government for services rendered as a result of illegal financial relationships. The third-party defendants individually moved for summary judgment on the third party complaint. The United States District for New Jersey denied the government's motion, but granted the third-party defendants' motions.

The court began by examining the government's motion. The government alleged that the doctor's employment contract was a sham and that the doctor knowingly caused false claims to be submitted by improperly referring patients to the hospital. The doctor argued that he had a bona fide employment relationship exception to the kickback and self-referral laws, that he did not submit or cause the submission of any false claim, and that the treatment of his own patients at the hospital was not an unlawful referral. The government countered that there was no employment exception because the doctor failed to perform the majority of the services in the employment contract; therefore, the government argued that his compensation could not be considered commercially reasonable except as compensation for another—in this case, unlawful—purpose. The court examined the employment contract and observed that there was no obligation for the doctor to meet the requirements of his contract, nor did he, so the amount he was paid could not be considered commercially reasonable for work performed. Hence, the court held that the doctor did not meet the bona fide employment exception because he did not satisfy the services requirements of the contract.

The court then examined the doctor's argument that he did not knowingly or recklessly submit false claims. The government argued that the doctor knew that false healthcare claims would be submitted to the government, or at the very least, he acted with reckless disregard of the truth or falsity of those claims. The court, though, held that the doctor's state of mind should not be decided on summary judgment and thus denied the government's summary judgment motion.

The court then examined the third-party defendants' motions. The doctor sought a judgment against the hospital and the two representatives jointly and severally for full contribution and/or indemnification, reimbursement of any and all damages, civil penalties, interest, costs, expenses, and attorney's fees regarding the government's claims against him, arguing that the third-party defendants negligently assured him that his employment contract was lawful and that he relied on this assurance. The doctor also alleged that the entire incident damaged his reputation and livelihood. The third-party defendants argued that FCA defendants cannot pursue claims for indemnification and contribution that are based on their liability under the FCA, or which have the same effect as offsetting FCA liability. The court agreed and held that the FCA does not provide for, or even speak of, a right to indemnification or contribution and that the legislative history of the FCA does not indicate that such a right may be implied. In addition, the court held that federal common law provides that a defendant found liable of FCA violations cannot pursue a claim that will offset liability or have the equivalent effect of contribution or indemnification. Accordingly, the third-party defendants' summary judgment motions were granted.

U.S. ex rel. Piacentile v. Sanofi Synthelabo, Inc., 2010 WL 5466043 (D. N.J. Dec. 30, 2010)

A relator brought a *qui tam* action against two pharmaceutical companies—Aventis and Sanofi—alleging that the defendants violated the False Claims Act by using improper means, such as free samples, and other kickbacks to physicians, in order to induce those physicians to prescribe the defendants' drugs, thereby increasing the defendants' profits and market share. The relator alleged that a false claim to the government was made whenever a physician or medical institution submitted a claim for reimbursement related to the off-label use of the defendants' drugs. The relator also alleged a conspiracy and a claim under the FCA's "reverse false claim" provision. The defendants moved to dismiss the relator's complaint, arguing that the relator's complaint failed to plead with particularity and failed to state a claim. Aventis also argued that the relator's claims against it were barred by the FCA's first-to-file rule. The United States District Court for the District of New Jersey granted the defendants' motion.

First-to-File Rule

The court began by analyzing whether the relator's claims were barred by the first-to-file rule. Aventis had argued that the relator's allegations were based on similar facts in a previously-filed FCA action. The relator argued that his complaint was not barred because the previously filed FCA action might still be dismissed. The court, however, found that, for purposes of the first-to-file bar, even complaints that are later dismissed have preclusive effect. The relator then argued that his complaint was different from the previously-filed complaint, because it incorporated various state law claims separate from the FCA claims. The court, though, found that the underlying facts were still the same and held that the relator's claims against Aventis were barred by the first-to-file rule.

Pleading Fraud with Particularity

The court then analyzed whether the relator pled fraud with sufficient particularity, and held that although the complaint identified the physicians who were given unlawful kickbacks, it made no mention of how the relator knew about off-label marketing or that false claims for reimbursement were actually presented to the government. The court found that the allegations made in the relator's complaint were conclusory, as they made no mention of the who, what, when, where and how of the defendants' alleged fraud scheme. The court also found that the complaint failed to plead the defendants' alleged conspiracy with particularity, since the complaint did not allege any meeting of the minds between the defendants and the doctors who prescribed their drugs. Moreover, the court held that the relator's reverse false claim was deficient and did not plead fraud with particularity, finding that the relator did not allege that the defendants had any existing obligation to return money or property to the government. The court held that the relator did not qualify for a relaxed pleading standard, since he could not show that the information necessary to cure his pleading deficiencies was exclusively in the defendants' possession.

Consequently, the relator's complaint was dismissed.

***U.S. ex rel. DeCesare v. Americare In Home Nursing*, 2010 WL 5313315 (E.D. Va. Dec. 16, 2010)**

A relator brought a *qui tam* action against two home health care agencies (MedStar and Americare), the CEO of Americare (Ammirati), and one referral agency and its executive director (VNSN), alleging that the defendants knowingly filed false claims, made false statements, conspired to submit the false claims, and violated various state laws. Specifically, the relator alleged that the home health care agencies paid kickbacks to VNSN in exchange for referrals and that VNSN would not refer patients to agencies who refused to pay kickbacks. The defendants moved to dismiss, in four separate motions, arguing that the complaint failed to meet the

particularity requirement, that there was no conspiracy, and that the complaint failed to state a claim. The United States District Court for the Eastern District of Virginia granted MedStar's and Ammirati's motions, but denied the others.

MedStar argued that the complaint did not plead fraud with particularity, as it failed to provide specifics as to who acted improperly and the amounts and dates of improper payments, and also failed to present examples of false claims being submitted to the government. The court held that the relator did not have to point to the specifics, because he alleged that every certification was false. MedStar also argued—and the court agreed—that the complaint failed to provide facts showing that the defendant knew of any wrongdoing, and thus, failed to satisfy the FCA's scienter requirement. The court also dismissed the conspiracy claim against MedStar, as it found that the complaint failed to show the existence of an agreement or that MedStar knowingly was a party to it.

Americare also argued that the complaint did not meet the particularity requirements. The court, as before, held that the relator alleged that every certification was false, which was sufficient to survive the motion to dismiss. Americare then argued that the complaint lacked a factual basis to show that it actually served patients referred by VNSN and billed the government for those services. The court disagreed, and held that the complaint alleged a theory of how the referral agency violated the kickback statute, that the defendant was a party to the scheme, and that the defendant submitted claims for reimbursement. Furthermore, the defendant argued that the state Medicaid program allegations failed to create liability. The court disagreed, and held that although these allegations may not have been as detailed or thorough as the federal Medicare allegations, they nonetheless fairly alleged the submission of fraudulent certifications by the defendant. Americare also argued that there could not be a conspiracy because the alleged conspirators sought legal advice and was told that their network was legal. Therefore, this defendant argued there could neither have been an agreement, nor any intent, to defraud the government. The court held that this argument failed because there was no proof of what facts were disclosed to counsel. The court held that the relator fairly alleged that this defendant attended meetings during which plans were discussed to charge fees for referrals made and to limit the number of providers that could participate in the plan. Finally, the defendant argued that the complaint characterized Medicare/Medicaid certifications of compliance with the anti-kickback statute as a condition of participation as opposed to a condition of payment by the government. The court disagreed and provided explicit sentences where the complaint properly alleged the materiality of the certifications. As a result, the court denied Americare's motion.

Defendant Ammirati—Americare's CEO—also moved to dismiss, and that motion was granted, as the court observed that this defendant's "name only appears

once" in the relator's operative complaint, and that the relator did not "allege a single instance of *conduct* by Ammirati." Therefore, the court dismissed the claims against that defendant.

VNSN argued that the complaint failed to adequately allege causation because it did not allege VNSN's participation in the submission of false claims. The court disagreed and held that it was foreseeable to the defendants that, as a consequence of the referrals, Medicare/Medicaid claims would be filed. The court held that the complaint fairly alleged that the referrals made by the defendants caused the filing of false claims. The court further held that the scienter requirement was adequately pled because a VNSN executive invited the relator to a meeting at which the alleged fraud scheme was discussed. The defendants then argued that there was no allegation that a government agency made any payment based on their actions. The court held that the defendants misconstrued the FCA's materiality requirements and held that filing the allegedly false claims was material because the claims had a natural tendency toward causing reimbursements to be improperly paid. VNSN also argued that the complaint lacked particularity, but the court held that the complaint alleged that none of its referrals was legitimate and that its improper referrals caused false claims to be presented. In response to VNSN's contention that the relator's conspiracy claim deficient, the court held that there was a properly alleged conspiracy because the complaint alleged a meeting, run by a VNSN executive and attended by representatives of the providers, during which plans were laid out for an allegedly improper referral program. As a result, the court denied the VNSN's motion.

U.S. ex rel. Bierman v. Orthofix Intern., N.V., 2010 WL 4973635 (D. Mass. Dec. 8, 2010)

A relator brought a *qui tam* action against several medical device manufacturers, alleging that the defendants knowingly submitted false claims for Medicare reimbursement. By regulation, Medicare pays for the devices by either purchasing them or on a monthly rental basis. In the case of the defendants' devices, the purchase price was about ten times more than the rental price. The relator alleged that the defendants all completed Medicare Enrollment Applications, which required them to certify that they would comply with Medicare regulations, and that one such regulation, the Medicare Supplier Standard Regulation (SSR), required the defendants to inform beneficiaries of both the rental and purchase options for their devices. The relator—who operated a business that provides medical billing services to healthcare providers—alleged that both he and the defendants' beneficiaries were routinely told that the defendants' devices were only available for purchase and could not be rented, even though the devices were typically only to be used between three and six months and were programmed to deactivate after nine months. Thus, the relator argued, no rational patient would ever choose to

purchase the devices instead of renting them, and no claim for purchase could ever be supported by medical necessity. Consequently, the relator alleged that all of the defendants' claims for Medicare reimbursements related to purchases of the devices were false. The relator also alleged the defendants violated the Anti-Kickback Statute by providing doctors with free devices in exchange for business, paying commissions, and providing volume discounts. The defendants moved to dismiss the relator's claims for failure to state a claim and for failure to satisfy Federal Rule of Civil Procedure 9(b)'s particularity requirement. The United States District Court for the District of Massachusetts denied the defendants' motions.

The defendants argued the Medicare Enrollment Application certification was too broad to constitute an express certification of compliance with the SSR. The court disagreed and held that Medicare conditioned payment on the defendants' compliance with all applicable conditions of participation. The court further held that although the SSR was not explicitly listed in the enrollment application, it nonetheless was an applicable condition of participation by Medicare and is explicitly labeled as a condition of participation. As such, the court observed, "a false certification [regarding a condition or participation] would lead the government to make a payment it would not otherwise have made."

The court also held that the relator's complaint satisfied Rule 9(b), as it provided sufficient details of the alleged violations, including schedules of Medicare claims for reimbursement by each defendant, the number of claims, dates, and amounts paid. Thus, the court denied the defendants' motions to dismiss.

U.S. ex rel. Westmoreland v. Amgen, Inc., 2010 WL 3622033 (D. Mass. Sept. 20, 2010)

A relator brought a *qui tam* action against an international biotechnology company, a nephrology company, its corporate affiliate, and a healthcare provider, alleging that the defendants violated the False Claims Act by engaging in a scheme of kickbacks to induce providers to purchase a drug manufactured by one of them. The relator alleged that the fraud scheme included sham consulting agreements, retreats, free services, and pass-through price concessions. In addition, the relator's complaint alleged an additional kickback, in the form of excess overfill—liquid dosages of the drug that exceeded the amount necessary to allow providers to withdraw the labeled dosage. Notably, some overfill is often necessary, as small quantities of the drug sometimes remain in the vial or are ejected prior to the dose being delivered to the patient, but the relator alleged that the defendants knowingly included additional amounts, which essentially amounted to free samples of the drug, designed to induced providers to purchase it, and which created the potential for providers to receive excess reimbursements from the government.

The relator alleged that these kickbacks caused providers to falsely certify in their Medicare enrollment forms that they were in compliance with applicable anti-kickback statutes. The relator alleged that the defendants encouraged providers to submit false claims, by advising them that Medicare would reimburse them for overfill, even if doses were never administered or medically necessary. Moreover, the complaint alleged that the defendants directly defrauded the government by reporting an inflated Average Sales Price (ASP) to Medicare and Medicaid, causing the government to overpay for drugs. Finally, the relator also alleged a conspiracy, in violation of the False Claims Act. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead fraud with particularity. The United States District Court for the District of Massachusetts denied the defendants' motion, finding that that the relator had sufficiently stated a claim with respect to all the allegations in the complaint.

Liability Based on the Overfill Theory

The defendants argued that that there was no violation of the anti-kickback statute when providers accepted free overfill, and thus there was no false certification of compliance. They noted that the FDA requires drug manufacturers to include overfill in their injectable products, for the reasons stated above, and that there is no legal standard governing the amount of overfill that can be included. The court disagreed and held that the relator adequately pled that the defendants were providing built-in free samples of the drug, since the only legitimate purpose of overfill is to allow providers to withdraw the labeled dosage, and the defendants exceeded the amount necessary to achieve that purpose. The court noted that the relator's claim was not that the amount of overfill was inherently illegal, but rather that it constituted an illegal kickback. This allegation, the court held, was sufficient to state a claim under the FCA.

The defendants further argued that they could not have caused providers to violate the anti-kickback statute simply by advising them about the reimbursements for units administered regardless of the presence or absence of overfill. The court again disagreed, and found that the relator's complaint was sufficiently pled, noting that one of the defendants even detailed the profits to be gained from excess overfill in its marketing materials to providers. The court also speculated that such advice to providers may not have been correct, as the Centers for Medicare and Medicaid Services explicitly stated to the defendants that it had not issued an opinion on reimbursements for overfill, and that its policy is to reimburse for the reasonable and necessary number of units received.

Knowingly False Express Certifications

The defendants also contended that the relator's allegations of false certification could not satisfy Rule 9(b)'s particularity requirements, arguing that the relator did not allege that the providers' certifications of compliance with the anti-kickback statute were "knowingly false when made." The relator countered, providing statistical evi-

dence that demonstrated that after the defendants' alleged kickback scheme began, 70% of Medicare-eligible providers had re-enrolled in the program and had certified future compliance with the anti-kickback statute on their enrollment forms. Thus, the relator reasoned—and the court agreed—the defendants' providers had also likely re-enrolled after the defendants' alleged kickbacks scheme began, and thus, those providers' certifications of compliance with the anti-kickback statute were knowingly false.

In addition, the defendants argued that the relator's complaint was insufficient because it did not identify particular providers who signed the allegedly false certifications. The court stated that when a defendant is alleged to have directly presented false claims to the government, the plaintiff must provide identifying details of those false claims. However, the court observed, when a defendant is alleged to have caused a third party to present false claims to the government, "a more flexible standard applies," and relators can satisfy Rule 9(b) by providing factual or statistical information that leads to a strong inference of fraud. This more flexible standard is required because relators will generally not have access to third party providers' enrollment forms at the pleading stage. The court held that the relator's factual and statistical evidence was sufficient to meet the more flexible standard, stating, "[a]lthough Relator cannot identify each particular instance of a knowingly false certification, the Complaint as a whole is sufficiently particular to strengthen the inference of fraud beyond possibility."

Liability Based on Overdosing & False Billing Theories

The defendants argued that the relator's theories of liability regarding providers' reimbursement claims for reimbursement doses never administered or medically unnecessary were not sufficiently supported, since the relator did not identify specific instances in which particular providers engaged in such conduct. The court rejected this argument, as it found that the relator alleged a marketing scheme and detailed instances in which the defendants encouraged providers to bill for unadministered or medically unnecessary overfills. In addition, the court found that the complaint contained allegations regarding particular medical providers who submitted legally and factually false claims at the defendants' encouragement.

The defendants also argued that their act of marketing overfill did not cause providers to submit false claims to the government, since it's a provider's independent decision to administer medically unnecessary dosages or to bill for unadministered doses. The court found the complaint adequately alleged that the defendants proximately caused the submission of claims, because that was a foreseeable consequence of the defendants' alleged scheme.

ASP Inflation by Failing to Report Excess Overfill

The relator also argued that the defendants inflated the drug's Average Sales Price by failing to report overfill. The defendants argued that the applicable regulations do not require them to include overfill in ASP calculations, since the regulations apply to the total number of units sold and overfill does not qualify as a "unit." Therefore, the defen-

dants argued, the relator's theory of liability fails as a matter of law. The relator, on the other hand, argued that overfill qualified as a "free good"—the value of which should be deducted from the total drug sales. Moreover, they argued that that providers could pool together free overfill, thereby reducing the amount they needed to purchase. They noted that the government had previously reached this same conclusion with respect to overfill on one of the defendants' other drugs, and therefore the defendants knew that excess overfill would affect the cost and sales of the drug. The court concluded that the relator adequately pled a violation of the FCA, due to ASP inflation.

Conspiracy to Inflate ASP as to INN and ASD

Finally, the court examined the relator's conspiracy claim, and determined that liability for the ASP inflation aspect of the conspiracy did not require the direct participation of all the defendants. The court found that the relator sufficiently stated claims for conspiracy through its allegations that the defendants together provided kickbacks, shared confidential information, and encouraged providers to bill for overflow.

Consequently, the court denied the defendants' motion to dismiss.

U.S. ex rel. Rost v. Pfizer, Inc., 2010 WL 3554719 (D. Mass. Sept. 14, 2010)

A relator filed a *qui tam* action against two pharmaceutical companies, alleging that the defendants engaged in illegal off-label marketing of a growth hormone deficiency medication and provided illegal kickbacks to physicians, which caused pharmacies to submit false Medicaid claims. The relator contended that these claims were false because the Medicaid claims contained implied false certifications of compliance with applicable Medicaid regulations, when in fact, there was no such compliance. The relator argued that prescriptions for the defendants' drug were only for government-approved, on-label uses if the results of two stimulation tests were positive. He asserted that the defendants promoted off-label use of the drug because they relied on the reports from only one test. The relator also argued that the defendants' alleged payments of kickbacks to physicians caused false on-label and off-label claims to be submitted to the government. The defendants moved for summary judgment. The United States District Court for the District of Massachusetts granted the motion.

The court found that the relator had not produced any evidence to show that nonperformance of both stimulation tests converted the drug usage from on-label to off-label. As a result, the court found that the relator failed to show that the defendants caused the submission of false claims based on inappropriate testing and summary judgment in favor of the defendants was entered on the relator's off-label claims.

The court then analyzed the implied certification claims, as it found no evidence of any false express certification of compliance with the Anti-Kickback Statute by either the pharmacies or the prescribing physicians. The defendants argued that the pharmacies' implied certification related only to their own compliance with applicable Medicaid regulations and not to the defendants' conduct. The court agreed, finding that neither the government (which filed a statement of interest in the case), nor the parties cited any cases to show that the implied certification theory imposed FCA liability on a payer of kickbacks where the person or entity who submitted the claims was innocent of any wrongdoing and where the claim itself was not factually false; the claim was not legally false due to an express certification of compliance with the AKS; or compliance with the federal statute was not an expressly stated precondition of payment. The court held that the relator could not proceed with his implied certification theory of liability as it failed as a matter of law. Consequently, the defendants' motion for summary judgment was granted.

See *Frazer ex rel. U.S. v. Iasis Healthcare Corp.*, 2010 WL 3190641 (9th Cir. Aug. 12, 2010), at page 133.

B. What Constitutes a False Claim?

Gonzalez v. Planned Parenthood of L.A., 2011 WL 1481398 (C.D. Cal. Apr. 19, 2011)

A relator plaintiff brought a *qui tam* action against nine healthcare centers and three individuals, alleging that the defendants defrauded the United States and the State of California by overbilling for contraceptives provided through the state's family planning program. The United States District Court for the Central District of California had previously dismissed the relator's action with prejudice, holding that the relator's allegations had already been publicly disclosed, that the relator was not an original source of the information upon which his complaint was based, and therefore the court did not have subject matter jurisdiction over the relator's claims. The relator appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit, which reversed and remanded, on the basis that the district court erred in holding that there had been public disclosures. The defendants then moved for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), and the district court granted their motion in part.

First, the defendants argued that the relator's claims failed because the relator could not establish the falsity of the defendants' bills—or the defendants' knowledge that its bills were false—since the state agency responsible for administering the family planning program determined that the governing regulations were ambiguous. The court, though, noted that ambiguities in regulations do not necessarily preclude FCA liability as a matter of law, and observed that the meaning of the terms at issue, and whether or not the defendants complied with those terms, are both subject to judicial interpretation. Given the limited record before the court, it concluded that it could not determine the reasonableness of the state agency's construction of the rules and regulations at issue, without converting the defendants' motion into a motion for summary judgment. Second, the defendants argued that they were forthcoming with the federal and state government officials about their billing practices, as evidenced by various letters, and therefore they did not have the requisite scienter to establish an FCA violation. The court, though, found that the defendants' communications with the government were insufficient to negate scienter element at this stage of the litigation—that matter could be resolved at summary judgment or at trial.

Third, the defendants argued that they notified appropriate state government officials of their billing practices more than eight years before the relator's suit was filed, and therefore the California FCA's three-year statute of limitations on the relator's allegations had expired. The court held that the defendants' letters were sufficient to put the state government officials on notice to inquire about possible false claims and held the relator's state law claims were time barred. Finally, the defendants argued that relator failed to plead fraud with particularity. The court

agreed that the relator failed to distinguish the allegations regarding the various defendants and failed to provide the specifics of the alleged false claims. As a result, the court dismissed the relator's federal FCA claims, but granted the relator leave to amend those claims.

U.S. ex rel. Colucci v. Beth Israel Med. Ctr., 2011 WL 1226267 (S.D.N.Y. Mar. 31, 2011)

A relator brought a *qui tam* action against a teaching hospital and its three senior executives, alleging that the defendants submitted false claims to Medicare. Specifically, the relator alleged that the hospital acquired two non-teaching hospitals to manipulate the factors on which Medicare payments are based, and thereby fraudulently inflate its Medicare reimbursement payments. The relator alleged that the teaching hospital violated Medicare and Medicaid statutes and regulations by consolidating with the non-teaching hospitals, which were alleged to have had more Medicare patients with greater illnesses, resulting in increases in the defendant hospital's Medicare reimbursement rates—notwithstanding the fact that the hospitals remained separate in every other way, as they maintained separate facilities, doctors and staff. The defendants moved to dismiss the relator's complaint for failure to state a claim and failure to plead with particularity. The United States District Court for the Southern District of New York granted the defendants' motion.

Although the relator alleged that the defendants improperly consolidated provider numbers for teaching and non-teaching hospitals, the court noted that the *qui tam* complaint failed to point to any statute or regulation prohibiting such conduct and the relator conceded that no such regulation existed. The court concluded that the defendant hospital "took advantage of the uncertainty in the regulations to maximize its Medicare billing. This is not fraud." Consequently, the court held the relator failed to state a claim under the FCA. The relator's *qui tam* complaint was dismissed with prejudice.

U.S. ex rel. Jamison v. McKesson Corp., 2011 WL 1158945 (N.D. Miss. Mar. 28, 2011)

The United States brought an action under the False Claims Act against a nursing facilities management company (Beverly), its durable medical equipment supplier subsidiary (CSMS), as well as a Medicare billing agent and its parent company (McKesson). The government alleged that Beverly created CSMS as a sham durable medical equipment provider, so as to conceal improper kickback arrangements with McKesson for business referrals and discounts. The government further asserted that CSMS was obligated to satisfy twenty one Medicare "supplier standards," certified that it would do, and ultimately did not, and thus, all Medicare

claims presented under CSMS's supplier number were false. All parties filed dispositive motions. The United States moved for summary judgment, claiming that there were no facts in dispute regarding the allegation that CSMS was knowingly created as a sham and thus, all of its claims were false. Beverly and CSMS also moved for summary judgment, arguing that the government's claims were barred by *res judicata* and collateral estoppel, since the issue of whether or not CSMS satisfied the supplier standards had already been adjudicated by an administrative law judge, who determined that the Centers for Medicare and Medicaid Services "agreed that [CSMS] was in compliance with Medicare supplier standards." Moreover, Beverly and CSMS argued that the Government could not show that any of CSMS's claims was false, that they had knowledge of any falsity, or that any alleged falsity was material to the government. McKesson moved to dismiss all of the government's claims, on the basis of several of the same arguments that Beverly and CSMS had raised. The United States District Court for the Northern District of Mississippi granted the defendants' motions for partial summary judgment and denied the government's motion.

The court found that, as a matter of law, the government did not prove that the defendants submitted false claims or failed to meet the supplier standards. The court found that CSMS maintained a valid Medicare supplier number for all relevant periods, since CMS itself resolved these issues in CSMS's favor. Furthermore, CSMS rightfully relied on CMS's determination in good faith. As a result, CSMS entitled to the Medicare payments it received and its claims were not false. The court further concluded that the government's theory of FCA liability was premised on its own subjective interpretation of the defendants' duties and obligations, rather than on objective falsehoods, as the FCA requires. Consequently, the court held that the government's allegations did not satisfy the FCA's knowledge and falsity elements, and the defendants' motions were granted, while the government's motion was denied. The court made clear, however, that its ruling only covered the government's allegations regarding the supplier standards and did not resolve the allegations that the defendants submitted false claims based on violations of other laws and regulations, such as the anti-kickback statute.

U.S. ex rel. Freedman v. Suarez-Hoyos, 2011 WL 972585 (M.D. Fla. Mar. 18, 2011)

A relator brought a *qui tam* action against his former employer, a pathology laboratory (TPL), its owner (Suarez), and a dermatology institute and dermatologist (collectively Wasserman), alleging that the defendants violated the False Claims Act by upcoding on claims for Medicare reimbursement and by falsely certifying their compliance with applicable Medicare regulations, even though they were engaged in a kickback arrangement that violated the Anti-Kickback statute. The United States intervened in the relator's suit and defendants TPL/Suarez and

Wasserman separately moved to dismiss for failure to state a claim and for failure to satisfy Rule 9(b). The United States District Court for the Middle District of Florida denied the defendants' motions.

The court first examined the motion to dismiss filed by Suarez and TPL, which argued that the allegations against them failed to meet the plausibility and particularity requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure; that the plaintiffs improperly grouped the claims against them with claims against other defendants; that the complaint failed to allege that they acted willfully and with an intent to violate the AKS; and that the complaint failed to state a claim pursuant to a false certification theory of FCA liability. The court rejected the defendants' arguments. The court found that the government properly pled its claims, as it provided the date of the alleged kickback agreement, identified the parties, and described the substance, purpose, and manner in which the agreement was executed. The court also concluded that the detailed allegations of the agreement between the parties negated any argument that the defendants did not know that false claims were being submitted. Therefore, the court held that the government's allegations were sufficiently alleged. In addition, and without explanation, the court simply rejected the defendants' argument that the government improperly grouped the claims against these defendants with claims against other defendants, as it found nothing improper in that regard. With respect to the defendants' argument that the government failed to sufficiently describe the defendants' actions and agreement as willful and with the intent to violate the AKS, the court once again ruled against the defendants, holding that the plaintiffs' allegations properly described a FCA violation and that the government's implied false certification theory could be maintained, since compliance with the AKS was a prerequisite for Medicaid reimbursement. Thus, the court denied these defendants' motion in its entirety.

The court then examined the Wasserman defendants' separate motion to dismiss, in which those defendants raised additional arguments that the government failed to allege a factual basis for damages; that there was no remuneration violation under the AKS; that they did work entitling them to bill Medicaid; that the kickback allegations were time-barred; and that the plaintiffs and failed to allege a factual basis for patient evaluations and AT T. The court, looking to the complaint, quickly determined that the government's complaint properly and adequately addressed each of the alleged pleading deficiency issues, that the go that the government's complaint-in-intervention related-back to the date of the original *qui tam* complaint for statute of limitations purposes. Therefore, the Wasserman defendants' motion to dismiss was also denied in its entirety.

U.S. ex rel. Patton v. Shaw Servs., L.L.C., 2011 WL 924292 (5th Cir. Mar. 17, 2011)

A relator brought a *qui tam* action against a construction company that formerly employed him, alleging that the company violated the False Claims Act by submitting false claims and making false statements regarding work performed under a construction project in Louisiana that was partially funded by the federal government—the relator contended that the defendant's work was "defective" and did not meet applicable building code requirements. The government declined to intervene in the *qui tam* case. In addition, the relator alleged that the defendant violated the False Claims Act by creating a hostile work environment and eventually terminating his employment in retaliation, after he reported the alleged fraud to the company and to federal and state agencies. The defendant moved to dismiss the relator's fraud claims, arguing that the relator failed to plead those claims with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendant also moved to dismiss, or in the alternative, moved for partial summary judgment on the relator's retaliation claim, arguing that the relator failed to establish that his superiors were on notice that he was engaged in protected conduct under the False Claims Act, and terminated his employment in retaliation. The United States District Court for the Eastern District of Louisiana treated all of the defendant's motions as motions for summary judgment and ultimately granted those motions. The relator then appealed the district court's rulings to the Fifth Circuit. The Fifth Circuit affirmed the district court's decisions.

False Claims

The Fifth Circuit first examined the relator's fraud claims and the district court's ruling that the relator failed to show that the defendant violated the terms of its government contract or any applicable building code. The circuit court agreed with the district court's assessment, as it concluded that none of the authorities the relator relied upon to show the defendant's non-compliance and allegedly false claims and false statements were ever incorporated in the defendant's government contract. Thus, as the circuit court stated, "any failure to conform to the standards set forth in those materials was irrelevant to determining whether [the defendant] violated its obligations under the contract."

The appeals court further noted that even if the authorities the relator relied on created an issue of material fact regarding the defendant's compliance with the contract, the relator failed to satisfy the other elements of a fraud claim under the FCA. First, the circuit court concluded that the relator did not claim that the defendant falsely certified its compliance with any contract term or regulatory provision that was allegedly violated, nor did he allege that compliance with any such provision was a condition of payment under the contract. Since the relator could not identify any false certification made by the defendant, the circuit court determined that his allegations

were based solely on speculation, and could not satisfy Rule 9(b)'s particularity requirements. Next, the court held that the relator failed to establish the FCA's scienter element, since he did not show that the defendant knowingly violated the FCA. The court stated that the relator "put forth unsubstantiated allegations that his supervisors admitted to employing substandard or improper construction practices, but these allegations are insufficient to create a genuine dispute as to whether [the defendant] knowingly or recklessly submitted false claims to the government." Consequently, the relator's fraud claims were dismissed and summary judgment was entered in favor of the defendant.

Retaliation

With respect to his retaliation claim, the relator argued that he repeatedly complained both internally and to federal and state government authorities about the defendant's alleged improper construction methods, and that his complaints constituted protected activity under the FCA. The circuit court, however, agreed with the district court that the relator's failed to provide any evidence of his internal complaints about fraud against the government, or any retaliation that resulted from those complaints. Instead, the Fifth Circuit held, the relator's evidence showed that he complained to the defendant about unsafe or improper construction methods, which are not protected activity under the FCA, since such complaints are not "in furtherance of" a *qui tam* action. In addition, the court noted that the relator failed to provide any evidence that the defendant was aware of his complaints to government authorities, and therefore, he could not show that any such complaints caused any retaliation he suffered. Accordingly, the circuit court held that the district court did not err in granting summary judgment in favor of the defendant on the retaliation claim, and that claim was also dismissed.

U.S. v. Hawley, 2010 WL 3292710 (8th Cir. Aug. 23, 2010)

The government alleged that the defendant insurance agent and his defendant's insurance company defrauded the Federal Crop Insurance Corporation (FCIC)—a wholly-owned government corporation—by causing ineligible farmers to make claims against insurance policies that were issued by a private insurance company and reinsured by the government. Based on these allegations, the government sued the defendants under sections 3729(a)(1), (2), and (3) of the False Claims Act, which respectively impose liability for presenting false claims (or causing false claims to be presented) to the government, making or using false statements or records (or causing false statements or records to be made or used) in support of false claims to the government, and conspiring to defraud the government. The defendants moved for summary judgment on the government's complaint, and the U.S. District Court for the Northern District of Iowa granted the defendant's motion. The government appealed the district court's decision to the 8th Circuit.

Claims Under Section 3729(a)(1)

The 8th Circuit first examined the government's claim that the defendants violated section 3729(a)(1), which prohibits presenting claims to the government. The district court had dismissed this claim, as it found that the government did not allege that the false claims at issue were presented to the FCIC, but rather were only presented to the defendant insurance company. This allegation, the district court concluded, was insufficient to maintain a claim under section 3729(a)(1). The Eighth Circuit disagreed with the district court's analysis, however. The circuit court, relying on the U.S. Supreme Court's holding in *Allison Engine Co. v. U.S. ex rel. Sanders*, concluded that section 3729(a)(1) does not require that false claims be made directly to the government, but also imposes liability when false claims are originally made to a government contractor, grantee, or other recipient of federal government funds, and are then forwarded to the Government. The court found that the government argued as much, as it alleged that the defendants induced farmers to submit false claims to the insurance company, and that those claims were in turn presented by the insurance company to the FCIC. The circuit court held that the district court's grant of summary judgment on the government's section 3729(a)(1) claim was not warranted, as there was a genuine issue of material fact regarding whether false claims were transferred from the defendant insurance company to the FCIC. Thus, the Eighth Circuit reversed and remanded the district court's decision with respect to the government's allegations regarding the presentment of false claims.

Claims Under Section 3729(a)(2)

The Eighth Circuit then turned its attention to the government's claims under section 3729(a)(2), which alleged that the defendants used false records and/or statements to get false claims paid or approved by the FCIC. The district court granted summary judgment in favor of the defendants on this claim as well, holding that in order for the defendants to be held liable under this provision, the government must demonstrate that the defendants intended for the allegedly false crop insurance claims to be material to the FCIC's decision to make payments, and that the government failed to meet this burden. Once again, the Eighth Circuit disagreed and found that the government provided enough evidence to support its assertion that the defendants did intend that the allegedly false crop insurance claims would be material to the FCIC's decision to make payment, since the defendant insurance agent had extensive experience selling federally reinsured crop insurance and it was reasonable for a jury to conclude that he understood that the defendant insurance company would forward crop insurance claims to the FCIC and that the FCIC would rely on those claims as a condition for making payment. The appellate court held that the evidence in the record created a genuine issue of material fact as to the defendant's intent, and thus, the Eighth Circuit reversed the district court's decision with respect to the government's claims under section 3729(a)(2), and remanded that matter as well.

Claims Under Section 3729(a)(3)

Finally, the Eighth Circuit considered the government's appeal of the dismissal of its conspiracy claims under section 3729(a)(3), which also includes an intent requirement. The district court had dismissed this claim as well, concluding that the government's evidence only showed that the defendant insurance agent and his alleged co-conspirators agreed to defraud the defendant insurance company, not the FCIC. However, the Eighth Circuit disagreed with the district court's analysis once more and held that, just as the government's allegations under section 3729(a)(2) were sufficient to overcome the defendants' arguments about intent, so too were the government's allegations under section 3729(a)(3). As a result, the Eighth Circuit reversed the district court's ruling and remanded the matter for further proceedings.

See *U.S. ex rel. Veltz v. Allegany Rehab. Assocs., Inc.*, 2011 WL 1042194 (W.D.N.Y. Mar. 18, 2011) at page 41.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Carter v. Halliburton, 2011 WL 2118227 (E.D. Va. May 24, 2011)

A relator brought a *qui tam* action against his former employer and two other companies, alleging that they violated the False Claims Act by fraudulently billing the government for services provided to the US military forces in Iraq. Specifically, the relator alleged that the defendants required employees to complete timecards stating that they worked 12 hours a day, even on days when they did not work at all, and knowingly billed the government for employees' unproductive time and for work that was not actually performed. The defendants moved to dismiss the relator's complaint, contending that the court lacked jurisdiction over the relator's claims, due to the FCA's first-to-file bar and its public disclosure bar. The United States District Court for the Eastern District of Virginia agreed and dismissed the relator's complaint without prejudice.

First-to-File Bar

The defendants argued that the relator's action was barred by two previous actions: one previously filed in California by a different relator, as well as an action that the relator himself had previously filed. The first action, filed in California by a different relator, was filed in 2005. Subsequently, in 2006, the present relator filed his original action, while the California case was still pending. As a result, the present relator's first case was dismissed without prejudice on first-to-file grounds. A few weeks later, however, the California action was dismissed, and the relator appealed the dismissal of his original complaint. While the appeal was still pending, the relator re-filed his *qui tam* action, and only later moved to dismiss his appeal. The court, noting that the FCA bars *qui tam* actions that are filed while a related action is still pending, held that since the relator's appeal was still pending when he re-filed his *qui tam* complaint, by the plain language of the FCA, that complaint was barred. The court rejected the relator's argument that *qui tam* actions are no longer "pending" when they are on appeal, since they are shown as "closed" in the district court's docket. The court reasoned that if the Fourth Circuit had reversed the district court's dismissal of the relator's original action, then that original case would have been remanded, and the relator would have then had two, identical pending *qui tam* actions, which was not proper. In announcing its holding, the court observed that "it is somewhat odd that a party's own, earlier case can bar that party's later case, but the statute says a 'pending action.' Again, 'in interpreting a statute a court should always turn first to one, cardinal canon before all others,' that when Congress writes a statute, it 'says . . . what it means and means . . .

what it says there.'" The court granted the defendants' motion to dismiss the relator's case, but did so without prejudice.

The court did not address the defendants' public disclosure argument, since the defendants' motion was resolved on first-to-file grounds.

U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co., 2011 WL 231767 (E.D. La. Jan. 24, 2011)

A relator brought a *qui tam* action against nine insurance companies, alleging that, following Hurricane Katrina, the defendants defrauded the government and reduced their obligation to pay claims under homeowners insurance policies, by improperly attributing damages to flooding, when in fact, those damages should have been attributed to wind or wind-driven rain. The United States District Court for the Eastern District of Louisiana dismissed the case in its entirety under the False Claims Act's first-to-file provision, as the court determined that an earlier case included similar claims. The relator appealed that decision to the Fifth Circuit, and the circuit court held that only claims against two of the defendants should have been barred, as the remaining defendants were not named in the earlier action. The appellate court reached this decision even though one of the two defendants had already been voluntarily dismissed from the earlier case. On remand, all of the remaining defendants moved for dismissal, arguing that the district court lacked jurisdiction over the relator's claims, pursuant to the FCA's public disclosure bar provision, because the relator's allegations were based on information that had been publicly disclosed and the relator was not an original source of that information. The district court, though, held that the relator had adequately pled that he was an original source of the information on which his complaint was based; he also satisfied Rule 9(b)'s pleading requirements. The relator then moved for leave to file a second amended complaint, to add a claim that the defendants also overstated the amount of flood damage—which allowed them to collect inflated fees due to their participation in the National Flood Insurance Program—and to assert that claim against the defendant who had been previously dismissed from the case. The court granted the relator's request. All of the defendants moved to dismiss the amended complaint, with the previously dismissed defendant again asserting the first-to-file rule and all of the defendants asserting the public disclosure bar.

First-to-File Bar

The defendant that was previously dismissed under the first-to-file bar again moved to dismiss the relator's new claims on that basis, arguing that the earlier, similar case still trumped the relator's complaint. The relator countered, arguing that the earlier case was no longer pending at the time he filed his amended complaint, and therefore, the first-to-file bar no longer applied. The court, though, applying the principles of

res judicata and collateral estoppel, held that since this defendant had already been dismissed from the case on first-to-file grounds, and since the Fifth Circuit was aware that the defendant had already been voluntarily dismissed from that earlier case at the time it affirmed the district court's ruling, "the judgment of dismissal remain[ed] effective to preclude relitigation of the precise issue of jurisdiction that led to the dismissal." The court held that since the relator brought his original complaint against this defendant while a related action was pending, the relator's subsequent claims against that defendant were also barred by the first-to-file rule, stating that the relator "cannot argue that the dismissal frees it to rename [the defendant] by amendment because the Court cannot have jurisdiction over an amended complaint if it did not have jurisdiction when the original complaint was filed."

Public Disclosure Bar

The court dismissed the claims against the remaining defendants under the FCA's public disclosure bar. The defendants argued that the relator's claims were based on publicly disclosed information, and the relator was not an original source of that information, because he did not have direct and independent knowledge of the information and did not voluntarily provide any such information to the government before filing his *qui tam* action. The relator disagreed, noting that his attorney discussed the allegations with an Assistant U.S. Attorney and gave her a copy of the complaint a written disclosure statement before filing the *qui tam* action. The relator also received confirmation that these materials were delivered to the U.S Department of Justice. The defendants argued that these disclosures to the government were insufficient, since they occurred on the same day that the relator's *qui tam* complaint was filed.

Before analyzing the parties' arguments, the court noted that the relator "must demonstrate that the information contained in its pre-filing disclosure is sufficient to make it an original source," and observed that "[b]ecause the Court cannot acquire jurisdiction because of changed jurisdictional facts . . . the Court must look to the disclosures [the relator] made before it filed suit." When the court reviewed the relator's initial pre-filing disclosures to the government—both verbal and written—it determined that the relator's "original written disclosure contains absolutely no specific information as to" several of the named defendants, and thus was insufficient to establish the relator's status as an "original source" with respect to its allegations against those defendants. Consequently, the relator's allegations against those defendants were dismissed. The court also dismissed the relator's claims against the remaining defendants, as the relator conceded that it did not have a factual basis for asserting those claims, and thus, could not be an original source of any information on which those claims were based.

U.S. ex rel. Denenea v. Allstate Ins. Co., 2011 WL 231780 (E.D. La. Jan. 24, 2011)

A relator, who was also an attorney, brought a *qui tam* action against an insurance company. The relator's case arose out of the same circumstances as *U.S. ex rel. Branch Consultants, L.L.C., v. Allstate Ins. Co.*, which is discussed above. In the present case, the relator alleged that the insurance company defendant violated the False Claims Act by shifting losses from wind coverage to flood coverage, which reduced the amount the company had to pay homeowners, while increasing the amount paid out by the government. The defendant moved to dismiss on first-to-file, public disclosure, and particularity grounds. The United States District Court for the Eastern Division of Louisiana granted the motion and held the court lacked jurisdiction over the relator's claims, due to the FCA's first-to-file rule.

The court began its analysis by examining the jurisdictional facts and found that two cases with the same essential facts were pending against the defendant when the relator's *qui tam* complaint was filed. The relator argued that his suit was not barred, however, because the relators in the other cases agreed to consolidate their actions with his. The court, though, held that relators cannot avoid the first-to-file bar by consolidating claims with earlier actions. The relator then argued that his complaint differed from the other previous actions, since he alleged fraud with respect to different properties. The court's response was that adding these factual details was insufficient to avoid first-to-file bar. Finally, the relator argued that the allegations in one of the prior actions had been voluntarily dismissed, and thus could not bar his action. The court, though, noted that, at the time the relator filed his *qui tam* action, those voluntarily dismissed allegations were still pending, and therefore barred his action.

U.S. ex rel. Jones v. Collegiate Funding Servs., Inc., 2011 WL 129842 (E.D. Va. Jan. 12, 2011)

Two relators brought a *qui tam* action against a private commercial lender and its subsidiaries, alleging that the defendants—all of whom made post-secondary education loans under the Federal Family Education Loan Program (FFELP)—violated the False Claims Act by making false statements to the Department of Education. Specifically, the relators—who both previously worked as telemarketers for the commercial lender—alleged that the defendants improperly secured federally-guaranteed consolidation loans, and then falsely certified their compliance with applicable regulations when making claims to the government for reimbursement, after borrowers defaulted on those loans. The relators' claim was based on their allegations that, as part of the reimbursement process for federally-backed education loans, the defendants were required to certify to the Department of Education that the information in their claims was true and accurate, and

that the loans were made in accordance with federal law. The relators contended that the defendants' certifications to the Department of Education were false, and that the consolidation loans were not made in accordance with the law, because the defendants violated the Higher Education Act by: (1) entering into unlawful agreements with colleges and universities, whereby the commercial lender made payments to the schools in exchange for the schools' cooperation in steering students toward the commercial lender for loan consolidation services; (2) entering into improper agreements with schools to take over the schools' statutory duty to provide students with personalized exit loan counseling, and subsequently deceived students into believing that loan consolidation was for everyone; (3) using misleading direct mail solicitations to college students and graduates that appeared to come from the government; and (4) offering and making illegal bonus payments to employees based on the number of FFELP student loan applications they initiated. As a result of these four alleged improprieties, the relators alleged that all of the defendants' reimbursement claims involving these factual scenarios were false.

The defendants moved to dismiss the relators' complaint, arguing that the relators' claims arising from the first three allegations were based on prior public disclosures—namely, a series of news reports and the commercial lender's publicly-available SEC filings—and that the U.S. District Court for the Eastern District of Virginia did not have subject matter jurisdiction over the relators' complaint. In addition, the defendants argued that the relators did not plead their claims based on the fourth allegation with particularity, as required by Federal Rule of Civil Procedure 9(b). The defendants' arguments were based on the fact that the relators worked as telemarketers, and therefore were in no position to learn about the defendants' purported illegal activities, to process any loan consolidations, to provide any post-consolidation service, or to access information regarding the defendants' claims to the government. The matter was referred to a magistrate judge.

The magistrate judge recommended dismissal of the claims based on the first two allegations for lack of subject matter jurisdiction, finding that the relators failed to prove that their allegations were not derived from prior public disclosures. The magistrate held that there was subject matter jurisdiction over the remaining claims, but concluded that those claims were not properly pled and should also be dismissed. Consequently, the magistrate recommended dismissal of the relators' complaint in its entirety. Moreover, the magistrate concluded that allowing the relators to further amend the complaint would be futile, since the relators admitted that they did not have sufficient additional information to satisfy Rule 9(b)'s pleading requirements. The district court then considered the magistrate's recommendation.

The Public Disclosure Bar

The district court first considered the defendants' argument that the relators based claims on publicly disclosed information. The relators argued that the magistrate erred by determining that if the relators' knowledge did not come through their employment with the defendant commercial lender, then it must have come from a prior public disclosure. The court, though, held that the magistrate's conclusion was reasonable, since he considered all the facts acquired from the relators' work experience and observed that no further explanation was given as to how the relators learned additional information that was outside the scope of their positions as telemarketers.

The relators next argued that the SEC filings they relied on were not "administrative reports" capable of triggering the public disclosure bar. The court disagreed and held that the SEC filings can trigger the bar, since there is no requirement that administrative reports must be created by the government—according to the court, such reports may also be received by the government. In addition, the court mentioned that the defendants pointed to numerous other public disclosures which were indisputably sufficient to trigger the bar.

The relators then argued that the magistrate erred by finding that the relators failed to prove their allegations were not "based upon" the prior public disclosures. The relators argued that there were only three public disclosures published prior to the filing of their original complaint and that a prior public disclosure can only deprive a court of subject jurisdiction over a relator's claims if it discloses the allegation or transaction on which the relators' claims were actually based. The court disagreed and held the essential elements of the relators' allegations were clearly disclosed prior to the filing, stating that the public disclosure bar is not limited to circumstances in which a *qui tam* complaint is based on "a single comprehensive public disclosure which embraces "each and every element of the alleged fraud." The court determined that, taken together, the prior public disclosures provided enough information to the relators for them to use as a basis for their fraud allegations.

Having determined that the public disclosure bar had been trigger, the court turned its attention to the question of whether the relators qualified for the "original source" exception to the public disclosure bar. The relators argued they were original sources of the information supporting their claims. The court, though, found that the relators failed to provide any evidence of their direct and independent knowledge of the information upon which their allegations were based. The court made clear that it did not hold that "every relator in a *qui tam* action must affirmatively establish the source of his or her knowledge," but compelled the relators in this case to do so because the facts underlying their complaint had been previously publicly disclosed and the relators had no logical access to that information through their employment positions. The court hypothesized that the relators' attorneys may have supplemented the relators' complaint—perhaps without the relators' knowledge—with the publicly disclosed information, and when the relators could not provide an alternative explanation, the court concluded that they did not meet the standard for the False Claims Act's original source exception.

The court held that the bar did not apply to the relators' claims based on their third and fourth allegations jurisdiction was proper for fact patterns three and four. With respect to the relators' claims based on the third allegation—that the defendants used misleading advertising to deceive students into believing that they were receiving solictations from the government—the court held that it was plausible that even if though the relators were not involved with creating the advertisements, callers may have referenced them when speaking to the relators. With respect to the relators' claims based on the fourth allegation—that the defendants made improper bonus payments to employees, based on the number of student loan applications they process—the court held that the public disclosure bar did not apply, rejecting the defendants' only argument that those claims should be dismissed because they incorporated the first two allegations by reference. Instead, the court noted, the public disclosure bar is applied on a claim-by-claim basis, and there was no evidence that the bar applied to the relators' claims based on the fourth allegation. As a result, the court held that it had no subject matter jurisdiction over claims based on allegations one and two, and those claims were dismissed.

Rule 9(b)

The court then turned its attention to the question of whether or not the relators pled the remaining claims with sufficient particularity. The relators argued that the magistrate repeatedly misstated their allegations and erroneously determined that the relators had alleged that all of the defendants' claims to the government were false—not just those claims that arose from the four alleged factual scenarios listed above. However, the court held found that the magistrate fully grasped the scope of the relators' claims.

The relators also argued that they satisfied Rule 9(b) when making claims of false certifications, because they attached a blank FFELP claim form detailing the certifications the defendants were compelled to make when submitting claims for reimbursement, and they described the defendants' alleged Higher Education Act violations. The relators further argued that it was unnecessary for them to prove that the alleged false claims were actually presented to the government, since their claims were based on the defendants' alleging making false statements or causing false statements to be made in support of false claims. The court held that the relators misunderstood the FCA's liability provisions, noting that the relator did not allege that the defendants caused some third party to present false claims to the government, but that the defendants themselves had submitted false claims. As a result, the court held that the relators' submission of a blank FFELP document with no facts supporting that it was the basis of a false claim, did not satisfy the particularity requirement.

The relators further argued that they satisfied Rule 9(b) by pleading the defendants' alleged fraudulent scheme with particularity, even though they did not have evidence of the defendants' alleged false claims to the government. The court disagreed and held the relators were still required to plead supporting facts such as dates, defaults, payments, and specific information regarding claims for payment. The court

noted that the magistrate "merely asked Relators for some facts from which the Court could reasonably infer that [the defendants] submitted at least one false claim," but the relators were unable to do so. While the court acknowledged that Rule 9(b) can, in some circumstances, be satisfied by pleading a fraudulent scheme with particularity, it stated that in such circumstances, relators must also provide some "reliable indicia that lead to a strong inference that claims were actually submitted." As the relators did not provide such information, the court concluded that their remaining claims were not pled with the requisite particularity, and those claims were dismissed.

U.S. ex rel. Batiste v. SLM Corp., 2010 WL 3786600 (D.D.C. Sept. 24, 2010)

A relator, who worked as a senior loan associate for the defendant—a company that administered federally-guaranteed student loans—brought a *qui tam* action alleging that the defendant violated the False Claims Act and defrauded the United States by accepting payments from the federal government that were based on false certifications of compliance with federal law. Specifically, the relator alleged that the defendant gave forbearances to borrowers regardless of their intention to re-pay or their reasons for non-payment, and also granted loans without basic documentation, offered loans to delinquent borrowers, and implemented a system of quotas and bonuses as an incentive for its employees to extend forbearances. The defendant moved to dismiss the relator's complaint for lack of subject matter jurisdiction, contending the first-to-file limitation jurisdictionally barred the relator's action. The United States District Court for the District of Columbia granted the defendant's motion. The defendant argued that a different relator had previously filed an identical *qui tam* action against the defendant two years before the present case was filed. The relator argued that his case was different because the previous complaint failed to allege that the defendant extended forbearances to delinquent borrowers as an inducement for them to make their outstanding payments. The court disagreed and held that the relator's claims were barred because they contained the same essential elements of fraud with only minor variations. The relator also argued that the previous complaint was not a pending action and could not be used as a basis to dismiss because the previous complaint was dismissed for failure to meet the 9(b) pleading requirements. The court found this unpersuasive, noting that it is plausible that a complaint may provide sufficient information to cause the government to launch its own investigation of a fraudulent scheme without providing enough information under 9(b). Therefore, it held that the government had been made aware of the alleged fraud in the previous complaint and granted the defendant's motion to dismiss.

See *U.S. ex rel. Piacentile v. Sanofi Synthelabo, Inc.*, 2010 WL 5466043 (D. N.J. Dec. 30, 2010), at page 10.

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

U.S. ex rel. Wilson v. Bristol-Myers Squibb, Inc., 2011 WL 2462469 (D. Mass. June 16, 2011)

A relator brought a *qui tam* action against pharmaceutical companies Bristol-Myers Squibb ("BMS") and Sanofi, alleging that the defendants engaged in a scheme of off-label promotion and marketing of certain medications, thereby causing physicians to submit prescriptions for drugs that were ineligible for reimbursement under Medicaid. After filing an amended complaint, the relator moved for leave to amend his complaint again, in order to add another employee of BMS (Allen) as an additional relator and to expand upon his factual allegations. The defendants argued that the relator should not be allowed to further amend his complaint, and that the amended complaint would violate the FCA's public disclosure bar. Further, the defendants argued that the proposed amended complaint violated the *qui tam* filing and service requirements because it raised allegations not found in the original complaint and previously not disclosed to the government before it determined whether or not to intervene in the relator's suit. The United States District Court for the District of Massachusetts agreed with the defendants and denied the realtor's motion for leave to amend his complaint.

First, the court analyzed the FCA's unique filing and service requirements, which provide for filing *qui tam* complaints under seal, while the government investigates the relator's allegations. The relator argued that his proposed amended complaint did not have to comply with these requirements, since the government already had an opportunity to investigate his allegations while the case was under seal and declined to intervene. However, the court held that the relator's proposed inclusion of a new relator and the development of new allegations violated the FCA's filing and sealing provision and thus rejected the proposed amended complaint on that basis.

Second, the court analyzed whether the proposed amended complaint was barred by the FCA's public disclosure bar. The court found that the relator's previous complaints were unsealed and already in the public forum when Allen provided his additional allegations. Consequently, the court held that Allen would have to show that he qualified for the "original source" exception to the public disclosure bar. Allen argued that he qualified for the original source exception because he acquired direct knowledge of the defendants' fraud scheme during his years as a BMS employee. However, the court ultimately determined that Allen could not join the original relator's suit, because in order to qualify for the original source exception, Allen would have had to voluntarily disclose his fraud allegations to the government before the original *qui tam* suit was filed, and Allen could not show that he made any such disclosure to the government at all, and certainly not before the original *qui tam* suit was filed. The court determined that "[i]f Allen's information is

'new' he has failed to disclose it to the government. If Allen's information is not new, it is based upon the public disclosure of Wilson's [the original relator] complaint. Either way, he [Allen] is jurisdictionally barred from becoming a second relator in this suit." The relator's motion to further amend his complaint was denied.

Schindler Elevator Corp. v. U.S. ex rel. Kirk, 2011 WL 1832825 (U.S. May 16, 2011)

A relator brought a *qui tam* action against his former employer—a government contractor—alleging that the defendant violated the False Claims Act by falsely certifying its compliance with the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). Specifically, the relator alleged that the defendant failed to file certain required reports regarding the number of Vietnam Veterans it employed, and when the company did file the necessary reports, it provided false information. To confirm and support his allegations, the relator made three requests to the Department of Labor under the Freedom of Information Act (FOIA), to obtain the defendants' reports. The Department of Labor responded by providing the reports and/or specifying when no such report had been filed, and the relator then filed his *qui tam* action.

The defendant moved to dismiss the action, arguing that the relator's complaint was based on a public disclosure. Notably, the company did not allege that the underlying documents the relator received—the reports the company had filed with the Department of Labor—were public disclosures. Rather, the company asserted that the Department of Labor's search for the documents constituted an "administrative investigation" and that the agency's written response to the relator constituted an "administrative report", which deprived the district court of subject matter jurisdiction over the relator's claims. The United States District Court for the Southern District of New York agreed, and dismissed the relator's action. The relator appealed that decision to the U.S. Court of Appeals for the Second Circuit, which vacated the district court's decision and remanded the case. The circuit court held that a government agency's responses to FOIA requests do not automatically result in administrative investigations and/or reports, under the False Claims Act's public disclosure bar, but are merely ministerial acts. The company then petitioned the U.S. Supreme Court for certiorari, which the Court granted.

In a 5-3 decision (Justice Kagan, who served as U.S. Solicitor General when the Court addresses similar issues in 2009, recused herself from this case), the Supreme Court reversed the Second Circuit's ruling and held that "[a] federal agency's written response to a FOIA request for records constitutes a 'report' within the meaning of the FCA's public disclosure bar." The Court reasoned that the FCA does not define "report", and that since the public disclosure bar include other broad categories of disclosures, such as "news media", the term "report" should also be broadly construed. Relying on the broadest plain meaning of the term, the Court concluded that "report"

means "something that gives information," and held that all agency written responses to FOIA requests provide information, and are thus, reports, for FCA purposes. The court determined that its expansive reading of "report" was consistent with congressional intent to preclude parasitic relators, stating that "[a]nyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA." The Court remanded the case, for further proceedings regarding whether the relator's *qui tam* action was "based upon" the public disclosures.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, dissented, and agreed with the Second Circuit that the types of disclosures discussed in the FCA's public disclosure bar provision all arise in an investigatory context, and that the term "report" should also be read in that context. These Justices reasoned that since routine responses to FOIA requests do not involve synthesizing documents for the purpose of gleaning insight or information, but merely consist of assembling and duplicating records and/or noting the absence of records, such routine responses do not generate "reports," for purposes of the FCA's public disclosure bar. The dissenting Justices declared that the majority's opinion weakens the FCA as a fraud-fighting tool, as it bars non-parasitic, non-frivolous relators with partial information from substantiating that information through FOIA requests, in order to satisfy Rule 9(b)'s pleading standards. The dissenting Justices suggest that the majority's opinion, "which severely limits whistleblowers' ability to substantiate their allegations before commencing suit," should be addressed through a congressional fix.

U.S. ex rel. Digital Healthcare, Inc. v. Affiliated Computer Servs., Inc., 2011 WL 1495928 (D.D.C. Apr. 20, 2011)

A healthcare corporation brought a *qui tam* action against a computer services company that operated as a Medicaid fiscal agent and pharmacy benefits manager, alleging that the defendant violated the federal False Claims Act and various state FCA statutes. The relator alleged that the defendant company processes hundreds of millions of Medicaid claims each year for the federal government and thirteen states, and that he company failed to take steps to determine whether Medicaid claimants were also covered by third-party insurance, which led to the submission of false Medicaid claims to the federal government, since Medicaid is designed to be a payor of last resort and third-party insurance should be billed for Medicaid patients' services, when available. The relator alleged that it conducted a national cost analysis study to determine the extent of these "coordination of benefits" problems, and that the defendant company participated in the study. The study concluded that, depending on the state involved, between 20% and 35% of the patients for whom the defendant had processed Medicaid claims had private third-party insurance as well, and therefore the Medicaid claims the defendant processed for those patients were false. The relator further alleged that it suggested software to the defendant that would remedy this problem, but the defendant refused to

implement the software. The relator then filed its *qui tam* suit. The United States declined to intervene in the suit, and the defendant moved to dismiss the relator's complaint, arguing that the court did not have subject matter jurisdiction over the relator's complaint and that the complaint failed to state a claim under the FCA. The United States District Court for the District of Columbia granted the motion in part. While the court held that it had subject matter jurisdiction over the relator's claims, it concluded that the relator failed to plead fraud with particularity. Consequently, the court dismissed the relator's complaint, but granted the relator leave to amend the complaint.

Public Disclosure Bar and Subject Matter Jurisdiction

The court first considered the defendant's assertion that the court lacked subject matter jurisdiction as the relator's claims, since those claims were based on information that was previously publicly disclosed in various Government Accountability Office (GAO) reports—one of which concluded that "Medicaid could save millions of dollars if states ensured that liable third parties paid Medicaid recipients' medical bills"—and in various Congressional materials, including a Senate subcommittee hearing. Further, the defendant referred the court to contracts that it had with multiple states, which it argued had been publicly bid, and for which the awards had been published. The court found that while the materials cited by the defendants "reveal some important background information, such as the problem of verifying whether a Medicaid beneficiary has third-party coverage and the difficulties states have in obtaining payment from third-party payers," that information did not amount to public disclosures of the allegations made in the relator's *qui tam* complaint, and therefore did not trigger the FCA's public disclosure bar. For instance, the court observed that the GAO reports and other sources did not discuss the role of Medicaid fiscal agents or pharmacy benefits managers, or any particulars regarding how claims are processed and submitted to state Medicaid agencies. In addition, the court found that the disclosures were devoid of any allegations of fraud or wrongdoing by the defendant. Accordingly, the court denied the defendant's motion to dismiss for lack of subject matter jurisdiction.

Failure to State a Claim

The court then considered the defendant's argument that the relator failed to state a claim, since it did not identify any specific claim submitted, the time and place of any of the fraudulent claims, or any of the defendant's representatives who allegedly committed wrongful acts. The court agreed and found that the relator's complaint failed to identify who was involved in the alleged FCA violations, and failed to identify a single false claim submitted to the government for Medicaid reimbursement or any claim improperly paid by Medicaid. The relator argued that the pleading standard should be relaxed, since the defendant was in exclusive possession of certain information, which prevented the relator from plead more particularized facts regarding its FCA allegations. The court, though, found that the relator's complaint failed to allege anything

about a lack of access to information and held that the relator failed to plead fraud with particularity. As a result, the court dismissed the relator's claim under the federal FCA and then declined to exercise jurisdiction over the state FCA claims. The court, though, granted the relator leave to amend the complaint.

U.S. ex rel. Davis v. Dist. of Columbia, 2011 WL 1126048 (D.D.C. Mar. 29, 2011)

A relator brought a *qui tam* action against the District of Columbia, alleging that the District submitted false Medicaid reimbursement claims for fiscal year 1998, because the District did not have the necessary documentation to support those claims. The relator claimed that he had knowledge of the District's improper practices because his firm had been contracted to collect data, maintain all necessary documentation and prepare the District's Medicaid reimbursement claims during the relevant period. The U.S. government declined to intervene in the relator's action. The United States District Court for the District of Columbia dismissed the relator's claim for treble damages, as the relator did not allege that the federal government suffered any damages. The court determined that before the relator's original action was filed, the Office of the District of Columbia Auditor issued a report that noted deficiencies in the District's record-keeping, which resulted in the District not maintaining sufficient documentation to support some of its Medicaid reimbursement claims for fiscal year 1998. Subsequently—but still before the relator's original *qui tam* action was filed—the Centers for Medicare and Medicaid Services conducted its own investigation and issued its own report, which ultimately resulted in the District repaying nearly $8 million to CMS for fiscal year 1998.

The relator file an amended complaint, re-alleging his fraud claims against the District and once again seeking treble damages, arguing that the government did suffer damages, as evidenced by the District's repayment to CMS. The relator then moved for summary judgment, while the District moved to dismiss the relator's complaint for lack of subject matter jurisdiction, or in the alternative, for summary judgment.

Public Disclosure Bar

The District moved to dismiss the relator's complaint, arguing that the *qui tam* action was based on publicly disclosed information—namely, the District's audit report—and thus, the court was without subject matter jurisdiction over the relator's claims. The court first concluded that the District report did fall within the FCA's definition of an "administrative report," and therefore was a public disclosure, for FCA purposes. As the court noted, although the FCA's public disclosure bar provision has been clarified, and only federal administrative reports can be deemed public disclosures, that

change to the law was not retroactive, and does not apply to the relator's case, which was filed several years before the law was changed. Next, the court held that the relator's claims were based on the District's report, stating that the "audit report revealed the essence of plaintiff's fraud claim—that the fiscal year 1998 cost claim submitted by [the defendant] lacked supporting documentation."

The court then considered whether the relator could avoid the public disclosure bar by qualifying for the FCA's "original source" exception. The court held that he could not. Although the relator had direct and independent knowledge of the District's alleged fraud because of his job, and although he voluntarily informed the federal government of his *qui tam* allegations before filing suit under seal, the court concluded that he was not an "original source" for FCA purposes, because he did not provide the government with information regarding the alleged fraud before the public disclosure occurred. The court based its reasoning on the D.C. Circuit's decision in United States ex rel. Findley v. FPC-Baron Employees' Club, 105 F.3d 675 (D.C. Cir. 1997), which surmised that disclosure to the government prior to any public disclosure is required under the FCA, since the public disclosure bar is designed to incentivize relators to give the government "advance notice" of fraud schemes. The district court acknowledged that several other circuit courts have disagreed with the rationale announced in Findley, and impose no such requirement; the district court even recognized that the D.C. Circuit itself "has recently expressed some uncertainty" regarding this requirement. Nonetheless, the district court felt compelled to apply Findley, concluded that the relator did not notify the federal government of the District's alleged fraud prior to the public disclosure, and dismissed the *qui tam* action for lack of subject matter jurisdiction. Given that ruling, the court did not address either party's summary judgment motion.

U.S. ex rel. Black v. Health & Hosp. Corp. of Marion County, 2011 WL 1161737 (D. Md. Mar. 28, 2011)

A relator brought a *qui tam* action against a state municipal corporation that operated nursing homes, alleging that the defendant participated in a scheme whereby it fraudulently certified certain Medicaid expenditure documents in order to receive "federal matching" Medicaid funds to which it was not entitled. The defendant moved to dismiss for lack of subject matter jurisdiction, failure to state a claim and failure to plead with particularity. The United States District Court for the District of Maryland granted the motion to dismiss with prejudice.

The defendant argued that the relator's claims were barred by public disclosures—namely, several government reports and audits, congressional hearings, and CMS statements—and that he did not qualify for the "original source" exception to the bar. The court agreed, as it determined that these prior disclosures were sufficient to put the government on notice of the alleged fraudulent activity. The court also observed that the relator's claims merely echoed the public criticism of the Medicaid financing

mechanisms at issue, which had been the subject of great debate within CMS and Congress. The court held that the relator's claims simply mirrored CMS's concerns regarding and that his complaint asserted no facts to prove that the defendant ever presented a false claim or made a false statement to the government in order to obtain Medicaid funds. Similarly, the court observed that the relator failed to provide any evidence for conspiracy to defraud the government. Further, the court noted that the relator acknowledged his lack of original and independent knowledge and relied on inference and guess work. As a result, the court held that it lacked the subject matter jurisdiction over the relator's claims.

In addition, the court agreed with the defendant that the relator's complaint was deficient and did not state or claim or plead fraud with particularity, since it did not plead the basic elements of fraud. Thus, the complaint was dismissed with prejudice.

U.S. ex rel. Veltz v. Allegany Rehab. Assocs., Inc., 2011 WL 1042194 (W.D.N.Y. Mar. 18, 2011)

A relator brought a *qui tam* action against his former employer, a rehabilitation center, alleging that the defendant violated the False Claims Act by submitting fraudulent Medicaid reimbursement claims. Specifically, the relator alleged that the defendant knowingly used faulty billing software that automatically up-coded Medicaid claims by replacing correctly-entered rate codes with incorrect ones. He also alleged that the defendant fraudulently billed Medicaid for non-reimbursable services and falsely certified its compliance with various Medicaid regulations, including staffing requirements. Moreover, the relator alleged that when he reported the alleged fraud to his superiors and to the defendant's board of directors, the defendant terminated his employment, in violation of the False Claims Act's anti-retaliation provision. The defendant moved for partial summary judgment on some of the relator's fraud claims, and the United States District Court for the Western District of New York granted the motion in part.

The relator had alleged that the defendant's improper billing scheme began in 1995, when Medicaid first required the defendant to transition to an electronic claims-submission system. He claimed that the defendant realized that its computer program was automatically changing billing codes—resulting in upcoding as well as downcoding—but that the company continued to use the program through 1999. The defendant argued that some of the relator's claims could not be maintained, since the New York State Department of Health (DOH) audited the defendant's Medicaid billing for the years 1993 through 1995, determined that the defendant had received more than $80,000 in overpayments and settled with the defendant for that amount. In addition, the defendant asserted that, pursuant to the False Claims Act's public disclosure bar, the court lacked subject matter jurisdiction over those claims, since the information on which those claims was based had been publicly disclosed in the DOH audit report before the relator's *qui tam*

suit was filed. The court agreed with the defendant that the relator's upcoding allegations for the 1994 to 1995 period were precluded due to the public disclosure bar. The court determined that, pursuant to the version of the public disclosure bar in effect at the time the *qui tam* suit was filed, the state audit report qualified as a public disclosure and the relator's allegations were based upon that disclosure. The court noted that the relator did not identify any claims contained in his *qui tam* complaint that were not also publicly disclosed in the audit. In addition, the court concluded that the relator did not qualify for the "original source" exception to the public disclosure bar, since he conceded that he did not have direct and independent knowledge of the defendant's alleged upcoding scheme. Consequently, the court granted the defendant's motion for summary judgment with respect to the relator's upcoding claims for 1994-1995.

The court then considered the relator's additional allegations of fraud through 1999. The defendant argued that the relator's claims were insufficient, since he could not show the defendant's fraudulent intent—the defendant contended that the computer issues were the result of inadvertent and innocent mistakes. The court held that this was an issue of material fact, and therefore denied the defendant's motion for summary judgment with respect to that issue. However, the court agreed with the defendant that the relator's false certification claim, which asserted that the defendant repeatedly failed to meet certain staffing requirements, yet certified to Medicaid that it was in compliance, was deficient. The court noted that the relator based this claim on a New York State regulation that discussed staffing ratios, as he alleged that the defendant was required to maintain a 10-to-1 staffing ratio. The court concluded that the regulation in question only required programs to "maintain an adequate and appropriate number of clinical staff members on site in proportion to the number of recipients on site," and that any mention of a 10-to-1 ratio was nothing more than a suggestion that such a ratio was presumptively acceptable. Thus, the court agreed with the defendant that the relator did not demonstrate that false certification of compliance with the New York law, and granted the defendant's summary judgment motion with respect to that claim.

U.S. ex rel. Lancaster v. Boeing Co., 2011 WL 888366 (N.D. Okla. Mar. 11, 2011)

A relator brought a *qui tam* action against her former employer, an aircraft manufacturer, alleging that the defendant had a logistics support contract (CLS) with the Air Force, essentially to act as the purchasing agent in obtaining repair and replacement parts for aircraft in the E-4 Program. The relator alleged that the contract required the defendant to use only FAA-certified parts in modifying and maintaining the aircraft but that the defendant failed to do so, but falsely certified that it had. The defendant moved for summary judgment, arguing that the court lacked subject matter jurisdiction over the relator's fraud claims, because of a pri-

or public disclosure, and contending that the relator was not an original source of the information upon which her complaint was based. The United States District Court for the Northern District of Oklahoma granted the defendant's motion.

The court found that in 1992 the Air Force Office of Special Investigations (OSI) initiated an investigation into the defendant's repairs of the E-4 aircraft under the CLS contract, which focused on whether or not the defendant used certified parts to perform the repairs. The investigation involved a U.S. Attorney's office, which contemplated bringing criminal and civil charges against the defendant, and consisted of numerous interviews with employees of the defendant and its vendors, as well as the Department of Defense Office of Inspector General. Eventually, the Air Force determined that certified parts were not required for the repairs and the investigation ceased.

The defendant argued that this administrative investigation constituted a prior public disclosure, and the court agreed. The relator did not dispute this fact. The court then analyzed whether the alleged disclosure had been made public within the meaning of the FCA. The defendant argued that the investigation involved disclosures to a U.S. Attorney's Office, to employees of third parties, and to employees of the defendant who were not involved in the suspected fraud scheme. The relator argued that the disclosure of information to these groups was not "public" for False Claims Act purposes, because it was made from one government employee to another involved in the investigation. The court held that the disclosure to the U.S. Attorney's Office was "public" under the FCA, stating that "[d]isclosure of information to a competent public official about an alleged false claim against the government is 'public disclosure' within the meaning of §3730(e)(4)(A) when the official is 'authorized to act for or to represent the community on behalf of government.'" Moreover, the court determined that a "public" disclosure had occurred, since OSI and the U.S. Attorney's Office were separate agencies. In addition, the court held that public disclosures occurred during many of the interviews performed in the investigation, since many of the interviewees were not even aware of the purported scheme until they participated in the OSI interview process. Therefore, the court held that a public disclosure within the meaning of the FCA occurred.

Next, the court analyzed whether the relator's claims were based on the publicly disclosed information contained in the OSI investigative reports. The court found that the investigation examined the requirements of the CLS contract and revealed pre-existing and ongoing issues related to the defendant's compliance with quality assurance and FAA approved parts requirements. Further, the court found that the government, as a result of the investigation, had sufficient notice for future fraudulent conduct. The court concluded that since the relator's allegations were "substantially similar to" the revelations of the prior investigations, the relator's complaint was "based upon" the public disclosure.

Finally, the court analyzed whether the relator qualified for the FCA's "original source" exception to the public disclosure bar. The court found that the relator could not qualify for the original source exception, since she did not begin working for the defendant until 1996, and could not possibly have had direct and independent knowledge of the information on which her complaint was based, as the public disclosures were made in a 1992-1996 investigation. Therefore, the court granted the defendant's motion for summary judgment.

U.S. ex rel. Lisitza v. Johnson & Johnson, 2011 WL 673925 (D. Mass. Feb. 25, 2011)

Two relators brought a *qui tam* action in the U.S. District Court for the District of Massachusetts on behalf of the United States and several States, alleging that a pharmaceutical company and its subsidiaries unlawfully induced their former employer—a pharmacy services provider—to promote its branded drugs over cheaper alternatives. Specifically, the relators alleged that the defendant used the pharmacy services provider to funnel kickbacks (disguised as payments for physician data, grants, and sponsorship fees) to physicians and nursing homes to induce them to recommend the defendants' drugs to patients, instead of competitors' drugs. Further, the relators alleged that the drug company provided the pharmacy company with rebates on purchases of its drugs, as compensation for its role in the scheme. The relators further alleged that the defendants sought to cover up these rebates, as the reductions in price would have required the defendants to offer the federal and state governments the same "best price" when those drugs were purchased under Medicaid. The relators alleged that the defendants' improper scheme of kickbacks caused the pharmacy company to falsely certify that it had complied with applicable federal and state anti-kickback laws, thereby filing false claims for Medicaid and other government reimbursements. The federal government and several states moved to intervene, and realleged the relators' claims and added claims for conspiracy and unjust enrichment. The defendants moved to dismiss the complaint-in-intervention, arguing that the court did not have jurisdiction over the relators' claims, that the plaintiffs' false certification theory failed to state a claim, and that the fraud claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

Public Disclosure Bar

The defendants argued that the court did not have jurisdiction over the relators' allegations, because their *qui tam* complaint was based upon information contained in a previously filed *qui tam* action and the relators did not qualify as "original sources" of the publicly disclosed information. The court observed that the two relators initially filed separate *qui tam* suits, which were eventually consolidated. The court noted that the first complaint "detail[ed] the alleged fraud," while the second complaint "simply

add[ed] a sprinkle of factual garnish" to the first complaint. Thus, the court concluded, the second *qui tam* relator's suit was prohibited by the FCA's public disclosure bar.

The defendants argued that the "best price" allegations in the first *qui tam* complaint should also be dismissed on public disclosure grounds, directing the court to four previously-filed actions that purportedly alleged the same fraud scheme. The court agreed that the allegations in the first *qui tam* complaint had been previously publicly disclosed, and then turned its focus to the question of whether or not the first relator qualifed for the FCA's original source exception. The court determined that the relator did not qualify, since he could not show that he had direct and independent knowledge of the information on which his complaint was based. Thus, his best price fraud allegations were also dismissed.

Failure to State a Claim

The defendants argued that the rebates at issue were not unlawful because the discounts in price were properly disclosed and were appropriately reflected in the costs claimed. Therefore, they argued, the rebates fell within the safe harbor provision of the discount provision of the Anti-Kickback Statute. The court disagreed. After reviewing the FCA claims, the court found that the allegedly improper kickbacks—the data acquisition fees, grant awards, sponsorship fees, and other payments—did not fall within the safe harbor provision of the AKS, as the terms and conditions of the rebates were not disclosed to the government. In support of the plaintiffs' false certification theory, the court further held that AKS compliance was not merely a condition of participation in the federal health care programs, but it was also material to the government's decision to pay any claim for reimbursement that resulted from a kickback. Thus, the court rejected the defendants' argument that the plaintiffs failed to state a claim under the FCA.

Rule 9(b)

The defendants argued that the FCA claims were not pled with particularity and should be dismissed. The court, though, agreed with the plaintiffs that "where a defendant is alleged to have 'caused' a third party to file a false claim, the complaint need not 'provide details as to each false claim,'" but must allege "'a connecting causal link.'" The court determined that the plaintiffs' complaint adequately pled the alleged fraud scheme, as it "specifies the relevant time period, the manner in which the kickbacks were paid, and the claims alleged to be false that flowed from the various kickback schemes." Consequently, the court rejected the defendants' Rule 9(b) challenge.

State FCA Claims

The court then examined each of the state FCA claims and determined that several of those claims should be dismissed. Some of the claims had already been resolved through settlement agreements between the defendants and the affected state, while

others were barred because either the state in question did not have a *qui tam* provision in effect at the time the alleged fraud against the state occurred or the relators otherwise did not have standing to pursue the claims on behalf of the state.

U.S. ex rel. Baltazar v. Warden, 2011 WL 559393 (7th Cir. Feb. 18, 2011)

A relator and chiropractor brought a *qui tam* action against her former employer—a healthcare firm—and its owner, alleging that they submitted fraudulent bills to Medicare and Medicaid. Specifically, the relator alleged that the defendants added unperformed services to her billing slips and upcoded services to receive higher reimbursements. The defendants moved to dismiss, arguing that the court did not have subject matter jurisdiction over the relator's complaint, because her allegations were based on prior public disclosures in several governmental reports and she did not qualify for the FCA's original source exception. The United States District Court for the Northern District of Illinois agreed with the defendants and granted the motion. The relator appealed the district court's ruling to the Seventh Circuit. The circuit court reversed the district court's decision as it found that the reports at issue did not make specific references to any medical practitioners or clinics, but rather were aimed at widespread Medicare fraud. The Seventh Circuit stated; "As far as we can tell, no court of appeals supports the view that a report documenting widespread false claims, but not attributing them to anyone in particular, blocks *qui tam* litigation against every member of the entire industry." Further, the appeals court found that the relator's complaint supplied vital facts that were not in the reports, but which were based on her personal knowledge about the defendants' practices. In addition, the court concluded that the relator had voluntarily provided the government with the information on which her complaint was based, because she alerted an Assistant U.S. Attorney that the *qui tam* suit was soon to be filed. As a result, the court held that the relator would have qualified as an original source, even if her *qui tam* allegations had been previously publicly disclosed. Consequently, the Seventh Circuit reversed and remanded the district court's decision.

U.S. ex rel. Davis v. District of Columbia, 2011 WL 611814 (D.C. Cir. Feb. 15, 2011)

A relator brought a *qui tam* action against the District of Columbia (DC) alleging that DC made false claims for Medicaid reimbursement and conspired to defraud the federal government. DC moved to dismiss the relator's claims for failure to state a claim, and for lack of subject matter jurisdiction, pursuant to the False Claims Act's public disclosure bar. The United States District Court for the District of Columbia granted the defendant's motion and denied the relator's motion

for reconsideration. The relator appealed to the United States Court of Appeals for the District of Columbia Circuit, arguing that his allegations had not previously been publicly disclosed and alternatively, that he was an original source of the information upon which his claims were based. The circuit court, though, found that a Government Accountability Office report issued before the relator's complaint was filed included information regarding the alleged wrongdoing that was at the heart of the relator's complaint. Further, the court determined that the relator could not qualify for the original source exception to the public disclosure bar, because he did not provide the information to the government before the public disclosure occurred, or even before his *qui tam* complaint was filed. The appellate court also held that the district court did not abuse its discretion by denying his motion for reconsideration, since such motions "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." The appeals court found that the relator was given ample opportunities to produce additional evidence to the district court and did not do so. Thus, there was no abuse of discretion when the district court denied the motion for reconsideration. The district court's ruling was affirmed.

U.S. ex rel. Davis v. Prince, 2011 WL 63899 (E.D. Va. Jan. 5, 2011)

Two relators brought a *qui tam* action against five corporations and one individual, alleging that the defendants knowingly submitted false claims in connection with two governmental contracts—one contract with the Department of Homeland Security to provide security services in the aftermath of Hurricane Katrina, and a second contract with the Department of State to provide security services in Afghanistan and Iraq. The relators, who were employed as independent contractors by one or more of the defendants and the government, alleged that the defendants submitted invoices that were based on false personnel records, and that they used false documents to bill the government for unallowed expenses and worthless services. The defendants moved to dismiss the relators' complaint, arguing that the relators' claims were based on publicly disclosed information, and that the relators did not qualify as original sources of that information.

With respect to the Afghanistan/Iraq contract, the he United States District Court for the Eastern Division of Virginia addressed each of the relators' fraud claims individually. First, the relators alleged the defendants submitted false employment sheets, which resulted in the government overpaying for labor costs. The defendants asserted that a state audit had previously disclosed those allegations to the public. The court held that the audit could trigger the public disclosure bar, but concluded that it did not disclose any allegations of the fraud. Specifically, the court held the audit did not reveal that the employment sheets were actually submitted to the government, nor did it reveal the true facts from which one could

infer that those sheets were inaccurate. Therefore, the court held that the public disclosure bar did not apply to those claims.

Second, the relators had alleged that the defendants defrauded the government by inflating the amount of reimbursements for travel and other expenses. The defendants referenced to two sections of the same state audit, claiming that the relators' allegations had been previously publicly disclosed. This time, the court concluded that the audit disclosed information upon which the relators' allegations of fraud were based. The relators argued that they did not actually derive any information in support of their complaint from the audit, but rather, from their own independent knowledge. The court accepted the relators' explanation, finding that the relators' employment position and the lack of similarity between the allegations and the audit report were significant proof that they had independent knowledge. Therefore, the public disclosure bar did not prevent them from bringing this claim either.

Third, the relators had alleged that the defendants defrauded the government by providing unqualified personnel. Again, the defendants argued that the relators' allegations were derived from documents already publicly disclosed. The court agreed and found numerous examples of similar allegations pertaining to unqualified personnel provided by the defendants. The court also found that the relators did not have any independent knowledge of these allegations, as they admitted that they did not read the contract, nor could they provide the source of their knowledge. The court held that since the relators did not have any knowledge of any critical facts regarding this claim, it was reasonable that the claim, at least in part, was derived from public disclosures. Therefore, that claim was barred.

Finally, the court examined the allegations against the individual defendant. The relators alleged that this defendant was liable for fraud because he personally participated in the fraudulent schemes relating to the contracts. The defendants argued that this claim should be barred because the allegations were derived from complaints filed by the relators' attorney in other suits. However, the court found this argument unpersuasive and held that none of the defendants' disclosures qualified as public disclosures because the content of the complaints did not reveal allegations of fraud. Therefore, the court found the public disclosure bar did not prevent the relators from bringing their claims against the individual defendant.

With respect to the Katrina contract, the court found that although the defendants cited numerous purported public disclosures, they did not identify any prior disclosures related to the Katrina contract. The defendants argued that the Katrina claims were nonetheless barred because they were combined with the Afghanistan/Iraq claims. The defendants argued that the complaint consisted of two counts and that each count depended on allegations relating to both contracts. In addition, they argued that even if the public disclosures related only to the Afghanistan/Iraq contract, each of the relators' claims was partly derived from public

disclosures, and therefore, each claim must be dismissed in its entirety. The court disagreed and held that the allegations supporting each claim were not merged together and that public disclosures pertaining solely to the Afghanistan/Iraq contract could not serve to prevent relators from prosecuting claims related to the Katrina contract. Since the court did not find that the allegations regarding the Katrina contract had been previously publicly disclosed, it denied the defendants' motion with respect to those claims.

U.S. ex rel. Sanches v. City of Crescent City, et al., 2010 WL 4696835 (N.D. Cal. Nov. 10, 2010)

A relator brought a *qui tam* action against a city, the city's housing authority (CCHA), and the director of the housing authority, alleging that the defendants obtained and held in trust, money for the U.S. Department of Housing and Urban Development's (HUD) Section 8 housing program, in the form of vouchers that provided housing assistance to low-income families. The relator, who had previously served as the defendant city's finance director, alleged that pursuant to HUD regulations, administrative funds received by housing agencies are to be kept in separate trust accounts, and that housing agencies may be entitled to accumulate reserves to use for HUD-approved purposes. The relator further alleged that HUD imposed a cap that required administrative reserves not exceed 105% of administrative fees paid to housing agencies. The relator's *qui tam* suit alleged that the defendants violated the False Claims Act when CCHA was overpaid by HUD because CCHA and its director intentionally and knowingly submitted false reports certifying HUD compliance which caused HUD to make full payments of monthly administrative fees to CCHA that exceeded the 105% cap. The relator alleged that the excess funds were then reserved for improper, non- approved city purchases. The defendants moved to dismiss the relator's complaint, arguing that the transactions upon which the complaint was based had been publicly disclosed prior to the suit being filed, and she did not qualify as an original source of that information. In response, the relator argued that the documents the defendants relied on did not amount to a public disclosure, and even if her allegations had been previously publicly disclosed, she was an original source of the information. The United States District Court for the Northern District of California agreed with the defendants and granted the motion to dismiss.

Public Disclosure Bar

The defendants argued that the information on which the relator's *qui tam* action was based had already been disclosed in a joint City Council and CCHA public meeting, as well as in a staff report that was made available to the public for that meeting. The relator countered that there had not been a public disclosure, because the documents

referenced in her complaint were maintained in CCHA and HUD files and were not disclosed to the general public. The court held that information that was substantially similar to the relator's allegations of fraud had been publicly disclosed in the administrative city council meeting and in documents from the meeting that were made available to the public, before the relator's suit was filed. The court then addressed whether or not the relator qualified for the original source exception to the public disclosure bar. The defendants argued that the relator was not an original source, because she was not hired as the city's finance director until after the City Council and CCHA meeting took place, and thus, she could not have played any role in the information being publicly disclosed. The relator responded by saying that she was an original source, because she had direct and independent knowledge of the fraud through her job, and she voluntarily disclosed that information to the government. The court, however, held that although the relator did disclose information regarding the alleged fraud to the government, she did so after the meeting in which the public disclosures were made occurred. Moreover, the court found that the relator did not have direct and independent knowledge of any information that had not already been publicly disclosed, and that her allegations "serve merely to republish the information already made public and do not add to what was already disclosed." Consequently, the court granted the defendant's motion to dismiss the relator's complaint.

Goldberg v. Rush Univ. Med. Ctr., 2010 WL 4340455 (N.D. Ill. Nov. 2, 2010)

Two relators filed a *qui tam* action against a university medical center, a group of independent orthopedic surgeons who had surgical privileges at the medical center and were university faculty members (MOR), a surgery center owned by the university, and other surgeons and doctors of the medical center. The relators alleged that the defendants failed to provide supervision over residents during surgical procedures and that the doctors fraudulently claimed that they were present at multiple procedures that occurred at the same time. Specifically, the relators alleged that the medical center and the surgery center knew that surgeries billed by MOR doctors were not being properly supervised, but they allowed the scheduling of concurrent surgeries to continue and obtained reimbursement from the government for surgeries they knew did not comply with Medicare regulations. The relators also alleged that the defendants conspired and participated in referral and kickback programs. The defendants filed two separate joint motions, with MOR and the individual doctors jointly moving to dismiss, and the university medical center and the surgery center jointly filing a separate motion to dismiss. Common to both motions was the defendants' assertion that the relators' complaint should be dismissed for lack of subject matter jurisdiction, as the defendants all asserted that the relators' allegations were based on publicly disclosed information and the relators were not original sources of the information. The United States

District Court for the Northern District of Illinois granted the defendants' motions to dismiss. The court held that all the claims asserted by the relators had been previously disclosed in various administrative reports and in the news media. Additionally, the court held, and the realtors conceded, that the relators did not qualify as original sources of the information because one relator did not properly notify the government prior to the filing of the *qui tam* suit, and the other relator did not have any independent knowledge of the allegations.

Public Disclosure Bar

The court first analyzed whether the relators' allegations had been previously publicly disclosed. The defendants argued the relators' allegations had been publicly disclosed in government reports and in the news media. In support of its contentions the defendants offered a General Accounting Office audit report, an Office of Inspector General audit report, and several news reports. The court held that the audits were concerned with medical billing without sufficient "personal direction" and the practice of teaching physicians upcoding claims at 125 medical schools, including the defendant university medical center. The court relied on the Seventh Circuit's holding that the audit reports constituted an industry-wide public disclosure that barred *qui tam* actions against any implicated defendant. The relators argued that the MOR surgeons were not implicated by the audits, but the court disagreed and held that the relators' allegations against the MOR doctors were encompassed by the scope of the audits and the related news coverage. Therefore, the court held that the relators' allegations mirrored allegations of fraud already exposed in the audits and granted all the defendants' motions to dismiss.

U.S. ex rel. DeKort v. Integrated Coast Guard Systems, 2010 WL 4363379 (N.D. Tex. Oct. 27, 2010)

A relator brought a *qui tam* action against a shipbuilding company, alleging that the defendant violated the False Claims Act by disregarding various design defects and falsely certifying that its boats met the Coast Guard's performance specifications. The defendant moved for summary judgment, arguing that the FCA's public disclosure bar deprived the district court of subject matter jurisdiction over the relator's complaint. The defendant argued that all of the relator's allegations were publicly disclosed in a Congressional hearing, in media reports, and/or by the Coast Guard itself. The relator countered, arguing that portions of his allegations were never publicly disclosed and that he was the original source of any public disclosures. The U.S. District Court for the Northern District of Texas disagreed with the relator, granted the defendant's motion, and dismissed the relator's claim for lack of subject matter jurisdiction.

Public Disclosure Bar

The relator filed his *qui tam* action against two other defendants as well—both of which were not involved in the summary judgment motion at issue. One of these additional defendants employed the relator, and pursuant to his job duties, he was responsible for modernizing the C4ISR system in the shipbuilder's renovated boats. The relator had no responsibility for the hull, mechanical, or electrical renovation work done by the shipbuilder defendant. He filed his original complaint against his employer, solely on an alleged false claim related to installation of non-compliant C4ISR equipment. He attended status conferences involving personnel from all 3 defendants and discussed various issues. At one such meeting, he learned about hull and shaft problems, which prompted him to amend his complaint and add allegations regarding these design defects. However, before the amended complaint was filed, the Coast Guard publicly announced the suspension of operations on the boats due to structural damage discovered in the hulls. After the amended complaint had been filed, the U.S. House of Representatives Committee on Transportation and Infrastructure held a hearing to examine the issues with the boats, which included extensive testimony about the hull and shaft. The defendant argued that the Congressional hearing disclosed every significant aspect of the relator's claim. The district court agreed, as it found that all the essential elements of the relator's fraud allegations were substantially similar to the publicly disclosed information, and all the relator had to do was infer that a fraud had occurred. This, the court, held, was sufficient to provide a basis for a public disclosure under the False Claims Act.

The defendant also argued that the defendant had no direct or independent knowledge of the design claim prior to the Congressional hearing and receipt of Coast Guard documents. The relator, however, claimed to qualify as an original source of the design defects because he filed his amended complaint before the Congressional hearing. The district court disagreed and found that, prior to the Congressional hearing, the relator had not alleged any design defects regarding hull, mechanical, or electrical renovation work, or any false certifications by the shipbuilder to the government regarding those issues—information that was publicly disclosed in the hearing. It was not until two years after that hearing that the relator first brought these additional design defect allegations. Consequently, all of the relator's design defect claims related to hull, mechanical, or electrical renovation work were dismissed.

U.S. ex rel. Schumann v. AstraZeneca PLC, 2010 WL 4025904 (E.D. Pa. Oct. 13, 2010)

A relator brought a *qui tam* action against two pharmaceutical companies, Bristol-Myers-Squibb (BMS) and AstraZeneca (AZ), under state and federal law, alleging that the defendants entered into fraudulent agreements to sell their brand-named drugs and submitted false best price reports, causing the submission of false rebate claims to the government. Specifically, the relator alleged that the defendants

paid kickbacks to purchasers of their products so that the actual prices of those products were misrepresented to the government, resulting in overpayments. The defendants filed separate motions to dismiss the relator's complaint. BMS argued that the complaint was based on publicly disclosed allegations and that the relator did not qualify as an original source of the information. Additionally, both BMS and AZ argued that the relator failed to state a claim and failed to plead fraud with particularity. The United States District Court for the Eastern District of Pennsylvania granted BMS's motion with prejudice and denied AZ's motion.

BMS argued the relator's kickback and best price claims were substantially similar to allegations and transactions already publicly disclosed in other civil actions and that the relator did not qualify as an original source of the information on which those allegations were based. The court agreed and held that the civil actions already disclosed were sufficient to set the government on the trail of fraud before the relator's complaint had been filed. Additionally, the court held that the relator failed to qualify as an original source because he did not allege any direct and independent knowledge of the alleged fraud. The court found that he only alleged that he participated in contract negotiations, with no mention of how he obtained direct knowledge of the ultimate allegedly fraudulent conduct. As a result, the court granted BMS's motion.

The remaining defendant, AZ, had argued that the relator failed to plead the details of any individually submitted false claims or any facts demonstrating that its best price reports were false. The relator alleged that AZ set up an elaborate scheme to defraud the government through a series of sham contracts. He alleged the details of eleven agreements which included contract titles, payment amounts, the products involved, and the years during which these fraudulent agreements were in force. He also provided meeting dates and the names of the participants. The relator alleged that as a result of these inflated prices, the defendant caused the submission of false claims. The court held that the relator sufficiently alleged that the kickbacks resulted in the submission of false claims and the details of fraud involving sham agreements. As a result, the court denied AZ's motion to dismiss.

U.S. Dept. of Transp. ex rel. Arnold v. CMC Eng'g, 2010 WL 3942488 (W.D. Pa. Sept. 28, 2010)

The relator, an employee with the Pennsylvania Department of Transportation (PennDOT), filed a *qui tam* action against several engineering and consulting firms, alleging that the defendants falsified consultant credentials in order to obtain higher pay rates on federally-funded projects. The defendants moved to dismiss the relator's complaint for failure to state a claim. The United States District Court for the Western District of Pennsylvania granted the motions, holding that the relator failed to allege that the federal government was involved in the alleged

false claims. However, on appeal the Third Circuit vacated and remanded the judgment in light of the new FERA amendments to the FCA. The Third Circuit held that if the federal government was involved in the disbursement of funds from a state agency—such as PennDOT—to the defendants, then it was possible that relator's claims were actionable, depending upon the circumstances surrounding the federal government's involvement. The relator was then granted leave to file an amended complaint.

The amended complaint alleged that through the relator's consultant field audits, he discovered that many of the defendants' employees lacked proper credentials, but were paid at higher rates than they were qualified to receive. The relator alleged that no action was taken when he reported this to his supervisor, to PennDOT's central office, or to the Pennsylvania Inspector General's office. Therefore, the relator reported his findings to the United States Department of Transportation, which then launched its own investigation. That investigation revealed many consultants with flawed credentials. After the U.S. Department of Transportation investigation, PennDOT performed its own internal investigation and found other consultants not mentioned in the relator's complaint who also had falsified credentials. The relator alleged that PennDOT permitted defendants to submit false credentials for their consultants because PennDOT's officials were corrupt. The relator also alleged a conspiracy between PennDOT and the defendants.

The defendants then individually moved for summary judgment and to dismiss the relator's amended complaint. The defendants argued that the relator failed to satisfy numerous statutory and jurisdictional requirements and failed to plead fraud and conspiracy with the required particularity. The defendants also argued that the FCA's public disclosure bar and that the relator was not allowed to maintain his suit. They argued that the relator gained his knowledge through PennDOT's internal investigation, which was publicly disclosed, and that he did not voluntarily provide the information to the federal government before filing his *qui tam* suit. The relator countered the defendants' claims, arguing that his knowledge came, not from publicly disclosed information, but from his own audits. The United States District Court for the Western District of Pennsylvania granted the defendants' motions in part. The court held that the relator qualified as an original source only for those claims against the defendants for whom he had direct knowledge. Hence, the court held the relator did not qualify as an original source for claims against the defendants that were uncovered as part of PennDOT's internal investigation. The relator argued that all of the defendants should be included under a common scheme theory, but the court disagreed and held that the FCA still requires relators to allege direct and independent knowledge of information supporting their allegations in order to meet their burden under the FCA.

The court then evaluated whether or not the relator had met his burden with respect to those defendants about whom he did have direct and independent knowledge. The defendants alleged that the relator still could not qualify as an original source of the information upon which his allegations were based, because he did not voluntarily provide information regarding their alleged false claims to the government; they contended that the relator's audits were not voluntary because his position at PennDOT specifically required him to review the credentials of defendants' consultants. The relator countered that his audits were performed independently, and were not related to or required by his employment position, and that his job did not require him to disclose findings to the federal government. The court held that the relator qualified as an original source because he was employed by the state and his obligations to report inaccuracies were to the state; therefore any information given to the federal government was considered voluntary.

Finally, the defendants argued that the relator did not plead the fraud or conspiracy claims with requisite particularity. The court held the relator's amended complaint included information regarding the federal government's review and approval of claims for payment sent by PennDOT. Specifically, it held that the relator properly alleged that the defendants engaged in a scheme in which they submitted falsely inflated credentials for their consultants to PennDOT, and intended to induce fraudulent payments from the federal government through PennDOT. Therefore, the motions to dismiss filed by the defendants the relator had audited were denied.

U.S. ex rel. Duxbury v. Ortho Biotech Prod., L.P., 2010 WL 3810858 (D. Mass. Sept. 27, 2010)

Two relators filed a *qui tam* action against a pharmaceutical company, alleging that the defendant gave illegal kickbacks to providers and hospitals to induce them to prescribe its drug. The defendant moved to dismiss the complaint. The district court found that one of the relators' claims was based on publicly disclosed information and that the relator did not qualify as an original source. Thus, that relator was dismissed from the suit. The other relator was allowed to maintain his claim, but that claim was subsequently dismissed for failure to plead fraud with particularity. The relators then appealed to the First Circuit, which affirmed the dismissal of one relator, but reversed and remanded the court's ruling that the complaint failed to comply with the 9(b) requirements for the remaining relator.

The defendant then moved to limit the remaining relator's claims in time and scope. The United States District Court for the District of Massachusetts granted the motion. The defendant argued that the remaining relator was the original source of information only for claims that alleged unlawful conduct that occurred during the time he was employed by the defendant and in the geographical areas

he had worked in while employed by the defendant. The defendant argued that the court lacked subject matter jurisdiction over claims alleging fraud during any other time period or in any other geographic area. The relator argued that original source jurisdiction depends not on an original source's direct knowledge of every aspect of the scheme, but only the essential facts of the scheme. He also argued that once the scheme is disclosed, he may recover regardless of when he ceased to qualify as an original source with direct and independent knowledge. This was a case of first impression for the court, and the court held that a relator cannot recover for events occurring after his/her termination, if he/she does not have direct knowledge of those events. The court applied the same reasoning to the relator's argument that since the scope of his claims was nationwide, he was entitled to nationwide discovery. The court held that the relator, who had worked as a territory manager for the defendant, was the original source of information for the claims about which he had direct knowledge, and therefore, his claims were limited in geographic scope to the region in which he had worked.

U.S. ex rel. Lewis v. Walker, 2010 WL 3614144 (M.D. Ga. Sept. 08, 2010)

Three relators filed a *qui tam* action against a group of EPA employees and a group of University of Georgia researchers. The relators alleged that the researchers deliberately made false claims in an EPA grant application to study sewage treatment on farmlands, and that they falsified the results from that study. The relators claimed the study led to the publication of an article that contained false and fabricated data regarding the effects of sewage sludge on health and land. The relators further alleged that the EPA employees encouraged the researchers to apply for the grant and that they misrepresented information in and effort to assist the researchers in receiving the grant. The defendants moved for summary judgment, and contended that the relators' complaint was barred by the FCA's public disclosure provision. The United States District Court for the Middle District of Georgia granted the defendants' motion. The defendants argued that the information relied on in the relators' complaint—including the relevant grant application and communications between the defendants—were publicly disclosed via requests for public information under the Freedom of Information Act and Georgia Open Records Act. The court noted that information contained in reports generated by such requests to the government constitute public disclosures, as they qualify as government reports. In response, the relators argued that they were an original source of the information on which their allegations were based, as they had direct and independent knowledge of the false information in the grant application. However, the court found that the relators were not involved in any drafting or reviewing of the grant application and only received information from their attorney, which was received from open records act requests (ORAR) during discovery in a prior litigation. The court determined that the relators only suspected fraudu-

lent activity and then were able to confirm the contents of the grant application once they received information from an ORAR. Hence, the court held that relators were not an original source, and that their claims were barred by the FCA's public disclosure provision.

U.S. ex rel. Poteet, et al. v. Bahler Med., Inc., 2010 WL 3491159 (1st Cir. Sept. 08, 2010)

A relator appealed the U.S. District Court for District of Massachusetts' dismissal with prejudice of their *qui tam* action alleging that a group of doctors and medical device distributors defrauded the government by unlawfully promoting medical devices to third-party doctors, knowing that the unlawful promotions would result in the submissions of false Medicare and Medicaid claims. The relator also alleged that the distributor defendants paid kickbacks to doctors to induce them to use their products. The district court dismissed the relator's claim with prejudice, holding that it did not have subject matter jurisdiction over the claims against the doctor defendants as those claims were jurisdictionally barred by the FCA's public disclosure provision and that the claims against the distributor defendants were not pled with sufficient particularity. The relator appealed the district court's decision to the First Circuit, contending that the district court erred by dismissing her claims against the doctor defendants for lack of subject matter jurisdiction; dismissing all of her claims with prejudice; and denying her leave to file a second amended complaint.

Public Disclosure

The First Circuit affirmed the district court's decision. It held the relator's allegations had previously been publicly disclosed through prior lawsuits and the news media and that the relator did not claim that she qualified as an original source of the information upon which her allegations were based. The relator had argued that civil complaints filed in state or federal courts do not qualify as a public disclosures, since there is no real audience. The circuit court disagreed and held that the relevant information was generally available to the public and thus, the information had been previously publicly disclosed, for purposes of the FCA's jurisdictional bar. Alternatively, the relator argued that filings in federal court may qualify as public disclosures, but state court filings do not. The court again disagreed and held there is no difference under the FCA. Finally, the relator argued that an exception should be made in her case, because her *qui tam* action was based on her own prior public disclosures. The court, though, determined that no exception was warranted because the relator's prior disclosures were themselves also based on public disclosures from other prior litigation. Thus, the First Circuit affirmed the district court's decision to dismiss the relator's claims against the doctor physicians, with prejudice. The circuit court held that the district court did not err when it dismissed those claims with prejudice, as it held that the jurisdictional defect was incurable and that these claims were "forever barred."

Dismissal With Prejudice

The First Circuit then examined whether the district court erred in dismissing the relator's claims with prejudice based on her failure to plead fraud with particularity. The court noted that while dismissals under Rule 9(b) are often without prejudice, it found that the relator admitted that she was unable to offer any further specifics regarding the alleged fraud committed by the defendant distributors. Thus, the court found no error in the district court's holding. The First Circuit also affirmed the district court's decision not to allow the relator to file a second amended complaint, as it determined that allowing such relief would be prejudicial to the defendants, who had been served with amended complaints that had never actually been filed with the court. The First Circuit held that to allow the relator to further amend her complaint would incentivize deception and it found no error with the district court's decision.

U.S. ex rel. McCurdy v. Gen. Dynamics Nat. Steel and Shipbuilding (NASSCO), 2010 WL 3463675 (S.D. Cal. Aug. 31, 2010)

A relator brought a *qui tam* action against his employer, a ship building and repair company that did work for the US Navy. The relator alleged that the defendant defrauded the government by underreporting the proceeds from the sale of scrap metal in its disclosure statements and invoices, which resulted in overpayments by the US Navy. The defendant moved to dismiss the action for failure to state a claim and lack of subject matter jurisdiction. The United States District Court for the Southern District of California denied the motion to dismiss. The defendant argued that the court lacked subject matter jurisdiction to consider the relator's claims, because the facts underlying the relator's allegations had already been disclosed to the Naval Criminal Investigation Service (NCIS). The court determined that the alleged disclosure to NCIS alone was insufficient to be a public disclosure, because it was made to a government official during an investigation.

The defendant also argued that the relator failed to state a claim because the complaint did not allege that the defendant itself submitted a false claim, and the defendant should not be held vicariously liable for the acts of its employees. The relator had argued that the false claims were made in Cost Accounting Standards Disclosure (CASD) Statements and in invoices. The defendant provided the court with examples of these CASD statements and the court found no indications of false statements. However, the court observed that neither party submitted an invoice, which limited the court to rely only on the allegations in the complaint and to take these allegations as true. With respect to the issue of vicarious liability, the court noted that this issue is unsettled in the Ninth Circuit and therefore declined to dismiss the relator's complaint based only on the pleadings. As a result, the court denied the defendant's motion to dismiss.

U.S. ex rel. Associates Against Outlier Fraud v. Huron Consulting Group, Inc., 2010 WL 3467054 (S.D.N.Y. Aug. 25, 2010)

A relator brought a *qui tam* action against a healthcare service provider and a consulting group, alleging that the defendants submitted false outlier claims for reimbursement. The relator was previously employed as an accountant consultant for the service provider and uncovered the alleged fraud in the course of his work. The government elected not to intervene, but filed a statement of interest in the case. The defendants moved to dismiss the relator's complaint for failure to state a claim and for lack of particularity. The defendant service provider further alleged that dismissal was warranted because the court lacked subject matter jurisdiction over the relator's claims, arguing that all administrative remedies had not yet been exhausted, and that the relator's allegations were barred under the FCA's public disclosure provision. In a short opinion, the United States District Court for the Southern District of New York granted the defendants' respective motions. The court held that the relator's causes of action lacked sufficient particularity and failed to allege false statements sufficiently. Consequently, it dismissed the relator's complaint without prejudice, and granted the relator leave to amend his complaint. However, the court disagreed with the jurisdictional arguments, finding that exhaustion of administrative remedies is not required in the context of FCA cases, and that the public disclosure provision did not apply because the relator had first-hand knowledge of the information upon which his allegations were based and thus qualified as an original source under the FCA.

U.S. ex rel. Rosner v. WB/Stellar IP Owner L.L.C., 2010 WL 2670829 (S.D.N.Y. July 02, 2010)

A relator brought two separate *qui tam* actions against two housing complexes, one of their parent companies, the parent company's management, the city of New York, and an individual. The relator alleged that the two housing complexes were constructed as part of a program aimed at providing rent regulated housing to low and middle-income households, and that as long as the complexes were in the program, they received state tax benefits. However, the relator alleged that the two complexes left the housing program, but continued to receive the tax benefits. As a result, the relator alleged that the defendants violated the FCA by knowingly submitting false claims and records for payment to the Department of Housing and Development (HUD) and by conspiring to defraud the government by getting the false claims paid. The relator alleged the city was well aware of the fraud and thus, was a participant in the fraudulent scheme. The defendants moved to dismiss the relator's complaints contending they were jurisdictionally barred by the public disclosure bar. One of the housing complexes also moved for recovery of attorney fees and costs.

The United States District Court for the Southern District of New York granted the defendants' motions to dismiss, but denied the motion to recover attorney fees and costs.

The defendants demonstrated to the court that many of the relators allegations had been previously publicly disclosed in a newspaper article, in two previous court proceedings, and the city's Comptroller's Report. Thus, the defendants argued, the court lacked subject matter jurisdiction over the relator's claims, due to the False Claims Act's public disclosure bar. The relator countered, arguing that the court should not consider some of the disclsures relied on by the defendants, since they either pre-dated the alleged fraud or they post-dated the filing of the relator's complaint. The court, however, rejected this latter argument, finding that the relator did not offer sufficient evidence to support his claim that some of the disclosure occurred after he filed his *qui tam* complaint. The court also observed that information regarding one of the complex's tax abatements had only been previously disclosed in a searchable database located on the city's webpage. The court held that the database qualified as a public disclosure, since it was a government administrative report that was "readily available to the public," since "the searches are free and unlimited," and since the database "presents synthesized tax benefits histories for many different properties over many years." Thus, the court concluded, all of the relator's allegations were based upon publicly disclosed information. Notably, the court recognized, in a footnote, that Congress recently amended the public disclosure bar, clarifying that only administrative reports prepared by the federal government should be deemed public disclosures. However, the court also recognized that mere days after the public disclosure amendment was signed into law, the Supreme Court declared that it would not apply retroactively. Thus, the city's database qualified as an enumerated source under the FCA's public disclosure bar.

The relator contended that he qualified for the FCA's original source exception to the public disclosure bar, stating that he had direct and independent knowledge of the alleged fraud. The court disagreed, and held the relator was not the original source of the information contained in the claims, because, by his own admission, he obtained the information upon which his complaint was based, "through his own investigative efforts," which included relying on information received from third parties. The court held that the relator's investigative efforts did not amount to "direct and independent" knowledge of the alleged fraud, and therefore held that he did not qualify as an original source, for FCA purposes. Thus, the court concluded that it did not have subject matter jurisdiction over the relator's complaint, and dismissed the action.

The court also denied the defendant's motion to recover attorney fees, finding that it was not so obvious that the court lacked subject matter jurisdiction that the relator's *qui tam* suit should be deemed "objectively frivolous."

Gonzalez v. Planned Parenthood of L.A., 2010 WL 2725574 (9th Cir. July 1, 2010)

The relator originally filed a *qui tam* action against several Planned Parenthood healthcare centers and their affiliates, alleging that the defendants violated the federal and California false claims act statutes. The U.S. District Court for the Central District of California determined that the relator's allegations had been previously publicly disclosed in a state court proceeding and in a state legislative committee report. The court also concluded that the relator was not an original source of that information. As a result, the district court dismissed the complaint pursuant to the False Claims Act's public disclosure bar. The relator appealed the district court's decision to the Ninth Circuit.

The Ninth Circuit reversed and remanded the decision of the district court. The appellate court considered the defendants' argument that an audit discussing the facts included in the relator's complaint by the California Department of Health Services had been made public when it was discussed in an internal email sent to several of the defendants' centers. The Ninth Circuit agreed with the district court that the email was not a public disclosure, since it was only disseminated to various of the defendants' centers—all of whom had an interest in keeping the information to themselves—and not to any outsiders. However, the appeals court disagreed with the district court's holding that prior disclosures contained in a state legislative committee report barred the relator's claim. The Ninth Circuit and the parties agreed that a recent amendment to the federal FCA's public disclosure bar provision—which clarifies that only federal (and not state) government reports qualify as public disclosures—did not apply retroactively to this case. The Ninth Circuit, though, did rely on the Supreme Court's recent interpretation of the non-amended version of the public disclosure bar provision, and declared: "The Supreme Court has now clarified that 'congressional' denotes only the federal legislature and a state legislative report is therefore not an enumerated source under the prior statute."

The Ninth Circuit also took issue with the district court's finding that the relator's allegations had been previously publicly disclosed through an internal report, as well as newspaper articles, which focused on the activities of pharmaceutical companies. The appellate court disagreed and held that those materials did not disclose material elements of the alleged fraud. The Ninth Circuit further reversed the district court's ruling that the relator was not an original source of information, finding that the relator obtained knowledge of the questionable practices in the scope of his employment and acquired the knowledge directly; certainly, the court held, the relator was an original source of allegations he had previously made in a state court proceeding—which did qualify as a public disclosure—wherein he alleged that the defendants wrongfully terminated his employment. As a result, the Ninth Circuit reversed the judgment dismissing the federal claim and remanded

for further proceedings. The appeals court left it to the district court to determine whether or not the relator's claims under the California FCA should be treated differently, "in light of the differences between state and federal law as to enumerated sources."

See *U.S. ex rel. Kunz v. Halifax Hosp. Med. Ctr.*, 2011 WL 2269968 (M.D. Fla. June 6, 2011), at page 144.

See *U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 2011 WL 231767 (E.D. La. Jan. 24, 2011), at page 28.

See *U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 2011 WL 129842 (E.D. Va. Jan. 12, 2011), at page 30.

See *U.S. v. Smith & Nephew, Inc.*, 2010 WL 4365467 (W.D. Tenn. Nov. 4, 2010), at page 124.

See *U.S. ex rel. Barber v. Paychex Inc.*, 2010 WL 2836333 (S.D. Fla. July 15, 2010), at page 138.

C. Section 3730(e)(1) Intramilitary Immunity

U.S. ex rel. Conover v. Anthony, 2011 WL 502082 (D. Md. Feb. 9, 2011)

A relator, who was an officer in the Maryland Air National Guard (MDANG), brought a *qui tam* action against twenty seven other MDANG members, alleging that the defendants—who stood to receive federal funds in the form of training pay and credits toward retirement pay—submitted false claims to the government for fly training that was never actually performed. The defendants moved to dismiss the relator's action for lack of subject matter jurisdiction, claiming that the relator's claims were barred under the FCA because the relator and all the defendants were protected by the FCA's intramilitary immunity provision, which "bars a former or present member of the armed forces from asserting a *qui tam* action against another member of the armed forces if the action arises out of that person's service in the armed forces." The relator argued that this provision did not extend to members of the National Guard when they were not in active service and that members of the MDANG were not members of the "armed forces," as required by the provision. The defendants argued that they were members of the armed forces due to their dual enlistment in both the MDANG and the federal National Guard. The United States District Court for the District of Maryland granted the defendants' motion. The court held that provision applied to the state National Guards and their members even when not called into active federal service. Further, the court found that the defendants were "performing inactive duty training required under federal law in accordance with regulations issued by the federal, not state, government. Moreover, their training was considered to be 'in Federal service as a Reserve of the Air Force' . . . , they were paid with federal funds, and they were considered federal employees . . . Thus, even though they were not actively called into federal service, the defendants were wearing their 'army hat' when they allegedly submitted false claims for payment to the government." As a result, the court dismissed the relator's complaint.

FALSE CLAIMS ACT RETALIATION CLAIMS

Sharma v. D.C., 2011 WL 2418917 (D.D.C. June 17, 2011)

The plaintiff brought an action against his former employer, the District of Columbia, alleging retaliatory discharge under the False Claims Act and state law. The plaintiff, a former Senior Contract Specialist for the District of Columbia Office of Contracting and Procurement, alleged that he was pressured to approve fraudulent and wasteful contracts that violated state and federal laws, but that he refused to approve these contracts and subsequently filed a series of whistleblower complaints with various state and federal agencies. He alleged that in retaliation for his whistleblowing, he was denied employment opportunities, harassed, discriminated against, and eventually terminated from his job. The defendant moved to dismiss the plaintiff's complaint for failure to state a claim. The United States District Court for the District of Columbia denied the defendant's motion.

With respect to the plaintiff's claim under the FCA, the defendant argued that the plaintiff's complaint contained no facts to support a viable claim, that the relator failed to show that the defendant had knowledge of any protected activity he was engaged in, and that the relator failed to show that his termination was the result of any such protected conduct, which occurred long before his termination. The court found that the plaintiff's allegations provided sufficient details regarding the defendant's allegedly fraudulent contracts and invoices and provided information regarding the approximate time period when the violations occurred. Moreover, the determined that the relator alleged sufficient facts to demonstrate that he engaged in protected conduct and that his employer was aware of his protected conduct. Specifically, the court noted that the relator alleged that he complained to his supervisor about the contracts irregularities and also filed two formal complaints with the DOJ. Accordingly, the court held the relator made numerous allegations which, if proven, would establish the defendant's knowledge of his protected activities.

The court then turned to the defendant's argument that the relator's termination was not due to his protected conduct, but rather was the result of a reduction in workforce. The defendant urged the court to use the temporal proximity test to decide if the relator's termination was caused by his protected activities, since the relator alleged that he began engaging in protected conduct years before he was terminated from his job. The court found that the relator filed numerous formal complaints with various state and federal agencies alleging the irregularities over a period of four years, and that these allegations were consistent with his claims that he was harassed and discriminated against since shortly before his first complaint up to the time of his termination. Accordingly, the court held that the relator es-

tablished the necessary causal connection between his protected activities and termination, and he was allowed to maintain his retaliation claim under the FCA.

Saunders v. D.C., 2011 WL 2176900 (D.D.C. June 6, 2011)

The plaintiff originally brought an action against her former employer, the District of Columbia (DC) and two of its officials, alleging that the defendants retaliated against, in violation of the False Claims Act, after she disclosed the alleged misuse and mismanagement of federal funds by DC's Office of Chief Technology Officer. DC moved to dismiss the plaintiff's complaint, arguing that she failed to bring her action within the one-year limitations period applicable to FCA retaliation claims. The plaintiff countered that a three-year limitations period applied, and that her complaint was filed within that time period. The United States District Court for the District of Columbia agreed with the plaintiff and denied the defendant's motion.

The court began by observing that, until recently, Congress had not specified the limitations period governing retaliation claims under the FCA. Instead, courts were required to apply the limitations period under the most analogous state law. However, recently—but after the plaintiff's claim arose—Congress enacted the Dodd-Frank legislation, which supplied an express statute of limitations of three years for FCA retaliation claims. The court then sought to determine whether the amendment to the statute of limitations should be applied retroactively, which was, as the court noted, a question of first impression for the court. The court determined that the question of retroactivity was ultimately immaterial, since DC has its own False Claims Act statute, which the court determined was the most closely analogous state law to the federal FCA, and under the DC False Claims Act, the statute of limitations for retaliation claims is three years. Thus, the court held, the plaintiff was entitled to a three-year limitations period. The court rejected DC's argument that the District of Columbia Whistleblower Protection Act (DCWPA), with its one-year statute of limitations, was the most closely analogous state law statute to the federal FCA. The court observed that the DCWPA was primarily concerned with encouraging disclosures concerning government misconduct and public safety issues, rather than preventing fraudulent claims upon government funds, which is the primary concern of FCA statutes. As a result, the court held the plaintiff's retaliation claim was timely filed and DC's motion to dismiss on statute of limitations grounds was denied.

Garcia v. Aspira of N.Y., Inc., 2011 WL 1458155 (S.D.N.Y. Apr. 13, 2011)

A relator brought a *qui tam* action against his former employer, alleging that the defendant operated youth programs jointly funded by the State of New York and the U.S. Department of Health and Human Services. The relator alleged that the defendant violated the False Claims Act by misusing government funds and by submitting fraudulent grant applications, and budget and expense reports to the government. The relator eventually voluntarily dismissed his *qui tam* allegations, but subsequently filed a separate claim against the defendant alleging retaliation under the False Claims Act, alleging that he raised these issues to his superiors at a budget meeting and cited specific examples of the alleged misconduct. Shortly thereafter, he was demoted, and later, after requesting a meeting with his superiors to discuss further discrepancies and noting that he had enough information to take his complaints to the authorities, he was fired from his job.

The defendant moved to dismiss the retaliation claim for failure to state a claim. The United States District Court for the Southern District of New York denied the motion and held that the relator's complaint was sufficient to state a claim, as it adequately pled that he was engaged in protected activity, that his employer was aware that he was contemplating a *qui tam* action, and that he was demoted and fired in retaliation for his actions. The court also held the temporal proximity between the relator's announcement that he could report the fraud to the government and his termination—a matter or minutes—formed sufficient basis for his retaliation claim. Thus, the defendant's motion to dismiss was denied.

U.S. ex rel. Parks v. Alpharma Inc., 2011 WL 1366491 (D. Md. Apr. 11, 2011)

A relator originally brought a *qui tam* action against her former employer, a pharmaceutical company. The relator alleged that the defendant violated the False Claims Act by using a doctor to engage in off-label marketing of one of its drugs and by retaliating against her when she complained about those practices. The government intervened in the case and reached a settlement with the defendant on the fraud claims, leaving the retaliation claim. The relator alleged that she complained to her supervisors about the off-label promotion, the presentation that the doctor gave, and the doctor's compensation for the presentation. The relator alleged that termination of her employment stemmed from these complaints. The defendant moved for summary judgment. The United States District Court for the District of Maryland granted the motion.

The defendant argued that the relator failed to prove any nexus between her purported protected activity and any false claims submitted to the government—the defendant argued the relator's allegations essentially concerned regulatory violations,

which did not amount to FCA violations. The relator countered that her complaints constituted protected conduct under the FCA's anti-retaliation provision because "off-label" is synonymous with "fraudulent" and "illegal." The court agreed and held that the relator's complaints relating to off-label marketing was internal reporting of allegedly fraudulent or false claims and hence, a protected activity. However, the court found the relator failed to plead any facts to show that the defendant was aware of her protected conduct and fired her as a result of it. The court found that since the relator initially actively promoted the doctor, and the marketing of the defendant's drug, her complaints alone did not put the defendants on notice of a possible *qui tam* action. The defendant also argued that the relator's termination was a result of numerous complaints regarding her allegedly subversive behavior and her failure to keep internal investigations confidential. The court found that the relator failed to provide evidence that her termination was unlawful or was based on any pretext. The court also observed the relator had alleged in a separate action that her termination was the result of a conspiracy to defame her—she later voluntarily dismissed that action and proceeded with her retaliation claim under the FCA. The court found that this contradiction diluted the relator's FCA retaliation claim, and as a result, the court granted summary judgment in favor of the defendant.

Haynes v. Poudre Valley Health Care, Inc., 2011 WL 1225590 (D. Colo. Mar. 31, 2011)

The plaintiff brought an action against her former employer, a hospital, alleging, among other things, retaliatory discharge under the FCA. The factual findings of the U.S. District Court for the District of Colorado showed that during the course of the plaintiff's employment, she was repeatedly warned about various performance issues, both verbally and in writing, and received several performance reviews indicating areas of growth and improvement. While the plaintiff disputed some of the factual circumstances surrounding some of these issues, she conceded that the discipline and performance reviews had occurred. At some point, another of the defendant's employees discovered an anonymous complaint letter that was to be faxed to the Colorado Department of Regulatory Agencies, alleging unethical and unsafe conduct by yet another employee. The complaint letter accused the other employee of fraud and misconduct, and identified the patients who were allegedly harmed. The defendant began an investigation and interviewed the plaintiff, who denied writing or attempting to fax the letter, although she agreed with the issues raised in the letter regarding the other employee. The defendant decided to suspend the plaintiff for a suspected violation of HIPAA. As the defendant continued its investigation, it discovered other misconduct by the plaintiff, and when she returned following her suspension, she was immediately terminated from her job for poor job performance—specifically the additional instances of misconduct, which included accessing a patient's files for no reason.

The plaintiff then argued that she was terminated for writing and attempting to fax the complaint letter—which she alleged exposed Medicare and Medicaid fraud—and claimed that her termination was in violation of the False Claims Act's anti-retaliation provision. The defendant eventually moved for summary judgment, arguing that the plaintiff failed to demonstrate that her actions were taken in furtherance of an FCA action, as the complaint letter did not mention Medicare or Medicaid fraud. The court agreed with the defendant, noting that the plaintiff's complaint letter did not put the defendant on notice of a possible FCA action against. Thus, the court granted summary judgment in favor of the defendant on the plaintiff's retaliation claim under the FCA.

U.S. ex rel. Schweizer v. Oce N. Am., Inc., 2011 WL 1097419 (D.D.C. Mar. 25, 2011)

A relator brought a *qui tam* action against her former employer and its affiliated companies. She alleged that the defendants held two contracts with the General Services Administration (GSA), under which they were to provide the federal government with printers and related products. She claimed that the defendants hired her as a GSA contracts manager and that she was responsible for daily management, oversight, and contract compliance regarding the two contracts. She alleged that during the course of her job, she observed that the defendants were committing fraud by failing to reflect commercial price discounts when negotiating contract modifications with GSA, as required by the contract. In addition, she alleged that the defendants falsely certified that certain products were manufactured in the Netherlands, when in fact, they were manufactured in China, in violation of the Trade agreements Act, which governed the contracts. She alleged that these practices violated the False Claims Act.

In addition to the fraud claims, the relator alleged that the defendants violated the False Claims Act by firing her from her job, in retaliation for her attempts to stop the fraud from continuing. She alleged that reported the fraud to the defendant's director of government contracting, and was told not to share the information with anyone outside the company; if she did, the defendants would "destroy" her. She further alleged that she reported the fraud to one of the defendant's vice presidents, as well as to the defendants' in-house and outside counsel, as directed by the defendants. Days later, she was suspended from her job without pay—soon after, she was terminated from her job, purportedly for unprofessional conduct and poor performance. Her termination letter also stated that she was fired for making unfounded allegations of fraud and criminal conduct against the director of government contracting to whom she'd first reported her concerns. The government intervened in the case and settled the fraud allegations, leaving only the retaliation claim. The defendants moved for summary judgment on that claim and the U.S. District Court for the District of Columbia granted that motion. The defendants also moved for their attorneys' fees and costs, but the court denied that motion.

With respect to the defendants' motion for summary judgment on the relator's retaliation claim, the court held that the relator did not do enough to put the defendants on notice of a potential *qui tam* action, since it was her job to investigate any non-compliance with the GSA contracts' terms. The court noted that while the relator conveyed her concerns to her supervisor, her job description required her to do so. Moreover, although she reported the alleged fraud to the defendants' counsel, she did so at the direction of the defendants, and not of her own accord. Thus, the court held, she did not put the defendants on notice that she had gone beyond the scope of her employment duties and was engaged in protected conduct under the FCA's anti-retaliation provision, and summary judgment was entered in favor of the defendants on her retaliation claim.

With respect to the defendants' motion for attorneys' fees and costs, the court held that the defendants did not demonstrate that the relator's FCA action was "clearly frivolous" or was brought primarily for the purpose of harassing the defendants, given the relator's reasonable, good faith belief that litigating those claims would reveal fraud against the government. Furthermore, the court observed, the government intervened in the case and settled the fraud allegations. Finally, the court held, the relator's retaliation claim, was not brought frivolously either, even though her interpretation of the FCA's anti-retaliation provision was mistaken. Consequently, the court denied the defendants' motion for fees.

Kachaylo v. Brookfield Twp. Bd. Of Tr., 2011 WL 867585 (N.D. Ohio Mar. 9, 2011)

The plaintiff, a former lieutenant firefighter/paramedic and EMS operations officer, originally filed a *qui tam* action against his previous employer—a township—and several individuals, alleging that the defendants presented or caused to present numerous false claims for ambulance services to Medicaid and Medicare. The plaintiff also contended that the defendants terminated his employment because he challenged their illegal practices. He argued that, pursuant to the False Claims Act's anti-retaliation provision, he was entitled to reinstatement of his job with seniority status, twice the amount of back pay he lost with interest, and attorneys' fees. The defendants moved to dismiss the retaliation claim, arguing that the plaintiff's allegations did not satisfy the elements of a retaliation claim under the FCA, and for failure to state a claim. The United States District Court for the Northern District of Ohio granted the defendants' motion.

The court first analyzed whether the plaintiff's conduct fell within the FCA's definition of protected conduct. The complaint alleged that the plaintiff investigated and assisted a federal investigation of the defendant's allegedly false claims and that he engaged in other protected activities. In support of that allegation, the plaintiff stated that when asked to do so, he refused to instruct other paramedics

to submit false claims to the federal government; he also stated that he informed the board of the township that one of the individual defendants was involved in the alleged fraud scheme and had already been debarred from participating in Medicare and Medicaid billing. The court held that such broad, conclusory allegations were insufficient to constitute protected conduct under the False Claims Act.

The court then analyzed whether the plaintiff ever put his employer on notice of any possible protected conduct he had engaged in. The court found that the plaintiff only informed the township's board of the individual defendant's debarment from Medicaid and Medicare billing, but not that false claims were being presented to the government. The court declared: "While the notice [to one's employer] need not explicitly characterize a plaintiff's concerns as involving false claims against the government, there must be some reason for the employer to suspect that the plaintiff was contemplating a *qui tam* action or was assisting the government in an FCA investigation." The court found that the plaintiff failed to connect his alleged protected activity to any FCA claim or investigation, and therefore he did not put the defendants on notice of the distinct possibility that he might have intended to pursue a *qui tam* action.

Finally, the court analyzed whether the defendants discharged or otherwise discriminated against the plaintiff as a result of his participation in any possible protected activity. The court found that the plaintiff's complaint merely alleged that the defendants approved, condoned, and participated in retaliation against him. The court held that such a conclusory allegation was insufficient to show a causal connection between any protected activity and any retaliation. Accordingly, the plaintiff's retaliation claim was dismissed for failure to state a claim.

Molino v. Bast Servs., Inc., 2011 WL 841891 (N.D. Ill. Mar. 7, 2011)

The plaintiff originally brought an action against her former employer for wrongful termination and retaliation, under common law, the Illinois Whistleblower Act, the False Claims Act, and the Illinois Whistleblower Reward and Protection Act. After summary judgment was granted in her favor on each of her claims, she again moved for summary judgment to recover damages for, among other things, back pay with interest, emotional distress and other special damages, and attorneys' fees. The court granted her request for these damages.

The court first analyzed the plaintiff's back pay claims. The plaintiff—who eventually found new employment before judgment was entered in her case—sought to recover the difference between her current salary and she would have earned had she remained employed by the defendant from the date of her termination until the date of the judgment. The defendant argued that back pay should be calculated only until the plaintiff obtained her next job, rather than to the date of judgment. The court disagreed and held that the plaintiff must be made whole.

Further, although the court found that the plaintiff had a duty to mitigate her damages by exercising reasonable diligence in finding new employment, the defendant did not submit any evidence on the issue of mitigation. Accordingly, the court held that, under the FCA and state whistleblower statutes, the plaintiff was fully entitled to double the amount of back pay, plus interest as calculated using the rates published by the U.S. Department of Labor.

The court then analyzed the plaintiff's request for emotional distress damages. The defendant argued that the plaintiff should not be entitled to emotional distress damages without medical evidence. The court, however, found that damages for emotional distress could be based solely on the testimony of the plaintiff, and determined that the plaintiff suffered shock, confusion, panic, anxiety, stress, depression, loss of appetite followed by weight gain, severe sleeplessness, crying jags, humiliation, embarrassment, panic attacks, headaches and loss of self esteem and self worth. Further, the court found that the plaintiff's distress lasted for years, until she obtained her current job. As a result, the court awarded a reduced damage amount, which reflected similar case awards for emotional distress.

Finally, the court analyzed the plaintiff's request for reasonable attorneys' fees under the FCA. The plaintiff's attorneys reduced their request by 10 percent to reflect the fact that some of their work was related to claims against a co-defendant with whom the plaintiff settled. The defendant did not object to the number of hours the plaintiff's attorneys billed, but they objected to the hourly rates charged by the attorneys. The court found that the plaintiff had not provided any evidence of what comparably-skilled and experienced attorneys charged for similar employment litigation in Chicago, notwithstanding the fact that the plaintiff's attorneys included information on the rates they charged their clients. Ultimately, the court held that the plaintiff did not establish that her attorneys' market rates were reasonable and adjusted the attorneys' fees accordingly.

Sicilia v. Boeing Co., 2011 WL 252955 (W.D. Wash. Jan. 25, 2011)

The plaintiff brought an action against his former employer—the Boeing Company—alleging a violation of the anti-retaliation provision of the False Claims Act, as well as various other employment law claims. The plaintiff alleged that, as a result of a pending criminal investigation of the defendant's practices, the indictment of two of the defendant's former employees, and the fact that the government suspended the defendant from future government contracting, the defendant entered into an "Interim Administrative Agreement" with the government, in an attempt to restore its rights as a government contractor. In accordance with that agreement, the defendant hired the plaintiff to serve as an Ethics and Compliance Specialist. The plaintiff alleged that a year after the defendant entered into the interim agreement, the defendant hired a new compliance manager, and replaced her a few years later with another compliance manager. He alleged that he

protested these changes and told several people within the company—including legal, finance and compliance officers—that if the company falsely certified to the government that it was in compliance with applicable regulations and the terms of the interim agreement, then it would be committing fraud and that he would be forced to report the fraud to the government. He alleged that the very next day, he received a poor performance review and subsequently went on medical leave. When he returned, he alleged that he had been removed from the company's compliance office, was given largely administrative duties involving the company's subsidiaries, and was eventually terminated from his job. The plaintiff alleged the company took these actions in retaliation for his protests of the fraud scheme he observed and his notification to the company that he would report to any fraud to the government. The defendants moved for summary judgment on the plaintiff's claims. The United States District Court for the Western District of Washington granted the motion in part, dismissing the FCA retaliation claim, but allowing other claims to proceed.

FCA's Anti-Retaliation Provision

The plaintiff argued that he suffered retaliation as a result of his complaints about the defendant's compliance process. The court found that the plaintiff produced evidence that he had a good faith belief his former employer was defrauding the government, but the court determined that the plaintiff's argument failed because the alleged fraud was not actionable under the FCA. The court held the plaintiff failed to provide evidence that the defendant was required to certify compliance with either the terms of the interim agreement or some regulation. Moreover, since the plaintiff failed to identify any certification requirement, the court held that he could not show that the defendant's receipt of money from the government was contingent on any such certification. Finally, the court held that the plaintiff could not show that the defendant company knew that he was engaged in a protected activity, since there was a presumption that any complaints about non-compliance were made within the scope of his job duties and since the company received no clear notice from the plaintiff of any intent to pursue an FCA action. Therefore, the court granted the defendant's motion for summary judgment with respect to the FCA claim.

Mann v. Heckler & Koch Def., Inc., 2010 WL 5262729 (4th Cir. Dec. 27, 2010)

The plaintiff brought an action against his former employer, a firearms dealer, alleging a violation of the False Claims Act's anti-retaliation provision. Specifically, he alleged that he was terminated from his job because he investigated and opposed the defendant's attempts to defraud the U.S. by submitting a bid to the U.S. to provide weapons that did not conform to various "statement of work" provisions. The relator also alleged state law violations, as well as an additional claim

for retaliation under the FCA, based on the theory that the defendant further retaliated against him for filing his initial retaliation claim. The defendant argued that it did not defraud the U.S. because it explicitly stated in its bid that its weapons did not conform and that it would be able to provide missing components if it won the bid. The defendant also argued that the plaintiff was not terminated for any protected conduct under the FCA, but rather because of his involvement with an unlawful scheme to procure weapons for a small police force. The U.S. District Court for the Eastern District of Virginia granted the defendant's motion to dismiss the additional retaliation claim and granted the defendant's motion for summary judgment on all remaining claims, as it determined that the plaintiff never identified any instance of the defendant making a false statement or engaging in fraudulent conduct. The plaintiff appealed to the Fourth Circuit, which affirmed the district court's decision.

The circuit court found that the defendant submitted a bid free of false statements or efforts to camouflage any defects in its products. Even as the circuit court noted that the defendant's conduct was unconventional and may have violated the federal bidding regulations, it held that the defendant's actions were not fraudulent. As a result, the Fourth circuit held that the defendant's conduct toward the plaintiff fell outside the scope of the FCA's anti-retaliation provision, because there was no reasonable possibility that the defendant violated the FCA. The circuit court also rejected the plaintiff's argument that the act of filing a retaliation claim itself qualified as protected conduct under the FCA, regardless of the nature or merits of the underlying claim. The court held that the FCA was not meant to be used in this manner and that adopting this threshold would open the floodgates to FCA litigation having little or nothing to do with fraud; the court also noted that accepting the plaintiff's argument would lead to an infinite sequence of FCA claims, each one citing the filing of the previous claim as the protected conduct. Thus, the court affirmed the district court's judgment.

Blackburn v. HQM of Riverview Health Care Ctr., 2010 WL 5393848 (W.D. Ky. Dec. 22, 2010)

The plaintiff originally filed a *qui tam* action against her former employer, a corporation that runs nursing facilities, and the company's subsidiary, alleging that the defendants were involved in fraudulent billing practices and provided inadequate care to patients. She also alleged a violation of the False Claims Act's anti-retaliation provision, asserting that the defendants terminated her employment because she challenged the defendants' illegal practices and refused to lie to state surveyors during an inspection. The plaintiff later withdrew the fraudulent billing and patient care claims, leaving the retaliation claim. The defendants moved to dismiss that claim, arguing that the plaintiff's allegations did not satisfy the elements of a retaliation claim and that she was fired due to inadequate job performance. The

United States District Court for the Western District of Kentucky granted the defendants' motion.

The court first analyzed whether the plaintiff's conduct fell within the FCA's definition of "protected conduct" and found that the allegations underlying the retaliation claim arose entirely from a state survey inspection. The court stated that "[g]enerally, an employee's investigation of his employer's non-compliance with federal or state regulations is insufficient to support a whistleblower claim, and concluded that the plaintiff's refusal to lie to a state survey inspector did not constitute protected conduct. The court then considered whether, if the employee had engaged in protected conduct, the plaintiff put her employer on notice of that conduct. The court held that the plaintiff's discussions with superiors about her refusal to lie to the state surveyor could not be deemed an investigation that would lead to false claim charges. As the court held that the plaintiff failed to allege two of the basic elements of a retaliation claim, it dismissed the plaintiff's complaint.

Davis v. Point Park Univ., 2010 WL 4929104 (W.D. Pa. Nov. 30, 2010)

The plaintiff brought an action against her former employer, a private non-profit university, as well as two individuals, alleging retaliation under the FCA and state law. Specifically, the plaintiff alleged that she told the defendants about accounting improprieties she found in compliance reports, but was told to keep quiet about it. She further alleged that she recommended an internal audit, which validated her suspicions, but was subsequently terminated from her job, purportedly due to restructuring. The plaintiff asserted that she was terminated because a separate federal audit was scheduled days later and due to her position in the university, she would have been compelled to share her information.

The defendants moved to dismiss the plaintiff's complaint for failure to state a claim. The United States District Court for the Western District of Pennsylvania granted the motion in part. The defendants argued that the plaintiff's complaint failed to allege that she was engaged in protected conduct and that she failed to place the defendant university on notice that she was contemplating filing a *qui tam* claim. Instead, the defendants argued that the plaintiff created an impression that her focus was to resolve any problems and that the internal investigation was within her job duties. In addition, the individual defendants asserted the defense that there was no individual liability under the FCA.

The plaintiff conceded that there was no liability for individual defendants pursuant to the FCA and agreed that the claims against those defendants be dismissed. The court then examined the university's protected conduct argument and found the plaintiff alleged that it was not the plaintiff's responsibility, but rather the responsibility of one of the individual defendants, to investigate compliance reports. Further, the court found that there was nothing to show that the plaintiff was acting within

the scope of her normal duties when she discovered the alleged inaccuracies. Hence, the court held that the plaintiff was engaged in protected conduct, for FCA purposes. The court then examined the defendant's notice argument and found that the plaintiff implied, but nowhere clearly alleged, that she was fired to prevent her from cooperating with the federal auditors. The court also held that although the plaintiff did not allege that she ever gave a specific notification that she intended to pursue legal action, such express notification is not required under the FCA, when the plaintiff's conduct could reasonably lead to a viable FCA case. The court noted that the federal audit and the plaintiff's exposure should have put the defendants on notice of potential litigation. While the court held that the complaint could have been more explicit in certain respects, it concluded that it should not be dismissed as deficient.

Turner v. DynMcDermott Petroleum Operations Co., 2010 WL 4363403 (E.D. La. Oct. 21, 2010)

The plaintiff was the human resources director for the defendant, a petroleum company that had a government contract to manage the Strategic Petroleum Reserve. The plaintiff filed a separate *qui tam* action, alleging that one of the company's subcontractor's had overcharged its healthcare costs to the defendant company, which resulted in an overcharge to the government. In the present action, the plaintiff alleged that as a result of the *qui tam* action against its subcontractor, the defendant retaliated against him by reducing his yearly bonus, conducting an oppressive audit of his department, and eventually terminating his employment when he was unable to report to work in a timely manner following Hurricane Katrina. The defendant moved for summary judgment.

The United States District Court for the Eastern District of Louisiana granted the defendant's motion in part. First, the court analyzed the claim that the plaintiff's bonus was less than in previous years, and the reduction was retaliatory. The court held that a denial of a monetary perk did not constitute an adverse employment action and was wholly within the employer's discretion. Second, the court analyzed the claim that the audit of the relator's human resources department was retaliatory. The court held that the audit was performed after complaints to the finance department, and found that the plaintiff could not demonstrate that the audit was performed for a retaliatory reason. Finally, the court analyzed the plaintiff's claim that his termination was a retaliatory action. The defendant argued that the plaintiff was terminated because he was the only director who did not report to work after Hurricane Katrina. The plaintiff responded, arguing that his failure to report was a pre-text, and that he was actually terminated in retaliation for filing the *qui tam* suit. The court held that genuine issues of material fact existed with regard to this dispute, and therefore denied the defendant's motion for summary judgment on that issue alone.

U.S. ex rel. Zemplenyi v. Group Health Co-op., 2010 WL 3584444 (W.D. Wash. Sept. 10, 2010)

The relator filed a *qui tam* action against several healthcare companies and doctors, alleging that the defendants performed medically unnecessary cataract surgeries, resulting in the submission of false Medicare reimbursement claims. Further, the relator alleged that the defendants retaliated against her, in violation of the False Claims Act. The defendants moved to dismiss for failure to plead with particularity. The United States District Court for the Western District of Washington granted the motion in part. The court found that the relator did not describe the specific details of any of the allegedly false claims, but instead pled those FCA violations in general terms. Thus, the court granted the defendant's motion to dismiss the fraud claims for failure to plead with particularity. The court, however, permitted the relator to amend her complaint and to provide more specific facts. The court then examined the retaliation claim and found that the relator had sufficiently pled facts to constitute a plausible claim. The court found the relator adequately demonstrated that she was involved in protected activity, as she alleged that she tried to inform the officers about the alleged fraudulent scheme, that she reported the same to a Medicare Compliance Officer, and that she was treated her corporate employer treated her negatively as a result. However, the court dismissed the retaliation claim against the individual doctors, as it determined that those claims were time-barred and that the doctors—who were the relator's superiors—could not also be held liable as her employers under the FCA.

Gordon v. ArmorGroup, N.A., 2010 WL 3418219 (E.D. Va. Aug. 27, 2010)

The plaintiff, who had been employed as a director of operations for a security service for the U.S. in Kabul, Afghanistan, brought an action against three private security providers, one of their managers, and an individual, alleging that the defendants violated the False Claims Act's anti-retaliation provision and Virginia state law by constructively discharging him from his job after he engaged in protected activities. The plaintiff's complaint alleged that the defendants engaged in wrongdoing and illegal conduct and attempted to convince him to defraud the U.S. Department of State. He further asserted that after he complained about the defendants' fraudulent conduct, the defendants moved him to a different location, with intolerable working conditions, which made him quit. The defendants moved separately to dismiss the plaintiff's claims or in the alternative, for summary judgment, contending that the plaintiff requested the move, as he no longer wanted to work on the government contract at issue. The United States District Court for the Eastern District of Virginia examined the plaintiff's state law claims and FCA claims separately and granted the defendants' motions in part. The court

dismissed the plaintiff's state law claims, finding that under Virginia law, at-will employees cannot be constructively discharged. However, the court allowed the plaintiff to maintain his FCA claims, as it held that under the FCA an at-will plaintiff can predicate a FCA claim on an alleged constructive discharge. Since the court could not determine the pertinent facts regarding the plaintiff's reassignment and alleged subsequent isolation and intolerable working conditions, it held that discovery was required with respect to the plaintiff's FCA claims.

Williams v. Basic Contracting Servs., Inc., 2010 WL 3244888 (S.D. W. Va. Aug. 17, 2010)

The plaintiff filed an action against her previous employer—a government contractor responsible for cleaning services at the federal government's Mine Safety and Health Administration Mine Academy—alleging unlawful termination in violation of the FCA's anti-retaliation provision, as well as violations of other federal and state laws. She alleged that the defendant double-billed the government and used fewer maids and janitors than the contract required. The defendant moved for summary judgment with respect to the plaintiff's FCA claim, arguing that she failed to allege sufficient facts in support of the three elements for that claim, namely, that she engaged in some protected activity in furtherance of an FCA action; that her employer was aware of that protected activity; and that her employer retaliated against her as a result of the protected activity.

The United States District Court for the Southern District of West Virginia denied the defendant's motion in part. With respect to the first element, the court noted that the plaintiff did not file a *qui tam* suit, and thus, it was necessary to determine whether she engaged in some other protected activity in furtherance of an FCA action. The court found that the plaintiff located a copy of the defendant's government contract and also spoke to various people regarding the defendant's allegedly fraudulent billing practices. The court held that these investigatory efforts constituted protected activity under the FCA's anti-retaliation provision. The court then analyzed the second element—the defendant's knowledge of the plaintiff's protected activity. The defendant argued that it was unaware of the plaintiff's investigatory efforts, but the court disagreed and found that the allegations of conversations between the plaintiff and her supervisors about fraudulent billing, coupled with her suspension after the conversations, were adequate to survive summary judgment. Finally, the court examined the retaliation element. The defendant argued that the plaintiff was not discharged as a result of her investigation, but rather for poor work performance. The court held that this was a question for the jury to decide, since the plaintiff could provide evidence that her termination was in retaliation for her investigation and that the reason offered by the defendant was pretextual. Thus, the court denied the defendant's summary judgment motion on the plaintiff's FCA retaliation claim.

Smith v. C.R. Bard Inc., 2010 WL 3122793 (M.D. Tenn. Aug. 9, 2010)

The plaintiff brought an action against his former employer, a pharmaceutical corporation, asserting claims of retaliatory discharge under the FCA and state laws. The plaintiff alleged that the defendant terminated him in retaliation for his internal complaint regarding the defendant's alleged improper off-label promotion and sales of one of its drugs. The defendant moved for summary judgment, arguing that the plaintiff could not prove that he was engaged in a protected activity because his complaints did not further a public good; or that he was terminated; or that he had demonstrated the requisite level of causation to show that any alleged protected activity was a substantial factor for his alleged termination. The defendant also argued that there was a legitimate, non-retaliatory reason to believe that the plaintiff had resigned. The plaintiff also moved for partial summary judgment on the issue of whether he had resigned from his position or was terminated. The United States District Court for the Middle District of Tennessee granted the defendant's motion for summary judgment and denied plaintiff's motion for partial summary judgment. The court held that the plaintiff's actions were not sufficiently connected to exposing fraud or false claims against the government, in part because he failed to identify any doctors who prescribed the drug at issue for off-label uses because of any illegal promotion by the defendant. The court determined that the plaintiff made his allegations in furtherance of his own private interests, rather than for the public good. Furthermore, the court observed that the defendant had stopped selling the drug at issue in 2007, but the court noted that the plaintiff never complained about the alleged fraud with respect to that drug prior to 2007. The court also held the plaintiff did not prove that he was actually discharged from his job and failed to present any direct or circumstantial evidence showing that any alleged protected activity was a substantial factor in his alleged termination.

U.S. v. Universal Health Servs. Inc., 2010 WL 2976080 (W.D. Va. July 28, 2010)

Three relators brought a *qui tam* action against a juvenile psychiatric facility, its operator company, and their parent corporation, alleging that the defendants submitted false claims in order to obtain Medicaid reimbursement, in violation of the federal False Claims Act and the Virginia Fraud Against Taxpayers Act (VFATA). Further, the relators alleged retaliatory discharge after they refused to comply with fraudulent practices. The U.S. Government and the Commonwealth of Virginia intervened in the case. After the intervention, the relators filed an amended complaint. The United States District Court for the Western District of Virginia dismissed all claims in the relators' amended complaint that were pled on behalf of the governments, finding that under both the federal FCA and it's Virginia counterpart, once the government intervenes in a *qui tam* action, "the action shall be conducted by the government," and that consequently, the relators could no longer prosecute the government's claims.

The defendants moved to dismiss the governments' complaint, contending that the plaintiffs failed to state a claim and did not satisfy Rule 9(b)'s pleading requirements. The court granted the defendants' motion in part and denied it in part. The court held that the complaint sufficiently alleged violations of the FCA and VFATA against the defendant facility and the defendant operator company, but held that the complaint did not contain enough factual information as to defendants' parent corporation. The court found that the complaint did not establish how the parent corporation was involved in the alleged fraud scheme or how the corporate veil could be pierced. Therefore, the court dismissed the parent corporation as a defendant from the action.

The court then analyzed the relators' retaliation allegations and found that the relators' complaint did not demonstrate that any of them were engaged in protected conduct. The court found that the relators complained to their supervisors about the alleged fraudulent billing, but held that this was not sufficient to put the defendants on notice of any protected conduct under the False Claims Act. The court, though, did find that one of the relators alleged sufficient facts to state a retaliation claim under the VFATA. The court observed that the VFATA protects relators who have "opposed any practice referenced in the statute" and noted that one of the relators had alleged that on more than one occasion she refused to participate in acts to defraud Medicaid. The court held that these allegations were sufficient to qualify as protected conduct under the Virginia statute.

Bell v. Dean, 2010 WL 2976752 (M.D. Ala. July 27, 2010)

The plaintiff filed suit in the United States District Court for the District of Alabama suing the trustees, the president, and the executive vice president of his former employer—a state university—in both the official and individual capacities. The suit alleged that the defendants violated the anti-retaliation provisions of the False Claims Act, and claimed that the plaintiff was directed by the defendants to use federal funding provided by the Department of Education for improper purposes. He alleged that when he refused to do so and threatened to report any misconduct to the agency, the defendants arranged for him to be terminated from his job. After his initial complaint was dismissed, the plaintiff filed an amended complaint that provided more factual information regarding the alleged fraud and retaliation. The defendants moved to dismiss the plaintiff's amended complaint for failure to state a claim. The court granted the motion in part and denied in part. The court held that the plaintiff's explicit threats to report any unauthorized use of funds, coupled with documentary evidence that suggested that the defendants submitted false claims to the government, were sufficient to state a claim that the plaintiff's efforts were in furtherance of stopping violations of the FCA. The defendants, however, also argued that, as state employees, they were entitled to qualified immunity. The court disagreed and held that qualified immunity does not apply to FCA retaliation

claims and is not available as a defense to defendants who have been sued in their individual capacities. Thus, the defendants' motion to dismiss was denied.

The court, however, had previously granted the defendants' motion to dismiss the plaintiff's claims to the extent that the plaintiff was suing the defendants in their official capacities for money damages. Therefore, the motion to dismiss was also granted in part.

U.S. ex rel. Gobble v. Forest Labs., Inc., 2010 WL 2933925 (D. Mass. July 23, 2010)

A relator whose intervened *qui tam* action was settled, also brought a personal action against the defendant laboratory and pharmaceuticals manufacturer, alleging retaliatory termination under the FCA. The relator alleged that during his employment as a sales representative he observed and subsequently complained to supervisors about illegal kickbacks and off-label promotions of drugs. Further, the relator alleged that a senior sales representative and the divisional manager paid speaker fees and other sums to doctors who prescribed the off-label drugs but performed no services, and provided expensive meals, golf outings, and other gifts to doctors to induce prescription of the drugs. The relator alleged that in April and May 2002 he informed the divisional manager and others about the illegal kickbacks. Furthermore, he alleged that in June 2002 he was directed to submit a false expense voucher and to purchase gifts for a doctor with whom he had cancelled a golf outing. He asserted that after he did those things, he was terminated from his job for misconduct, in an attempt to conceal the actual retaliatory reason for his ouster.

The defendants moved to dismiss the relator's complaint, but the United States District Court for the District of Massachusetts denied the motion. First, the defendants argued that the relator was not engaged in protected conduct because he did not allege that he was acting in furtherance of an FCA suit. The defendants argued that complaining to a supervisor did not fall under protected conduct and that the basis of the fraud alleged in the complaint was the defendant's alleged non-compliance with the laws applicable to pharmaceutical sales. The court disagreed and held that kickbacks and off-label promotions can form the basis for an FCA action. Second, the court analyzed the knowledge element and held that the relator adequately pled that the defendants were on notice of his protected conduct. Third, the court analyzed the causation element, as the defendants argued that the relator failed to show that he was fired in retaliation for his protected conduct. The court held that the relator's complaint sufficiently alleged that he was fired in retaliation for his protected conduct and that the defendants' stated reasons for his termination were pretextual. Consequently, the court denied the defendant's motion to dismiss.

See *U.S. ex rel. Bragg v. SCR Med. Transp., Inc.*, 2011 WL 1357490 (N.D. Ill. Apr. 8, 2011), at page 111.

See *U.S. ex rel. Wildhirt v. AARS Forever, Inc.*, 2011 WL 1303390 (N.D. Ill. Apr. 6, 2011), at page 112.

See *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys.*, 2011 WL 1053366 (9th Cir. Mar. 24, 2011), at page 113.

See *U.S. ex rel. Patton v. Shaw Servs., L.L.C.*, 2011 WL 924292 (5th Cir. Mar. 17, 2011), at page 23.

See *U.S. ex rel. Gatsiopoulos v. Kaplan Career Inst.*, 2010 WL 5392668 (S.D. Fla. Dec. 22, 2010), at page 170.

See *U.S. ex rel. Powell v. Am. InterContinental Univ. Inc.*, 2010 WL 4818536 (N.D. Ga. Nov. 22, 2010), at page 172.

See *U.S. v. Smith & Nephew, Inc.*, 2010 WL 4365467 (W.D. Tenn. Nov. 4, 2010), at page 124.

See *U.S. ex rel. Bierman v. Orthofix Intern.*, N.V., 2010 WL 4358380 (D. Mass. Nov. 4, 2010), at page 126.

See *U.S. ex rel. Hill v. Univ. Of Med.*, 2010 WL 4116966 (D.N.J. Oct. 18, 2010), at page 94.

See *Riddle v. Dyncorp Intern. Inc.*, 2010 WL 3304245 (N.D. Tex. Aug. 19, 2010), at page 105.

See *U.S. ex rel. Davis v. Lockheed Martin Corp.,* 2010 WL 3239228 (N.D. Tex. Aug. 16, 2010), at page 101.

See *U.S. ex rel. Martinez v. Va. Urology Ctr. P.C.*, 2010 WL 3023521 (E.D. Va. July 29, 2010), at page 158.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not Knowingly False

U.S. ex rel. Saltzman v. Textron Sys. Corp., 2011 WL 2414207 (D. Mass. June 9, 2011)

A relator brought a *qui tam* action against a corporation (Textron Systems), its parent companies and one of its employees, alleging that Textron Systems, through the employee defendant, entered into a contract with the U.S. Airforce to provide certain services. The relator alleged that the contract incorporated provisions of the Federal Acquisition Regulations (FAR), which the relator argued mandated Textron Systems to provide and maintain workers' compensation insurance for its employees at its own cost. The relator alleged that Textron Systems submitted false claims to the Air Force, seeking reimbursement from the government for the workers' compensation insurance premiums. Further, the relator alleged that the Textron Systems' parent corporations were vicariously liable for the alleged conduct of their subsidiary company. The defendants moved to dismiss for failure to state a claim and failure to plead with particularity. The United States District Court for the District of Massachusetts granted the motion.

The court first considered the claims against the parent corporations. The defendants argued that the relator failed to allege any facts that connected the parent corporations to the alleged conduct of Textron Systems. The court agreed, finding the relator failed to plead facts suggesting (1) any direct and pervasive involvement by the parent companies, (2) any confused intermingling of activity of Textron Systems and its parent companies, or (3) any ambiguity in the defendants' role with respect to the alleged conduct of Textron Systems. Therefore, the court held that the relator did not plead a viable action against the parent corporations of Textron Systems. Those claims were dismissed.

With respect to the individual defendant and Textron Systems, the defendants argued that the relator failed to state a claim on which relief could be granted. The relator asserted that the defendants' contract with the government incorporated the requirement that Textron Systems provide workers' compensation insurance at its own expense. Further, the relator alleged that by submitting a claim to the government for those insurance costs, the defendants failed to comply with a contractual condition for payment, rendering their claim false. The court found that the relator failed to allege facts linking the purported false claim to non-compliance with the FAR insurance requirements. The defendants also argued that the relator failed to allege that Textron Systems or the individual defendant knew that

the insurance premiums were not reimbursable. The court agreed, noting that an email message which the relator cited in support of this allegation was ambiguous because it lacked any discussion about workers' compensation insurance premiums. The court also found that there could be no liability due to willful ignorance of the truth, because the individual defendant made the relevant inquiry of the relator and others. Thus, the court held that the relator failed to adequately plead the scienter element of the FCA liability.

The defendants further contended that the relator failed to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), because of a failure to allege the specifics of the purported false claims. The court agreed, as it found that the relator offered an undated document without the recipient's name as the only evidence of the alleged false claims. Therefore, the relator's complaint was to be dismissed, although the court withheld its final order for ten days, in order to give the government an opportunity to respond.

U.S. ex rel. Williams v. Renal Care Group, 2011 WL 2118231 (M.D. Tenn. May. 26, 2011)

A relator brought a *qui tam* action against a group of medical supplies providers (FMCHI, RCG and RCGSC), alleging that the defendants violated the False Claims Act by submitted fraudulent Medicare claims. RCG provided dialysis supplies to patients with end-state renal disease at its facilities and was the former parent corporation of RCGSC, which supplied dialysis equipment to patients who received treatment in their homes. Both submitted claims for their services and supplies to Medicare. Defendant FMCHI is the successor-in-interest to both RCG and RCGSC. The United States intervened in the relator's case and alleged that RCGSC's claims for Medicare payments were in violation of Medicare statutes and regulations because RCG was a dialysis facility that created, controlled and operated dialysis supplier RCGSC, rendering RCGSC ineligible to receive higher payments from Medicare for the sales of certain dialysis supplies for home dialysis treatment.

In earlier proceedings, the United States moved for partial summary judgment on its unjust enrichment claim and on its claim that RCGSC was not a legitimate or qualified supplier to submit Medicare claims for higher payments. RCG and RCGSC moved for summary judgment on all the government's claims—with respect to the FCA claims, they argued that they did not have the requisite intent to submit false claims, since they relied on industry practices among other similarly related companies, and since RCG relied on the advice of counsel when creating RCGSC. They also argued that any alleged falsity on their Medicare claims could not have been material to the government, since they received payments on their allegedly false Medicare claims for more than six years. The United States Dis-

trict Court for the Middle District of Tennessee granted the government's motion and denied the defendants' motion, finding that the defendants showed reckless disregard for the applicable Medicare statutes and regulations, which the court determined was clear and was supported by legislative history. Further, the court held, the creation of RCGSC clearly demonstrated RCG's intent to improperly receive higher Medicare payments, and that RCG did not fully heed the advice of its counsel when creating RCGSC. Thus, the court held that the government was entitled to recover on its unjust enrichment claim and the defendants were ordered to reimburse the United States for the difference between the higher Medicare payments they received and the lower payments they should have received—a total of more than $19 million.

The government then moved for summary judgment on its remaining claims and an award of damages on its FCA claims, citing the court's prior findings of fact. The defendants opposed that motion and also moved for reconsideration of the court's earlier order.

The defendants first argued that the issues of scienter, pursuant to the FCA were not raised as part of the government's prior motion, that they didn't receive proper notice of the court's consideration of those issues and that a grant of summary judgment on those issues would be improper. The court held that by the nature of the defendants' motions and the assertions in their memoranda and at oral argument, the government and the defendants had been on actual notice that all elements of the government's FCA claims were before the court for summary disposition. Further, the court noted that proof of the defendants' specific intent is not required under the FCA.

Next, the defendants argued that FCA claims were inappropriate for resolution by summary judgment. The court noted that the defendants' principal defense was that the appropriate government officials were aware of their business structure, but held that such facts did not automatically absolve the defendants' of FCA liability. The court determined that an express statute precluded the defendants' conduct, and thus, the defendants were not entitled to receive the higher Medicare rate of pay. Consequently, summary judgment in favor of the government was appropriate.

With respect to damages under the FCA, the defendants argued that there was a material factual dispute about the number of allegedly false claims subject to the recovery under the FCA, and therefore, the measure of damages was also in dispute. The defendants rejected the $19 million damages award, and attempted to introduce supplemental evidence showing that they only received about $13 million in overpayments. The court held that summary judgment for that amount could be granted based upon the defendants' admissions, but concluded that the government could not seek more than that amount on summary judgment, since doing so would create a disputed issue of material fact. With respect to statutory

penalties under the FCA, the court noted that the defendants, through their discovery responses, "admitted" to submitting nearly 4000 claims that the government alleged were false. The court determined that imposing the maximum civil penalty of $11,000 per claim was appropriate, and that the resulting total penalty of more than $43 million did not violate the Eighth Amendment's excessive fines clause, as the defendants conceded that the government had suffered nearly $13 million in actual damages, which were subject to trebling.

As a result of this analysis, the court entered summary judgment in favor of the United States, trebling the government's actual damages of $13 million, and imposing the additional $43 million in civil penalties against the defendants, for a total award to the government of more than $82 million.

U.S. ex rel. Parato v. Unadilla Health Care Ctr., Inc., 2011 WL 1196067 (M.D. Ga. Mar. 28, 2011)

A relator brought a *qui tam* action against her former employer, a health care center (UHC), and its governing body, in which she alleged that the defendants falsely certified compliance with federal grant funding requirements on two federal grant applications, due to a conflict of interest. She also alleged a claim for retaliation under the FCA. Specifically, the relator alleged that, as part of their grant applications, the defendants were required to certify that they would "establish safeguards to prohibit employees from using their position for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain," but that the defendant company's interim CEO had an improper conflict of interest, due to his consulting relationship with a technology company from which his company purchased computer equipments and services. In addition, the relator alleged that she was terminated because she notified the company's board of her concerns. The defendants moved separately for summary judgment. The United States District Court for the Middle District of Georgia granted the defendants' motions with respect to the relator's fraud allegations. Additionally, the court granted the individual defendants' motions with respect to relator's retaliation claim, but denied the corporate defendant's motion with respect to that claim.

The court first addressed the relator's fraud allegation—that the defendants' falsely certified compliance with federal grant funding requirements. The court observed that the defendant company certified that it "will" comply with various requirements (including the conflict of interest provision), which amounted to a promise of future compliance. Thus, the court reasoned, the relator's claim was based on "promissory fraud." The court determined that such a statement could only give rise under the FCA if it was knowingly false at the time it was made, and the court held that the relator failed to show that the defendants had no intention

of complying with the regulations when their grant applications were submitted—in fact, the court found that the interim CEO was not even employed by the company when the first grant application was submitted, so the certification of future compliance contained in that application could not have been knowingly false due to his alleged conflict of interest. Accordingly, the court granted the defendants' motions with respect to the relator's fraud allegations.

Next, the court analyzed the relator's retaliation claim and found that the corporate defendant, as the relator's employer, was the only proper defendant for that claim. Accordingly, the court granted summary judgment to the individual defendants with respect to that claim. The corporate defendant then argued that the relator—who served as the company's CEO—failed to put it on notice that she was acting in furtherance of an FCA action because discovering and reporting wrongdoing was part of her job. Additionally, the defendant argued that the relator was terminated because her allegations of fraud and wrongdoing were without merit, not because of retaliation. However, the court found that the relator's claims were sufficient to put the defendant on notice of a possible FCA action. Further, based on the relator's conduct and the subsequent meetings held by the board, the court held that there was an inference of causation between the relator's protected conduct and her termination. Accordingly, the court denied the defendant's motion with respect to the retaliation claim.

U.S. v. Caremark, Inc., 2011 WL 653183 (5th Cir. Feb. 24, 2011)

A relator filed a *qui tam* action on behalf of the United States and eight States, alleging that a pharmacy benefits management company and its subsidiaries committed a "reverse false claims" violation by unlawfully denying requests for reimbursements made by state Medicaid agencies. The government entities intervened and filed a complaint-in-intervention, in which they alleged that the defendants administer pharmacy benefits for its clients—some of whom are dual-eligible, as they are insured by both third parties and Medicaid. The government further alleged that under federal law, if a state Medicaid agency discovers that a Medicaid recipient is a dual-eligible, then the agency must seek reimbursement from the private insurer. The plaintiffs alleged that the defendants unlawfully denied requests for reimbursements made by state Medicaid agencies, resulting in the plaintiffs paying claims that should have been covered by the defendant. The United States District Court for the Western District of Texas disposed of all of the United States' FCA claims and entered several partial summary judgment orders against the state governments.

On appeal to the Fifth Circuit, the United States argued that the district court erred in holding that the defendants did not impair an obligation to the federal government when they denied reimbursement requests from the Medicaid agencies. The U.S. also argued that the district court erroneously held that the defen-

dants did not make false statements to avoid making payments to the state Medicaid agencies and that its complaint-in-intervention did not relate back to the date of the relator's original complaint. The states also appealed the district court's ruling, arguing, among other things, that the district court erred in holding that: (1) *Caremark, Inc. v. Goetz*, 480 F.3d 779 (6th Cir. 2007), only established that Medicaid was the "payor of last resort"; (2) plan restrictions are not false statements under the FCA if they exist in the client's plan; (3) the defendants' good faith confusion about the applicable law was legally relevant to the FCA element of falsity; and (4) the out-of-network, preauthorization, and "billed-submitted" examples of the defendants' denials of reimbursement requests were not false. The two appeals were consolidated. The Fifth Circuit affirmed the district court's ruling in part and reversed and remanded the ruling in part.

The U.S. appealed the district court's ruling that the defendants did not have any obligation to the federal government for denials of reimbursement requests that the defendants submitted to Medicaid agencies. The U.S. argued that since Medicaid is partially funded by the federal government, defrauding a state Medicaid agency is the same as defrauding the federal government, and that even if the defendants did not owe an "obligation" to the United States, by causing the state Medicaid agencies to make false statements to the federal government, the defendants still violated the FCA. The defendants countered, arguing that an obligation to a federally-funded entity was not the same as an obligation to the United States and the that the U.S. did not raise this issue in the district court. The Fifth Circuit found that if the defendants made false statements that an individual was not covered by a plan, then those false statements would cause the state Medicaid agencies to improperly pay for prescriptions and then seek reimbursement from the federal government rather than from the defendants. This in turn, would cause the state governments to receive federal funds to which they would not otherwise be entitled. The court held that if the U.S. could prove that the defendants knowingly made false statements, then they could be held liable under a reverse false claims theory. As a result, the court concluded that the district court erred in granting summary judgment to the defendants on that issue.

The circuit court then considered the question of whether or not, for statute of limitations purposes, the U.S. and States' complaint-in-intervention related back to the date on which the relator's *qui tam* complaint was filed. It noted that Congress resolved this issue when it enacted the Fraud Enforcement and Recovery Act, which specifically provides for relation back of the government's complaint-in-intervention.

Next, the appeals court determined that the defendants did not make false statements when they rejected reimbursement requests based on out-of-network and preauthorization restrictions that were contained in a client's plan. The plaintiffs had argued that while the defendants' statements that they denied requests for re-

imbursement because the participants' plans did not have a paper claims provision were factually true, they still gave rise to FCA liability because the defendants were not legally permitted to deny those requests. The Fifth Circuit noted that the plaintiffs did not allege that the defendants made some false certification of compliance with the law, but merely alleged that they made false statements as a matter of fact. The court concluded that the defendants' statements were not in fact false, as they correctly stated their reasons for denying the plaintiffs' requests for reimbursement. In affirming the district court's ruling on this issue, the Fifth Circuit noted that the district court concluded that the defendants' statements were not false since there was a legitimate good faith disagreement about the applicable law. However, the plaintiffs argued that the district court erred in applying the test announced in *Caremark, Inc. v. Goetz*, 480 F.3d 779 (6th Cir. 2007), because under *Goetz*, the defendants' reliance on out-of-network and preauthorization requirements are false as a matter of law. The court held that further factual development on this issue was necessary and remanded the matter to the district court, as it could not determine whether the preauthorization requirement functioned as a procedural roadblock to reimbursement or a substantive limitation on coverage.

U.S. ex rel. DeCesare v. Americare In Home Nursing, 2011 WL 607390 (E.D. Va. Feb. 10, 2011)

A relator brought a *qui tam* action on behalf of the United States and the Commonwealth of Virginia, against, among others, against two home health care agencies (MedStar and Americare), Americare's CEO (Ammirati) and Director of Nursing (Tatum), and a patient referral agency (VNSN), alleging that the defendants knowingly filed false claims, made false statements, conspired to submit the false claims, and violated other state laws. Specifically, the relator alleged that the home health care agencies paid kickbacks to VNSN in exchange for referrals and that VNSN refused to refer patients to agencies that did not pay kickbacks. Defendants MedStar, Ammirati, and Tatum moved to dismiss the rerlator's action, arguing that the relator's complaint failed to satisfy Rule 9(b)'s particularity requirements, that there was no conspiracy, that there was no scienter, and that the relator failed to state a claim. The United States District Court for the Eastern District of Virginia denied MedStar's motion, but granted Ammirati's and Tatum's.

MedStar argued that the relator's complaint failed to allege that it knew that its certifications falsely reported the absence of kickbacks. The court disagreed and found that the complaint presented evidence in the form of a letter sent from a attorney to MedStar, explaining its view that VNSN participants were violating the Anti-Kickback Statute. The court determined that the letter was sufficient to inform MedStar that VNSN could be violating the Anti-Kickback Statute, and that fact plausibly supported the relator's claim that MedStar disregarded the possibility that its subsequent certifications to the government were false. Consequently,

the court held that the relator demonstrated MedStar's scienter. Likewise, the court found that the conspiracy allegation survived dismissal, as it noted that even after receiving the letter, the company knowingly continued to participate in the illegal referral program, which constituted its assent to the other parties' illegal agreement. Thus, MedStar's motion to dismiss was denied.

Ammirati and Tatum argued that the relator's complaint failed to show their liability because it did not implicate them in any conduct and it failed to plead any alleged fraud they engaged in with particularity. The relator argued that Ammirati and Tatum were liable for the false claims of their employer, Americare. The court found that the complaint did not contain any allegations of Ammirati and Tatum's actions besides a meeting which they attended to discuss a referral program. Further, the court found that the complaint failed to allege that Ammirati and Tatum had control over Americare's actions. Accordingly, the court held that the complaint did not implicate those two defendants in any fraudulent conduct, and the claims against those defendants were dismissed.

U.S. ex rel. Turner v. Michaelis Jackson & Assocs., L.L.C., 2011 WL 13510 (S.D. Ill. Jan. 4, 2011)

Two relators brought a *qui tam* action against their employer—an eye care practice—as well as an eye specialist, alleging that the defendants billed Medicare for procedures that were either never performed or were medically unnecessary. In particular, the relators alleged that the defendants submitted fraudulent bills for diagnostic procedures that were never performed, falsified medical records to receive payments for surgeries not performed, and fraudulently billed for follow-up visits outside of the accepted time frame. The defendants moved for summary judgment and for sanctions. The United States District Court for the Southern District of Illinois denied the defendants' motions.

The relators had hand-selected 200 patient records that they thought were most likely to show fraud, and the court randomly selected 25 of those as a probe sample. The court analyzed testimony offered by the relators from another employee who worked directly with the defendants as a tech—this employee did preliminary testing, and as a scribe, took notes during primary exams. The court found that the witness failed to recall whether any fraud occurred during examinations of the patients used as samples. Furthermore, the employee's testimony failed to identify date information, the name of the patient, or the amount billed for allegedly false claims. The witness also conceded that she had never acted as a tech during these patients' examinations and that she could not state with certainty whether any of their operations were medically necessary. As a result, the court held that the employee's testimony offered nothing to substantiate the relator's claims.

The court then analyzed the expert testimony and found that one of the doctors providing an expert opinion identified specific instances in which a patient never showed up in the office, yet there was documentation of a variety of tests having been conducted. The expert also found medical impossibilities surrounding the sample patient records. The court observed that it was difficult to judge whether the defendants were simply confused or whether they knowingly engaged in billing fraud. The expert also disagreed with the medical necessity of multiple procedures performed by the defendants. As a result, the court held that it was possible that the defendants billed Medicare for procedures that were not performed and which were unnecessary. Consequently, the court denied the defendants' motion. As the court held the relators' claims could be maintained, it denied defendants' motion for sanctions.

U.S. v. Copeland, 2010 WL 5394854 (E.D. Wash. Dec. 23, 2010)

The United States brought an action against an auction company (LC) and its president, alleging violations of the False Claims Act. Specifically, the government alleged that the US Department of Agriculture provides low-income people with loans to purchase homes. When there's a default on any of those loans, the USDA is entitled to foreclose on the property and auction it to the highest bidder. With respect to the case at issue, the government asserted that the USDA hired a company (ABC) to conduct the foreclosures, and that ABC hired the defendants to conduct the auction. The government alleged that one of the defendants' employees colluded with bidders at two such auctions, and in exchange for payments, the employee submitted forms to ABC indicating that those bidders' high bids were less than they actually were. ABC, unaware of this employee's deceit, in turn transmitted the false information to the government, which approved the fraudulent sales. After the government conducted its own investigation and discovered the fraud, the employee pled guilty to bribery. The government then sued the defendants who employed him, and later moved for summary judgment on its claims of fraud. The government argued that the defendant company president could be held individually liable for false claims submitted by his employee on behalf of the corporation. The government also argued that corporate defendant was vicariously liable for any fraudulent misrepresentation in the bids and asked the court to pierce the corporate veil and to impose liability on the company's majority shareholder—*i.e.* the company's president. The United States District Court for the Eastern District of Washington granted the government's motion in part.

The court found that the defendant president conceded that the employee acted on behalf of the corporation, that it was foreseeable that the claims would be presented to the government, and that the government would not have approved the sales if it knew of the deceit. The court found that the defendant's knowledge of the fraud was the only triable issue. The court examined the two auctions separately. With respect to the first auction, the court found that mere weeks after the first

auction, the president noticed a change in the employee's demeanor, but did nothing to investigate, even though, the president "was well aware that some bidders at foreclosure auctions attempt to collude with the auctioneer in an effort to obtain an unfair advantage." The government, however, investigated and found that the employee had changed bids in both auctions and had received money from the bidders in return. The court held that from the government's investigation, it was undisputed that the employee caused the company to submit false information in the first auction. However, the court found that, given the totality of the information, the president may or may not have had a duty to investigate the employee's conduct regarding the first auction. Therefore, the court denied the government's summary judgment motion with respect to claims regarding the first auction.

The court then examined the second auction and found that, by the time of the second auction, the president should have been suspicious of the employee's increasingly strange behavior. The court noted that soon after the second auction, the employee became "an absolute basket case," that he began "acting paranoid," and that he was "constantly shaking." Moreover, when the president asked the employee about his erratic behavior, he responded by saying that it is "better you don't know." Eventually, the employee told the president that the president would need to fire the employee, although he did not say why. The court concluded that the president acted with reckless disregard for the accuracy of the information submitted to ABC (and in turn to the government) and as a result was accountable for knowing that the information to be submitted to the government from the second auction was false.

The court then examined the allegation that the defendant company was vicariously liable for the employee's fraudulent misrepresentations in the bids from both auctions. The court held that since the employee had apparent authority to make representations on behalf of the company, the company was vicariously liable for his fraudulent misrepresentations with respect to both bids. The court, though, declined to grant the government's request to pierce the corporate veil of the defendant company and to hold its majority shareholder liable. First, the court noted that this request might become moot, since the company's majority shareholder had already been found liable in his capacity as the company's president. Second, the court determined that the president had raised an issue of material fact with respect to whether or not he respected the company's separate identity, and therefore held that the veil piercing issue could not be decided on summary judgment.

U.S. ex rel. Feldman v. Van Gorp, 2010 WL 5094402 (S.D. N.Y. Dec. 9, 2010)

A relator brought a *qui tam* action against a university and an individual, alleging that the defendants violated the False Claims Act by submitting false claims, through grant applications and renewals, in order to obtain federal grant funds from the National Institute of Health (NIH). A jury found the defendants liable for making false claims in various renewal applications for funds. The defendants then moved for judgment as a matter of law, or alternatively, for a new trial, arguing that the relator presented insufficient evidence in support of the verdict because there was no testimony from an NIH official with decision-making authority and the documentary evidence relied on by the relator was insufficient to show that the alleged false statements were material to the government's decision to award the grant funds or that the defendants knowingly violated the FCA. The United States District Court for the Southern District of New York disagreed and held that the relator presented significant documentary evidence in the plain language of the NIH guidelines, which made it clear that renewals were material to the decision to receive funding. The court also held that NIH official testimony was not necessary when the jury received such unambiguous NIH guidelines. The court also found that the defendants acted knowingly, noting the testimony of the defendants' Chief Fellow who stated that, in accordance with the defendants' instructions, she drafted three renewals that misrepresented the university's activities. Additionally, there was testimony from other Fellows that misrepresentations were made and that the defendants knowingly made omissions on renewals. As a result, the court held that the jury had ample evidence to conclude that the defendants acted knowingly in making false statements. The defendants' motion for judgment as a matter of law was denied.

U.S. v. Science Applications Int'l. Corp., 2010 WL 4909467 (D.C. Cir. Dec. 3, 2010)

The United States brought an action in the United States District Court for the District of Columbia alleging that a major government contractor violated the False Claims Act by impliedly falsely certifying to the Nuclear Regulatory Commission (NRC) that it had no conflicting interests and would promptly report any potential conflicting relationships. Following jury trial, the defendant was found liable and the United States was awarded treble damages. The defendant then moved for judgment as a matter of law and in the alternative, sought a new trial. The defendant argued that it could not be held liable under the FCA, because its government contract did not designate compliance with the conflict of interest requirements at issue as express conditions for payment. The defendant also argued that various jury instructions were erroneous and prejudicial and that the government failed to prove that it suffered any damages. The district court rejected each

argument and upheld the verdict and jury award. The defendant then appealed to the United States Court of Appeals for the District of Columbia Circuit, seeking judgment as a matter of law with respect to liability on all causes of action and with respect to FCA damages. It also alternatively urged the circuit court to vacate the district court's judgment and remand for a new trial on all claims. The circuit court vacated the judgment as to FCA liability and remanded for a new trial, holding that the district court's collective knowledge instruction conflicted with the FCA's scienter standard.

Scienter

The circuit court first analyzed the implied false certification theory. The defendant argued that liability may attach under an implied false certification theory only where a statute, regulation, or contractual provision made compliance with some requirement of an express condition precedent to payment. The appeals court disagreed and found that record evidence could have allowed the jury to conclude that there was an obligation to disclose any conflict of interest. However, the court still vacated and remanded for a new trial because it determined that the district court erroneously instructed the jury when it announced that corporations were liable for the collective knowledge of all employees and agents within the corporation, as long as those individuals obtained their knowledge while acting on behalf of the corporation. The circuit court held that the district court's instructions drew no distinction between the knowledge of corporate officers and that of potentially thousands of ordinary employees. The court found that the district court's instructions allowed the jury to find that the defendant knowingly submitted false claims for payment even if the jury concluded that no individual was simultaneously aware of the company's NRC contract and its relationships with other companies that violated the contract's conflict of interest provision. As the appeals court could find no other circuit in which the collective knowledge theory was applied to FCA cases, it vacated the district court's judgment and remanded for a new trial. The court of appeals also held that the jury instructions as to the damages were flawed.

U.S. ex rel. Hill v. Univ. Of Med., 2010 WL 4116966 (D.N.J. Oct. 18, 2010)

A relator brought a *qui tam* action against a medical university and two doctors, alleging that the defendants violated the False Claims Act by knowingly submitting fraudulent data to the National Institute of Health (NIH) in a grant application, that she reported her observations and suspicions of the fraud to numerous individuals and committees within the university, as well as to various governmental agencies, including the Office of Research Integrity (ORI) and a U.S. Attorneys' Office, and that, as a result of her actions, the defendants retaliated against her. Both the relator and the defendants moved for summary judgment. The United States District Court for the District of New Jersey granted the defendants' motion.

The court concluded that the relator did not demonstrate that the defendants had the requisite knowledge or intent to submit false data to NIH, and that the relator's claims failed to meet the FCA's materiality requirements because the data the relator alleged had been fabricated was not integral to NIH's decision to approve the defendants' grant application. The court also held that the relator's retaliation claims failed to allege any kind of discriminatory or adverse employment claim, as she held the same title and salary she had before the allegations were made.

Knowledge Requirement

The relator argued that the defendants knowingly submitted false reports, based on the accounts of eyewitnesses, the defendants' inability to replicate the experiments, and the statistical analysis of an expert. The court determined that one of the witnesses upon whom the relator relied to corroborate her allegations had not yet been employed by the defendant university when the relator alleged that he witnessed the experiments. Therefore, he could not have observed, nor attempted to replicate, the results of the defendants' experiments. Next, the court examined the relator's claim that the defendants were unable to replicate data, and held that the fact that the results could not be replicated was likewise inapposite to relator's contention that the defendant knowingly submitted false and fraudulent data to the NIH. Finally, the court held that the statistical analysis by the relator's expert was performed after the ORI investigation, and therefore could not have contributed to the defendant's knowledge. Additionally, the court found that, subsequent to the relator's initial suspicions, three independent investigations were conducted—all of which rejected the relator's allegations. Thus, the court held that since the FCA's knowledge element was clearly lacking, it did not need to look any further at the underlying claim of scientific fraud.

Materiality

The court also examined the materiality element and its relationship to the relator's claims of research misconduct. The relator had approached the defendants' research committee and even ORI to investigate the alleged fraud, and those investigations concluded that there was no cause to warrant further proceedings. The court observed that although the relator repeatedly alleged that the defendants were obliged to report their inability to replicate the results of the experiments, it was not actually a requirement. The ORI reports also concluded that the data which the plaintiff believed to have fabricated was not integral to the decision by the NIH to approve the grant application. As a result the evidence and claims presented failed to meet the FCA's materiality requirements.

Retaliation Claims

The relator alleged that, as a result of her fraud claim, she was forced to share space with a colleague and was locked out of the larger laboratory to which she was accustomed to having access. She also alleged that she was shunned and excluded from

meetings and otherwise humiliated. The court found that although her brief examined the standard for protected conduct, it did not address the fact that the defendant offered a plausible explanation for the change in laboratory access. Furthermore, the relator's exhibits demonstrated that the locks on the lab had been changed as a precautionary measure to investigate her allegations without the fear that she or anyone else would tamper with any results. Furthermore, the relator retained her title and salary and continued, to the best of the court's knowledge, to be employed by the defendant university. As a result, the court denied the relator's motion for summary judgment.

U.S. ex rel. Hixson v. Health Mgmt. Sys. Inc., 2010 WL 2977396 (8th Cir. July 30, 2010)

Two relators filed a *qui tam* complaint in the U.S. District Court for the Southern District of Iowa, alleging that a group of defendants—two companies that were contracted to perform work for Iowa's Medicaid program and two individuals who were employed by the Iowa Department of Health Services—defrauded Iowa's Medicaid program by obtaining federal funds to pay for medical care resulting from medical negligence without first seeking reimbursement from the tortfeasors. The defendants moved to dismiss the relators' complaint for lack of subject matter jurisdiction and for failure to state a claim. While the district court rejected the subject matter jurisdiction argument, it ultimately dismissed the complaint, finding that the relators failed to state a claim. The relators appealed that decision to the Eighth Circuit.

The Eighth Circuit affirmed the district court's dismissal, finding that the relators could not demonstrate that the defendants had the requisite scienter to be found liable under the FCA. Central to the dispute was the relators' allegation that before submitting claims to Medicaid (or causing such claims to be submitted) the defendants were required to deduct any overpayments that resulted from the defendants' failure to seek reimbursement for expenses incurred as a result of medical negligence and that each time the defendants failed to make these required deductions, they violated the FCA. The defendants countered, arguing that they did not seek reimbursement in medical malpractice cases because Iowa law eliminated the collateral-source rule in medical malpractice cases, and consequently, plaintiffs' damages in such cases are reduced by the amounts such plaintiffs receive from sources wholly independent, outside sources. Based on the defendants' reading of that provision of Iowa law, those outside sources included Medicaid benefits, and as a result, Iowa law precluded Medicaid recipients from recovering those expenses. Since the right to reimbursement under Medicaid is wholly dependent on the recipient's right to recover, the defendants reasoned that it was improper to deduct expenses incurred for treatment resulting from medical negligence when seeking reimbursements under Medicaid. Although the Eighth Circuit noted that

the Iowa Supreme Court has never been specifically asked to decide whether or not this provision of Iowa law applies to Medicaid benefits, it determined that the defendants' interpretation of the provision was reasonable and negated the scienter element of FCA liability. The court held that it was not necessary to determine whether or not the defendants' interpretation of the law was correct, "since a statement that a defendant makes based on a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute. That is because the defendant in such a case could not have acted with the knowledge that the FCA requires before liability can attach. . . . Because there is a reasonable interpretation of the law that does not obligate the defendants to seek reimbursement [from negligent tortfeasors], we hold that the relators have not stated a claim under the FCA." Therefore, the Eighth circuit affirmed the district court's dismissal of the relators' complaint.

U.S. ex rel. Loughren v. Unum Group., 2010 WL 2951175 (1st Cir. July 29, 2010)

A relator filed a *qui tam* suit in the U.S. District Court for the District of Massachusetts, alleging that a long-term disability insurance provider violated the False Claims Act by causing false claims to be presented and false statements to be made to the Social Security Administration (SSA). The relator claimed that the defendant forced all of its insureds who filed disability claims to first seek disability benefits from the government, lest their benefits under the defendant's policies be reduced. Since the government's standard for disability benefits was more rigorous than the defendant's, many of the defendant's insureds were not eligible for disability benefits from the government, but were still forced to needlessly apply for such benefits, in order to receive full benefits from the defendant. The defendant moved for summary judgment, arguing that the relator could not show that any allegedly false statements made to the government were material to the government's decisions regarding those applications. The district court generally denied that motion, except that it dismissed the claims relating to one of the defendant's insureds who ultimately received benefits from the government. At trial, the jury considered the Social Security Disability Insurance (SSDI) applications of several of the defendant's other claimants, found the defendant liable under the False Claims Act, and awarded damages and civil penalties to the government. The defendant appealed the verdict, arguing that the district court committed error by denying its summary judgment motion and by refusing to allow the jury to consider evidence that the federal government's retirement system and some state government counterparts often require applicants to apply for SSDI benefits before they can receive other forms of federal and/or state benefits. The First Circuit considered each of the appellant's arguments in turn.

Denial of Defendant's Summary Judgment Motion was Proper

The First Circuit held that the district court correctly denied the defendant's summary judgment motion. In that motion, the defendant contended that the relator's claims should fail. The defendant argued that the FCA requires that, for liability to attach, the false statements at issue must be material to the government's decision-making and that the statements its insureds made to the SSA were not material to the SSA's decision on their respective applications, since the insureds had "disclosed fully and fairly the underlying facts upon which the statement[s] were made," and since the SSA is authorized to make disability benefit decisions on its own, after a review of all available medical records. In denying the defendant's motion, the district court determined that there was a legally sufficient basis upon which the jury could find that the defendant was liable and the First Circuit agreed. The circuit court determined that the FCA's materiality requirement is governed by the "natural tendency" test, which only requires that the false statement *be capable* of influencing the government's decision, and concluded that based on the evidence, "an applicant's opinion regarding the date on which he became unable to work is material, in that it has the potential to influence the Agency's determination of one's eligibility." The First Circuit concluded that the defendant knew or should have known that the medical conditions of at least some of its insureds would preclude an SSA decision that they were eligible for disability benefits from the government. Thus, the First Circuit held, the insureds' statements to the SSA were material to the government's decision on their applications, and the defendant's motion for summary judgment was properly denied.

Moreover, the First Circuit rejected the defendant's scienter argument, in which the defendant asserted that it did not know that its insureds' statements were materially false. The defendant relied on the Supreme Court's decision in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, in which the Court stated that claims alleging that defendants caused false records or statements to be made to the government must demonstrate that such defendants "intended that the false record or statement be material to the government's decision to pay or approve the false claim." The First Circuit corrected the defendant's reading of the Supreme Court's language, pointing out that although the Supreme Court affirmed the FCA's materiality requirement, it did not alter the statute's scienter requirement. The circuit court then held that the defendant had the requisite scienter for liability under the FCA, since it was clear that, while the SSA welcomes applications from anyone who has a good faith belief that he/she is entitled to government disability benefits, the defendant knew that its disability standards were less rigorous than the government's and that at least some of its insureds would not be eligible for government disability benefits. Therefore, the First Circuit held, "it was not unreasonable for the jury to conclude that [the defendant] at least had 'reckless disregard' for the falsity of [its insureds'] statements" to the SSA. Consequently, the defendant's scienter argument failed as well, and the district court's denial of the defendant's summary judgment motion was affirmed.

Exclusion of Evidence was Improper

While the First Circuit affirmed the district court's denial of the defendant's summary judgment motion, it found that that the district court erred when it excluded evidence regarding the SSA's practices when evaluating claims made by various federal and state government employees—many of whom are required by their respective employers to apply for SSDI benefits before they can receive other forms of government assistance. Without explanation, the district court concluded that it had "an inadequate basis for comparing" these requirements to the defendant's. The First Circuit, however, found that by excluding evidence showing that, as a matter of course, the SSA knowingly receives applications from federal and state government employees who may not be eligible for SSDI benefits and is unable or unwilling to differentiate between those applicants and the defendant's insureds, the district court "prevented the jury from considering evidence that was highly relevant to the issue of materiality." As such, the First Circuit vacated the jury's verdict and remanded the matter for a new trial.

U.S. ex rel. Kennard v. Comstock Resources Inc., 2010 WL 2813529 (E.D. Tex. July 16, 2010)

Two relators brought a *qui tam* action against an oil and gas company and its corporate affiliate, alleging that the defendants submitted false reports to the government. The defendants leased tribal lands from the government (which acted as a trustee for a Native American tribe) and paid royalties to the government's Mineral Management Services (MMS) agency (which were then remitted to the tribe). The relators alleged the defendants knowingly submitted false reports to the MMS and undervalued royalty payments. They claimed that the lease agreements were invalid because they did not conform to federal law and that as a result, the defendants were knowingly trespassing on the property and the government, as trustees for the tribe, was entitled to one hundred percent of the royalties. Both parties moved for summary judgment. The United States District Court for the Eastern District of Texas granted the defendant's motion for summary judgment, as it held that the relators failed to show that the defendants knowingly made false statements to the government when filing their MMS reports; the court determined that the lease agreements were valid, finding that the government and the tribe extended and ratified prior state leases and enacted valid federal Minerals Agreements.

U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 2010 WL 2794369 (4th Cir. July 16, 2010)

The relator filed his *qui tam* suit in the U.S. District Court for the Eastern District of Virginia, alleging that his former employer, a construction firm, violated the False Claims Act. The defendant was contracted by the U.S. State Department to construct numerous buildings in Bahgdad, including the U.S. embassy. The rela-

tor was hired by the defendant as a general construction foreman. The relator alleged that the defendant falsely billed the government for deficient work and that when he investigated possible wrongdoing by the company, he was fired in retaliation. The government commissioned an independent investigation of the relator's claims, which resulted in the creation of a document known as the Collins Report. The Collins Report found the defendant's workmanship was comparable to that found in the U.S. and that any defects were minor, not unexpected for a project of that size, and had been repaired. The Bureau of Overseas Building Operations (OBO) granted certificates of final inspection to the defendant and the government declined to intervene in the relator's action. Subsequently, the district court dismissed the relator's fraud allegations for failure to plead fraud with particularity. The relator filed an amended complaint, asserting his retaliation claim, making several new allegations of fraud and arguing that the invoices and documentation submitted by the defendant to the government constituted false claims. The defendant moved for summary judgment. In response to the summary judgment motion, the relator brought additional allegations. The district court granted the defendant's motion. The relator then appealed to the Fourth Circuit.

The Fourth Circuit concluded that the essence of the relator's claim was that the defendant failed to live up to its contractual obligations. It found that the relator produced no evidence of either knowing misrepresentations by the defendant or of having been mistreated for any actions taken in furtherance of his FCA claims. The court also decided that it would not consider the additional allegations that the relator had not brought in his amended complaint. As a result, the circuit court affirmed the district court's decision.

B. Relator Released Defendant from FCA Claims

U.S. ex rel. Davis v. Lockheed Martin Corp., 2010 WL 3239228 (N.D. Tex. Aug. 16, 2010)

A relator brought a *qui tam* action against his former employer, an aircraft manufacturer, alleging that the defendant was awarded a contract to manufacture 22 new fighter aircraft for the US Navy and US Air Force, but failed to follow internal and government guidelines in developing the necessary software for the aircraft. When the relator, who had served as the defendant company's Software Lead and Software Product Manager for the contract, filed his *qui tam* action, he further alleged that the defendant retaliated against him because he'd expressed his concerns. Some time later, the relator and the defendant reached a settlement agreement whereby the relator voluntarily resigned from his position and signed a release agreement with respect to "any and all claims ... connected in any way" with his employment and his claim for "retaliation under any other federal, state, or local laws." The agreement, however, did not "waive rights or claims that may arise" in the future. Subsequent to the release agreement, the government decided not to intervene in the relator's case. The relator was granted leave to amend his complaint to supplement specific facts and to expand his retaliation claim to include an alleged black-balling by the defendant after he left the company. The defendant then moved to dismiss for lack of standing and for failure to plead with particularity. The U.S. District Court for the Northern District of Texas granted the defendant's motion. The court held that the relator, despite having signed the release agreement, still had standing to pursue his fraud claims under the FCA, since he could not release claims belonging to the government without the U.S. Attorney General's consent, and such consent had never been given. The court, however, held that the relator failed to allege with sufficient specificity the nature of any false claims the defendant presented to the government, and thus, his FCA fraud claims were dismissed without prejudice to the United States. In addition, although the court held that the relator could maintain claims for retaliation that arose after the release agreement was executed, since the release did not cover such claims, the court ultimately determined that the relator failed to plead an actionable retaliation claim under the FCA, because the FCA's anti-retaliation provision does not contemplate relief for a defendant's post-employment conduct and the relator's complaint, seen only by the government until the time it was unsealed, did not put defendant on notice that he was engaged in protected activity in furtherance of a FCA claim. Consequently, the relator's retaliation claim was dismissed as well, and that claim was dismissed with prejudice.

C. Sovereign Immunity

See *U.S. ex rel. Kunz v. Halifax Hosp. Med. Ctr.*, 2011 WL 2269968 (M.D. Fla. June 6, 2011), at page 144.

See *Bell v. Dean*, 2010 WL 2976752 (M.D. Ala. July 27, 2010), at page 80.

D. Statute of Limitations

U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 2010 WL 2487962 (D.C. Cir. June 22, 2010)

In 1995, the relator brought an action in the U.S. District Court for the District of Columbia against various construction companies and individuals, alleging a violation of the FCA. Specifically, the relator alleged that the defendants were part of a conspiracy to rig the bidding on USAID-funded sewer contracts in Egypt. The relator alleged that the defendant companies were a part of a price control club that would meet prior to bidding to discuss the bid for each contract and that the club would conspired with respect to who would enter bids and provided compensation to the others for over-bidding or for not bidding at all. The relator's complaint focused on his personal knowledge with one of the contracts—contract 20A. The government opened a criminal investigation into the alleged conspiracy and filed a motion to keep the relator's complaint sealed. In 2001, the government filed its own complaint-in-intervention; subsequently, the government's third amended complaint was filed in 2006. The government's complaint adopted the relator's claims and added claims regarding two new contracts that were characterized as a part of the same conspiracy. At trial, the jury found in the government's favor and awarded treble damages on all three contracts. The district court entered a judgment in accordance with that verdict.

The defendants then appealed to the DC Circuit Court, arguing, among other things, that the statute of limitations barred the plaintiffs' claims. The appeals court held that only the government's complaint-in-intervention could relate back to the relator's original complaint and that the statute of limitations had run on the two new contracts because they did not meet the standards for relation back, since the relator's original complaint did not refer to those contracts. The circuit court further held that the two new contracts did not arise from the same conduct, transaction, or occurrence as the original contract because the new contracts covered different time periods and projects, and the winning bidder had been selected from a different pool of bidders. The court found that the only similarity between contract 20A and the two new contracts was that all three contracts were funded

by the USAID and related to sewer work in Egypt. Consequently, the circuit court vacated the judgment of the district court with respect to the two new contracts and affirmed the district court's judgment with respect to the claims concerning contract 20A.

Relation Back

After the district court reached its judgment on the three contracts, but before the defendants' appeal, Congress amended the FCA to expressly provide for relation back when the government files a complaint-in-intervention, following the filing of a relator's *qui tam* complaint. The defendants argued that the amended FCA statute could not constitutionally be applied to their case, stating that the law never intended the amendment to reach cases in which the government had already intervened. The defendants also urged the court not to allow the government's claims to relate back to the date of the relator's original complaint because the government delayed filing its own complaint and unsealing the relator's complaint until several years after the statute of limitations had run. The court rejected these arguments, noting that the amended statute expressly permitted relation back. The court also observed, however, that while the FCA allows the government's allegations to relate back to the relator's, so as to take advantage of the relator's earlier filing date, the statute does limit the claims the government may add. Thus, for statute of limitations purposes, the court allowed the government's claims concerning contract 20A to relate back to the date of the relator's *qui tam* complaint because the government's claims arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the relator's prior complaint.

However, since the relator's complaint did not include allegations about either of the other two contracts, the government's complaint-in-intervention, with respect to allegations regarding those contracts, could not relate back to the date of the relator's original complaint for statute of limitations purposes. The court noted that although the defendants were aware of the government's criminal investigation of similar conduct with respect to these other two contracts, the defendants never received notice of the government's claims concerning those contracts until the government's complaint was filed and amended.

Preemption

Three of the defendants also argued that the case should have been dismissed because the Foreign Assistance Act (FAA) preempts the FCA. The three defendants argued that the *qui tam* provision of the FCA conflicts with the lack of such a provision in the FAA, and that allowing the relator's FCA action to proceed would nullify the FAA's more restrictive remedial provision. The argument was rejected by the district court and affirmed by the circuit court, which held that both the statutes can co-exist and in cases that involved foreign aid the government could bring an action under either of the two statutes as both the statutes are overlapping with partial redundancy.

U.S. ex rel. Frascella v. Oracle Corp., 2010 WL 4623793 (E.D. Va. Nov. 2, 2010)

A relator brought a *qui tam* action against a software development corporation and its subsidiary. The government intervened in the action and three years after the relator's suit was filed, the government filed a separate complaint-in-intervention. The plaintiffs alleged that the defendants made false statements to the General Services Administration (GSA) in connection with a Multiple Award Schedule (MAS) contract that provided software products to various federal agencies. As part of the 16-month contract negotiation, GSA required the defendants to disclose their commercial pricing policies and sales practices, and reserved the right to audit their transactional data. The contract also included a Price Reductions Clause (PRC), which monitored customer prices and required the contractor to disclose price and discount changes and to offer the government the same.

The government alleged that the defendants failed to disclose discounts that were offered to many of their commercial customers, resulting in substantial overcharges to the government. Three months before the effective date of the contract, the GSA Office of Inspector General conducted a routine pre-award audit of the defendants, which concluded that, in light of discounts being offered to the defendants' commercial customers, "GSA is not being offered fair and reasonable prices." The government also alleged that the defendants consistently manipulated information regarding the sales of software licenses to commercial end users in order to evade their PRC reporting obligations. Finally, the government alleged that, three years into the contract, the defendants made false statements in order to fraudulently induce GSA to modify the contract.

The defendants moved to dismiss the government's complaint for failure to state a claim. Further, the defendants argued that all counts based upon the contract negotiations—which occurred nearly 10 years before the relator's *qui tam* action was filed—were barred by the applicable statutes of limitations, and that some of the claims based on PRC reporting and compliance obligations were also time-barred. The United States District Court Eastern Division agreed and granted the defendants' motion, as it held that the FCA's six year statute of limitations barred the plaintiffs' claims. The court noted that the FCA includes a relation-back provision that expressly provides that the filing of a relator's *qui tam* complaint tolls the statute of limitations for subsequent claims brought by the government that arise out of the same conduct, transaction, or occurrence. The government argued that the statute of limitations should be further tolled because the FCA provides for tolling when facts material to the action are not known and could not reasonably have been discovered by the government official "charged with responsibility to act in the circumstances." The government argued that only officials within the Department of Justice could qualify as such responsible government officials, and

that no DoJ official could have reasonably known about the alleged fraud until the *qui tam* action was filed and after the government completed its investigation and filed its complaint-in-intervention. According to the government, proper tolling of the statute of limitations would allow the government's complaint-in-intervention to reach back to the defendants' alleged conduct that occurred 13 years before. The court rejected this argument and instead agreed with the defendants that six-year statute of limitations applied, since the GSA OIG qualified as a responsible government official, and that the OIG's audit provided the government with enough information to start the clock on the statute of limitations. The court reasoned that after the audit was completed, the government possessed enough information to refuse to award the defendants the MAS contract.

Moreover, the court held that the FCA's six-year statute of limitations should not be extended to 10 years—which is permitted under the FCA in cases in which the government files a complaint within three years of the date on which the relevant material facts are known or should be known to the responsible government official. The court noted that the government did not file its complaint-in-intervention until 3 years and 3 months after the relator's *qui tam* complaint was filed. Consequently, the court held that any allegations of FCA violations occurring more than six years before the relator's complaint was filed were time-barred, and those claims were dismissed.

Riddle v. Dyncorp Intern. Inc., 2010 WL 3304245 (N.D. Tex. Aug. 19, 2010)

The plaintiff brought an action against his former employer, a corporation, and other individuals, alleging that the defendants violated the False Claims Act by retaliating against him and terminating his employment after he raised concerns to his superiors about the defendants' alleged acceptance of unearned payments from the government. The defendants moved to dismiss the complaint for failure to state a claim, contending that the plaintiff's claims were time-barred. The United States District Court for the Northern District of Texas granted the defendants' motion. The court first noted that at the time the plaintiff filed his complaint, the False Claims Act did not specify a statute of limitations period for retaliation claims. The court was then concluded that it was required to apply the most analogous state law statute. The defendants argued that the 90-day statute of limitations under the Texas Whistleblower Act (TWA) was the most analogous state law statute, since the plaintiff wanted protection as a whistleblower. The plaintiff disagreed and argued that the correct limitations period was the two-year catch-all statute of limitations for personal injury claims. Further, the plaintiff argued that the TWA was inapplicable because it only provides a remedy for government employee whistleblowers. Alternatively, the plaintiff argued that a recent amendment to the FCA created a new, universal three-year statute of limitations for all

retaliation claims. The court, however, agreed with the defendants and held that the TWA was the most closely analogous state statute to the plaintiff's allegations, regardless of its limited scope and applicability only to claims by government employees. The court also rejected the plaintiff's argument that the FCA's newly enacted three-year limitations period should apply, finding that the amendment took effect after the plaintiff's claim arose and could not be applied retroactively. The court then applied the 90-day statute of limitations and held that the plaintiff's action was untimely, since it was filed 178 days after his termination. The court also denied the plaintiff's request to amend his complaint, finding that any amendment would be futile, since there was nothing the plaintiff could allege that would make his claim timely. Consequently, the defendants' motion to dismiss the plaintiff's complaint was granted.

See *Saunders v. D.C.*, 2011 WL 2176900 (D.D.C. June 6, 2011), at page 66.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Seal 1 v. Lockheed Martin Corp., 2011 WL 2150052 (11th Cir. June 1, 2011)

A relator brought a *qui tam* action against his former employer, an aircraft manufacturer, alleging that the defendant submitted false claims under a government contract for production of aircrafts. Specifically, the relator alleged that the defendant used inferior coatings on the aircrafts, which reduced their stealth capability. The relator alleged that the defendant's misrepresentations to the US Air Force about the coatings constituted false claims under the FCA because the stealth feature was the essence of the aircraft. The United States District Court for the Northern District of Georgia dismissed the action for failure to plead the alleged fraud with requisite particularity. Alternatively, the district court held that some of the relator's allegations were barred by the FCA's statute of limitations. The relator appealed the district courts ruling to the Eleventh Circuit, which affirmed.

The circuit court agreed with the district court's finding that, although the relator adequately pled that during the time he worked for the defendant the coatings used were defective, he failed to allege the specifics of any false claim the defendant presented to the government, as he failed to allege the amounts requested in the alleged false claims, the number of false claims allegedly presented, or the date of the presentation of any false claims. Further, the court found that the relator failed to make any allegations regarding the terms of the defendant's government contract, or how the defendant made misrepresentations in support of the alleged false claims. Finally, the court found that the relator failed to allege that he had personal knowledge of the defendant's billing practices. The court held that the lack of these types of allegations was a sufficient basis to dismiss the relator's action, and thus, the Eleventh Circuit affirmed the district court's dismissal of the relator's *qui tam* complaint.

U.S. ex rel. King v. DSE, Inc., 2011 WL 1884012 (M.D. Fla. May 17, 2011)

A relator brought a *qui tam* action against his former employer, a grenade manufacturer (DSE), and three subcontractors, alleging that the defendants violated the False Claims Act by manufacturing grenades that did not meet quality control contract specifications and that were not combat-worthy. He argued that the de-

fendants submitted false certifications and fraudulent bills to the military, which stated that the grenades met the applicable specifications, when in reality, the defendants shipped defective grenades to the government in order to meet production deadlines. Further, the relator alleged that he was terminated from his job because he opposed the sale of the defective grenades and refused to certify them. The defendants filed separate motions to dismiss, arguing that the relator failed to plead his fraud claims with particularity and that his claims alleging false billing were not credible, since he only worked for DSE for a matter of months. The relator responded by arguing that his complaint met Rule (9b)'s pleading standard and that he did not need to be employed by the defendant for any specific length of time in order to file a *qui tam* case. The United States District Court for the Middle District of Florida denied the defendants' motions.

The court found that the parties did not dispute that the defendants billed for and were paid for their grenades. It also found the relator's eighty-eight page complaint undoubtedly alerted the defendants to the pertinent acts and omissions that he maintained violated the FCA. The court then found that *qui tam* complaints regarding bills to the government for military equipment warranted a different threshold for particularity from other FCA cases. Specifically, the court noted that improper quality control procedures in assembling military equipment distinctly harm the government entirely distinct from any financial impact, and therefore, relators making such claims do not necessarily need to detail specific false claims, particularly when there is no dispute that the government was in fact billed for the equipment at issue. Thus, the relator's claims against DSE satisfied Rule 9(b). The subcontractor defendants then argued that the relator had no knowledge of their quality control procedures, since he only worked for DSE. The court, though, found that the relator's allegation that he was aware of the subcontractors' products' deficiencies because he inspected and handled components for the subcontractors was sufficient to meet the heightened pleading standard. Consequently, the court denied the defendants' motions to dismiss the relator's fraud claims.

U.S. ex rel. Ellsworth v. United Bus. Brokers of Utah, LLC, 2011 WL 1871225 (D. Utah May 16, 2011)

Two relators brought a *qui tam* action in the United States District Court for the District of Utah alleging that their former employers, a group of brokerage firms, and three individuals, violated the False Claims Act by knowingly submitting falsified U.S. Small Business Administration (SBA) loan applications. Specifically, the relators alleged that the defendants created two sets of closing documents—one set of real documents that reflected actual closing and a second set of fraudulent documents that was provided to the SBA. Further, the relators alleged that the defendants instructed employees on ways to circumvent SBA requirements to falsify information. The relators' original complaint was dismissed without preju-

dice, following the defendants' motion to dismiss for failure to plead the fraud scheme with particularity. The relators then filed an amended complaint, and the defendants again moved to dismiss for failure to plead fraud with particularity.

Although the court found that the relators added additional details in their amended complaint, it concluded that those details were insufficient to detail the defendants' fraudulent conduct or to specify how the defendants' alleged claims were false, since the relators failed to specify how the defendants' statements, applications, claims, records, or documents were fraudulent, and failed to provide information regarding the SBA guidelines the defendants' violated. The relators argued that the court should apply a relaxed pleading standard to their claims, since they did not have access to the relevant information. The court disagreed, though, and held that Rule 9(b)'s heightened pleading standard could not be applied based on speculation and conclusory allegations. Consequently, the relators' amended complaint was also dismissed for failure to plead fraud with particularity, but the court granted the relators leave to file a second amended complaint.

U.S. ex rel. Vigil v. Nelnet, Inc., 2011 WL 1675418 (8th Cir. May 5, 2011)

A relator brought a *qui tam* action against three private lenders (Nelnet, JP Morgan Chase, and Citigroup). The relator stated that the Department of Education (DOE) pays claims submitted by eligible private lenders to cover interest rate subsidies and for special allowances granted on behalf of student borrowers, and that DOE enters into guaranty agreements with agencies that insure lenders against defaults on student loans. The relator asserted that Nelnet participates in this program as both a lender and as a servicer for others' loans—including loans from Chase and Citigroup—and in turn submits claims for payments under the program. He alleged that Nelnet's marketing practices—which included providing illegal bonuses and commissions to loan advisors based on the number of borrowers they persuaded to complete loan consolidation applications; providing "exit-counseling software to universities that steered prospective borrowers to Nelnet; and directing fraudulent advertising at prospective student borrowers—violated various Federal Family Education Loan Program (FFELP) statutes and regulations as administered by DOE, and that the other defendants conspired with Nelnet to violate the False Claims Act by submitting false claims to the government for interest-rate subsidies, special allowances, and reimbursement of loan defaults. The relator further alleged that since participation in the program is conditioned on compliance with applicable DOE regulations, and since Nelnet's marketing practices and conspiracy to defraud the government did not comply with those regulations, Nelnet was ineligible to receive payments under the program, and only received payments by falsely certifying its compliance with the regulations. Therefore, the relator concluded, all of Nelnet's claims to DOE were false. In addi-

tion, the relator alleged that each of the defendants was jointly and severally liable to repay all improper interest rate subsidies, special allowances and defaulted loan reimbursements. The United States District Court for the District of Nebraska dismissed the relator's complaint with prejudice for failure to plead fraud with particularity and failure to state a claim. The relator appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed the district court's judgment and held that the district court did not abuse its discretion by dismissing the complaint with prejudice.

On appeal, the relator focused on his allegations that Nelnet falsely certified compliance with FFELP regulations which were conditions of payment by the DOE. However, the circuit court agreed with the district court that since the relator did not allege that Nelnet submitted a fraudulent application to establish its initial participation in the program, and since Nelnet has not been stripped of its eligibility at the time the relator filed his *qui tam* action, Nelnet's certifications that it was an eligible lender were not false, as a matter of fact. The court also rejected the relator's assertion that Nelnet's certifications of compliance were a condition of payment under the program, noting that the relator failed to allege any specific false claim submitted by Nelnet and/or how any such false claim was material to the DOE's decision to make a payment. Therefore, the court agreed with the district court and held the relator failed to state a claim and failed to satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The court also found that the relator alleged that Nelnet's FFELP insurance certification to Guaranty Agencies (GA) was false, yet he failed to allege that the GA forwarded any such false certification to the government. Thus, the court held the relator also failed to allege that any false claims for insurance payments were presented to the government and/or were material to its decision to pay. Additionally, the court found that the FFELP statutes and regulations provided detailed remedies for noncompliant lenders and servicers and nowhere in those statutes or regulations was it suggested that noncompliance may result in the wholesale recovery of claims previously paid. As the relator failed to state a plausible claim for relief, the appeals court found that his conspiracy claim was not actionable. Consequently, the Eighth Circuit affirmed the district court's dismissal of the relator's complaint. The appeals court noted that the complaint—the relator's third amended complaint—was properly dismissed with prejudice, since the relator did not seek leave to file a fourth amended complaint.

U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 2011 WL 2182422 (E.D. Va. May 4, 2011)

A relator brought a *qui tam* action against two pharmaceutical companies, alleging that the defendants engaged in improper off-label promotion one of its drugs, which it claimed was equivalent to a popular, similar drug. The defendants moved

to dismiss the relator's complaint for failure to plead with particularity and for failure to state a claim, arguing that the relator failed to plead facts in support of his conclusion that the defendants caused false or fraudulent claims to be presented to the government. In response, the relator argued that he was not required to allege the details of the defendants' claims to the government, as long as his *qui tam* complaint as a whole was sufficiently particular to pass muster under the Federal Rules of Civil Procedure However, the United States District Court for the Eastern District of Virginia found that the relator's complaint did not provide a fact-based explanation for its allegation that the defendants caused third party pharmacists and healthcare providers to submit improper claims to the federal government for prescriptions for the defendant's drug that were written for off-label purposes. Furthermore, the court found that the relator failed to identify any false certifications or representations that were allegedly submitted by these third parties, or how the defendants caused any such certifications or representations to be made. The court held that the relator alleged unlawful promotional tactics, but failed to show how the defendants caused the physicians or hospitals to submit false claims. As a result, the court dismissed the relator's complaint. The court did grant the relator leave to amend his complaint.

U.S. ex rel. Bragg v. SCR Med. Transp., Inc., 2011 WL 1357490 (N.D. Ill. Apr. 8, 2011)

A relator brought a *qui tam* action on behalf of the United States and the State of Illinois alleging that his former employer, a provider of non-emergency medical transportation, violated the FCA by submitting false claims and by retaliating against him. Specifically, the relator alleged that the defendant manipulated and modified trip tickets in order to create a better on-time performance record for its transportation service, and then sought payments under contracts with various federal, state and city transportation authorities. Further, the relator alleged that the defendant threatened, harassed, and discriminated against him because of the acts done in furtherance of his *qui tam* action. The United States and the State of Illinois declined to intervene in the case. The defendant moved to dismiss, arguing that the fraud allegations were not pled with particularity and that the retaliation allegation did not state a claim under the federal FCA or its Illinois counterpart. The United States District Court for the Northern District of Illinois granted the defendant's motion and after dismissing the federal claims, the court relinquished its jurisdiction over the state law claims.

With respect to the fraud claims, the relator argued that he satisfied Rule 9(b)'s pleading requirements because he pled the "who, what, when, where, and how" elements of the defendant's alleged fraud scheme. He argued that he identified individuals involved in the alleged scheme, described the modification and submission of falsified trip tickets, and detailed the time of the occurrence, the locations

where the modifications took place, and how the defendant implemented, monitored, and reviewed the modification process. The court disagreed and stated that the relator only alleged a general scheme used by the defendant to modify the trip tickets. Further, the court found that the relator failed to plead specific examples of modified trip tickets or false claims submitted by the defendant. The relator argued the particularity requirements should be relaxed as he lacked access to all facts necessary to detail his claim. The court, though, found that the relator had daily access to the defendant's trip tickets. Accordingly, the court held the relator failed to meet the particularity requirements and granted the defendant's motion to dismiss that claim.

With respect to the retaliation claim, the relator argued that he was constructively discharged because he refused to participate in the defendant's alleged fraud scheme. The court found that the relator's mere refusal to comply with the defendant's alleged fraudulent conduct did not constitute protected activity. Further, the court found that the relator failed to show that he investigated the fraud, took any other steps toward bringing a *qui tam* action, or otherwise put the defendant on notice of a *qui tam* action. Accordingly, the court dismissed the retaliation claim as well.

U.S. ex rel. Wildhirt v. AARS Forever, Inc., 2011 WL 1303390 (N.D. Ill. Apr. 6, 2011)

Two relators brought a *qui tam* action against their former employers—two home healthcare services providers. The relators alleged that the defendants conspired to violate Medicare and Medicaid standards and regulations, resulting in False Claims Act violations in the form of false and fraudulent claims. The relators also alleged that their respective employers retaliated against them, in violation of the FCA. The defendants moved separately to dismiss the relator's claims, arguing that the relators failed to plead with particularity and failed to state a claim. The United States District Court for the Northern District of Illinois granted the defendants' motions, but granted the relators' leave to amend.

With respect to the fraud allegations, the court determined that the relators' complaint alleged that the defendants "breached Medicare and Medicaid regulations in so many ways, their performance fell so short that every or nearly every claim they submitted to the federal and state governments was false and fraudulent." The court, however, rejected this "gestalt" method of pleading, and noted that the relators failed to identify specific false claims or false statements made by the defendants and/or failed to plead with certainty that the defendants' claims and statements were actually false. The court also noted that neither of the two exhibits relied on by the relators referenced specific claims submitted to the government for payment. The court further observed that while the relators alleged that the defendants were required to certify future compliance with Medicare and Medicaid

regulations as a condition for enrolling in the programs, the relators failed to allege that the defendants were required to certify that that they had in fact complied with those regulations as a condition of receiving payment. Thus, the court held, the relators' allegation that the defendant's Medicare and Medicaid claims were false was deficient. Finally, the court held that the relators could not maintain their allegation that the defendants conspired to defraud the government by getting false or fraudulent claims paid, since the relators failed to allege that the defendants ever entered into any such agreement. The relators' fraud allegations were dismissed.

With respect to the retaliation claims, the court found that the relators failed to allege that they were engaged in protected conduct under the False Claims Act prior to their termination. Although the court recognized the relators' contention that they complained to their superiors about deficient services patients were receiving, the court found that they failed to allege that they were investigating facts or otherwise engaged in conduct in furtherance of a FCA action, or that their respective employers suspected that such an action would be filed. Thus, the court dismissed the retaliation claims as well.

U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., 2011 WL 1053366 (9th Cir. Mar. 24, 2011)

A relator brought a *qui tam* action against her former employer, a technology company, and its parent company, alleging fraud and retaliation under the False Claims Act. Specifically, the relator alleged that the defendants entered into a contract with the Army that granted the government royalty-free usage of certain inventions developed in performance of the contract, as well as the right to require the defendant to license the use of those inventions to other parties on reasonable terms. The relator alleged that the defendants knowingly defrauded the government by failing to disclose new inventions which potentially led the government to other contractors for the same work—essentially paying for those technologies twice. The relator also alleged that she reported her concerns to her supervisor and asked for an audit or internal review, but that no corrective action was taken and she was later terminated. She stated that upon learning that she was to be terminated, she copied large amounts of data from the defendant's computers in anticipation of bringing a *qui tam* action. The government declined to intervene in the relator's suit and the relator pursued the action on her own.

During discovery, the defendant moved for summary judgment on the relator's fraud claims, following the relator's refusal to answer an interrogatory requesting that she "identify each specific provision of . . . the False Claims Act that you allege . . . that Defendant knowingly violated." The U.S. District Court for the District of Arizona granted that motion, dismissed the relator's fraud claims, and denied the relator leave to file his amended complaint, which the court deemed was too

long to give a "short and plain statement" of her claim." In addition, with respect to the relator's retaliation claim, the defendant filed a counterclaim, alleging that the relator misappropriated its electronic documents and files in violation a confidentiality agreement she executed when she was first employed by the defendant. Both parties then sought summary judgment on the relator's retaliation claim and the defendant's counterclaim. The district court decided both issues in favor of the defendant. The defendant then moved for attorneys' fees, which the district court granted in part. The relator appealed all of the district court's rulings to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the decisions of the district court.

Pleading Fraud with Particularity

First, the circuit court reviewed the district court's dismissal of the relator's *qui tam* claim. The court determined that, despite having access to the defendants' records, the relator's *qui tam* complaint did not satisfy Rule 9(b)'s particularity requirement, as it did not identify a single false or fraudulent claim for payment and failed to identify the particular circumstances in which the defendants withheld necessary information from the government. The Ninth Circuit stated that "[t]his type of allegation, which identifies a general sort of fraudulent conduct but specifies no particular circumstances of any discrete fraudulent statement, is precisely what Rule 9(b) aims to preclude." Ultimately, the circuit court found that the relator's allegations read more like a breach of contract claim than a fraud claim under the FCA, and although the court recognized that the relator's complaint alleged "unsavory conduct," it held that "unsavory conduct is not, without more, actionable under the FCA." Accordingly, the Ninth Circuit held that the relator failed to plead her fraud claims with the requisite particularity and that the district court properly dismissed those claims.

The Ninth Circuit also affirmed the district court's decision to deny the relator's motion for leave to amend her *qui tam* complaint. First, the court found that amending the complaint would have been futile, since the relator's motion was brought after nearly 2 years of discovery. In addition, the circuit court agreed with the district court that the proposed amended complaint, which was more than 700 pages long, was unnecessarily lengthy and should not be accepted, as it reasoned that preparing an answer would likely be unduly burdensome for the defendant.

Retaliation

Next, the circuit court analyzed the relator's retaliation claim. The defendant argued that the relator had not engaged in protected conduct under the FCA, because the fraud she suspected was not actionable under the statute and thus, her investigations could not have reasonably led to a viable FCA action. In addition, the defendant argued that the relator's termination was not for a retaliatory reason, but rather was part of a corporate reorganization unrelated to her conduct—the defendant claimed that the official who decided to terminate the relator was unaware of her inquiries

regarding alleged fraud. The relator countered, arguing that officials within the defendant's company who knew of her protected conduct could have influenced the official who decided to fire her. While the court found that evidence adduced by the relator established that the set of events as she described could conceivably have occurred, it determined that the relator failed to state facts sufficient to give rise to a reasonable inference that those event did in fact occur in the manner the relator described. Consequently, the circuit court affirmed the district court's decision to grant summary judgment in favor of the defendant on the retaliation claim.

Breach of Confidentiality Agreement

Next, the Ninth Circuit analyzed whether the district court abused its discretion in granting summary judgment to the defendant on its counterclaim for breach of the confidentiality agreement. The relator admitted that she breached the confidentiality agreement by removing the defendant's documents, but she urged not to enforce the agreement on public policy grounds that enforcement of such contracts against *qui tam* relators would allow defendants to shield themselves from FCA liability by preventing relators from disclosing information to the government in furtherance of an FCA action. The circuit court found some merit in the relator's position, but ultimately chose to enforce the confidentiality agreement, as it concluded that the relator failed to justify why removal of the documents was reasonably necessary to pursue an FCA claim. Further, the circuit court found that the relator's appropriation of files was overbroad and unreasonable, noting that she indiscriminately removed a vast number of the defendant's documents. The court held that her actions could not be sustained by reference to a public policy exception. Notably, the Ninth circuit did not completely reject the idea of a public policy exception that would protect relators who remove employers' documents—it reserved judgment on that issue—but the court held that any such exception would not apply in this relator's case, since she could not demonstrate why removing the documents at issue was reasonably necessary to pursuing her *qui tam* action. Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment on the defendant's counterclaim.

Award of Attorneys' Fees to Defendant

Finally, the Ninth Circuit affirmed the district court's award of attorney's fees to the defendant. The circuit court acknowledged that such awards might chill future relators from coming forward with fraud allegations, but cautioned that "relators and their attorneys are not free to engage in misconduct without consequences merely because those consequences might chill others." However, the court noted that the district court's ruling should not have such an effect on future relators, since the district court only granted the defendant attorneys' fees with respect to the counterclaim for breach of contract, and not with respect to the relator's *qui tam* action. The Ninth Circuit stated that it was "confident that future litigants will appreciate the difference," and thus, affirmed the district court's ruling.

U.S. ex rel. Wall v. Vista Hospice Care, Inc., 2011 WL 816632 (N.D. Tex. Mar. 9, 2011)

A relator brought a *qui tam* action on behalf of the federal government and five State government, alleging that her former employer—a healthcare provider—and its two subsidiaries violated federal and state False Claims Act statutes by submitting false claims for Medicare and Medicaid reimbursement. Specifically, the relator alleged that the defendants enrolled and sought reimbursements for patients who were not eligible for hospice car; accepted and retained payments from the government for services that were not actually provided to hospice patients; provided illegal-kickbacks; and wrongfully terminated her employment. Both the federal government and the five states declined to intervene in the relator's suit. The defendants moved to dismiss the relator's complaint, arguing that the fraud allegations were not pled with particularity and failed to state a claim. The United States District Court for the Northern District of Texas granted the motion in part.

With respect to the allegation that the defendants sought reimbursements for ineligible patients, the defendants argued that the complaint was deficient to support the relator's claim that false claims were presented to Medicare and/or Medicaid or that false records were made or used in support of false claims. Although the court found that the relator specifically alleged that ineligible patients—identified by their initials—were admitted into hospice care, as well as the pertinent dates of the alleged fraud scheme, she did not identify which of the defendants' facilities the patients were admitted to, or any specific individuals who participated in the alleged fraud, or which patients were covered by Medicare or Medicaid. Consequently, the court held that the relator had not pled this claim with sufficient particularity, but granted her leave to amend her complaint.

The court then analyzed whether the relator's assertion that the defendants falsely certified that patients were eligible for hospice care, properly stated a claim under either a legal falsity or a factual falsity theory. Under the legal falsity theory, the relator had argued that the government conditioned reimbursement to hospice providers—such as the defendants—on certification of hospice eligibility. She alleged that the defendants falsely certified that patients' eligibility without first obtaining the necessary approval of its medical director or a physician's, or by forging those individuals' signatures on certification forms. The court determined that this allegation was sufficient to state a claim for legal falsity. Next, the court analyzed the relator's factual falsity theory. The factual falsity theory was based on the defendants' alleged submission of requests for payment for services that the defendants knew were not covered. The court, though, found that the relator did not state that the defendants submitted an incorrect description of the hospice services provided nor that they requested reimbursement for goods nor services never provided. Consequently, the court held that the relator had not properly pled her theory of

factual falsity with sufficient particularity. Accordingly, the court granted the defendants' motion to dismiss that claim, but without prejudice.

The court then turned to the defendants' argument that the relator's complaint did not identify the "who, what, when, where, and how," with respect to the contention that the defendants accepted and retained payments from the government for services that were never actually provided. The court, though, found that the relator's allegations were sufficient, as the relator alleged that multiple patients—identified by their initials—were denied certain services, identified the location, listed the pertinent dates, and detailed the fraud scheme, noting that the defendants fraudulently certified compliance with statutes and regulations requiring those services, and submitted false and fraudulent claims to the government for payment. The court rejected the defendants' argument that the relator's complaint was deficient because she did not allege who was involved in the alleged fraud or the specific false statements or records used to obtain reimbursements. The defendants also argued that the relator's complaint did not sufficiently plead that their allegedly false certifications of compliance were material to the government's decision to pay them, as they contended that the certifications of compliance were required as conditions of participation in the government's programs, but not as conditions of payment. The relator, though, argued that the Medicare forms the defendants completed conditioned payments on compliance with all applicable conditions of participation. The court, however, disagreed with the relator, stating: "[T]his Court does not read that form as mandating an extension of FCA liability to every statement certifying compliance with any Medicare statute or regulation relating to conditions of participation." Thus, although the court found that the relator's allegations that the defendants retained payments for services that never performed were sufficient to satisfy Rule 9(b), it ultimately held that those allegations were insufficient to state a claim under the False Claims Act. This claim was also dismissed without prejudice.

The court continued, next evaluating the relator's contention that the defendants provided illegal kickbacks to patients and families as a means to encourage them to enroll in hospice care, and also provided improper kickbacks to nursing home employees in exchange for patient referrals. With respect to this allegation, the defendants argued that the relator had not sufficiently stated that the defendants ever certified compliance with the anti-kickback statute. The court disagreed, and found that the relator sufficiently alleged an anti-kickback scheme and that the defendants signed reimbursement forms which required compliance with the anti-kickback statute. Therefore, the court denied the defendants' motion as to this allegation.

The court next addressed the relator's allegations under the various state False Claims Act statutes and quickly observed that the relator had no actual knowledge of fraud in states other than Texas, where she worked. Moreover, the court noted that the False Claims Act statute of one of the states (Indiana) was not yet in effect

when the alleged fraud occurred, and thus, the relator could not maintain a claim under that state's FCA law. As a result, the relator was allowed to maintain only the state FCA claims brought under the Texas statute—the claims brought under the other four state FCA laws were dismissed, with the claims brought under Indiana's statute being dismissed with prejudice.

Finally, the court considered the relator's retaliation claim under the False Claims Act. After observing that the FCA did not provide a statute of limitations for retaliation claims, and after recognizing the Supreme Court's guidance that court's should look to the most closely analogous state law to determine the applicable limitations period, the court determined that the 180-day limitations period provided for under the Texas Whistleblower Act applied. Since the relator filed her retaliation claim almost two years after suffering the last alleged retaliatory act, the court determined that her retaliation claim was time-barred, and dismissed that claim with prejudice.

U.S. ex rel. Zemplenyi v. Group Health Coop., 2011 WL 814261 (W.D. Wash. Mar. 3, 2011)

A relator brought a *qui tam* action against several health care corporations—one of which was her former employer—alleging that the defendants submitted false Medicare claims by performing medically unnecessary cataract surgeries. The relator further claimed that she voiced her objections to her employer about the allegedly false claims and reported her concerns to a Medicare Compliance Officer, and that, as a result, her former employer retaliated against her and subjected her to a negative performance review. The relator then resigned, claiming that she had no other choice under the circumstances.

The defendants moved to dismiss the relator's claims, arguing that she failed to plead fraud with particularity and failed to state a claim. Further, the defendants argued that the relator's retaliation claim should be dismissed because the relator could not possibly have reasonably suspected that the defendants were submitting false claims. The United States District Court for the Western District of Washington granted the motion in part, as it dismissed the relator's fraud claims but allowed her retaliation claim to go forward.

With respect to the relator's fraud claim, the court found that the relator described the alleged scheme by discussing how the defendants stood to benefit from an increase in cataract surgeries. However, the court found that the scheme alleged could not be construed as a violation of the FCA because the defendants were paid a fixed rate per patient regardless of the number or type of service provided. As the court stated, "[u]nder such a system, it cannot be said that false claims are being made, since payments remain the same regardless of whether a surgery is performed or not. While Plaintiff puts forth that by incurring higher costs, Defendants may

receive higher capitated payments for managed care beneficiaries in the future, it nonetheless remains the case that those costs are self-incurred, and the government continues to pay a flat rate. Defendants receive payments in a fixed amount per member, per month, and thus the government is not spending additional money when an individual surgery is performed." Moreover, even though the court found that the relator described six cases of unnecessary surgery, it found that the alleged conduct was not material to the government's decision to pay the monthly flat rate. Consequently, the court held that the relator's allegations of a fraud scheme were not sufficiently linked to a reliable indicia leading to an inference that false claims were submitted. The court dismissed the relator's fraud claims with prejudice.

The court then examined the relator's retaliation claim. With respect to this claim, the court found that the relator satisfied all the necessary pleading requirements, as she stated enough facts to support her contention that she reasonably believed that the defendants were committing fraud and investigated, she stated that she repeatedly expressed her concerns to her employer and filed reports about the alleged fraud, and she alleged that her former employer retaliated against her by subjecting her to negative performance reviews without an opportunity to respond. Therefore, the court held that the relator sufficiently alleged a retaliation claim and denied the motion to dismiss that claim.

U.S. ex rel. Huey v. Summit Healthcare Ass'n, Inc., 2011 WL 814898 (D. Ariz. Mar. 3, 2011)

A relator brought a *qui tam* action against his former employer, a hospital, as well as a company that provided management services to the hospitals, and one of the management company's executives, alleging that the defendant hospital violated the False Claims Act by conspiring to defraud the government, by submitting false Medicare claims that sought reimbursements for unnecessary services and for admitted patients who were ineligible for Medicare benefits, and by falsely certifying compliance with Medicare conditions of participation and the Medicare anti-kickback statute, even though the hospital illegally received referrals from a medical center and failed to properly supervise nurse anesthetists—in fact, the relator brought a separate claim alleging violations of the anti-kickback statute itself. He further alleged that the defendant management company informed the hospital of the billing issues, and that the management company's executive advised the hospital not to self-report the violations to the government, and instead, retain the improper overpayments. In addition, the relator alleged that he spoke with the hospital's compliance officer, who admitted that the problem had been going on for years, and further, that he reported the problems at hospital board meetings, but was ignored. Finally, he alleged that he was terminated from his job as a result of investigating the allegedly improper billing practices. The defendants separately moved to dismiss the relator's complaint for failure to state a claim and

for failure to satisfy Rule 9(b)'s pleading requirements. The United States District Court for the District of Arizona granted the management company and individual defendants' motions, and granted the hospital's motion in part.

Rule 9(b)

The defendants argued that the relator failed to allege why any of the hospital's services were unnecessary, in light of a patient's complaints, symptoms, or illness. The defendants argued took issue with the sources relied upon by the relator and contended that the relator's allegations did not contain sufficient particularity, as it either did not identify the patients at issue as Medicare beneficiaries, did not demonstrate that the services in question were actually billed to Medicare, did not specify why the services were not reimbursable, and/or did not include specific dates or service. Notwithstanding these contentions, the court held that the relator's fraud allegations, taken as a whole, satisfied Rule 9(b)'s pleading requirements, since the relator offered details from several internal and external investigations and reports which allegedly identified pervasive issues with the defendant hospital's practices.

With respect to the relator's claim that the hospital falsely certified its compliance with Medicare Conditions of Participation and the Medicare anti-kickback statute, the court first noted the distinction between Medicare conditions of participation and Medicare conditions of payment. As the relator's allegations arose from alleged failures to meet conditions of Medicare participation, the court held that those claims were "insufficiently related to the government's payment decision to form the basis of an FCA claim." Moreover, the court held that these claims were conclusory and unsupported. As a result, these claims were dismissed for failure to meet the Rule 9(b)'s particularity requirements. The court also dismissed the relator's claim brought under the anti-kickback statute, noting that there is no private right of action under that statute.

Conspiracy

Next, the court considered the relator's claim that the defendants engaged in a conspiracy to defraud Medicare, when the management company executive and the hospital's board allegedly agreed not to self-report the alleged Medicare fraud to the government. In response, the management company executive argued that the intra-corporate conspiracy doctrine protected him from liability, since he was engaged in a collaborative decision-making process and was acting within the scope of his duties as an agent of the corporate defendants. The court agreed and dismissed the conspiracy claim against the individual defendant. The court also dismissed the conspiracy claim against the defendant management company, noting that the relator only alleged that the company had knowledge of the hospital's false Medicare claims. The court held that such knowledge alone was insufficient to support a conspiracy claim. Since the conspiracy claims against the management company and its executive were dismissed, the court also dismissed the conspiracy claim against the hospital, since there was no other defendant with whom the hospital could have conspired.

Retaliation

Finally, the court examined the retaliation claim. The defendant hospital argued that the relator failed to show that he engaged in any protected activity. The court, though, observed that the relator alleged that he advised the defendant hospital's board of directors to address and investigate the Medicare billing and compliance issues, and warned the board of the potential for FCA liability. The court held that these activities were sufficient to constitute protected activity, and when coupled with the allegation that the hospital terminated his job in response, the relator's allegations were sufficient to state a claim for retaliation under the False Claims Act. Therefore, the court denied the defendant hospital's motion to dismiss the retaliation claim.

U.S. ex rel. Compton v. Circle B. Enters., Inc., 2011 WL 382758 (M.D. Ga. Feb. 3, 2011)

A relator brought a *qui tam* action against his former employer—a contractor—and several subcontractors and individuals, alleging that the defendants presented false claims to the government through a scheme that violated the Anti-Kickback Act. The United States District Court for the Middle Division of Georgia granted the defendants' motions to dismiss for failure to state a claim and for failure to plead fraud with particularity. However, the court allowed the relator to amend the complaint. The realtor did file an amended complaint, alleging that his employer contracted with the government to provide housing in disaster relief, contracted with subcontractors to fulfill the government contract obligations, but, due to concerns that the subcontractors would cut out the prime contractor and deal directly with the government on future contracts, the company agreed to pay the subcontractors rebates on each house, and these payments were passed on to the government. The relator further alleged that these agreements were not set forth in any written agreement, the payments were off the ledger books, and that the relator was told not tell anyone about the rebate payments. The relator alleged that compliance with the anti-kickback act was a condition that had to be met before the prime contractor could receive payment from the government and that providing these secret rebates caused false claims to be submitted to the government. The defendants moved to dismiss the relator's amended complaint, arguing that it did not correct the former complaint's deficiencies. This time, the court denied the motions, as it held that the amended complaint established plausible claims for relief and pled fraud with particularity.

The court found the amended complaint explained the alleged plan and that the relator alleged particular facts that made it plausible that the plan's terms were that the employer would provide payments to the subcontractors in exchange for their agreement not to contract directly with the government. The court also found that the relator identified who participated in the fraudulent scheme, what was to be

gained by the fraud, and when the fraudulent scheme went into place. The court held that the relator connected the fraudulent agreement to acts taken pursuant to the agreement by claiming to have first-hand knowledge that the employer made unrecorded payments and that the subcontractors accepted those payments. Further, the court held that the relator adequately pled the submission of false claims because he was personally responsible for ensuring that the invoices were submitted to the government and every invoice included the cost of the rebate payments.

U.S. ex rel. Assocs. Against Outlier Fraud v. Huron Consulting Group, Inc., 2011 WL 253259 (S.D.N.Y. Jan. 24, 2011)

A relator brought a *qui tam* action against two medical service corporations, alleging that the defendants violated the False Claims Act by submitting fraudulent Medicare outlier reimbursement forms. In its first amended complaint, the relator alleged that Medicare generally pays hospitals a fixed amount based on the average cost of treatment for a particular illness, but also provides additional payments for cost outliers in certain cases. The realtor further alleged that the defendants manipulated the cost-to-charge ratio for the outlier payments, which allowed them to receive triple the proper payment amount. The defendants moved to dismiss the relator's complaint and the United States District Court for the Southern District of New York granted the defendants' motion without prejudice. The relator was allowed to file a second amended complaint and the defendants filed new motions to dismiss, on the grounds that the relator's complaint failed to state a claim and failed to plead with particularity.

The court first noted that the "first flaw in the First Amended Complaint was its failure to adequately allege the basis of the relator's first hand knowledge." The court determined that the relator's second amended complaint cured this deficiency, as it alleged first-hand knowledge of the defendant's fraud scheme, acquired through an employee of a hospital who obtained information regarding the fraud through his personal eyewitness accounts and personal relationships. The relator also provided information regarding this individual came to learn of the alleged fraud, even listing the names of the employees who informed him of the fraud.

The court then noted that the "second deficiency of the First Amended Complaint was its failure to plead the fraud claims with the particularity required by Federal Rule of Civil Procedure 9(b). Again, the court held that the second amended complaint cured this deficiency, as the complaint included a chart with a sample of 421 Medicare outlier cases, which included dates of patient admission, length of stay, billing codes, account balances, and cost-to-charge ratio. The court held that, pursuant to the standard announced by the Fifth Circuit in *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 (5th Cir. 2009), the relator's chart provided "particular and reliable indicia that false bills were actually submitted as a result of the scheme."

The court also agreed with the relator that the particularity requirement should be relaxed in this instance, because the relator was not in a position to plead more specific information. Thus, the court denied the defendants' motion to dismiss.

U.S. ex rel. Folliard v. Hewlett-Packard Co., 2011 WL 109570 (D. D.C. Jan. 11, 2011)

A relator brought a *qui tam* action against a technology company, alleging that it violated both the False Claims Act and the Trade Agreements Act, by knowingly mis-identifying the country of origin on certain of its products that were "likely" being sold to the government. The relator alleged that the Trade Agreements Act prohibited the government from purchasing products that originated in non-designated countries, and thus the defendants falsified this information in order to make sales. The defendant moved to dismiss the relator's complaint, arguing that the relator failed to identify any false claim submitted to the government, and failed to specify the date, content, products, or individuals involved in any such claims. The United States District Court for the District of Columbia granted the motion. The court held that the relator failed to identify any allegedly false claim to the government, and only relied on the general popularity of the defendants' products to form a belief that the government had been defrauded. However, the relator did not allege any facts that showed that the government ever purchased any of these products. Therefore, the motion was granted and the relator's complaint was dismissed.

U.S. ex rel. Davis v. Lockheed Martin Corp., 2010 WL 4607411 (N.D. Tex. Nov. 15, 2010)

A relator brought a *qui tam* action against his former employer, an aircraft manufacturer, alleging that the defendant had been awarded a government contract to manufacture fighter aircraft, but violated the False Claims Act by failing to follow internal and government guidelines in developing software included in the contract. The relator also alleged that the defendant retaliated against him because he raised concerns about the defendant's failure to comply with the government standards and its submission of false claims to the government for payment. Subsequently, the relator voluntarily resigned from the defendant company and signed a release agreement with respect to "any and all claims . . . connected in any way" with his employment and claims for "retaliation under any other federal, state, or local laws." The agreement, however, did not "waive rights or claims that may arise after" the date of the agreement. The defendant moved to dismiss the relator's complaint for lack of standing and for failure to plead with particularity, arguing that the relator's complaint was deficient because it was predicated on the assumption that every claim for payment submitted by the defendant was a false claim. The United States District

Court for the Northern District of Texas granted the defendant's motion in part. The court concluded that the FCA does not provide a remedy for post-employment retaliation by a defendant and also held that the relator could not maintain his claim for any past retaliation, due to the release agreement he signed. However, with respect to the relator's fraud claim, the court held that the relator properly alleged that the defendant made false claims to the government for payment and provided sufficient details regarding descriptions and dates for several disputed services, and regarding the defendant's billing system to satisfy the particularity requirement and to overcome the defendant's motion to dismiss those claims.

U.S. ex rel. Jones v. Brigham and Women's Hosp., 2010 WL 4502079 (D. Mass. Nov. 10, 2010)

A relator brought a *qui tam* action against two hospitals and two doctors, alleging that the group of defendants violated the False Claims Act by fraudulently certifying—both expressly and impliedly—compliance with relevant statutes and regulations when they applied for federal grant funds from the National Institutes of Health in order to conduct research on Alzheimer's Disease. The relator also alleged that the defendants falsified scientific data and made misrepresentations in the grant application. Both sides moved for summary judgment. The United States District Court for the District of Massachusetts granted the defendants' motion. The court held the relator failed to articulate how the alleged falsified data related to false statements in the grant application, as the relator did not offer any evidence that the alleged false data was ever submitted as part of a grant application. Furthermore, the court noted that the basis for the relator's claim of falsified data concerned matters over which experts could disagree, and thus, was insufficient to support a claim that false statements were made. Ultimately, the court held that summary judgment in favor of the defendants was appropriate, because the relator failed to present sufficient evidence to support his claims. Therefore, the court held that there was no issue of material fact regarding the relator's claims, and summary judgment in favor of the defendants was proper.

U.S. v. Smith & Nephew, Inc., 2010 WL 4365467 (W.D. Tenn. Nov. 4, 2010)

A relator filed a *qui tam* action against a medical device provider, alleging that the defendant repeatedly sold and its products to the government in violation of the Federal Trade Agreements Act (TAA)—a federal law that restricts the government's purchases to products manufactured in the U.S. or in certain designated countries—by misrepresenting the products' country of manufacture. In addition, the relator, who had been employed by the defendant, alleged that he was unlawfully terminated from his job in retaliation for refusing to participate in the alleged

fraud scheme and for attempting to put a stop to the defendant's allegedly illegal conduct. The defendant moved to dismiss the relator's complaint for failure to plead the fraud allegations with particularity and for lack of subject matter jurisdiction pursuant to the False Claims Act's public disclosure bar provision. The United States District Court for the Western District of Tennessee denied the motion.

The defendant asserted that the relator's complaint failed to plead the fraud scheme with particularity, arguing that the complaint merely speculated that the defendant submitted a false claim for payment to the government. The defendant relied upon the Sixth Circuit's holding in *U.S. ex rel. Bledsoe v. Community Health Sys., Inc*, to support its contention that a relator cannot satisfy Rule 9(b)'s heightened pleading requirement without alleging that specific false claims were submitted. The relator argued that his complaint alleged the defendant's fraud scheme with sufficient particularity, because the complaint demonstrated that it was reasonable to conclude that evidence in support of its allegations would likely be uncovered by further investigation or discovery. The court agreed with the relator, noting that the relator's complaint was based on first-hand knowledge and contained sufficient details regarding the alleged fraud scheme, including the contracts under which the allegedly improper sales occurred and the items that were allegedly labeled falsely. The court held that the complaint provided satisfactory information which detailed the defendant's allegedly fraudulent conduct, and that the alleged fraud scheme was so expansive that requiring the relator to plead additional information "would demand an omniscience that cannot reasonably be expected of a relator's complaint." As a result, the court denied the defendant's motion to dismiss for failure to plead fraud with particularity and failure to state a claim.

The defendant also argued that the relator's complaint was based on prior public disclosures that it made when it voluntarily self-reported to various government agencies its failures to comply with federal procurement law. The relator argued that such self-reporting does not constitute a public disclosure under the False Claims Act. The court agreed and held that applying the public disclosure bar to defendants' self-reporting of fraud would reinstate the "government knowledge bar" that was specifically rejected by Congress when the public disclosure bar was first added to the FCA in 1986. Thus, the court held that the public disclosure bar did not apply.

Finally, the court analyzed the relator's retaliation claim. The defendant argued that the relator's actions were largely passive and that the relator did not undertake affirmative steps to report, investigate, or prevent any violations of the law. The defendant also argued that the relator's allegations did not constitute protected activity because they were at most reports to supervisors of potential regulatory violations. The court disagreed and held that the relator sufficiently demonstrated protected activity because his complaint alleged a series of actions he undertook to express his concerns to the defendant about their fraudulent conduct. As a result, the relator was allowed to maintain his retaliation claim.

U.S. ex rel. Bierman v. Orthofix Intern., N.V., 2010 WL 4358380 (D. Mass. Nov. 4, 2010)

A relator brought a *qui tam* action against his former employer—a medical device company—and its parent company, alleging numerous False Claims Act violations related to health care fraud. Additionally, the relator alleged a claim under the FCA against his former employer for retaliation and wrongful termination. The defendants moved to dismiss the relator's claims for, among other things, failure to plead with particularity. In a short opinion, the United States District Court of Massachusetts granted the motion in part. It found that the relator failed to plead the fraud scheme with particularity, as it determined that the relator's complaint only made general or conclusory allegations of fraud, and failed to provide specifics as to the time, place, persons involved, or the content of any alleged false representation. Therefore, the court dismissed all of the relator's fraud claims.

The court then examined the relator's retaliation claim and denied the defendants' motion to dismiss that claim. The court held that the relator's allegations that he asked questions to his supervisors regarding the legality of the alleged fraud schemes constituted protected conduct under the FCA, about which the defendants had been put on notice. The relator also alleged that he had recently been praised for his job performance, but was later abruptly fired because he engaged in protected conduct. The relator further alleged that he was presented with a severance package and release that would have required him not to assist in any administrative or legal action brought by any state or federal agency and would not share any settlement or recovery of any type. The court held that these allegations provided a sufficient basis to conclude that the relator was fired due to protected conduct, and denied the employer defendant's motion to dismiss.

U.S. ex rel. Steury v. Cardinal Health, Inc., 2010 WL 4276073 (5th Cir. Nov. 1, 2010)

A relator filed a *qui tam* action, and a subsequent amended complaint, alleging that a group of medical manufacturers sold defective and potentially life-threatening equipment to United States Department of Veterans Affairs. A magistrate judge recommended dismissing the complaint because the relator failed to plead the fraud scheme with particularity as required by Federal Rule of Civil Procedure 9(b), but recommended that the relator be given an opportunity amend the complaint once more. The U.S. District Court for the Southern District of Texas adopted the magistrate's recommendation in full. However, that same day, the district court entered a final judgment, dismissing the relator's action. The relator appealed to the Fifth Circuit, arguing that she pled the fraud allegations with the requisite particularity and that the district court abused its discretion by denying her an opportunity to amend her complaint once more.

On appeal, the relator asserted that her amended complaint properly pled a fraud scheme in which the defendants made implied false certifications to the government that their products complied with the warranty of merchantability when they requested payment from the government for allegedly defective equipment. The Fifth Circuit first noted that it has not yet recognized the implied false certification theory of FCA liability, but ultimately ruled that that issue did not need to be resolved, because the relator's complaint did not provide a basis for an implied false certification. The Fifth Circuit agreed with the district court that unless the government conditions payment on a certification of compliance, a contractor's request for payment does not imply any certification of compliance. As the circuit court concluded that the relator failed to show that the government conditioned payment for the defendants' equipment on a certification of compliance with the warranty of merchantability, it affirmed the district court's dismissal of the relator's complaint. The court found support for its ruling in the Federal Acquisition Regulations (FAR), which the court determined allow the government to "accept (and pay) for [sic] noncompliant commercial items," and which offer the government a wide range of remedies in the event that it receives noncompliant items from a contractor. The court noted that, pursuant to the FAR, the standard warranty clause in federal commercial acquisition contracts includes a warranty of merchantability, but those regulations condition payment on the government's acceptance of items, not on compliance with the warranty of merchantability. The Fifth Circuit declared: "Were private litigants able to pursue FCA claims whenever the Government acquired noncompliant commercial items, the Government's ability to pursue the range of remedies contemplated by the FAR would be substantially compromised." The court cautioned, however, that a defendant's knowing delivery of defective goods to the government can result in FCA liability if the government contract specifically conditions payment on a certification of compliance with the warranty of merchantability.

The Fifth Circuit also observed that although the district court granted the relator leave to amend her complaint, it nonetheless entered a final judgment before the time to amend the complaint expired. The circuit court held that the district court's entry of the final judgment was an abuse of discretion. As a result, the Fifth Circuit vacated the district court's decision and remanded the matter, directing the district court to provide the relator with ten days to file an amended complaint.

Wagemann v. Doctor's Hosp. of Slidell, LLC, 2010 WL 4340801 (E.D. La. Oct. 26, 2010)

A relator brought a *qui tam* action alleging Medicare fraud, against a hospital that had previously employed her, as well as a doctor. She alleged that she personally witnessed the defendants manipulating patients' medical records to unnecessarily extend hospitalization stays in order to receive additional funding. Further, she

alleged that the defendants engaged in a conspiracy to defraud the government and instructed employees to falsify, alter, change, or ignore alterations to medical records, invoices, vouchers, and claims. The relator claimed that she informed the hospital's CEO of the alleged falsifications and was later terminated from her job. The defendants moved to dismiss the relator's complaint for failure to plead the alleged fraud scheme with particularity and for failure to state a claim. The United States District Court for the Eastern District of Louisiana denied the defendants' motion. The defendants argued that the relator failed to identify any false claim that was submitted to the government and that she only alleged a general scheme or methodology of fraud. The court disagreed and held that the available facts provided enough specificity and factual particularity to show the circumstances in which various fraudulent actions may have occurred. The court found that the relator explained who was involved with the operation of submitting false claims, provided a general overview of how the operation worked, and showed that the defendants acted with requisite intent of getting a false claim compensated by the government. Further, the court held that the relator sufficiently alleged that the defendants conspired to submit billing records based on false hospital records which resulted in defrauding the government.

U.S. ex rel. Bennett v. Medtronic, Inc., 2010 WL 3909447 (S.D. Tex. Sept. 30, 2010)

Two relators brought a *qui tam* action against a manufacturer of medical devices, alleging that the defendant improperly promoted one of its devices for an off-label use and encouraged hospitals and physicians to "upcode" procedures on Medicare reimbursement forms by providing them with a variety of kickbacks. The relators alleged that the defendant's conduct resulted in physicians and hospitals submitting false Medicare and Medicaid claims to the government, in violation of the False Claims Act. The government declined to intervene in the relators' suit. The defendant moved to dismiss the relators' complaint for failure to plead fraud with particularity and for failure to state a claim. The United States District Court for the Southern District of Texas granted the defendant's motion, and also granted the relators' leave to amend their complaint.

First, the court analyzed the allegations that the defendant's off-label marketing caused physicians and hospitals to submit false claims for treatments that were not "reasonable and necessary" or "medically necessary." The relators argued that the treatments in question could not possibly have been medically necessary, because no element of the defendant's device had ever received approval for those uses. Moreover, the relators argued that the use of the defendant's device for off-label uses was not medically necessary, but rather, experimental within the scientific community. However, the court found the complaint did not allege that the defendant concealed or misstated the limits of the FDA's approval on the use of the de-

vice, and noted that Medicare contractors may approve coverage for such devices and that necessity decisions are made by individual physicians. In addition, the court held that each state's Medicare carrier determines the conditions for coverage and reimbursement and found that the relators failed to allege that any state denied coverage for the off-label use of the defendant's device. Further, the court held that alleging that a device is "experimental" does not equate to alleging that it is medically unnecessary for Medicare/Medicaid reimbursement purposes.

The court held that the relators also failed to allege specific false statements made by the defendant, and found that statements made in the defendant's patient education brochures did not support an inference that the defendant caused physicians and hospitals to submit false claims for using its device. Further, the court held that the relators failed to plead fraud with particularity, as they did not identify any of the defendant's employees who engaged in off-label promotion or specific physicians or hospitals who received the promotions. The court found the relators alleged unlawful promotional tactics, but failed to show how the defendants caused the physicians or hospitals to submit false claims. In short, the complaint did not sufficiently allege that by promoting off-label use, the defendant caused the submission of false claims.

The court next analyzed the relators' upcoding allegations, in which the relators alleged that the defendant instructed hospitals and physicians to upcode in order to get higher medical reimbursements. The court found the relators failed to plead the scheme to defraud with sufficient particularity to withstand the defendant's motion for dismissal. Specifically, the relators failed to identify any of the defendant's sales representatives or employees who encouraged hospitals or physicians to upcode improperly or any hospital or physician who upcoded a Medicare reimbursement submission.

Finally, the court analyzed the relators' allegations that the defendant provided remuneration and kickbacks in various forms to hospitals and physicians in order to induce them to purchase and use its device. The relators alleged that compliance with the anti-kickback statute was a prerequisite to seeking reimbursement under Medicare, and that the defendant's illegal kickbacks scheme caused physicians and hospitals to submit false claims, as they falsely certified their compliance with the anti-kickback statute. The court found that the relators alleged unlawful remuneration by the defendant, but failed to allege that the defendant caused any physicians or hospitals to make false certifications of compliance. Therefore, the court held that the relators failed to state a claim. Further, the court held that even if the relators alleged that the defendant's kickbacks caused false certifications, the relators still did not provide reliable indicia that physicians or hospitals falsely certified compliance. It held the kickback allegations did not meet the particularity requirements because the relators failed to identify the "who, what, when, where, and how" of the alleged false certifications. The court dismissed all the allegations against the defendant, but granted the relators' leave to amend.

U.S. ex rel. Pervez v. Beth Israel Med. Ctr., 2010 WL 3543457 (S.D.N.Y. Sept. 13, 2010)

A relator brought a *qui tam* action against his former employer, a medical center, and the center's accounting firm, alleging that the medical center submitted false claims to Medicaid in New York and that the accounting firm knowingly assisted the center in the alleged fraud scheme by falsely certifying that it had audited the center's reports and that those reports were free of misstatements. The relator's suit alleged violations of both the federal False Claims Act and the New York State False Claims Act, as the federal government and the State of New York each pay 50% of New York's Medicaid reimbursement expenses. The government intervened in the relator's suit and settled the claims against the medical center. However, the government declined to intervene in the remaining claims against the accounting firm, and the firm moved to dismiss the relator's remaining claims for failure to plead fraud with particularity.

The United States District Court for the Southern District of New York granted the defendant's motion. The relator had alleged that under New York Medicaid law, certain costs related to administering the Medicaid program are reimbursable, while other costs are not. Among the non-reimbursable costs are capital costs that a provider incurs in order to support the space and operations of the provider's private practice. The relator alleged that the medical center misrepresented certain capital costs as reimbursable costs on its cost reports. As the relator alleged that the accounting firm assisted the medical center in this fraudulent conduct, it argued that the firm was liable under both FCA statutes. The defendant accounting firm countered that the medical center's cost reports did not constitute claims under the false claims act statutes, since no reimbursements flowed directly from them. Moreover, the accounting firm argued that the relator failed to sufficiently demonstrate that the cost reports or certifications and opinion letters it prepared were false or fraudulent. The district court found that the relator had sufficiently pled factual details to plausible allege that the medical center's cost reports falsely allocated capital costs as reimbursable costs. However, the court could not find that the accounting firm's allegedly false certifications and opinion letters gave rise to FCA liability, since the relator did not allege facts to show that accounting firm did not complete the audits it claimed to have performed or that those audits were not performed in compliance with professional standards. Although the relator alleged that the audits could not have satisfied professional standards since they did not uncover the medical center's alleged misrepresentations, the court determined that the relator did not demonstrate that audits performed in conformity with professional guidelines would necessarily have revealed the medical center's alleged falsehoods. Consequently, the court held that the relator's allegations were insufficient and did not satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements. The court also found that the allegations regarding the ac-

counting firm's opinion letters offered only conclusory assertions that the letters were knowingly false and that the relator's allegations could not lead to a reasonable inference that the accounting firm was aware of the alleged falsity of the medical center's cost reports.

The relator also claimed damages for conspiracy and for reverse false claims. The court held that the relator failed to show the existence of a conspiracy or a reverse false claim, as his allegations did not show the existence of an unlawful agreement between the defendant and the medical center or the requisite scienter to maintain those claims. As a result, all of the relator's claims under both FCA statutes were dismissed.

U.S. ex rel. Snapp, Inc. v. Ford Motor Co., 2010 WL 3419433 (6th Cir. Sept. 1, 2010)

A relator filed a *qui tam* action in the United States District Court for the Eastern District of Michigan, alleging that a defendant car manufacturer fraudulently exaggerated the extent of its dealings with small and minority-owned businesses, which fraudulently induced the government to contract with it. The district court found the relator's complaint failed to plead the complex and far-reaching scheme with particularity. However, the court allowed the relator to amend his complaint, although it subsequently held that the amended complaint also failed to meet the particularity standard. The relator then filed a motion to vacate and for leave to file a second amended complaint, but that request was denied. The relator then appealed the district court's decision to the Sixth Circuit, contending that the district court erred when it concluded that the proposed amended complaint did not allege with sufficient particularity the existence of a "claim" defined by the FCA.

The Sixth Circuit affirmed the district court's decision. The court noted that the circuit court had re-visited the pleading standards in far-reaching, complex FCA cases in *U.S. ex rel. Bledsoe v. Cmty. Health Sys. Inc.*, 501 F.3d 493 (6th Cir.2007)—known as *Bledsoe II*. The court stated that under the standards announced in that case, "a relator who alleges such a complex and far-reaching fraudulent scheme need not state with particularity all of the false claims made over the course of the scheme, but must nevertheless 'include specific examples of the defendant's claims for payment' that are 'characteristic example[s] . . . illustrative of [the] class of all claims covered by the fraudulent scheme.'" However, the circuit court still held that the relator's claims were deficient. It concluded that its prior holding in *Bledsoe II* presupposes the existence of at least one valid claim and only discusses circumstances in which a relator may plead the existence of a broader class of such claims through the use of representative examples. Ultimately, the circuit court held that the relator was still required to plead at least one false claim with specificity, or provide support for the argument that a contract is a claim within

the meaning of the FCA. As the relator was unable to do so, the Sixth Circuit held that the district court did not abuse its discretion denying the relator's request to file a second amended complaint.

U.S. ex rel. Pilecki-Simko v. Chubb Inst., 2010 WL 3463307 (D.N.J. Aug. 27, 2010)

Relators brought a *qui tam* action against their former employer, an educational institute, alleging that the defendant knowingly filed false claims by making misrepresentations to the Department of Education when securing student financial aid under Title IV of the Higher Education Act. The relators alleged that the defendant violated the Act's incentive compensation ban and that its implied false certification of compliance with the Higher Education Act gave rise to liability under the False Claims Act. Specifically, relators alleged defendant knowingly submitted student applications for financial aid which certified that students were eligible for Title IV financial aid, without disclosing that the defendant was not in compliance with the program's governing regulations. The United States District Court for the District of New Jersey dismissed the relators' false certification claim and the relators moved for reconsideration. The court also denied the relators' motion for reconsideration, due to procedural defects of the motion and because the relators' arguments failed to establish a clear error of law deserving reconsideration.

The court originally determined that relators did not meet the heightened pleading standard of Rule 9(b). The court acknowledged that an even higher standard for pleading scienter is required when addressing an implied false certification theory, due to the potential to exceed the anti-fraud purpose of the FCA. The court noted that the relators failed to allege even a minimum element of scienter. Therefore the court found dismissal of the action appropriate and denied relators' motion for reconsideration.

U.S. v. Albinson, 2010 WL 3258266 (D.N.J. Aug. 16, 2010)

The government brought an action under the False Claims Act against a civilian employee of the U.S. Army, alleging that the defendant was involved in a fraudulent scheme to have the government pay a contractor and subcontractor for work that was not performed. The government alleged that the contract at issue called for the contractor and subcontractor to install updated computer workstations, but that this work was not performed, even though the government received invoiced signed by the defendant that certified that the work had been completed. The defendant moved to dismiss the FCA allegations for failure to state a claim and for failure to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The United States District Court for the District of New Jersey denied the motion with respect to those fraud allegations, as it found that

the government identified specific false claims—in the form of invoices the defendant signed and certified, even though he allegedly knew they were false—which were submitted to the Army for reimbursement. The court held that these allegations were sufficient to plead a viable claim that the defendant expressly falsely certified his compliance with the terms of the government contract. The court also held that the government satisfied Rule 9(b)'s pleading requirements, since it offered evidence showing that the defendant communicated with the contractor and subcontractor involved in the alleged fraud scheme, and that they all agreed that they would bill the government for work that was not performed. The defendant argued that the government faield to allege that he knew that invoices he signed were false, but the court held that the government's allegations made it plausible he knew the invoices were false and that his signature on those invoices was enough to cause the government to pay false claims. As a result, the court denied the defendant's motion, stating that "[t]he Government's allegations give rise to a reasonable inference that as part of a scheme with [the contractor and subcontractor involved], Albinson knowingly signed … invoices accepting work on behalf of the Government that [the contractor and subcontractor] did not perform."

Frazer ex rel. U.S. v. Iasis Healthcare Corp., 2010 WL 3190641 (9th Cir. Aug. 12, 2010)

The relator originally filed a *qui tam* complaint alleging that the defendant healthcare company submitted false claims for reimbursement from federally-funded health care programs for unnecessary procedures and that the defendant entered into prohibited financial relationships and provided kickbacks to doctors. The U.S. District Court for the District of Arizona dismissed the relator's second amended complaint, finding that the relator's allegations were not pled with particularity. The district court also denied the relator an opportunity to amend the complaint. The relator appealed the district court's decision to the Ninth Circuit.

The Ninth Circuit agreed with the district court that the relator's complaint was not pled with particularity to put the defendant on sufficient notice to defend the suit. The circuit court noted that the relator was "not required to plead representative examples of false claims submitted to the Government to support every allegation, but he must plead with sufficient particularity to lead to a strong inference that false claims were actually submitted." Without elaboration, the court concluded that the relator's complaint did not include enough "reliable indicia" that the defendant submitted false claims to the government for unnecessary medical services or falsely certified compliance with the Stark and Anti-Kickback laws. Consequently, the court held that the relator's complaint was not pled with the requisite particularity and affirmed the district court's dismissal of the complaint on that basis.

However, the Ninth Circuit held that the district court erred when it dismissed the complaint with prejudice. The circuit court held that the district court did not give sufficient weight to the fact that the relator's original complaint and first two complaints were filed under seal and that the defendant's motion to dismiss the second amended complaint was the first time that the relator's claims were subject analysis under Rule 9(b). Hence, the Ninth Circuit held the relator should be permitted an opportunity to amend his complaint once more. The appellate court also held that the district court erred in denying the defendant's motion for surrender on mootness grounds.

Ebeid ex rel. U.S. v. Lungwitz, 2010 WL 3092637 (9th Cir. Aug. 9, 2010)

A relator appealed the U.S. District Court for the District of Arizona's dismissal of his *qui tam* action to the Ninth Circuit. The relator alleged that the defendants—three healthcare companies and certain individuals who owned and operated them—violated the Stark law by providing each other with improper referrals for healthcare services, but submitted Medicare claims in which they impliedly certified that they were in compliance with those applicable laws. The result, the relator alleged, was that all of the defendants' Medicare claims were false, under a theory of implied false certification. The district court dismissed the relator's complaint, as it determined that the relator's allegations had not been pled with particularity, as required by Federal Rule of Civil Procedure 9(b).

The Ninth Circuit examined the relator's implied false certification claim in order to determine whether the relator's allegations met the required particularity standard. The circuit court first compared and contrasted the implied false certification theory of liability and the express false certification theory, stating:

> Express certification simply means that the entity seeking payment certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted. Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim. Under both theories, "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." Likewise, materiality is satisfied under both theories only where compliance is "a *sine qua non* of receipt of state funding." (internal citations omitted; emphasis in original)

The court then addressed the pleading requirements of Rule 9(b), noting that, in contrast to the district court's determination, Rule 9(b) does not require plaintiffs

"to identify representative examples of false claims to support every allegation, although we recognize that this requirement has been adopted by some of our sister circuits." Instead, the Ninth Circuit held that "use of representative examples is simply one means of meeting the pleading obligation," and stated that "it is sufficient to alleged 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" (internal citations omitted) The relator had argued that the pleading requirements should be relaxed, since he was an outsider, the alleged fraud occurred over an extended time period, and the necessary billing information was in the defendants' possession. The court rejected this argument, noting that "the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government."

After applying these standards, the Ninth Circuit concluded that the relator's complaint failed to allege both the fraud scheme and the defendants' submission of false claims with particularity. The court stated that the relator baldly asserted his claims, without reference to any statute, rule, regulation, or contract that conditioned payment on the defendants' compliance, and did not provide necessary details regarding the alleged improper referrals. Consequently, the Ninth Circuit affirmed the district court's dismissal of the relator's complaint with prejudice.

Wagemann v. Doctor's Hosp. of Slidell, LLC, 2010 WL 3168087 (E.D. La. Aug. 6, 2010)

A relator brought a *qui tam* action against her previous employers, a hospital and a doctor, alleging that the defendants conspired to defraud and actually committed fraud against the government's Medicare program by manipulating patients' medical records in order to unnecessarily extend hospitalization stays. Further, she alleged that the defendants instructed employees to falsify or ignore alterations to medical records, invoices, vouchers, and claims. She also alleged that after she informed the hospital's CEO of the alleged falsifications, she was terminated from her job. The defendants moved to dismiss the complaint, arguing that the relator did not plead her fraud claim with particularity, since she failed to identify any false claim submitted to the government and that she only alleged a general scheme or methodology of fraud. In response, the relator contended that she was not required to plead the details of specific false claims and that allegations of a general scheme coupled with reliable indicia from which an inference that false claims were presented to the government could be drawn would suffice.

The U.S. District Court for the Eastern District of Louisiana held that, although detailed factual allegations are not required, Federal Rule of Civil Procedure 9(b) still requires FCA plaintiffs to plead with particularity the circumstances constituting fraud, including time, place, content and identity. This standard can be sat-

isfied if a plaintiff alleges "a general scheme to defraud the government, when the scheme occurred, those involved, its mechanics, an explanation of how the claims were false, and a description of the billing system." The court held that the relator failed to meet the Rule 9(b) standard, as her complaint does "little more than to provide a cursory explanation of the [alleged fraud] scheme's design." The relator's conspiracy claim also failed, as the court determined that the relator failed to provide any facts to show an agreement between the doctor and the hospital to defraud the government. Finally, the court also held that the relator's complaint failed to state a fraud claim, since it did not contain allegations showing that the defendants' alleged misrepresentations were material to the government's decision to pay their Medicare claims.

The court conditionally denied the defendants' motion to dismiss, but gave the relator only ten days to amend her complaint, lest her complaint be dismissed.

U.S. ex rel. Carpenter v. Abbott Labs Inc., 2010 WL 2802686 (D. Mass. July 16, 2010)

A relator brought a *qui tam* action against his former employer, a pharmaceutical manufacturer, alleging violations of the federal and various state False Claims Act statutes. The relator alleged that the defendant offered kickbacks and illegal inducements to encourage doctors to write "off-label" prescriptions for the defendant's drug, Kaletra. Further, the relator alleged that despite FDA regulations, which forbid pharmaceutical companies from initiating discussions for off-label uses, the defendant's managers informed the relator and others that they were permitted to initiate discussions about the off-label use of Kaletra. The relator alleged that he had personal knowledge of the defendant's questionable marketing practices to promote Kaletra and sued the defendant for presenting false claims to the government and for making and using false records in support of false claims. The defendant moved to dismiss the relator's complaint, on the grounds of failure to meet Rule 9(b)'s particularity requirements and failure to state a claim. The United States District Court for the District of Massachusetts granted the motion in part and denied it in part.

The court found that the relator filed his complaint after the FCA was amended by the Fraud Enforcement and Recovery Act of 2009 (FERA). The court noted that the amendments were driven, at least in part, by Congress' reaction to the Supreme Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, in which the Supreme Court read a specific intent requirement into the FCA's liability provision covering making and using false statements in support of false claims. Following that decision, Congress enacted FERA, which specifically eliminates any specific intent requirement for liability under the FCA and made that amendment retroactive to June 7, 2008—two days before the Supreme Court issued its decision. How-

ever, the district court also noted that FERA's retroactivity provision states that the amendment would apply to "claims" pending on before June 7, 2008, and, as some other courts have done, interpreted the word "claims" to mean claims to the government for payment, rather than legal claims brought in a complaint. Consequently, the court, finding that there were no claims to the government pending at that time, held that the relator was bound by the Supreme Court's decision, which required him to plead specific intent. Since he had not done so, the court dismissed his claims alleging that the defendant made false statements to the government. The court, finding "no convincing reason why state false claims statutes modeled on the federal FCA would be interpreted any differently by the state Supreme Courts," dismissed the relator's analogous state law claims as well.

The court then turned to the relator's allegations that the defendant actually presented false claims to the government. With respect to these allegations, the court first observed that FERA did not retroactively amend this liability provision, but held that this provision never included a specific intent requirement, as the Supreme Court did not address it and the pre-FERA language did not require it. However, the defendant also argued that the relator's claims did not satisfy Rule 9(b) and the court turned its attention to that argument. The court found that the relator's allegations regarding improper kickbacks were not adequately pled, since the relator failed to provide any details as to names, dates, amounts, or incentives allegedly received by physicians as kickbacks. The defendant also argued that the relator failed to show a causal connection between any alleged kickbacks and prescriptions of Kaletra for off-label uses. The court found that although the relator's allegations in this regard were not "overwhelming," they were sufficient to show causation, since the relator alleged that the defendant knew that off-label uses of its drug were not as effective as other drugs approved for those uses, but publicly stated otherwise.

The court further held that the relator adequately pled the false claims themselves, noting that "for each of the claims alleged to have been presented, [the relator] has provided the redacted identity of the patient, a prior drug history to demonstrate why the prescription would have been off-label, the date of the claim, the Medicare or Medicaid program to which the bill was submitted, the location of the submitting pharmacy, the dosage, the dollar amount billed, the initials of the pharmacist who filled the prescription, and the name of the doctor who wrote it." In addition, the court held that the relator's complaint sufficiently pled that the defendant falsely certified compliance with the law, stating that the relator was not necessarily required to plead evidence of false certifications in order to satisfy Rule 9(b). Moreover, the court held that the relator's complaint sufficiently plead an implied false certification by the defendant, since the complaint alleged that under the applicable Medicare and Medicaid rules, off-label uses of drugs are generally not reimbursable and the drug at issue was being promoted and prescribed for off-label uses. Finally, the court considered the defendant's argument that the

relator's complaint did not adequately plead a nationwide fraud scheme, as he only addressed fraud in a single state. The court agreed with First Circuit precedent and held that the relator's complaint could allege a nationwide scheme of fraud, even as the relator's claims were based on conduct alleged in a single representative state. The court, however, stated that it would initially limit discovery to allegations involving that one state, before allowing nationwide discovery.

Thus, the court denied the defendant's motion in part and granted it in part. With respect to the allegations that were dismissed, the court denied the relator leave to amend his complaint, finding that he had already amended the complaint twice and declaring that "[p]laintiffs do not get a fourth chance to try to get it right."

U.S. ex rel. Barber v. Paychex Inc., 2010 WL 2836333 (S.D. Fla. July 15, 2010)

Two relators brought a *qui tam* action against three providers of outsourced payroll and tax services, alleging that in federal tax returns, each defendant improperly claimed interest earned from investment of clients' funds as income, resulting in reverse false claims. The government elected not to intervene. The defendants moved to dismiss the relators' complaint, arguing that the court lacked subject matter jurisdiction, that the complaint failed to satisfy Rule 9(b)'s heightened pleading requirements, and that the relators failed to state a claim. The United States District Court for the Southern District of Florida granted the defendants' motion.

The court observed that the defendants made a facial challenge to the court's jurisdiction, in reliance on the FCA's explicit prohibition against using the statute in cases alleging tax fraud. In addition, the defendants made a factual challenge to the court's jurisdiction, relying on the FCA's public disclosure bar. Each will be discussed in turn.

FCA and Allegations of Tax Fraud

First, the court analyzed the defendants' arguments regarding the tax fraud prohibition, since the relators had alleged that the defendants made false records and false statements in their 2006, 2007, and 2008 federal tax returns. In conducting this analysis, the court considered the two *Lissack* factors, which were outlined in *U.S. ex rel., Lissack v. Sakura Global Capital Mkts ., Inc.*, 377 F.3d 145 (2d Cir.2004).

The court addressed the first *Lissack* factor—whether the relators' FCA claims turned upon an interpretation of the Tax Code. The court determined that the relators' action was based upon allegations that the defendants violated Section 7501 of the Internal Revenue Code, which, the relator's alleged, imposed a trust on the defendants to make federal tax payments from income earned from a client's funds. Further, the relators argued the legal basis of their claims was the Miscellaneous Receipts Act, and not the Tax Code. The court disagreed with the relators' characterization and held

that the FCA's tax bar applied to the relators' case. The court concluded that the MRA applied only to the conduct of officials or agents of the government and not to private entities like the defendants.

The court also held that the second *Lissack* factor—whether the IRS could bring an action against the defendants to collect the money the relators were seeking—supported dismissal of the relators' complaint under the FCA's tax bar. The court stated that "[t]he IRS has authority to address violations of the Tax Code, including violations of Section 7501, and could certainly proceed against [the defendants] to recover any amount owed."

The could also rejected the relators' argument that the FCA's tax bar could not apply to their case, since the defendants' reporting of interest income on their tax returns was not a statement made under the Tax Code, but rather was gratuitous. The court held that, regardless of the relators' characterization of the statements contained in the defendants' respective tax returns, those statements were still made "under the Internal Revenue Code," and thus not subject to the provisions of the FCA. Thus, the court did not have subject matter jurisdiction over the relators' complaint.

FCA's Public Disclosure Bar

The court next analyzed whether or not the relators' claims were barred by the FCA's public disclosure rule. The court noted that the relators did not dispute that the facts concerning the defendants' alleged wrongdoings had been publically disclosed, that their allegations were based upon the publicly disclosed information, or that they did not qualify as the original source of information. The court determined that even though the relators alleged that they added "their own legal interpretations, conclusions and 'unclouded judgment'" to the publicly disclosed information, "these sorts of contributions make no difference to the application of the Public Disclosure Bar." Consequently, the court held that it lacked subject matter jurisdiction over the *qui tam* complaint.

FCA and Rule 9(b)

Lastly, the court analyzed whether or not the relators' complaint satisfied Rule 9(b)'s pleading requirements. The court noted that when pleading a reverse false claims case, Rule 9(b) requires plaintiffs to plead with particularity: (1) a false record or statement; (2) the defendant's knowledge of the falsity; (3) that the defendant made or used the false statement or record or caused the false statement or record to be made or used; (4) that the defendant did so in order to conceal, avoid or decrease an obligation to pay money to the government; and (5) the materiality of the defendant's misrepresentation. The relators conceded that they did not allege fraud in their complaint and did not have grounds to do so. The court held that "[i]n the context of a 'reverse false claims' action, the absence of factual particularity stating that the defendant engaged in a knowing deceit to keep money belonging to the government is fatal." The court also observed that the relators failed to allege that the defendants owed "a definite and

clear obligation to the United States" at the time of the allegedly false statements. As a result of these deficiencies, the court held that the relators failed to allege their reverse false claims action with the requisite particularity.

U.S. ex rel. Conrad v. GRIFOLS Biologicals Inc., 2010 WL 2733321 (D. Md. July 9, 2010)

A relator brought a *qui tam* action against three pharmaceutical manufacturers, alleging violations of the federal False Claims Act and several state false claims statutes. The relator alleged that the defendants misrepresented their brand-name drugs as generic drugs in order to reduce their payments to the Centers for Medicare and Medicaid Services (CMS), thereby using false records and presenting false claims to the government. In addition, the relator alleged that the defendants knowingly and falsely classified their pharmaceutical products as non-innovators, rather than as innovators, in order to reduce their quarterly rebate costs, thereby committing a "reverse false claims" violation. The defendants jointly moved to dismiss the relator's complaint, contending that it was not pled with particularity. The United States District Court for the District of Maryland granted the defendants' motion and dismissed the relator's complaint with prejudice.

Presentment of False Claims and Use of False Records

First, the court analyzed the allegations that the defendants presented false claims and used false records, which caused state Medicaid agencies to present false claims to the government and to use false records to get claims paid. The court held that the relator failed to provide particularized details as to when and how the allegedly fraudulent acts were committed. Moreover, the relator alleged that the defendants falsely represented their products in certain documents, but the court noted that the relator failed to identify the documents on which these allegations were based, and failed to provide any specific time period during which the allegedly fraudulent activities occurred. It found that the complaint only pled a general fraudulent scheme and failed to show why the defendants' products should have been classified as non-innovators. The relator had also alleged that the defendants' allegedly false representations resulted in the presentment of false claims to CMS for payments. However, the court stated, the relator failed to allege that any claim was actually submitted by a state agency to the government. The court held that this allegation was inadequate because the relator failed to plead proof of an actual false claim. Consequently, the court held that the relator failed to meet pleading requirements and the claims regarding the defendants' alleged presentment of false claims and use of false records were dismissed with prejudice.

Reverse False Claim

The court then analyzed the relator's reverse false claims allegation—that the defendants knowingly created and used records falsely classifying their products in order to reduce their rebate payments to state Medicaid agencies. The court held that these allegations failed for the same reasons as the previous allegations, since the relator failed to provide particularized details of time, place and contents of the allegedly fraudulent activity. As a result, the relator's reverse false claim allegation was also dismissed with prejudice.

State FCA Claims

The court also dismissed with prejudice all the relator's parallel state false claims allegations on the same grounds, as well as because the relator did not qualify to sue the defendants because either: the statute required that the relator be personally affected by the alleged fraud against the state and he was not; the statute required that the state intervene in the relator's suit in order for the suit to proceed, and the state did not; or the statute had not yet taken effect when the conduct giving rise to the relator's complaint were alleged to have occurred.

U.S. ex rel. Davis v. Prince, 2010 WL 2679761 (E.D. Va. July 2, 2010)

Two relators brought a *qui tam* action against their former employer and other entities that provide, among other services, security to government agencies. The relators alleged that the defendants made fraudulent misrepresentations under two government contracts—one contract with the U.S. Department of Homeland Security to provide security services in Louisiana in the aftermath of Hurricane Katrina and another contract with the Iraq & Afghanistan State Department to provide security services in those places and to operate a program management office in Washington, DC.

With respect to the Homeland Security contract, the relators alleged that the defendants intentionally and knowingly submitted false claims, which resulted in the government making improper reimbursement payments each month, by overstating their expenses and inflating their work hours and the number of employees. The relators also alleged that the defendants willfully and intentionally failed to perform material terms of the contract, that the defendants hired felons and issued firearms to them, and that the defendants failed to ensure that their employees abided by the terms governing the deadly use of force. With respect to the Iraq & Afghanistan contract, the relators alleged that the defendants knowingly and intentionally submitted "musters" and "expense reports" on a monthly basis that documented more employees than were actually employed and more expenses than were actually incurred. Furthermore, funds were allegedly transferred from one defendant company to another, but these transfers were improperly reflected as a reimbursable management fee paid to unrelated parties. Moreover, the rela-

tors alleged that the defendants submitted improper expenses to the government by using a software program to create the false appearance that they were using the services of a third party travel agent. The relators alleged that the defendants' non-performance of the two contracts was equal to no performance.

Finally, one of the relators alleged that she was wrongful terminated by one of the defendants for seeking to rectify the abuses in that defendant's offices.

The defendants moved to dismiss the relators' complaint on the grounds that the complaint did not satisfy Rule 9(b)'s pleading requirements and that the complaint failed to state a claim. The defendants alleged that the relators did not identify a single false claim or tie any of the alleged schemes to a false claim.

The United States District Court for the Eastern District of Virginia granted the defendants' motion in part and denied it in part. The court first considered whether or not the relators' complaint had been pled with particularity. While the court held that the relators adequately met the particularity requirements by alleging that false statements were made on a monthly basis during the specific given time, it held that the relators did not adequately plead with particularity that the defendants allowed disqualified persons to carry firearms or that the defendants improperly allowed the use of deadly force. The court held that these allegations did not amount to the identification of any false statement, but rather allege a breach of contract. The court also held that these allegations did not adequately explain the time, place, or contents of the allegedly false representations, or the identity of the people who allegedly made the false statements. The court, however, granted the relators leave to re-plead those allegations.

The court then addressed the defendants' contention that the relators' complaint failed to state a claim. The court held that the relators' allegations of overcharging on the two contracts were adequate to create a plausible inference that all the elements of an FCA claim were satisfied. The court, however, did note that the relators failed to allege any specific fraudulent activity by one of the defendants, and merely alleged that "reasonable discovery will show" that this defendant participated in the alleged fraud scheme. Consequently, the court dismissed the allegations against this defendant, but granted the relators leave to re-plead the claims against that defendant.

The court also dismissed the relator's retaliation claim, finding that the complaint failed to allege that she was engaged in any FCA protected conduct, and if she was, that the employer defendant knew of the conduct.

See *U.S. ex rel. Lisitza v. Johnson & Johnson*, 2011 WL 673925 (D. Mass. Feb. 25, 2011), at page 44.

See *U.S. ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. #49-5*, 2011 WL 691620 (D.S.D. Feb. 18, 2011), at page 178.

See *U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 2011 WL 129842 (E.D. Va. Jan. 12, 2011), at page 30.

See *U.S. ex rel. Piacentile v. Sanofi Synthelabo, Inc.*, 2010 WL 5466043 (D. N.J. Dec. 30, 2010), at page 10.

See *U.S. ex rel. DeCesare v. Americare In Home Nursing*, 2010 WL 5313315 (E.D. Va. Dec. 16, 2010), at page 11.

See *U.S. ex rel. Bierman v. Orthofix Intern., N.V.*, 2010 WL 4973635 (D. Mass. Dec. 8, 2010), at page 13.

See *U.S. ex rel. Westmoreland v. Amgen, Inc.*, WL 2010 3622033 (D. Mass. Sept. 20, 2010), at page 14.

See *U.S. ex rel. Poteet, et al. v. Bahler Med., Inc.*, 2010 WL 3491159 (1st Cir. Sept. 08, 2010), at page 57.

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

U.S. ex rel. Raynor v. Nat'l. Rural Utils. Co-op Fin. Corp., 2011 WL 2581186 (D. Neb. June 29, 2011)

A relator brought a *qui tam* action against a non-profit financial cooperative, an electric rural utilities cooperative association and its board, two international accounting firms, three credit rating agencies and several individuals, alleging that the defendants' accounting practices resulted in frauds against the government. In an earlier proceeding, the defendants moved separately to dismiss the relator's *qui tam* complaint for failure to state a claim, failure to plead with particularity, and for lack of subject matter jurisdiction. The United States District Court for the District of Nebraska granted those motions. The relator then moved for reconsideration, arguing that the court should have given him an opportunity to amend his complaint and that the court erred in applying the law. The government filed a statement of interest in the case, requesting that the court reconsider its interpretation of the FCA and make clear that any dismissal of the relator's claims is without prejudice to the government. The court denied the relator's motion, but adopted the government's statement of interest in part.

The court found that the relator alleged that the defendants submitted false claims to the government for loans, because their claims included false certifications of compliance with accounting principles. However, the court determined that the relator failed to allege that the defendants knew that their accounting practices violated a statute or regulation. Further, the court found that the relator failed to indicate how the alleged falsity contained in the defendants' claims would have been material to the government's decision to issue loans. Consequently, the court found no error with its decision to dismiss the relator's third amended complaint. The relator then argued that it was manifest error for the court to dismiss his complaint with prejudice. The court, though, found that the relator did not state how yet another amendment of his complaint would cure these deficiencies, nor did he submit a proposed amended complaint. Therefore, the court dismissed the relator's claims with prejudice. The court, however, made clear that while the case was dismissed with prejudice as to the relator, it was not dismissed with prejudice as to the government.

U.S. ex rel. Kunz v. Halifax Hosp. Med. Ctr., 2011 WL 2269968 (M.D. Fla. June 6, 2011)

A relator brought a *qui tam* action against a medical facility and its affiliate, alleging that defendants violated the False Claims Act by systematically admitting patients without medical necessity and submitting inflated claims to Medicare.

Further, the relator alleged that the defendants engaged in improper financial arrangements with certain physicians and paid excessive compensation to them in violation of the Anti-Kickback Statute (AKA) and the Stark law. The defendants moved to dismiss the relator's complaint, arguing Eleventh Amendment immunity, that the relator's claims were prohibited by the FCA's public disclosure bar, and that the relator failed to state a claim under the FCA. The United States District Court for the Middle District of Florida denied the defendants' motion.

Eleventh Amendment Immunity

The defendants argued that they were entitled to immunity because they were characterized as state agencies, and the state had control over them and their "fiscal life." The court disagreed, however, and found that, even if the defendants were deemed a state agency or instrumentality, they failed to show that they were entitled to Eleventh Amendment immunity. The court determined that the defendants were not treated as an arm of the state and that the state generally did not exercise any more control over them than it did over private hospitals. Further, the court found that the defendants admitted that they, rather than the state, would be legally responsible for any judgment that might be entered against them. Therefore, the court held that the defendants were not entitled to Eleventh Amendment immunity.

Public Disclosure Bar

The defendants then argued the relator's medical necessity allegations were based on an information request they received a year earlier from the Department of Justice, related to a government review of the medical necessity of inpatient admissions for certain procedures. The defendants also argued that the relator's allegations had been previously publicly disclosed in an announcement of a settlement between DOJ and another company, related to non-medically necessary patient admissions for a procedure. The court, though, determined that the defendants failed to show that the information contained in these purported public disclosures was also at issue in this case or that it somehow formed the basis of the relator's claims. Accordingly, the court held that the defendants failed to show that the relator's claims were prohibited by the public disclosure bar.

Failure to State a Claim

Finally, the defendants argued that the relator failed to satisfy Rule 9(b)'s heightened pleading requirements, and therefore failed to state a claim under the FCA. Specifically, the defendants argued that the relator did not provide billing records, but instead relied on internal audits that purported to identify fraudulent admissions. The court disagreed with the defendants' assessment, and concluded that the audits did identify fraudulent admissions by the defendants. The court found the relator, who was the Director of Physician Services for the medical center, identified various lists of patients,

each of whom was identified by a Patient ID Number, as well as DRG codes and names, the name of the attending physician, and comments—including, in numerous instances, statements that the patient did not meet the criteria for inpatient admission. Further, the court found that the relator identified a listing of the amount of charges accrued by the patients, as well as the amounts paid by Medicare with respect to each patient. Further, the court found that the relator identified the particular financial relationships and payments she alleged violated the Stark law and the Anti-Kickback law, as well as the physicians involved, and she also provided records of Medicare payments for patients referred by them. Accordingly, the court held that the defendants failed to show that the relator did not state a claim.

Consequently, the court denied the defendants' motion to dismiss the relator's complaint.

U.S. ex rel. Bennett v. Boston Scientific Corp., 2011 WL 1231577 (S.D. Tex. Mar. 31, 2011)

A relator brought a *qui tam* action against her former employer—a manufacturer of medical devices—and one of the company's subsidiaries, alleging that the defendants violated the False Claims Act. Specifically, the defendants were accused of causing physicians and hospitals to submit false Medicare and Medicaid claims for reimbursement by improperly promoting one of their devices for an off-label use, instructing hospitals and physicians to "upcode" the procedures on claim forms, providing kickbacks. In addition, the relator alleged that the defendants violated the FCA's anti-retaliation provision by firing her. The government declined to intervene. The defendants moved to dismiss the relator's complaint for failure to plead with particularity and for failure to state a claim. The United States District Court for the Southern District of Texas granted the defendants' motion and granted the relator's motion for leave to amend her complaint.

Failure to Plead Fraud with Particularity

As an initial matter, the court noted that the relator argued for a relaxed pleading standard, stating that Rule 9(b) should be strictly applied, since the relator did not have access to certain information that would support her fraud allegations. The defendants countered, stating that they also did not have such information, since all billing and claims information would be in the possession of doctors, hospitals and government agencies. The court rejected the relator's argument, stating that "[t]here is no basis to relax the Rule 9(b) pleading standard on this ground under the applicable precedents." While the court agreed that relators who allege that defendants have caused third parties to submit false claims can satisfy Rule 9(b) "alleg[ing] either at least some false claims with particularity or . . . alleg[ing] both particular details of the scheme to submit false claims and reliable indicia that lead to a strong inference that false claims were actually submitted." However, the court held that the present relator's complaint

was insufficient because the relator did not allege "'a representative sample' or even an 'instance of submission'" of a false claim, nor did the relator allege that "a specific physician or hospital submitted a false claim," that specific physicians and hospitals received the defendants' off-label promotions and/or illegal kickbacks, that specific physicians or hospitals were instructed to engage in improper upcoding, or the dates on which such misconduct occurred. The court held that the relator did not allege a sufficient factual basis for her assertions, and thus, did not satisfy Rule 9(b)'s requirements.

Failure to State a Claim

With respect to the relator's specific allegations of fraud, the court first analyzed the relator's claim that the defendants' off-label marketing of their device caused physicians and hospitals to submit false healthcare false. The relator argued that the claims were false because the use of the off-label use of the device could not have been "reasonable and necessary" or "medically necessary," since the device had ever received approval for the off-label use promoted by the defendants. However, the court found the complaint did not allege that the defendants concealed or misstated the limits of the FDA's approval with respect to the uses of the device. The court noted that Medicare contractors may approve coverage for such devices that and necessity decisions are made by individual physicians. The relator also argued that the off-label use of the device could not have been medically necessary because the use was considered experimental within the scientific community. The court, though, determined that off-label use of a drug is separate and distinct from medical necessity, noting that each state's Medicare carrier determines the conditions for coverage and reimbursement and that the relator failed to allege that any state denied coverage for the off-label use promoted by the defendants. Further, the court held that the relator's an allegation that a device's use is "experimental" is not the same as an allegation that a device's use is medically unnecessary. In short, the court concluded that "even if a drug or device manufacturer's marketing or promotion activities violate FDA regulations, that is insufficient to plead that the manufacturer caused physicians or hospitals to submit false claims for reimbursement." Consequently, the relator's allegations regarding off-label marketing were dismissed without prejudice.

The court then examined the relator's allegation that the defendants prepared sales presentations in which they "coached" and instructed doctors and hospitals to upcode certain procedures, so as to receive over-reimbursements from Medicare to which they were not entitled. The court held that this allegation failed to state a claim, since Medicare uses a Prospective Payment System that provides pre-determined reimbursement rates to healthcare providers. According to the court, these flat rates incentivize providers "to use lower-cost procedures to treat the diagnosis identified in the PPS code," and do not create an inference that, by using the defendants' device for an off-label use, providers knowingly submitted false claims to the government. The court held that the relator's upcoding allegation did not state a claim for relief, since she did not allege that the defendants and providers knowingly used the wrong code for procedures when billing Medicare. This claim was also dismissed without prejudice.

Next, the court analyzed the relator's allegations that the defendants provided illegal kickbacks in various forms to hospitals and physicians in order to induce them to purchase and use the defendants' device. Although the relator alleged that providers' compliance with the anti-kickback statute was a prerequisite to seeking reimbursement under Medicare, the court found that the relator never alleged that any such unlawful remuneration actually caused any physicians or hospitals to falsely certify compliance with the anti-kickback statute and, thereby submit false claims. Therefore, the court held that the relator failed to state a claim and the kickbacks claim was dismissed without prejudice.

Retaliation Claim

Finally, the court analyzed the relator's allegation that the defendants fired her in retaliation, after she challenged the legality of the defendants' marketing practices. The court found that the relator's allegations were only threadbare and that her factual allegations were insufficient. The court also noted that the relator's claim that she "challenged" the defendants' practices might not be sufficient to subject the defendants to liability for retaliation under the False Claims Act, as several other courts have required plaintiffs to do more, including investigate the alleged fraud, make specific reports or complaints to the employer, and tie the alleged wrongdoing to a scheme of fraud against the government. Therefore, the court also dismissed the relator's retaliation claim, without prejudice.

U.S. v. Carell, 2011 WL 1060669 (M.D. Tenn. Mar. 21, 2011)

The United States brought an action under the False Claims Act against a group of home health care entities, a health care management company and its owner (Carell), and another individual (Vining). The government alleged that the defendants defrauded the Medicare program by establishing Vining as the "sham owner" of the healthcare companies, while Vining and Carell agreed that Carell and his management company would actually have total control over the health care companies. The government contended that the purpose of this agreement was to evade a Medicare rule regarding cost reports; providers submit cost reports to Medicare in order to receive interim payments based on their estimated costs for providing services to Medicare patients. Pursuant to the rule at issue, when home health care companies submit cost reports to Medicare, the amount of their costs attributable to compensation paid to their owners is limited. However, this rule does not apply to costs attributable to fees paid to management companies. The United States claimed that, as a result of the defendants' improper agreement, eight cost reports filed by Vining, as the purported owner of the home health care companies, were false, as they included fraudulent costs for management fees, which were actually fees paid to the real owners—Carell and his company. Carell and his company filed separate motions for partial judgment on the pleadings, which the United States District Court for the Middle District of Tennessee considered. The court denied the defendants' motions.

The defendants essentially argued that the government failed to state a claim under the False Claims Act. First, they claimed that they never presented, or caused to be presented, any false statements to the government, since all Medicare cost reports are submitted to private parties that serve as Medicare intermediaries. The court reviewed the decisions of various circuit courts, and determined that the False Claims Act does not necessarily require FCA defendants themselves to have presented false claims to the government, since causing someone else to present false claims is also actionable under the statute. The court rejected the defendants' argument and held that the government's allegation that the defendants "knowingly or with reckless disregard presented, or caused to be presented, false or fraudulent Cost Reports to receive reimbursement and that the United States suffered damages as a result of those submissions" was "sufficient to establish a plausible claim for relief."

The defendants also argued that the government did not state a claim that they were liable for making false statements with respect to false claims. They asserted that the FCA, as it was written at the time of the alleged fraud, only imposed liability upon those who made false statements with the intent that those statements would lead to false claims being paid by the government, and that their allegedly false statements were made to a Medicare intermediary, which made the payments to them. The court noted that after the government filed its complaint, this provision of the FCA was amended, making clear that the statute did not involve any requirement that defendants specific intend that their false statements defraud the government. While the court held that this amendment did not apply to the current case, it still found that the government stated a claim, stating that "[w]hile the Cost Reports were submitted to [the Medicare intermediary], those records undoubtedly were submitted with the intention that the Government, not [the intermediary], pay the claims."

Consequently, the court denied the defendants' motions for judgment on the pleadings.

U.S. ex rel. Raynor v. Nat'l Rural Utils. Co-op Fin. Corp., 2011 WL 976482 (D. Neb. Mar. 15, 2011)

A relator brought a *qui tam* action against a non-profit financial cooperative (CFC), an electric rural utilities cooperative association and its board, two international accounting firms, three credit rating agencies and several individuals, alleging that the group of defendants conspired to defraud and in fact did defraud the USDA's Rural Economic Development Loan and Grant Program, which is a program that is administered through the Federal Financing Bank (FFB) to provide funding to rural projects through local utility organizations. The relator alleged that, as a result of accounting fraud and false and misleading financial statements and SEC

filings issued by CFC, the FFB purchased $3 billion in bonds issued by CFC under the program. Further, the relator alleged that CFC used the same fraudulent financial statements to induce the Federal Agricultural Mortgage Corporation (Farmer Mac) to invest in CFC, and that CFC also caused Farmer Mac to improperly extended loans to CFC without authorization. The defendants separately moved to dismiss the relator's complaint for failure to state a claim, failure to plead with particularity, and for lack of subject matter jurisdiction. The United States District Court for the District of Nebraska granted the motions.

The court found the realtor failed to state a claim because he failed to allege that CFC ever actually submitted a false claim to the government. Further, the court held that the *qui tam* complaint failed to explain how the claims were false, that any of CFC's allegedly false statements were material to the government's investment decisions, that the defendants knowingly presented false claims to the government, or that CFC ever actually received federal funds, since USDA merely guarantees FFB loans, and there was no allegation that CFC ever defaulted on one of those loans. The relator countered, arguing that Rule 9(b)'s particularity requirements did not apply, or in the alternative, that the heightened pleading standard should be relaxed in this case. The court declined to relax the pleading standard, though, and held that the relator's complaint was deficient, since it did not "allege the 'who, what, when, where, and how' of the fraud."

Finally, the court rejected the relator's conspiracy allegation, as it found that the *qui tam* complaint only stated that each of the defendants must have been aware of CFC's fraudulent activity. Furthermore, the court found that the complaint failed to indicate how CFC's allegedly fraudulent actions would have been material to the government's decision to issue loans. Consequently, the relator's complaint—which had already been amended twice—was dismissed with prejudice.

Abbott v. BP Exploration and Prod., Inc., 2011 WL 923504 (S.D. Tex. Mar. 15, 2011)

Two relators brought a *qui tam* action against a group of oil and gas exploration and production corporations, seeking to enjoin the defendants' ability to drill until their alleged lack of compliance with environmental and safety regulations was corrected. Specifically, the relators alleged that the defendants falsely certified to the Department of Interior (DOI) that they were in compliance with the Outer Continental Shelf Lands Act (OCSLA) and all regulations issued pursuant to the Act—requirements, the relators alleged, was included as part of five leases the government issued to the defendants to drill, develop, and produce oil and gas resources. The relators alleged that the defendants knowingly submitted, and then attempted to fraudulently conceal, false documents certifying compliance with these regulations, when in fact the defendants violated OCSLA by failing to

adhere to various safety and environmental regulations. The defendants moved to dismiss the relators' complaint for failure to state a claim and for failure to plead fraud with particularity. Further, the defendants sought to dismiss the relators' claim for injunctive relief under the OCSLA. The United States District Court for the Southern District of Texas denied the defendants' motions.

Failure to State a Claim

The defendants argued that the relators' fraud claims under the FCA should be dismissed for failure to state a claim because the relators did not plead that a false claim for money or property was presented to the government. Alternatively, they argued that their alleged post-lease regulatory non-compliance could not serve as a basis for a claim under the FCA. The court found that the right to extract oil and gas was predicated upon the defendants' compliance with the leases' contractual provisions, and that since the leases did not grant the defendants a fee simple ownership of the oil and gas, the defendants could not exercise its rights to drill until they received the necessary permits and approvals—which the relators alleged were fraudulently acquired. The defendants argued that any misrepresentation in such permits could not have been false certifications, because the permits were submitted after the issuance of leases. The court, however, found that the defendants misconstrued the relationship between leases and permits, and held that the defendants' rights under the leases were expressly conditioned on their obtaining certain government permits to ensure the safety and efficacy of any drilling and production activities, and that the defendants violated the lease terms by making misrepresentations that ultimately rendered the leases void. Further, the court held that the defendants' alleged fraudulent inducement was material to the government's decision to permit them to operate. Thus, the defendants' motion to dismiss the relators' FCA claims for failure to state a claim was denied.

Failure to Plead Fraud with Particularity

The defendants then argued that the relators failed to plead the alleged fraud with particularity. The court, though, found that the relators provided a specific description of the alleged chain of events, including specific dates, people involved, emails received, and meetings attended. The court found that the relators effectively identified the defendants' signatory and the government's approval based on the defendants' certification. Therefore, the court found the relators' allegations successfully established that the defendants lacked the requisite documents necessary to support their earlier certifications of compliance. Accordingly, the court held the relators had pled their fraud claim with sufficient particularity. The defendants' motion to dismiss the *qui tam* complaint for failure to plead fraud with particularity was denied.

Claim for Injunctive Relief

Finally, the court analyzed the relators' claim for injunctive relief, due to the alleged violations of the OCSLA. The court denied the defendants' motion to dismiss, as it determined that the DOI was not an indispensable party, the relators had standing to bring the claim, and the relators stated a permissible claim for injunctive relief.

U.S. v. Dialysis Clinic, Inc., 2011 WL 167246 (N.D.N.Y. Jan. 19, 2011)

A relator brought a state and federal *qui tam* action against his former employer, a dialysis treatment center, alleging that the defendant submitted false claims to Medicare, Medicaid, and the Veterans' Administration, by falsely certifying its compliance with Medicare and other programs, while violating regulatory requirements that resulted in compromised patient care. The defendants moved to dismiss the relator's action, for failure to plead with particularity and failure to state a claim. The realtor filed a cross-motion for leave to file a second amended complaint. In response, the defendant filed a second motion to dismiss for lack of subject matter jurisdiction. The United States District Court for the Northern District of New York granted the relator's cross-motion, holding that there was no undue delay or prejudice to the defendant in allowing the relator to amend his complaint. However, after examining and applying the federal FCA, the court also granted the defendant's motions in part.

The court began by examining the motion to dismiss for lack of subject matter jurisdiction. The defendant argued that the relator's allegations were based on information that was previously publicly disclosed in an audit report by the New York State Office of the Medicaid Inspector General, that consisted of a random sample of 200 services with Medicaid payments and revealed missing documentation, documents not signed by licensed health professionals, incomplete treatment, and failure to explain medical benefits. The realtor conceded that the report had been publicly disclosed, but argued that his allegations were different from the information included in the report, that nothing in the report pertained to patient treatment, nursing practices, and safety regulations, and that his allegations were based on his own personal observations. The court held the allegations were distinct and separate theories of liability that were not based upon or referenced in the audit report, and the defendant's motion to dismiss for lack of subject matter jurisdiction was denied.

The court then examined the defendant's argument that the relator's complaint did not satisfy Rule 9(b)'s particularity requirement. The defendant argued that the complaint lacked sufficient detail about the dates, amounts, and employees involved with the submission of any false claims. While the court observed that the relator provided 16 examples of alleged violations of patient safety, it found the complaint contained imprecise references to routine and systematic violations

of Medicare and failed to identify any specific fraudulent claim that was submitted to the government. The relator responded that even though no specific claim was identified, the complaint gave the defendant adequate notice of the allegations. The court, though, held that since the relator failed to identify a single bill submitted in relation to any of the examples, the *qui tam* complaint did not plead the alleged fraud scheme with particularity, and granted the defendant's motion to dismiss on that basis. The court noted that the relator was not entitled to a relaxed pleading standard because the facts alleged did not support a strong inference of fraud. As the relator's complaint did not plead the alleged fraud scheme with particularity, it was dismissed.

Finally, the court examined the defendant's argument that the relator's complaint failed to state a claim under the FCA, under both express and implied false certification theories. The relator argued that the Medicare enrollment form the defendant completed made compliance with regulations a precondition of government payment. Specifically, the relator argued that by executing the form, the defendant expressly certified that it would comply with all conditions of participation as a prerequisite to Medicare payment. The defendant, however, argued that the Medicare enrollment form was not a claim for payment, but was merely an agreement to comply in the future with applicable laws and regulations. The court disagreed with the defendant's argument, but nonetheless held that the relator's express certification claim failed, since the relator did not identify any fraudulent claim for payment submitted by defendant to the government. The court then examined the implied false certification. The realtor argued that the defendant submitted claim forms and therefore attested, by implication, to its compliance with all applicable statutes and regulations. The court held that the statutes the relator cited established conditions of participation, but were not conditions of payment, as they were not prerequisites to receiving reimbursement from the government. Therefore, while a violation of these statutes and regulations could result in the termination of a facility's participation in the program, it could not constitute conditions to government payment. Consequently, the court granted the defendant's motion to dismiss for failure to state a claim.

All of the relator's claims under state FCA statutes were dismissed for the same reasons.

U.S. ex rel. Wood v. Family Healthcare Network, 2010 WL 5343289 (E.D. Cal. Dec. 20, 2010)

A relator brought a *qui tam* action against a private health care center (HCC) and two of its employees (Foster & Webber), alleging that the defendants conspired to submit, and did in fact submit, fraudulent claims to the government by applying for grant funds to expand staff and hours. The relator also alleged a reverse false

claim. Specifically, the relator alleged that the defendants' applications represented that additional staff was needed, that recruitment was already underway, and that the positions would be filled within 90 days of grant award. The government awarded two grants to the defendants. The relator alleged that the defendants, however, did not intend to hire the proposed staff, and that they submitted false progress reports in connection with the grants, which inflated the amount of "new users" they were servicing. The defendants moved to dismiss for failure to state a claim, arguing that the relator's complaint failed to differentiate between the defendants and did not indicate which of them made the allegedly false statements. The defendants also argued that the complaint failed to indicate what was actually false in the grant applications.

The United States District Court for the Eastern District of California denied the defendants' motion. The court found that the complaint contained sufficient factual allegations to state claims against the defendants. First, the court found that the complaint's allegations against the defendant employees properly alleged that they did not intend to hire the additional staff, as the court observed that the complaint alleged that during a meeting, Webber told another employee that the company did not have to adhere to the figures advanced in the grant applications, that he never intended to hire new staff or expand services, and that he intended to use the grant money to fund existing operational costs. The complaint also alleged that Foster said that the proposed staffing positions were not to be filled. The complaint further alleged that the staff proposed was never hired, that recruitment efforts were never undertaken, and that the hours of operation were never increased. Instead, the complaint alleged that as of eight months after the grant award, the number of employees had actually decreased. The court also held that the allegations were sufficient to hold HCC liable for the fraudulent acts of its employees, under an intent-to-benefit, an apparent-authority, or a managerial-capacity theory.

The court also denied the defendants' motion to dismiss the conspiracy claim, holding that the complaint properly alleged conspiracy through an agreement between Foster and Webber to submit misleading grant applications. It also identified the false representations in the applications, the reasons they were false, and the purpose of the false representations. Finally, the court denied the defendants' motion to dismiss the reverse FCA claim, finding that the complaint alleged that HCC was required to submit a progress report and a yearly report after receiving the grants, and noting that the complaint sufficiently alleged that the progress reports for the grants contained false statements, and that the defendants manipulated the database system to fraudulently inflate the number of new patients. As a result, the court denied the defendants' motion to dismiss in its entirety.

U.S. ex rel. Bender v. N. Am. Telecomms., Inc., 2010 WL 4365531 (D.D.C. Nov. 4, 2010)

A relator brought a *qui tam* action against a telecommunications company (NATI), a technical service provider (CTSI), an electrical subcontractor (PAE), and four individuals. The relator, who was an electrician employed by NATI, alleged that NATI was contracted by the government to maintain four buildings, that CTSI took over the contract, and PAE—a subcontractor of CTSI—performed electrical work on the buildings. The relator alleged five violations of the FCA. Count I alleged that NATI and CTSI falsified service call response times in order to claim monthly bonuses provided for in the contract. Count II alleged that NATI and CTSI misrepresented non-reimbursable repairs as reimbursable repairs. Count III alleged that NATI, CTSI, and PAE charged the U.S. Department of Agriculture (USDA) for work performed by employees who did not possess the qualifications required by the contract. Count IV alleged that NATI and CTSI billed the USDA for overtime work that the contract excluded from overtime status. Finally, Count V alleged that NATI and CTSI misrepresented the amount of work they performed. The government declined to intervene. All of the defendants moved to dismiss the relator's complaint for failure to state a claim, although PAE filed a motion separate from the joint motion filed by the other defendants. The United States District Court for the District of Columbia granted the defendants' motions.

The court first analyzed the claims against defendant PAE. The relator alleged that PAE caused the submission of false claims in Counts I, II, and V. Additionally, the plaintiff alleged PAE used false records in the preparation of fraudulent claims submitted by others, knew of the fraudulent claims, and acted in deliberate ignorance of that knowledge in Counts III and IV. PAE argued that the relator failed to allege any facts relating to its alleged wrongdoing under Count I, II, IV and V. Further, PAE argued that in Count III, the relator failed to allege a knowing violation of the FCA and failed to identify any particular false claim. The court held that the relator merely alleged that NATI's fraudulent practices were continued by PAE employees, but did not provide dates or any other information regarding specific fraudulent claims allegedly submitted or prepared by PAE. The court held that Counts I, II, IV, and V did not address PAE's liability and dismissed those counts for failure to state a claim. With respect to the allegations against PAE in Count III, the court held that the relator made specific allegations against PAE, but failed to identify the false claims submitted, the content of the false claims, and who was involved. Also, the court held that the relator did not allege that PAE knowingly caused CTSI to submit false claims to USDA. Thus, the court dismissed the claims in Count III against PAE for failure to state a claim and for failure to satisfy the particularity requirements.

The court then analyzed the claims against NATI, CTSI, and the four individual defendants. In Count I those defendants jointly argued that the relator's complaint

failed to allege the content of any false claims, identify the employees who made them, state how many times or when the false claims were submitted, or describe any specific false bonus claims that were submitted. The court held that although the complaint described how the alleged scheme was carried out, it did not contain allegations related to specific claims submitted by any of the defendants. Therefore, the court dismissed Count I as to all the defendants for failure to state a claim. Similarly, in Count II the defendants argued the complaint failed to allege specific false claims, the dates of any such claims, or the employees who submitted them. The court agreed and held that the relator failed to allege any false claim with sufficient particularity and dismissed Count II as to all the defendants for failure to state a claim.

In Counts III, IV, and V the defendants argued the complaint did not contain any allegations that they actually submitted claims to the government. The court agreed, but more importantly held that the allegations amounted to breach of contract or common law fraud claims, and that the relator did not have standing to bring such causes of action under the FCA. Consequently, the court dismissed Counts III, IV, and V as to all the joint defendants for failure to state a claim.

U.S. ex rel. Lemmon v. EnviroCare of Utah, Inc., 2010 WL 3025021 (10th Cir. Aug. 4, 2010)

A relator filed a *qui tam* suit in the U.S. District Court of the District of Utah, alleging that a hazardous waste removal company violated the FCA by falsely certifying its compliance with contractual and regulatory obligations governing its contracts with the federal government to properly dispose of hazardous and radioactive waste; the government contracts required the defendant to dispose of the waste materials "in accordance with all applicable, relevant and appropriate federal, state and local regulations," and obligated them to submit periodic reports to the government regarding the work and to maintain records that would allow the government to confirm the defendant's compliance with the contractual terms. The relator further alleged that the defendant failed to satisfy those requirements, yet it expressly and impliedly certified compliance to the government by submitting requests for payments, which the government paid in full. The district court dismissed the relator's complaint, finding that although the complaint alleged various regulatory violations, the relator failed to allege that those regulations required complete compliance before the government would pay under the contract with the defendant. Thus, the district court held, the relator failed to link her allegations to an actual, identifiable false claim that was submitted to the government, and her complaint was dismissed for failure to state a claim under the FCA and for failure to plead fraud with particularity. The relator appealed this decision to the Tenth Circuit.

The Tenth Circuit first recognized that the relator asserted both express and implied false certification theories of the defendant's liability, but noted that the district court failed to address the relator's impliedly false certification theory at all.

The appeals court began its analysis by observing that express false certification claims can arise under any section of the FCA's liability provisions, but since implied false certification claims do not include any false record or false statement, they can only arise under section 3729(a)(1)(A), which pertains to the presentment of false claims to the government. The court also determined that both theories of liability contain a materiality element, which requires plaintiffs to show that the false certification was material to the government's decision to make a payment.

With respect to the relator's implied false certification claim, the Tenth Circuit held that she provided enough facts to show that the defendant knowingly submitted legally false requests for payment to the government, that the government paid those claims, and that had the government known that the claims were false, it may not have made the payments. Under this theory, it was unnecessary, as the district court had required, for the relator to tie the alleged fraud to identifiable certifications of regulatory compliance, since the implied false certification theory does not include any explicit, identifiable certification at all. Thus, the circuit court held that the relator had indeed stated a claim under the FCA under the implied false certification theory, and reversed the district court's dismissal of the relator's complaint on that basis.

The Tenth Circuit also reversed the district court's dismissal of the relator's express false certification claim, finding that the relator provided enough factual support for her allegation that the defendant submitted claims to the government that contained false statements and that those false statements were material to the government's decision to make payments under the defendant's government contract. The court noted that the defendant was required to expressly certify that "the payments requested were only for work performed in accordance with the specifications, terms and conditions of the contract," and that any time the defendant's certification was untrue, the defendant was liable under the FCA. Thus, the Tenth Circuit held, the relator properly stated a claim under the express false certification theory as well.

Finally, the circuit court held that the relator satisfied the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), as her *qui tam* complaint adequately identified the "who, what, when, where, and how" of the fraud scheme she alleged. In that regard, the Tenth Circuit stated: "The federal rules do not require a plaintiff to provide a factual basis for every allegation. Nor must every allegation, taken in isolation, contain all the necessary information. Rather, to avoid dismissal under Rules 9(b) and 8(a), plaintiffs need only show that, taken as a whole, a complaint entitles them to relief. The complaint must provide enough information to describe a fraudulent scheme to support a plausible inference that false claims were submitted." As the appellate court found that the relator met this burden, it reversed the district court's dismissal of her complaint for failure to plead fraud with particularity as well.

U.S. ex rel. Martinez v. Va. Urology Ctr. P.C., 2010 WL 3023521 (E.D. Va. July 29, 2010)

A relator brought a *qui tam* action against her former employer, a urology center, claiming that the defendant submitted bills to Medicare and Medicaid without the required certifications, in violation of the FCA and the Virginia Fraud Against Taxpayers Act (VFATA). Specifically, the relator alleged the anesthesiologists improperly certified certain procedures, and that surgeons failed to properly supervise procedures, but that the center nonetheless forwarded bills containing false information to Medicare for reimbursement. The relator contended that she brought the concerns to the attention of the doctors and practice administrator, but they refused to take corrective actions. She alleged that her persistence in raising these concerns led to retaliation eventually to the termination of her employment, which resulting in a claim against the defendant under the FCA's and VFATA's anti-retaliation provisions. The defendant filed a motion to dismiss and contended that the relator failed to state a claim upon which a relief could be granted. The United States District Court for the Eastern District of Virginia granted the defendant's motion to dismiss. The court held the relator failed to provide specific information regarding her allegations, as she did not provide information regarding the particular procedures which were allegedly not followed, the specific forms which were allegedly left blank, details linking the alleged omissions and misinformation to claims submitted for payment, and the amounts of the alleged improper payments. The court also held that the relator failed to establish that the defendant did not its procedural requirements in some other manner. The court held the relator failed to connect the required certification omissions to claims which would otherwise have gone unpaid by the government. Thus, the relator's fraud claims were dismissed.

The court also dismissed the relator's retaliation claim. The court determined that, in the Fourth Circuit, a retaliation claim under the FCA can be maintained when the plaintiff "employee investigates potential wrongdoing and threatens a *qui tam* suit." (emphasis supplied). The court stated that the FCA's anti-retaliation provision only protects "employees who are found to be developing *qui tam* claims and who are terminated for that reason." As the court determined that the relator failed to allege that she filed or threatened to file an FCA action prior to her termination, it concluded that she did not state a valid claim for retaliation under the False Claims Act. In addition, although the court held that the VFATA expands the range of activities that are protected, it still requires plaintiffs to allege some connection between protected conduct and retaliation. The court held that the relator's allegations of retaliation were too conclusory to state a claim under the VFATA.

See *U.S. v. Ctr. for Diagnostic Imaging, Inc.*, 2011 WL 1304727 (W.D. Wash. Apr. 4, 2011), at page 6.

LITIGATION DEVELOPMENTS

A. Applicability of FCA to Tax Fraud

See *U.S. ex rel. Barber v. Paychex Inc.*, 2010 WL 2836333 (S.D. Fla. July 15, 2010), at page 138.

B. Applicability of Fraud Enforcement and Recovery Act of 2009 (FERA)

See *U.S. ex rel. Carpenter v. Abbott Labs Inc.*, 2010 WL 2802686 (D. Mass. July 16, 2010), at page 136.

C. Bankruptcy and Automatic Stay Issues

U.S. ex rel. Kolbeck v. Point Blank Solutions, Inc., 2011 WL 325898 (E.D. Va. Feb. 1, 2011)

A relator brought a *qui tam* action against two corporations and three individuals. The government declined to intervene. The relator voluntarily dismissed the individual defendants. The two corporate defendants filed for bankruptcy and the bankruptcy court stayed the *qui tam* action as to these two defendants, pursuant to the automatic stay provision of the bankruptcy code. The question presented was whether a *qui tam* action in which the government declined to intervene was nonetheless an action or proceeding "by a governmental unit" so as to fall within the statutory governmental police powers exception to the automatic stay provision. The U.S. District Court for the Eastern District of Virginia concluded that the matter was properly stayed by the bankruptcy court against the two defendants.

The court determined that the application of the governmental police powers exception to the automatic stay provision depends on the party conducting the proceedings. When the government intervenes in a *qui tam* action, it has the primary responsibility of prosecuting the action and the action would appropriately proceed as an exception to the automatic stay. However, the court found nowhere in the statutory definition of "governmental unit" any reference to a private citizen or entity acting on behalf of the government. Thus, the court found that when a relator conducts a *qui tam* action without intervention by the government, enforcing the automatic stay is appropriate, since such actions fall outside the scope of the governmental police powers exception.

D. Calculating Damages and Civil Penalties

U.S. v. United Techs. Corp., 2010 WL 4643244 (6th Cir. Nov. 18, 2010)

The United States brought suit under the FCA alleging that United Technologies (UT) submitted falsified cost estimates in a bid to convince the Air Force to award UT a contract to build fighter jet engines. The U.S. District Court for the Southern District of Ohio held that the defendant was liable under the False Claims Act for 709 false claims, but concluded that the United States had suffered no damages, since the defendant's false cost estimates were offset by various subsequent warranty price reductions the United States had received as part of contract modifications. Those modifications also included changes to the defendant's liability, which had initially been unlimited, but was later capped. Both parties appealed the district court's decision to the Sixth Circuit, with the defendant appealing the district court's ruling on FCA liability and the United States appealing the court's damages ruling.

As to the liability claims, the district court concluded that the defendant violated two provisions of the FCA by knowingly presenting false claims to the government and knowingly making false statements in support of false claims. The Sixth Circuit Court had little trouble affirming the district court's ruling, as it found that the defendant made several false statements in its final bid proposal to the Air Force, which fraudulently induced the Air Force to contract with the defendant and to pay each of the invoices it received from the defendant, pursuant to the contract. Thus, while the invoices themselves may not have contained false information, the defendant's false statements during the negotiations process was material to the Air Force's decision to award the contract to the defendant, giving rise to FCA liability. The district court's liability determination was affirmed.

With respect to the district court's damages calculation, the United States argued that the district court erred when it concluded that the defendant's conduct caused no damages. On appeal, the Sixth Circuit first analyzed the district court's calculation method and found that it subtracted the full amount of the defendant's warranty price reductions from its estimate of the government's damages without calculating the value of the new warranties, which included a cap on the defendant's liability to the United States. The court held that in order to calculate the difference between what the government paid and what it should have paid, the district court should have accounted for the diminished value of the new warranties (due the cap on the defendant's liability), since that resulted in the United States receiving far less, in terms of insurance for faulty engines, than it had originally bargained for.

Second, the circuit court, acknowledging that the terms of the contract changed over the years, determined that the district court failed to properly calculate the damages to the United States on a year-by-year basis, and instead incorrectly

reduced the Government's damages over the course of the entire contract. As a result, the Sixth Circuit reversed the district court's ruling on the Government's damages, and remanded that matter to the district court, with instructions to "calculate what the government eventually paid each year, . . . what it should have paid each year based on what the government received, then take the difference between the two.

U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2010 WL 3730894 (D. Colo. Sept. 16, 2010)

A relator brought a *qui tam* action against an oil and gas corporation, alleging submission of false royalty reports with the Minerals Management Service (MMS). The relator was awarded damages at trial and moved for entry of judgment. The United States District Court for the District of Colorado granted the motion in part. The first point of dispute was whether the defendant cooperated with the government's investigation to the extent that government's damages would be limited to double damages, rather than treble damages. The relator contended that the defendant did not qualify for double damages, since the Department of Justice was the agency responsible for investigating false claims, and that the defendant never communicated any information about royalty payments to that agency. The defendant countered that MMS was the appropriate agency responsible for the investigation, and that it disclosed all relevant information to that agency. The court agreed with the relator and held that in order to qualify for reduced damages, the defendant must have furnished all information about the false claims to DOJ and not simply to MMS. As a result, the court held that since no information with regard to the claims was communicated to DOJ, the reduced multiplier would not apply, and the defendant would be subject to treble damages.

The second dispute was over the number of claims that should be subjected to civil penalties under the FCA. The relator contended that each of the defendant's miscalculated royalties, from each lease, included in each monthly report constituted a separate false claim. The defendant argued that only the consolidated monthly filings constituted false claims and that civil penalties should only be imposed for the monthly reports that contained one or more miscalculations. The court observed that a claim is determined by examining the document submitted and by determining how many requests or demands are contained therein. The court then found that the monthly consolidated form filed by the defendant to the MMS aggregated a large volume of data, but was ultimately reduced down to a single "Net Payment" field for each form. As a result, the court held that the statutory penalty should be imposed only with regard to the monthly reports—48 of them. The relator further argued that any judgment entered should include prejudgment interest. The court held that the FCA does not provide for an award of prejudgment interest and that it is incompatible with the damages multiplier.

Finally, the defendant argued that the total amount of the judgment violated the Eighth Amendment's excessive fines clause. However, the court observed that the defendant defrauded the government of more than $7 million in unpaid royalties through a scheme involving dozens of leases over an extended period of time. The court observed that the defendant's actions were not so sporadic, isolated, or minimal such that a significant penalty would be disproportionate to the offense. As a result, the court held that the judgment imposed did not offend the Eighth Amendment. The court also allowed the relator's application for attorney's fees and costs, which the defendant did not dispute.

U.S. ex rel. Stearns v. Lane, 2010 WL 3702538 (D. Vt. Sept. 15, 2010)

A relator filed a *qui tam* action against her former landlord, alleging that the defendant received supplemental rent from the relator in addition to money received under HUD's Section 8 program, which contributed monthly payments to assist with the relator's rent. When the relator applied for participation in the Section 8 program, she omitted information regarding her husband's disability checks, as she knew that such income would reduce the amount of government benefits she received, thereby increasing the amount of rent she would be responsible for. Instead of reporting this income, she chose not to disclose that her husband would be living with her. Before the government approved the relator's application, she and the landlord executed a lease agreement. At that time, the landlord knew that the relator had misled the government by not including her husband's income on her application, but decided to participate in the fraud because he considered her a friend in need. When the government eventually approved the relator's application, it established a maximum rent that was slightly lower than the amount the relator and the landlord had agreed upon. In addition, due to the relator's fraud, the amount of rental assistance she received was about $400 less than she would have received, had she properly included her husband's income on her application.

The landlord knew that the applicable regulations did not allow him to charge rent beyond the maximum approved by the government, so he and the relator agreed to submit documentation to the government that showed that the rental amount complied with the amount that Section 8 had established, while they separately agreed that the relator would pay the difference between that and the amount that they had originally agreed to. After a year, the relator's husband threatened to destroy property at the location, and the landlord forced the relator to add his name to the lease, thereby notifying the government of his presence at the property and causing a re-calculation of the relator's rental benefits. The relator and her husband were now responsible for an additional $480 of the rent payments. In retaliation, the relator filed the *qui tam* action, disclosing that the landlord had committed fraud by accepting rental payments beyond the amount established by the government.

The government decided not to intervene in the relator's case. The United States District Court for the District of Vermont held the defendant landlord liable and awarded actual damages to the government, which amounted to less than $900 total over the course of a full year. The court did not treble or even double those damages, and did not impose any civil penalties against the landlord either. The court reasoned that imposing civil penalties of between $5500 and 11,000 per each of the monthly false claims would be excessive and would violate the Eighth Amendment. In addition, the court confined the government's recovery to its actual damages, noting that the defendant, who immediately admitted to his role in the scheme, only agreed to participate in the fraud because he felt sorry for his friend, who took advantage of him. The court also denied the relator any share of the government's recovery, as it found that the relator—who defrauded the government to an even greater extent, without punishment—had planned and initiated the fraud, and thus, under the FCA, could have her recovery reduced to zero. The court also denied the relator's request for attorneys' fees on that same basis.

See *U.S. ex rel. Williams v. Renal Care Group*, 2011 WL 2118231 (M.D. Tenn. May. 26, 2011), at page 84.

See *U.S. v. Karron*, 2011 WL 1126578 (S.D.N.Y. Mar. 23, 2011), at page 177.

E. Costs and Attorney's Fees

U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2011 WL 2174413 (D. Colo. June. 2, 2011)

A relator brought a *qui tam* action against an oil and gas corporation, alleging that the defendant violated the False Claims Act by filing false royalty reports with the Minerals Management Service (MMS) concerning oil and gas leases on government land, which he claimed he discovered while working as an auditor with the MMS. The case was tried and a jury found for the relator. The relator then moved, under the FCA, to recover his attorneys' fees for performed on his behalf by the three law firms that represented him. Further, he sought an enhancement of one-third to account for the risk of non-payment, since his attorneys were working on a contingency fee basis. Finally, he sought to recover his attorneys' expenses as well as his own expenses for his own work as an expert witness. The United States District Court for the District of Colorado granted the relator's motion for attorneys' fees and expenses in part.

The court noted that the defendant did not dispute the reasonableness of the number of hours spent by the relator's attorneys, or the reasonableness of their hourly rates. However, the defendant argued that the total amount of fees was excessive because the relator's contingency fee agreement with his attorneys would entitle them to 55% of the entire recovery, plus an attorney fee award. The defendant argued that the recovery of both sums constituted a windfall to the attorneys. The court disagreed, and found that the existence of a contingency fee agreement between the relator and his counsel did not justify reducing the lodestar amount of attorneys' fees. The court determined that neither the relator's nor his attorneys' actions with regard to each other impacted the defendant's statutory obligation to pay reasonable attorney fees.

Next, the defendant argued that the relator's degree of success at trial should result in a reduction of the attorneys' fee award. The court observed that the relator brought one claim for relief, and that the jury awarded some but not all of the damages asserted under that claim. The court did not find that the relator only enjoyed "partial success" simply because the jury did not award all the damages he sought. Accordingly, the court awarded the attorneys' fees sought by the relator for the three law firms involved in his *qui tam* matter. The court then analyzed the relator's application for an enhancement of one-third of the lodestar amount to account for the risk of non-payment, given his attorneys' contingent fee arrangement. The court noted the contingency fee agreement allowed the relator's attorneys to recover both a 55% contingent fee, plus a statutory attorney fee, pursuant to the FCA, and held that there was no need to further compensate the realtor's counsel for any risk associated with representation.

The relator also sought to recover his attorneys' expenses, which included payments to an expert witness, as well as the relator's own fees and expenses, as he also served as an expert witness. The defendant argued that expert witness fees were not recoverable under the FCA's fee-shifting provision. However, the court observed that other courts have awarded expert withness fees under the FCA and consequently awarded fees attributable to the relator's outside expert witness. The court, though, declined to award the relator his own expenses as an expert because, he was the *qui tam* relator prosecuting the action and there was no showing that he reasonably anticipated being compensated as an expert witness for doing so.

U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 2011 WL 1833243 (D.D.C. May 12, 2011)

The relator brought a *qui tam* action against two individuals and 4 construction companies (BHIC, HII, HC, HUK and BIE), alleging that the defendants were part of a conspiracy to rig the bidding on three construction contracts in Egypt funded by the U.S. Agency for International Development (USAID). Following the dismissal of one of the defendant and a trial of the claims against the five remaining defendants, the relator prevailed in his *qui tam* suit and the United States District Court for the District of Columbia ordered the defendants to pay the relator's reasonable attorneys' fees, expenses and costs, pursuant to the False Claims Act's fee-shifting provision. The defendants moved for a directed verdict or for a new trial, which was denied. The defendants then appealed the district court's rulings to the United States Court of Appeals for the District of Columbia, which vacated the judgment with respect to two of the contracts, upon a finding that the statute of limitations had run on those claims. The circuit court also dismissed the claims against three of the five defendants with respect to the third contract, but affirmed the judgment regarding that contract with respect to the remaining two defendants. The appeals court then directed the district court to determine the proper award of attorneys' fees and costs, consistent with those rulings.

The defendants then split into two groups, with each group moving the district court to vacate the fee award to the relator. The first group consisted of defendants BHIC, HII and HC—the defendants who received reversals of all the claims against them—while the second group included defendants HUK and BIE, who were found liable for false claims regarding the third contract. The relator conceded that vacatur of the fee award was appropriate for these defendants, but reserved the right to seek reinstatement of the fee award, in the event that he prevailed in a new trial. The relator opposed the remaining defendants' motions for complete vacatur of the fee award and cross-moved for an adjustment of the fee award to account for the dismissal of claims concerning two of the three contracts at issue. Subsequently, the two remaining defendants moved for a two-thirds reduction of the fee award, which they argued would properly reflect the dismissal of all claims

regarding two of the three contracts. The district court vacated the fee award for the first group of defendants, and affirmed, but amended, the award with respect to the second group.

The court first examined whether or not the relator remained a prevailing party, eligible for fees, costs and expenses under the False Claims Act, regarding his claims against the two remaining defendants. The court concluded that the relator remained a prevailing party. The court noted that "a party need not obtain favorable outcomes on every claim or argument to be considered a 'prevailing party' for these purposes; instead, a prevailing party need only 'succeed on any significant issue in litigation which achieves some of the benefit the party sough in bringing suit.'" (internal citation omitted) The court also noted that "[t]he normal practice in assessing liability for attorneys' fees is that all defendants are jointly and severally liable," and thus, the fact that claims against three of the five defendants were dismissed has no bearing on the liability for attorneys' fees for the remaining two defendants. The court determined that all of the claims were interrelated because the core of the action was an overarching conspiracy between the defendants to rig the bidding system in order to extract excessive payments from USAID for projects in Egypt.

The court, though, agreed that the award of attorneys' fees to the relator should be reduced, after comparing those fees to the level of success the relator achieved. The court found that the majority, about 70%, of the relator's efforts focused on claims arising from the third contract—for which the two remaining defendants were held liable, as well as claims regarding the overall conspiracy. The court also found that the relator achieved tremendous success in the action, as nearly 88% of the original damage award from the trial remained intact. Consequently, the district court held that the relator was entitled to 80% of his fee petition.

U.S. ex rel. Feldman v. Van Gorp, 2011 WL 651829 (S.D.N.Y. Feb. 9, 2011)

A relator brought a *qui tam* action against an individual and a medical college. Following a trial, the jury returned a verdict in favor of the relator on three of his FCA five claims. The relator then moved for an award of attorneys' fees and expenses. The United States District Court for the Southern District of New York granted the motion in part.

The defendants did not object to the reasonableness of the attorney rates or hours expended. They did, however, object to the requested fees for travel time, arguing that because the relator hired counsel from Philadelphia rather than New York, he should not be entitled to attorneys' fees for travel time. The court found that a reasonable client would have chosen New York counsel in order to prevent unnecessary travel costs, and held that the relator could not receive attorneys' fees

for most of the claimed time spent traveling. The court did, however, approve attorneys' fees for travel time for recording depositions. The court also reduced the lodestar for one of the attorneys' travel time, finding that the attorney failed to verify his travel time entries.

The defendant then argued that the sum which the relator sought to recover for attorneys' costs excessive, as it was almost the same as the amount recovered as damages on the FCA claims. The court examined whether the relator's partial success required a downward adjustment, but ultimately held that the relator's successful and unsuccessful claims were interrelated and could not be segregated neatly. Therefore, the court declined to subtract the expenses related to the unsuccessful claims from the lodestar and held the ratio of attorneys' fees to the damages in the case was within the acceptable limits and should not be reduced by the percentage of unsuccessful claims simply because damages were low. However, the court found that an overall 15% reduction in the lodestar was warranted.

Finally, the defendant objected to the amount of costs claimed to have been incurred by the relator's attorneys. The court held that the relator was not entitled to recover travel costs for the same reasons as to the recovery of attorneys' fee for travel time. However, once again, the court reimbursed for travel costs associated with depositions. Next, the defendant argued that the relator's photocopying and reproduction costs were taxable under the fee-shifting provision of 28 USC § 1920 and that the relator provided insufficient details as to which photocopying costs were taxable. The court disagreed and held fee shifting statues permit recovery of costs beyond those considered taxable. Moreover, it held that the relator submitted a detailed accounting of its photocopying costs, which was sufficient to support an award of copying costs. The court also determined that the relator's personal expenses were reasonable and entitled to compensation.

U.S. ex rel. Lefan v. Gen. Elec. Co., 2010 WL 3476673 (6th Cir. Sept. 3, 2010)

A group of defense contractor defendants were sued by two relators in the U.S. District Court for the Western District of Kentucky. The relators alleged that the defendants falsified jet engine specifications manufactured for the government. The defendants settled the case with the government. After the settlement, the relators' lawyers, which included both labor lawyers from Kentucky as well as FCA specialists from Ohio, moved for allowable attorneys' fees under the False Claims Act. The district court set the attorneys' respective hourly rates and awarded attorneys' fees and expenses. Both parties appealed the district court's decision to the Sixth Circuit, which affirmed in part and reversed in part.

The relators' attorneys argued that all attorneys from the Ohio firm, not just the FCA specialists, should be entitled to a higher fee rate than the district court's Kentucky rate. The Sixth Circuit court held that the district court did not abuse its discretion by varying the fee for FCA specialists and the Ohio firm's other attorneys. The court held that the firm's non-FCA attorneys would not be awarded a higher rate, as they were not specialists. The relators' attorneys also argued that the district court failed to award fees for all casework related to the FCA action, contending that the district court should have included attorneys' fees for work related to a first-to-file challenge based on the same FCA claim involving a third-party relator. The Sixth Circuit held that the action did not directly involve the *qui tam* defendants and thus, no attorneys' fees would be awarded for that dispute.

Moreover, the relators' attorneys argued that the district court erred when calculating the fees incurred for litigating the attorneys' fees issue. The court held that attorneys' fee litigation may be included as part of a reasonable fee, but noted that it is limited. The court held that when settlements are reached, the attorneys' fees should not exceed 3% of the hours in the main case. The court reversed and remanded to determine a reasonable fee from the attorneys' work hours on the FCA original claim subject to the 3% cap.

The defendants argued that the relators' claims relating to the Ohio firm's attorney fee rates and the attorneys' fee litigation costs were untimely, as they were not brought within the 30-day period for filing notices of appeal. The circuit court found that the government was a party to a viable FCA claim and therefore the attorneys' fee litigation was also part of the same FCA action. Consequently, the relators' attorneys were entitled to the 60-day period for filing appeals in cases in which the government is a party, and its appeal of the district court's decision was timely.

U.S. ex rel. Cullins v. Astra, Inc., 2010 WL 3008833 (S.D. Fla. July 28, 2010)

A relator brought a *qui tam* action against her previous employer—a corporation that provided mail transport services to the United States Postal Service (USPS), in which the relator alleged a general violation of FCA without identifying any specific provision of the Act. The defendant moved to dismiss and in response the relator filed an amended complaint specifically asserting three claims. The defendant moved to dismiss the amended complaint, on the grounds that it failed to state a claim and failed to plead fraud with particularity. The defendant's motion was granted, but the relator was allowed to file a second amended complaint. The relator's second amended complaint only alleged a reverse false claim, claiming that the defendant used and caused the USPS to use payment certifications as a means to keep and conceal its obligation to repay any overpayments made. The defendant again moved to dismiss on the same grounds. The defendant's third

motion to dismiss was granted, this time with prejudice. Subsequently, the defendant filed a motion for attorney's fees and costs. The defendant argued that the relator's action were clearly frivolous, vexatious, and was brought primarily for purposes of harassment. The United States District Court for the Southern District of Florida granted the motion in part, holding that the relator's allegations were not frivolous because the relator attempted to allege more specific facts to support her claim and because the court allowed her amend the complaint twice. The court also found no evidence that the relator brought the litigation for an improper purpose. The court found that the relator had personal knowledge of her claims and that she was proactively litigating all the claims she might have had against the defendant. Thus, the court held that the defendant was not entitled to attorney fees. The defendant, however, had also moved for taxable costs and the court awarded the defendant $288.87 in copying costs, reasoning that such costs were covered by Federal Rule of Civil Procedure 54 as necessary for successfully defending against the relator's claims.

See *U.S. ex rel. Ubl v. IIF Data Solutions*, 2011 WL 1474783 (4th Cir. Apr. 19, 2011), at page 183.

See *U.S. ex rel. Schweizer v. Oce N. Am., Inc.*, 2011 WL 1097419 (D.D.C. Mar. 25, 2011), at page 69.

F. False Certification of Compliance

U.S. ex rel. Gatsiopoulos v. Kaplan Career Inst., 2010 WL 5392668 (S.D. Fla. Dec. 22, 2010)

Two relators brought a *qui tam* action against their previous employer, a higher education service provider, and its subsidiary, alleging that the defendants did not comply with the requirements of the Higher Education Act (HEA), which requires schools that wish to receive financial aid to certify compliance with the HEA through a Program Participation Agreement (PPA). The relators alleged that the defendants violated the PPA by improperly providing compensation to school admissions representatives (which is prohibited under the HEA's "compensation ban"), by misrepresenting job placement rates in advertisements, and by advertising job placement rates without the state licensing requirements. Further, the relators alleged that in order to receive funding under the HEA, a program must have a graduation rate of at least 70%, and that the defendants manipulated the rate by encouraging instructors to change grades. The relators further alleged that the defendants coached students to enable them to pass a required entrance exam, which allowed unqualified students admittance into the school. Finally, one of the relators also alleged unlawful retaliation. The defendants moved to dismiss these claims for failure to plead fraud with particularity and for failure to state a claim. The United States District Court for the Southern District of Florida granted the motion in part.

The court first analyzed the relators' false certification allegation, which the defendants argued failed as a matter of law. The court disagreed and held that when an institution executes a PPA, agrees to comply with statutory and regulatory requirements, and submits or causes the submission of requests not in compliance with the requirements, there is a cause of action under the FCA. Further, the court found that the execution of the PPA was material to the government's decision to pay. Accordingly, the court dismissed the defendants' motion to dismiss for failure to state a claim.

The court then analyzed the relators' allegations of HEA violations. The defendants argued that the relators' claim based on the violation of the HEA's incentive compensation ban did not state a valid claim for relief. The court found the complaint specifically alleged that the defendants compensated representatives directly on their enrollment success and terminated them if they did not maintain their numbers. The defendants argued that such compensation was allowed as long as it was not based solely on enrollment success. The court disagreed with the defendants' argument and held the relators stated a valid claim for violation of the incentive compensation ban. Next, the defendants argued that the relators failed to allege that the defendants advertised using job placement rates and without the state licensing requirements. The court observed that under the HEA, an institution that advertised job placement rates as a means of attracting students must

make available the statistics and that the complaint provided several examples of the defendants' manipulations of the job placement rates. However, the court held that the relators failed to allege that the defendants advertised using the job placement statistics because the relators did not provide any examples of actual advertisements placed by the defendants.

The defendants argued the relators' claim based on the requisite 70% graduation rate must be dismissed because the relators failed to allege that the rule applied to the defendants' program. The court agreed and held that the relators had not specified the programs which are required to meet the 70% rule and whether or not the defendants' program was included. Accordingly, the court granted the defendants' motion with respect to that claim. Further, the defendants argued that the relators' claims based on an admission exam should be dismissed because the relators failed to state a claim. The court agreed and held that the complaint failed to allege that "coaching" students for the test was a violation of the HEA. Therefore, the court granted the defendants' motion with respect to that claim as well.

The court then analyzed the relator's retaliation claim brought by one of the relators. The defendants argued that the relator failed to allege that she engaged in protected conduct and that she put the defendants on notice of possible FCA violations. The court disagreed and found that the complaint alleged that the relator complained to the defendants about unethical and illegal behavior and alleged that she would report this behavior to the Department of Education and the State Accreditation Board. Further, the court found that the relator was allegedly terminated shortly after providing the defendants' compliance manager with documents that established grade changing and false attendance records. The court held that the relator put the defendants on sufficient notice about her involvement in protected conduct and accordingly, the defendants' motion to dismiss the retaliation claim was denied.

U.S. v. Science Applications Int'l. Corp., 2010 WL 4909467 (D.C. Cir. Dec. 3, 2010)

The United States brought an action in the United States District Court for the District of Columbia alleging that a major government contractor violated the False Claims Act by impliedly falsely certifying to the Nuclear Regulatory Commission (NRC) that it had no conflicting interests and would promptly report any potential conflicting relationships. Following jury trial, the defendant was found liable and the United States was awarded treble damages. The defendant then moved for judgment as a matter of law and in the alternative, sought a new trial. The defendant argued that it could not be held liable under the FCA, because its government contract did not designate compliance with the conflict of interest requirements at issue as express conditions for payment. The defendant also argued that various jury

instructions were erroneous and prejudicial and that the government failed to prove that it suffered any damages. The district court rejected each argument and upheld the verdict and jury award. The defendant then appealed to the United States Court of Appeals for the District of Columbia Circuit, seeking judgment as a matter of law with respect to liability on all causes of action and with respect to FCA damages. It also alternatively urged the circuit court to vacate the district court's judgment and remand for a new trial on all claims. The circuit court vacated the judgment as to FCA liability and remanded for a new trial, holding that the district court's collective knowledge instruction conflicted with the FCA's scienter standard.

Scienter

The circuit court first analyzed the implied false certification theory. The defendant argued that liability may attach under an implied false certification theory only where a statute, regulation, or contractual provision made compliance with some requirement of an express condition precedent to payment. The appeals court disagreed and found that record evidence could have allowed the jury to conclude that there was an obligation to disclose any conflict of interest. However, the court still vacated and remanded for a new trial because it determined that the district court erroneously instructed the jury when it announced that corporations were liable for the collective knowledge of all employees and agents within the corporation, as long as those individuals obtained their knowledge while acting on behalf of the corporation. The circuit court held that the district court's instructions drew no distinction between the knowledge of corporate officers and that of potentially thousands of ordinary employees. The court found that the district court's instructions allowed the jury to find that the defendant knowingly submitted false claims for payment even if the jury concluded that no individual was simultaneously aware of the company's NRC contract and its relationships with other companies that violated the contract's conflict of interest provision. As the appeals court could find no other circuit in which the collective knowledge theory was applied to FCA cases, it vacated the district court's judgment and remanded for a new trial. The court of appeals also held that the jury instructions as to the damages were flawed.

U.S. ex rel. Powell v. Am. InterContinental Univ. Inc., 2010 WL 4818536 (N.D. Ga. Nov. 22, 2010)

A group of relators brought a *qui tam* action against two educational institutes, alleging that the defendants knowingly made false statements in their "Program Participation Agreements" to the Department of Education regarding their compliance with, among other things, Title IV of the Higher Education Act. The United States District Court for the Northern District of Georgia previously denied the defendants' motion to dismiss and the defendants moved for reconsideration. The defendants also moved for certification for interlocutory appeal of the court's ruling regarding the legal sufficiency of predicating an FCA claim on false statements con-

tained within program participation agreements; the defendants argued that there is a distinction between false statements regarding conditions of eligibility—for which, they argued, there is no FCA liability—and false statements regarding conditions of payments—for, which, they argued, there can be FCA liability. The defendants contended that statements contained in program participation agreements concern conditions of eligibility and as such, there can be no FCA liability for any false statements alleged by the relators. The court denied the defendants' motions.

The court had originally determined that the relators met the heightened pleading standards of Rule 9(b). In their motion for reconsideration, the defendants argued that the court misapplied Rule 9(b) by not requiring the relators to plead specific details regarding the dates, frequency, or amounts of the alleged false claims at issue. The court noted that this same argument had been raised and rejected in the original motion to dismiss, as it held that the relators' allegations were sufficient to articulate the alleged fraud with requisite specificity. The defendants also argued that the court committed error by not requiring the relators to plead specific details regarding how they obtained firsthand knowledge of the alleged fraud scheme. The court observed that none of the cited authorities relied on by the defendants provided support for a rule requiring detailed pleading as to the source of a relator's knowledge. The court concluded: "Other than mere disagreements with the Court's ultimate result, Defendants offer no basis for reconsidering its previous rulings in this case," and denied the defendants' motion for reconsideration on that basis.

The court also denied the defendants motion for certification for interlocutory appeal, as it held that the defendants had not demonstrated a substantial difference of opinion as to whether courts should distinguish between conditions of eligibility for government funding and conditions of payment for purposes of a FCA claim. The court relied on authority from several circuit courts, which all recognized that false statements regarding an entities condition of eligibility to participate in federal financial aid programs can serve as the basis for FCA liability. The contrary district court authority cited by the defendants paled in comparison, both in number and in precedential value. Consequently, the court held that "the present case does not present a *substantial* difference of opinion as to whether courts should distinguish between conditions of eligibility for government funding and conditions of payment for purposes of a FCA claim." The defendants' motion for certification for interlocutory appeal was denied.

U.S. ex rel. Sanchez-Smith v. AHS Tulsa Reg'l Med. Ctr., 2010 WL 4702270 (N.D. Okla. Nov. 10, 2010)

Three relators brought a *qui tam* action against their former employer—a medical center—alleging that the defendant submitted numerous false Oklahoma Medicaid claims for inpatient psychiatric services. The relators noted that the defendant

was issued two different provider numbers to be used for Medicaid billing: one provider number for patients classified as "acute," and a second provider number for patients classified as "residential." A minimum of 21 hours of total weekly therapy was required when billing for residential patients, while a total of 24 hours of weekly treatment was required for acute patients. Medicaid reimbursed at a higher rate for the acute classification. Among other things, the relators alleged that the defendant violated the False Claims Act by knowingly failing to meet Medicaid's weekly minimum total therapy hours requirements and misrepresenting the length of therapy sessions in order to receive improper reimbursements. For example, the relators alleged that the defendant conducted "drive-by" sessions, during which therapists would visit with patients for 10-15 minutes and then bill for an hour. The realtors further alleged that the defendant was audited by the state and assessed partial per diem penalties for failing to provide the required number of therapy hours for specific patients. One of the defendant's manager's testified that acute and residential billing was bundled together and was based on occupancy, not hours of treatment, as required.

The relators relied upon two alternative theories of FCA liability: factual falsity and legal falsity. The factual falsity theory was based on the information included in the defendant's Medicaid reimbursement claims, including the provider number the defendant listed for the services for which it was seeking reimbursement. As the court stated: "[r]elators' theory tied to the provider numbers is simply that, by billing for acute or residential services while failing to comply with Oklahoma Medicaid's active treatment requirements for each type of service, [the defendant] submitted a 'factually' false bill." The relators' legal falsity theory of liability was based on the notion that the defendant, by submitting claims to Oklahoma Medicaid, impliedly certified its compliance with the applicable rules and regulations, and those implied certifications were false.

The defendant moved for summary judgment on the relators' claims, and the United States District Court for the Northern District of Oklahoma denied the motion.

Factual Falsity Theory of FCA Liability

The court first addressed—and rejected—the relators' factual falsity theory, observing that nothing on the defendant's Medicaid claim forms was false on its face. The court noted that the relators did not allege that the defendant "knowingly used the acute provider number for patients preauthorized for residential care in order to receive a higher payment," and that the provider numbers used did not appear to be false on their face. Similarly, the court rejected the relators' contention that the defendant improperly billed Medicaid for services never provided. The court held that "in order to reach a jury on a factual falsity theory in the context of 'bundled' per diem Medicaid billing, a plaintiff must present facts amounting to (1) the provision of entirely 'worthless services;' or (2) at a minimum, the provision of grossly negligent services

with regard to a particular standard of care or regulatory requirement." The court held that the relators failed to satisfy either standard, as it determined that even though the defendant did not always meet the required number of therapy hours for its patients, no reasonable jury could determine that the services the defendant did provide were worthless. Furthermore, the court found no evidence that the patients' overall bundled services were so deficient that a jury could conclude that any of the claims at issue were false on their face based on the defendant's gross negligence. The court ultimately concluded that "[a]llowing this case to proceed in a factual falsity theory would stretch the FCA 'factual' falsity liability too far beyond its intended purpose of preventing misrepresentations of fact on claim forms." The court then turned its attention to the relators' implied false certification theory.

Implied False Certification Theory of Liability

The court first noted that under an implied false certification theory of FCA liability, knowing regulatory violations can serve as the basis for false claims, "so long as the 'underlying contracts, statutes, or regulations themselves . . . make compliance a prerequisite to the government's payment.'" The defendant argued that it was entitled to summary judgment on relators' implied false certification theory, arguing that the neither the governing agreements nor the applicable Medicaid regulations conditioned payments from the government on compliance, and therefore, any failure to comply was not material to the government's decision to make Medicaid reimbursement payments to the defendant; the defendant argued that the applicable regulations only reflect condition of participation in the Medicaid program, not conditions of payment.

The court agreed that the agreements at issue did not condition payment on compliance with the therapy hours requirements, as the defendant was only required to certify that any service billed for was both medically necessary and actually provided. However, the court disagreed with the defendant's characterization of the applicable Medicaid regulations, and determined that those regulations were not merely conditions of participation. The court stated several reasons for this holding, including: (1) the regulations at issue are not labeled as conditions of participation under either Oklahoma or federal law; (2) the regulations include a "reimbursement" provision, and the court concluded that conditions of participation are not tied to reimbursement at all; (3) the fact that the regulations involve an "Inspection of Care Review" process that allows for monitoring of the Oklahoma Medicaid program does not automatically mean that the regulations are merely conditions of participation, since the purpose of the review process is not to determine eligibility to participate in the program, but rather to ensure that proper payments are being made—which is yet another link to reimbursements; (4) the regulations are entirely objective and easy to apply—either the required weekly therapy hours were met or they were not met—and do not require "any 'qualitative standard measuring the efficacy' of the therapy provided; and (5) the relators provided evidence from federal and state Medicaid officials that showed that if the government knew that the applicable regulations were not being followed, then the defendant's Medicaid reimbursement claims might have been denied.

The court also found that the relators presented sufficient evidence to create a question of fact that the defendant knowingly violated the minimum therapy requirements. As an example, the court referred to testimony evidence showing that the defendant instructed therapists to conduct improper "drive-by" sessions. The court also rejected the defendant's "government knowledge" argument, in which the defendant claimed that there could be no FCA liability since the government conducted audits and was aware of any violations, but never instructed the defendant to change its billing practices or threatened to decertify the defendant as a Medicaid provider. The court, though, observed that the audit reports did not constitute the type of government knowledge of regulatory non-compliance that would entitle the defendant summary judgment.

Finally, with respect to materiality, the court held that the materiality element only requires plaintiffs to show that the government *may* not have made a payment had it known of a defendant's false claims; plaintiffs do not have to show conclusively that the government would not have made a payment. Since the relators provided testimonial evidence showing that the government may not have paid the defendant's claims, had it been aware of the failure to comply with the therapy hours requirements, the relators satisfied the materiality element.

Consequently, the court denied the defendant's summary judgment motion.

U.S. ex rel. Jones v. Brigham and Women's Hosp., 2010 WL 4502079 (D. Mass. Nov. 10, 2010)

A relator brought a *qui tam* action against two hospitals and two doctors, alleging that the group of defendants violated the False Claims Act by fraudulently certifying—both expressly and impliedly—compliance with relevant statutes and regulations when they applied for federal grant funds from the National Institutes of Health in order to conduct research on Alzheimer's Disease. The relator also alleged that the defendants falsified scientific data and made misrepresentations in the grant application. Both sides moved for summary judgment. The United States District Court for the District of Massachusetts granted the defendants' motion. The court held the relator failed to articulate how the alleged falsified data related to false statements in the grant application, as the relator did not offer any evidence that the alleged false data was ever submitted as part of a grant application. Furthermore, the court noted that the basis for the relator's claim of falsified data concerned matters over which experts could disagree, and thus, was insufficient to support a claim that false statements were made. Ultimately, the court held that summary judgment in favor of the defendants was appropriate, because the relator failed to present sufficient evidence to support his claims. Therefore, the court held that there was no issue of material fact regarding the relator's claims, and summary judgment in favor of the defendants was proper.

G. *Res Judicata* and Collateral Estoppel

U.S. v. Karron, 2011 WL 1126578 (S.D.N.Y. Mar. 23, 2011)

The United States brought a suit under the False Claims Act against the president of a medical technology company. The government alleged that the defendant submitted grant applications to the National Institutes of Standards and Technology to develop computer applications that would generate 3-D models that would assist in medical procedures, including surgeries and creating prosthetics. The government further alleged that once the defendant was awarded the grant, she was required to make various certifications regarding how the grant funds were being used. Following a routine audit, the government alleged that the defendant and her company were found not to be in compliance with the terms of the grant and that federal funds had been used improperly. As a result, the government then suspended the defendant's grant funding. Years later, the defendant was criminally convicted for misapplying the federal grant money. She was imprisoned and ordered to pay restitution. She appealed her conviction to the U.S. Court of Appeals for the Second Circuit, which upheld the verdict and sentencing. The United States then filed its civil action under the False Claims Act and later moved for summary judgment on those claims.

The government argued that the defendant was estopped from contesting civil liability, due to her prior criminal conviction for intentionally misapplying federal funds. The government relied on both the common law doctrine of collateral estoppel, as well as an FCA provision that precludes those convicted of fraud or making false statements from denying liability for making false statements in subsequent, related civil proceedings. The defendant disagreed and argued that summary judgment was not proper.

The U.S. District Court for the Southern District of New York agreed with the government that the defendant was precluded from contesting civil liability under the False Claims Act, since her criminal conviction was a final judgment; both the criminal and civil proceedings stemmed from the same conduct and the defendant had a full opportunity to litigate those issues during the criminal proceedings; the jury in the criminal case specifically found that the defendant intended to misapply federal funds (which satisfied the FCA's scienter requirement); and the defendant's fraudulent conduct was proven to satisfy the FCA's materiality requirement (since upon learning of the fraud, the government suspended the defendant's grant funding and eventually prosecuted her). The court also agreed with the government's calculation of damages, and concluded that, since the government did not receive any benefit from its relationship with the defendant and her company, it was entitled to three times the amount of the grant funds she received, minus the restitution that had already been paid. However, the court disagreed with the government's calculation of statutory penalties under the FCA. While the govern-

ment sought statutory penalties for twenty alleged false statements, based on all of the certifications made by the defendant, the court held that the government only made generalized allegations of false statements in its civil complaint. Since only one document reflecting a false statement by the defendant had been used during the criminal proceedings, the court granted the government a statutory penalty with respect to that single false statement, but held that summary judgment with respect to the other alleged false statements was not proper.

U.S. ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. #49-5, 2011 WL 691620 (D.S.D. Feb. 18, 2011)

The relator, a registrar for the Southeast Technical Institute (STI), alleged that he was wrongfully terminated from his job. After the city school board approved the decision, the relator appealed to the state circuit court, arguing that the termination was arbitrary, unreasonable, and violated public policy. The court affirmed the decision of the school board and held that the relator was terminated for no reason other than his incompetence as a registrar. The relator also brought a *qui tam* action against the school district, a local government agency and several individuals, alleging that the defendants applied for and received money from the government based on false and fraudulent representations that STI was graduating qualified individuals and that qualified teachers were being hired. The complaint was dismissed for failing to plead fraud with particularity. The relator amended and alleged that in order to receive financial aid, the defendants falsely certified compliance with the Program Participation Agreement (PPA) with the Department of Education (DOE). The relator also alleged that his employment was terminated in retaliation of his investigation and reporting of the alleged fraud. The defendants moved to dismiss for failure to meet pleading requirements and failure to state a claim. The relator also moved for sanctions. The United States District Court for the District of South Dakota granted the defendants' motion in part and denied the relator's motion for sanctions.

The individual defendants moved for dismissal of the claims asserted against them in their individual capacities. The court observed that the relator alleged that the individual defendants knew about the false claims, but did not advise the government "for to do so would endanger their funding." The court held that, read liberally, this allegation was sufficient to avoid dismissal of the defendants in their individual capacities.

The defendants then argued that the relator failed to plead fraud with particularity and failed to state a claim because he did not attach a copy of STI's PPA, which was integral to that defendant's receipt of federal funds. The relator responded that he could not attach a copy of the PPA to the Amended Complaint because he did not have it. Further, the realtor alleged that through his work he gained personal knowl-

edge of the requirements of all PPAs. The court held that the complaint alleged violations of the PPA with sufficient particularity to place the defendants on notice of the alleged violations even without a copy of the PPA attached, and thus rejected the defendants' argument that the relator failed to plead fraud with particularity.

Res Judicata

The defendants then argued the relator's FCA claims were barred by the doctrine of *res judicata* and collateral estoppel, claiming that he had a full and fair opportunity to litigate the issues in his prior state court proceedings. The court began by examining whether or not the issues were identical. The court distinguished the relator's personal cause of action under the anti-retaliation provision of the FCA from his *qui tam* claim that the defendants falsely certified compliance to receive federal funds and noted that the resolution of personal employment litigation does not preclude a *qui tam* action, since it is often impractical and impossible to pursue both the claims in one suit, due to the procedural differences between personal and *qui tam* litigations.

The court first analyzed the relator's FCA retaliation claim and determined that that claim was precluded, since the state court specifically held that the sole reason for the relator's termination was his incompetence as registrar. The state court explicitly stated that the relator failed to prove that he was a whistleblower or that the school terminated him in retaliation for whistleblowing. Thus, all for requirements of *res judicata* were present, as the claim of termination in retaliation in the state court action was identical to the present claim; there had been a final judgment on the merits in the prior action regarding that claim; the parties to the retaliation claim were the same; and the relator was given fair opportunity to litigate the alleged whistleblowing and retaliation claims in the state court proceeding. Accordingly, the court held that under the doctrine of *res judicata,* the relator was barred from re-litigating his retaliation claims.

The court then analyzed the relator's FCA claim. The defendants argued that although the relator's federal lawsuit advanced a different legal theory and a different remedy than in his state court case, the causes of action were the same. The court disagreed and found that the relator's appeal to the state court focused on the legality of his termination, while the *qui tam* action focused on whether the defendants falsely certified compliance with the PPA in order to receive federal funds. The court found that the relator's fraud claims were not precluded under the doctrine of *res judicata,* since the issues in the federal FCA suit and the state employment suit were not the same; the parties were not the same or in privity, since the government had no involvement in the state proceeding; and there was no opportunity for the relator to litigate the *qui tam* issues in the state court case, since the relator had to wait for the government's decision to intervene and only had 90 days to appeal the school board's decision. Ultimately, the court held that none of the claims in the relator's *qui tam* action could have or should have been joined in his administrative appeal of the school board's termination decision. Therefore, the court denied the defendants' motions to dismiss the *qui tam* claim.

H. Seal/Service Issues

American Civil Liberties Union, et al. v. Holder, et al., 2011 WL 1108252 (4th Cir. Mar. 28, 2011)

The American Civil Liberties Union, joined by OMB Watch and the Government Accountability Project, filed a complaint in the United States District Court for the Eastern District of Virginia against the U.S. Attorney General and the clerk of the district court. The plaintiffs made a facial constitutional challenge to the seal provisions of the False Claims Act, arguing that those provisions violate the public's First Amendment right of access to judicial proceedings; that the provisions gag *qui tam* relators from speaking about their cases, in violation of their First Amendment rights; and that the provisions allow Congress, and not the courts to decide whether *qui tam* complaints should be sealed, in violation of separation of powers principles. The district court rejected all of the plaintiffs' arguments and dismissed their complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The plaintiffs appealed the district court's decision to the U.S. Court of Appeals for the Fourth Circuit, and the circuit court affirmed the district court's decision.

Right of Access to Judicial Proceedings

The Fourth Circuit first examined whether or not the First Amendment provides a right of access to sealed *qui tam* complaints. The court observed that the First Amendment does provide a right of access—although not absolute—to criminal trials and certain criminal proceedings, and that most circuit courts—including the Fourth Circuit—recognize such a right with respect to aspects of civil cases, even though the Supreme Court has not addressed that issue. The circuit court, though, ultimately determined that it was not necessary to resolve whether or not any right of access to aspects of criminal proceedings extends to sealed *qui tam* complaints. The court concluded that even if such a right exists, the First Amendment allows for narrowly-tailored denials of access when it serves a compelling government interest, and that the FCA's seal provision fits those criteria. First, the court held that the United States has a compelling interest in protecting the integrity of fraud investigations and that the FCA's seal provision was added to serve that interest. Next, the court held that the seal provision is narrowly-tailored, since: (1) "Congress crafted a detailed process for initiating and pursuing a *qui tam* complaint under the FCA, including a narrow window of time (i.e., 60 days) in which the seal provisions are mandatory;" (2) the seal provisions mandate judicial review once the statutory 60-day period expires, and the United States can only extend the seal upon a showing of good cause to the court; and (3) the seal only restricts relators from publicly discussing the fact that a *qui tam* suit was filed, but allows them to disclose the existence of the fraud if they choose to do so. Consequently, the Fourth Circuit affirmed the district court's dismissal of the right of access claim.

Gag on *Qui Tam* Relators

The Fourth Circuit addressed the appellants' second argument—that the FCA's seal provision violates the First Amendment by gagging relators from speaking about their *qui tam* complaints. The appellants were not relators seeking to speak about sealed *qui tam* cases, so they sought standing to raise this argument by contending that they were "willing listeners" available to relators who would discuss their *qui tam* complaints with them, but for the FCA seal provision. The appellants, though, could not identify any *qui tam* relator who fit this description. Thus, the court held that the appellants didn't have standing to bring their "willing speaker" claim and affirmed the district court's dismissal of that claim.

Separation of Powers

Finally, the Fourth Circuit considered the appellants' third argument—that the FCA's seal provision infringes on the power of federal district courts by requiring that all *qui tam* complaints be filed under seal, without any opportunity for a judicial assessment of whether or not sealing is necessary. The circuit court observed that the federal district courts enjoy three types of inherent power: (1) core powers under Article III of the Constitution; (2) those powers that are "necessary to the exercise of all others;" and (3) those powers that are "reasonably useful to achieve justice." The court concluded that the FCA's seal provision does not impact the first category, as that category relates to the judiciary's power to decide all cases over which it has jurisdiction, without Congressional interference in dictating the results of particular cases. The court concluded that the seal likely reaches the third, and possibly also the second categories. In either case, the court held, the seal provisions do not violate Constitutional separation of powers principles, since they are a proper subject of congressional legislation and do not intrude on 'the zone of judicial self-administration to such a degree as to prevent the judiciary from accomplishing its constitutionally assigned functions." As a result, the Fourth Circuit affirmed the district court's dismissal of the separation of powers claim.

U.S. ex rel. Summers v. LHC Group Inc., 2010 WL 3917058 (6th Cir. Oct. 4, 2010)

A relator filed a *qui tam* complaint against her former employer, alleging that the defendant fraudulently and unnecessarily billed Medicare for health services. The defendant moved to dismiss, and the U.S. District Court for the Middle District of Tennessee granted the motion, as it found that the relator's failure to file her complaint under seal was a fatal deficiency that required dismissal with prejudice to the relator, but without prejudice to the United States. The relator, arguing that the district court applied an improper legal standard, appealed to the Sixth Circuit.

This was a case of first impression for the Sixth Circuit, which observed that the primary purpose of the FCA's seal requirement was to allow the government sufficient time to consider whether it would intervene in the relator's suit or not. The relator urged the appellate court to adopt the balancing test announced by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, wherein the Ninth Circuit held that the FCA does not require dismissal of a *qui tam* case as a sanction for a relator's failure to comply with the seal provision. Instead, that court held that when the seal is broken, it becomes necessary to evaluate the balance between the purposes of *qui tam* actions and law enforcement needs, in light of the facts and circumstances of the case, by considering the harm the disclosure caused to the Government, the "relative severity" of the violation, and the presence or absence of good faith or willfulness on the relator's part.

The Sixth Circuit distinguished *Lujan*, noting that the complaint in that case was originally filed under seal, whereas the complaint in the instant case was never filed under seal. Rather than adopt the Ninth Circuit's balancing test, the Sixth Circuit announced a bright-line rule that "violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status." The court concluded that the Ninth Circuit's balancing test was "judicial overreach" in contravention of congressional intent, as it held that the FCA's sixty-day seal period reflects Congress' efforts to balance the various interests involved. Thus, the district court's ruling was affirmed and the relator's *qui tam* complaint was dismissed, with prejudice to the relator, but without prejudice to the Government.

See *U.S. ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 2011 WL 2462469 (D. Mass. June 16, 2011), at page 35.

I. Settlement Issues

U.S. ex rel. Ubl v. IIF Data Solutions, 2011 WL 1474783 (4th Cir. Apr. 19, 2011)

A relator brought a *qui tam* action against his former employer, a professional services provider, and the company's vice-president. The parties reached an agreement to settle the relator's FCA claims, but the United States—the real party in interest in the case—initially refused to agree to the settlement and declared it void. Although the relator did eventually persuade the government to agree to the terms of the settlement, the defendant did not participate in those conversations and chose not to agree to the terms any longer. The United States District Court for the Eastern District of Virginia then held that there was no longer a settlement offer for the government to accept and the case proceeded to trial. At trial, a jury found in favor of the defendants, and after the jury verdict, the court determined that the relator's case had been filed frivolously and, pursuant to the FCA's fee-shifting provisions, awarded attorneys' fees to the defendants. 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 by not enforcing the parties' settlement agreement, and erred by awarding attorneys' fees to the defendants. The Fourth Circuit affirmed the district court's ruling in part, holding that the district court properly refused to enforce the settlement agreement and committed no reversible error during trial, but finding that the relator's *qui tam* action was not clearly frivolous, and therefore reversed the district court's award of attorneys' fees to the defendants.

Settlement of FCA Cases

The Fourth Circuit first considered the relator's argument that the district court erred by refusing to enforce the parties' initial settlement agreement, which the relator asserted was only contingent on the government approval—a condition that was eventually satisfied. The relator argued that the district court erred when it held that the government's original rejection of the settlement agreement, and its declaration that the agreement was void, was of no consequence, once the government decided to consent to the agreement. The Fourth Circuit, though, agreed with the district court that although the government did eventually consent to the terms of the settlement, since the original agreement had been nullified and the defendant did not agree to a new settlement, there was no longer a valid settlement offer for the government to accept or for the court to approve.

Attorneys' Fees to Prevailing Defendants

The circuit court then turned to the district court's decision to award attorneys' fees to the defendants. The relator argued that his *qui tam* action was not clearly frivolous and that the district court erred by awarding the defendants' fees. The circuit court

agreed, as it found that the district court had rejected the defendants' pre-trial efforts to dismiss the case in two motions to dismiss and in a motion for summary judgment, and that the evidence presented by the relator at trial was not significantly different from the evidence presented at the summary judgment stage. The defendants disagreed with this assessment, arguing that the frivolousness of the relator's claims became apparent at trial, when the relator was exposed as a liar. However, the court found that the relator presented evidence that could have supported a verdict in his favor, even if the jury did not find the relator, himself, to be credible. Further, the court found that the jury's acceptance of the defendants' trial arguments over the relator's did not mean that the relator's action was clearly frivolous or that he had no reasonable chance of success. Thus, the court held that the district court erred when it concluded that the relator's claims had no reasonable chance of success and reversed the award of attorneys' fees to the defendants.

J. Vicarious Liability

U.S. v. Universal Health Servs. Inc., 2010 WL 4323082 (W.D. Va. Oct. 31, 2010)

Three relators originally brought a *qui tam* action against a juvenile psychiatric facility, its operator company, and their parent corporation, alleging that the defendants violated the federal False Claims Act (FCA) and the Commonwealth of Virginia's corresponding statute, the Virginia Fraud Against Taxpayers Act (VFATA) by submitting false or fraudulent claims in order to obtain Medicaid reimbursement. They also alleged retaliatory discharge and discrimination claims. The federal government and the state (collectively the "government") intervened and realleged the fraud claims in their own complaint. The defendants moved to dismiss all the claims against them, contending that the plaintiffs failed to state a claim and did not meet the pleading requirements. The United States District Court for the Western District of Virginia granted the motions in part. In particular, the court dismissed all claims against the parent corporation, Universal Health Services, (UHS), finding that there were not sufficient allegations tying the corporate parent to the alleged wrongdoing. The government and relators moved to amend their complaints in order to cure the defective allegations against UHS. The court denied the motions, as it determined that the proposed amended complaints did not sufficiently allege wrongdoing by UHS. The court held that the government's complaint still did not connect UHS to any submission of a false claim, and that there was no allegation that UHS used any of its control in the alleged fraud. Ultimately, the court held that the plaintiffs did not demonstrate why the corporate veil should be pierced, as it stated: "Even if UHS exercised significant supervision over [the juvenile facility], there still must be allegations that UHS abused the benefits of the corporate form in order to improperly insulate itself from violations of the FCA and VFATA committed by its subsidiaries. Because the Government has failed to provide such allegations, its amended complaint remains deficient to meet the requirements of Rule 8 and 9(b) on an alter ego theory." The court also held that UHS' alleged knowledge of its subsidiaries' fraud was not enough to pierce the corporate veil, noting that a parent's knowledge of a subsidiary's false claims and its failure to investigate the fraud do not provide a basis for imposing vicarious liability.

Likewise, the court denied the relators' motion to amend their complaint and bring retaliatory discharge and discrimination claims against UHS. The court held that the relators, who had all been employed by the subsidiary juvenile facility, had not adequately demonstrated that parent company UHS was their "employer," and subject to liability under the FCA and/or VFATA.

Judgments & Settlements

JULY 1, 2010–JUNE 30, 2011

Academy for Educational Development: (D.D.C. June 30, 2011)

The Academy for Educational Development (AED) agreed to pay the United States more than $5 million to settle allegations that it submitted false claims to the United States Agency for International Development (USAID). The alleged false claims involved two cooperative agreements to provide aid to the Federally Administered Tribal Area Livelihood Development Program in Pakistan and the Higher Education Project in Afghanistan. AED allegedly failed to ensure that it complied with applicable regulations concerning competition in procurements, adherence to contract specifications, and supervision of its subcontractors. In addition, AED allegedly failed to inform USAID when it discovered defects in its systems of internal controls and when it learned that certain AED subcontractors may have engaged in corruption and other improper activities.

Dr. Rakesh Nathu: (D. Nev. June 30, 2011)

Dr. Rakesh Nathu agreed to pay the United States $5.7 million plus interest to settle allegations that he submitted false claims to federal health care programs for various radiation oncology services. From 2007 through 2009, Nathu allegedly submitted improper claims to Medicare, TRICARE and the Federal Employees Health Benefits Plan by double-billing for several procedures affiliated with radiation treatment plans, for certain high reimbursement radiation oncology services when a different service should have been billed, and for medically unnecessary radiation oncology services.

Jackson Purchase Medical Center: (W.D. Ky. June 27, 2011)

Pinelake Regional Hospital, LLC d/b/a Jackson Purchase Medical Center agreed to pay the United States $998,770.74 to settle allegations that the medical center submitted false claims to Medicare by inappropriately submitting in-patient admissions charges to Medicare for certain gallbladder and biliary tract procedures—including Endoscopic Retrograde Cholangiopancreatography and Laparoscopic Cholecystectomy procedures—when those charges should have been submitted as out-patient admissions. In addition to the settlement agreement, the medical center agreed to enter into a five-year Corporate Integrity Agreement with the Office of Counsel to the Inspector General of the United States Department of Health and Human Services.

Anadarko Petroleum Corporation and Kerr-McGee Corporation: (E.D. Tex. June 20, 2011)

Anadarko Petroleum Corporation, Kerr-McGee Corporation and various affiliates agreed to pay the United States over $17 million to resolve claims that the companies violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal and Indian leases. The companies allegedly improperly

deducted from royalty values the cost of boosting gas up to pipeline pressures and improperly reported processed gas as unprocessed gas to reduce royalty payments. This settlement resolves a False Claims Act *qui tam* suit filed by Harold Wright, who is deceased. Wright's estate and heirs will receive his relator's award of $1.95 million plus interest.

GlaxoSmithKline LLC and SB Pharmco Puerto Rico Inc.: (D. Or. June 23, 2011)

GlaxoSmithKline LLC and SB Pharmco Puerto Rico Inc. agreed to pay 37 states and the District of Columbia $40.75 million to settle allegations involving adulterated drugs. Between 2001 and 2004, the company failed to comply with federal manufacturing guidelines in the production Kytril, Bactroban, Paxil and Avandamet, resulting in substandard drug manufacturing processes that produced adulterated drugs. This settlement follows a recent False Claims Act *qui tam* suit that resulted in a $750 million settlement with the federal government.

Fluor Hanford Inc.: (E.D. Wash. June 17, 2011)

Fluor Hanford Inc., a subsidiary of Fluor Federal Services Inc. and Fluor Corporation, agreed to pay the United States $4 million to settle allegations that its employees knowingly submitted false claims and received kickbacks while managing mixed radioactive waste operations at the Department of Energy's Hanford Nuclear Site in Washington. At least fourteen Fluor employees allegedly accepted kickbacks from the Hanford-area vendor Fast Pipe and Supply Company and its owner, Shane Fast. In addition, Fluor employees Susanna Zuniga, Gregory Detloff and Paul Kempf, allegedly made hundreds of fraudulent purchases using government purchase cards. The allegations and resulting settlement stemmed from a joint federal investigation by the Department of Justice, the U.S. Attorney's Office for the Eastern District of Washington and the Department of Energy Office of Inspector General.

Institute of International Education, Inc.: (S.D.N.Y June 16, 2011)

The Institute of International Education, Inc. (IIE) agreed to pay the United States $1 million to settle allegations that the company violated the False Claims Act by submitting false claims for payment to the State Department in connection with the funding it received to administer the Fulbright Program. IIE allegedly falsely reported the labor costs it incurred in performing under various Fulbright grants and knowingly presented fraudulent claims for payment and approval. This settlement resolves a 2007 *qui tam* suit filed by Rachel Goldberg, who was represented by TAFEF members Tim McInnis and Richard Bernstein of McInnis Law.

Novo Nordisk Inc.: (D. Md. June 10, 2011)

Novo Nordisk Inc. agreed to pay the United States $25 million to settle allegations that the company engaged in off-label marketing of its hemophilia drug, NovoSeven, which was promoted to both military and civilian physicians for non-hemophilia purposes. The federal share of the settlement is $21,425,790.59 and the state Medicaid share is $3,574,209.41. This settlement resolves a False Claims Act *qui tam* suit filed by Army physician Ian Black and former Novo Nordisk medical science liaison Oscar Montiel. These relators were represented by Waters & Kraus, LLP and co-counsel, Hargrove & Rea. They will receive a combined $3.5 million share of the federal recovery. In addition to the settlement agreement, the company agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services.

Novo Nordisk, Inc.: (E.D.N.Y. June 10, 2011)

Novo Nordisk, Inc. agreed to pay the United States and several states $1.725 million to resolve False Claims Act allegations involving the diabetes drugs Novolin, Novolin 70/30, Novolog, and Novolog 70/30. The company was alleged to have accessed and misused private patient information after company sales representatives made payments to pharmacists at Rite Aid drug stores in exchange for recommending Novo Nordisk products to customers. The pharmacists and sales representatives then identified patients who were candidates for the drugs and encouraged physicians, patients and other pharmacists to use or recommend the use of the drugs. As a result, the company was accused of causing false claims to be submitted to the Medicaid program. In addition to the settlement agreement, the company agreed to enter into a five-year Corporate Integrity Agreement with the U.S. Department of Health and Human Services.

UCB Inc.: (D.D.C. June 9, 2011)

UCB Inc. agreed to pay the United States over $34 million to resolve criminal and civil liability arising from its illegal promotion of Keppra, an epilepsy drug. The company agreed to pay $7.55 million in criminal fines, $1.1 million forfeiture and $25.7 million to resolve civil charges. Keppra was approved by the Food and Drug Administration as an anti-epileptic drug. UCB, however, promoted the sale of Keppra for off-label use in the treatment of migraines, psychiatric conditions and pain conditions. The civil settlement resolves two *qui tam* suits that were brought by Pamela Maly and Brian Root. These realtors will receive more than $2.8 million from the federal share of the civil recovery. Brian Root was represented by TAFEF members Ann Lugbill and Mark Hanna of Murphy Anderson PLLC. Their legal team was aided by co-counsel Rebecca Webber of Linnell, Choate & Webber, LLP, and TAFEF members Traci Buschner of Grant & Eisenhofer and Michelle Woolley of Murphy Anderson PLLC also assisted with this matter.

Midtown Imaging LLC: (S.D. Fla. June 8, 2011)

Midtown Imaging LLC and its former owners, Midtown Imaging P.A. and PBC Medical Imaging, agreed to pay the United States $3 million to resolve allegations that the radiology clinic violated the False Claims Act, the Anti-Kickback Act and the Stark Act, by submitting false claims to Medicare from 2000 through 2008—the claims were false because they did not disclose Midtown's improper leasing and professional services agreements with certain referring physicians and physician groups. This settlement is the result of a 2009 *qui tam* suit brought by two former Midtown Imaging radiologists, Dr. Teresa M. Cortinas and Dr. Walter E. Wojcicki. They will receive a $600,000 share of the federal recovery.

The City of Dallas: (N.D. Tex. June 7, 2011)

The City of Dallas agreed to pay the State of Texas and the United States $2,470,000 to resolve allegations involving improper Medicare and Medicaid billings. The City of Dallas and the company hired by the City to perform ambulance services, Southwest General Services of Dallas, LLC, were accused of knowingly defrauding Medicare and the Texas Medicaid program by miscoding claims submitted to the programs from January 2006 to May 2010. The settlement resolves a 2009 False Claims Act *qui tam* suit filed by relator Douglas Moore, who was formerly employed by the City of Dallas as an investigator. Moore was represented by TAFEF members David L. Haron and Maro E. Bush of Frank Haron Weiner, in coordination with TAFEF members Charles S. Siegel and Loren Jacobson of Waters & Kraus.

Ultralife Corporation: (W.D.N.Y. June 2, 2011)

Ultralife Corporation, formerly known as Ultralife Batteries Inc., agreed to pay the United States $2.7 million to resolve allegations that the company violated the False Claims Act by failing to provide current, accurate and complete cost and pricing data related to three contracts with the U.S. Army—instead, the company allegedly knowingly provided government contracting personnel with false certifications concerning the company's cost and pricing information, resulting in the Army paying inflated prices for Ultralife's lithium-manganese dioxide non-rechargeable batteries.

Dr. Mark W. Izard: (D. Conn. June 1, 2011)

Connecticut physician Dr. Mark W. Izard and his professional corporation, Mark W. Izard, P.C., agreed to pay the United States $2.2 million to resolve allegations that they violated the False Claims Act, when, from July 1, 2004 through April 30, 2009, Izard fraudulently billed Medicare and Medicaid for medical services that he did not provide. In addition, under the terms of the settlement agreement, Izard and his professional corporation are excluded from all federal health care programs, including

Medicare and Medicaid, for a period of seven years.

Gentiva Health Services: (E.D.N.Y. June 1, 2011)

Gentiva Health Services agreed to pay the United States $12.5 million to settle claims that it fraudulently billed Medicare for advertising costs and other related expenses that are not covered by the program. A federal investigation led by the U.S. Attorney's Office in Brooklyn and the Office of the Inspector General for the Department of Health and Human Services found that the company improperly billed Medicare between 1998 and 2000 for salaries and other costs of employees performing sales functions designed to increase patient use.

American Medical Response: (E.D.N.Y. May 26, 2011)

American Medical Response (AMR) agreed to pay the United States $2.7 million to resolve allegations that it defrauded Medicare and other federal health insurance programs between 2001 and 2005, when AMR and subsidiaries Park Ambulance Service, Five Counties Ambulance Service and Associated Ambulance Service allegedly knowingly submitted falsely inflated claims through its Brooklyn and Long Island offices. This settlement resolves a False Claims Act *qui tam* suit brought by several former employees.

Areté Sleep LLC, Areté Sleep Therapy LLC and Areté Holdings LLC: (D. Ariz. May 26, 2011)

Areté Sleep LLC, Areté Sleep Therapy LLC and Areté Holdings LLC agreed to pay the United States $650,000 to resolve allegations that their sleep medicine and durable medical equipment facilities in Arizona and Texas submitted false claims to Medicare. From November 1, 2002, through December 31, 2009, Areté allegedly submitted false claims to Medicare for diagnostic sleep tests performed by technicians lacking the licenses or certifications required by Medicare rules and regulations. The relator in this case, Amanda Drews, will receive a $107,250 share of the settlement.

Renal Care Group, Renal Care Group Supply, and Fresenius Medical Care Holdings, Inc.: (M.D. Tenn. May 26, 2011)

Renal Care Group, Renal Care Group Supply Company, and Fresenius Medical Care Holdings, Inc. were ordered to pay the United States $82.6 million to resolve a False Claims Act *qui tam* suit involving Medicare overbilling. Between January 1999 and December 2005, Fresenius and the companies it owns allegedly fraudulently billed the Medicare program for supplies and equipment provided to end stage renal disease patients. This suit was brought by relators Julie Williams and Dr. John Martinez, who were represented by TAFEF member Eric Young.

Shell Oil Co.: (E.D. Tex. May 10, 2011)

Shell Oil Co. and various affiliates agreed to pay the United States $2.2 million to settle allegations that the companies underpaid royalties owed on natural gas produced from federal leases. Shell allegedly underpaid royalties by improperly reporting processed gas as unprocessed gas, and by improperly deducting the cost of boosting gas up to pipeline pressure. This settlement resolves a False Claims Act *qui tam* suit filed by Harold Wright, who is deceased. Wright's estate and heirs will receive a $572,000 share of the federal recovery.

Quest Diagnostics Inc.: (E.D. Cal. May 9, 2011)

Quest Diagnostics Inc. agreed in principle to pay the State of California $241 million to settle a *qui tam* action brought by competitor Hunter Laboratories, which filed the suit in November 2005 under California's False Claims Act. The complaint alleged that the company did not comply with California's "comparable charge" regulations, which resulted in overpayments by the state's Medicaid program, Medi-Cal for laboratory testing services.

Serono Laboratories, Inc.: (D. Md. May 4, 2011)

Serono Laboratories, Inc., EMD Serono, Inc., Merck Serono S.A., and Ares Trading S.A. agreed to pay the United States $44.3 million to resolve allegations involving marketing practices associated with the multiple sclerosis drug Rebif. Between January 1, 2002 and December 31, 2009, Serono allegedly paid kickbacks to health care providers to induce them to promote and prescribe Rebif. This settlement resolves a False Claims Act *qui tam* action filed in 2005 by Timothy Amato, a former business director for Serono. Amato will receive about a $5.2 million share of the federal recovery.

FedEx Corp.: (D.D.C. May 3, 2011)

FedEx Corp. agreed to pay the United States $8 million to settle allegations that it improperly blamed late deliveries to federal government agencies on security delays. While there certainly were increased security measures at government buildings following the September 11, 2001, terrorist attacks, Fedex couriers allegedly continued to use and misuse security delay codes long after security measures at these buildings subsided or became a routine part of making deliveries. As a result, the company allegedly avoided reimbursing federal government agencies for the late deliveries. This settlement was the result of a False Claims Act *qui tam* action brought by Mary Garofalo, a FedEx employee, who was represented by the firm Mallon & McCool and by TAFEF members Julie Grohovsky and Shan Wu of Wu, Grohovsky & Whipple. Garofolo will receive a $1.44 million share of the federal recovery.

Wheelabrator Technologies Inc.: (D. Mass. May 3, 2011)

Wheelabrator Technologies Inc. agreed to pay the State of Massachusetts $7.5 million to settle allegations that the company violated the Clean Water Act, the Hazardous Waste Management Act, and the Wetlands Protection Act by improperly disposing of contaminated sludge and waste water at its plants in Millbury and Saugus, and by improperly treating and disposing of ash at its plants in Saugus and North Andover. The Massachusetts Environmental Strike Force launched an investigation into the company's conduct in September 2009 after two whistleblowers—one a current employee and the other a former employee of the Saugus facility—filed a *qui tam* suit under the Massachusetts False Claims Act.

Duane Reade Inc.: (S.D.N.Y. April 27, 2011)

Duane Reade Inc. agreed to pay the United States $369,744 to resolve allegations that it submitted false claims to the New York Medicaid program and illegally paid doctors to prescribe prescription drugs. These allegations specifically involve Duane Reade's Express Pharmacy Kiosk Program, which allowed customers to enter prescription information electronically at their doctors' offices before picking them up at their local Duane Reade store. Duane Reade allegedly failed to charge a fair market rate for renting kiosk space at doctors' offices and instead paid practitioners higher "rents" for prescribing more medications.

Par Pharmaceutical Companies, Inc.: (April 27, 2011)

Par Pharmaceutical Companies, Inc. agreed in principle to pay the United States, Texas, and Florida $154 million to settle False Claims Act allegations that Par reported inflated average wholesale pricing information, thereby causing government entities to pay inflated reimbursements for drugs under Medicare and Medicaid. This settlement resolves claims involving state Medicaid programs in 49 states (excluding Illinois). The claims in this case were brought by Ven-A-Care of the Florida Keys, Inc., which was represented by the litigation team of TAFEF member Jim Breen.

Masonicare Health Center: (D. Conn. April 26, 2011)

The Masonicare Health Center agreed to pay the United States $447,776 to resolve allegations that the health center submitted, or caused to be submitted, improper claims to Medicare and Medicaid for leuprolide acetate (Lupron) injections, which are used to treat prostate cancer in men and endometriosis and fibroids in women. The reimbursement rate for treating female patients is higher, and between January 1, 2001 and May 31, 2010, Masonicare allegedly received substantially higher reimbursements from the federal healthcare programs by using female billing codes when treating male patients. In addition, Masonicare allegedly improperly avoided an obligation to self-

report and pay excess money back to Medicare and Medicaid after discovering the improper claims.

Dartmouth-Hitchcock Medical Center: (D. Vt. April 26, 2011)

Dartmouth-Hitchcock Medical Center agreed to pay the United States, the State of Vermont and the State of New Hampshire over $2.2 million to settle allegations that it improperly billed various federal health programs. Of the total settlement amount, $80,396 will be paid to Vermont, $61,541 will be paid to New Hampshire and $1.5 million will be paid to the federal government. This settlement follows a False Claims Act *qui tam* action filed in 2007 by Dr. Thomas J. Prendergast, a physician in the DHMC pulmonary department. Prendergast alleged that the hospital improperly billed various federal health programs, such as Medicare, Medicaid and Veterans Affairs, for services performed by resident staff exclusive of sufficient supervision by physicians. Prendergast will receive $334,440 of the federal recovery.

Dyncorp International LLC and the Sandi Group: (D.D.C. April 22, 2011)

Dyncorp International, LLC and its subcontractor The Sandi Group agreed to pay the United States over $8.7 million to settle allegations that the companies submitted false claims in connection with construction costs for State Department civilian police training camps in Iraq. DynCorp agreed to pay $7.7 million to resolve allegations that it submitted inflated claims for the construction of container camps and TSG agreed to pay $1.01 million to resolve allegations that it improperly sought reimbursement for danger pay. This settlement resolves a False Claims Act *qui tam* suit brought by Drew Halldorson and Brian Evancho, two former employees of The Sandi Group. Halldorson and Evancho will receive a $481,710 share of the federal recovery. The relators were represented by TAFEF member Victor A. Kubli of Kubli & Associates, P.C.

Sunpower Inc.: (N.D. Ohio April 22, 2011)

Sunpower Inc. agreed to pay the United States more than $1.2 million to resolve allegations that it improperly billed the NASA Glenn Research Center. NASA contracted Sunpower for the development of an Advanced Stirling Converter, and between 2006 and 2009, Sunpower allegedly charged NASA for unallowable organizational costs associated with a related company, Engine, Co.

Norton Healthcare: (W.D. Ky. April 21, 2011)

Norton Healthcare agreed to pay the United States $782,842 to settle allegations related to Medicare overbilling. From January 2005 through February 2010, Norton allegedly inappropriately submitted charges for outpatient wound care, infusion and

radiation oncology services, and submitted charges for services that were never performed. These improper billing practices were discovered through a routine search by AdvanceMed, a Medicare contractor that analyzes claims and detects fraud.

Cardinal Health Inc.: (W.D. Mo. April 21, 2011)

Cardinal Health Inc. agreed to pay the United States $8 million to resolve False Claims Act and Anti-Kickback Act allegations that the company paid kickbacks to induce referral orders for its prescription drugs. This settlement resolves a False Claims Act *qui tam* action filed by former pharmacy owner R. Daniel Saleaumua and pharmacy consultant Kevin Rinne, who will receive a $760,000 share of the federal recovery.

CVS Pharmacy Inc.: (D. Minn. April 15, 2011)

CVS Pharmacy Inc., the retail pharmacy division of CVS Caremark Corporation, agreed to pay the United States and 10 states at total of $17.5 million to resolve False Claims Act allegations that it submitted inflated prescription claims to the government by billing the Medicaid programs in Alabama, California, Florida, Indiana, Massachusetts, Michigan, Minnesota, New Hampshire, Nevada and Rhode Island for more than what it was owed for prescription drugs. CVS will pay the United States $7,993,615.55 and will pay the States $9,506,384.45 plus interest. CVS also agreed to enter into an amended Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. This settlement resolves a False Claims Act *qui tam* action filed by Stephani LeFlore, a CVS pharmacist in St. Paul, Minnesota. LeFlore, who was represented by TAFEF members, Neil Thompson and Brian Wojtalewicz, as well as Robert Christensen, James VanderLinden and local Wisconsin council Aaron Halstead, will receive a relator's share of about $2.6 million.

Dr. Kevin J. O'Brien: (D.Ariz April 13, 2011)

Dr. Kevin J. O'Brien, an Arizona podiatrist, agreed to pay the United States $98,000 to resolve allegations that he and his podiatry practice, Kevin J. O'Brien D.P.M. Inc., violated the federal False Claims Act from January 2002 to December of 2005, by falsely billing Medicare for services not covered by the health care program.

Rickey Kanter: (E.D. Wis. April 11, 2011)

Rickey Kanter, former CEO of Rikco International, agreed to pay the United States $27 million to resolve allegations of Medicare fraud. Kanter, doing business as Dr. Comfort, sold shoe inserts for diabetic patients that were allegedly falsely represented and marketed as conforming to Medicare's requirements. The settlement resolves a False Claims Act *qui tam* suit filed by two former employees of Dr. Comfort. They will receive more than $4.8 million from the civil recovery.

Dr. William J. Garrity: (D. Conn. April 11, 2011)

Dr. William J. Garrity agreed to pay the United States $379,764 to resolve allegations that he violated the False Claims Act between 2002 and 2009, by improperly billing Medicare for patient office visits that were either not medically necessary or were never provided. The allegations primarily involved osteopathic manipulative treatment (OMT), a medical procedure used by osteopathic physicians to treat musculoskeletal disorders. In addition to the settlement agreement, Garrity agreed to enter into a five-year Corporate Integrity Agreement with the Department of Health and Human Services.

Securitas GmbH Werkschutz: (April 5, 2011)

The German security company Securitas GmbH Werkschutz agreed to pay the United States $9.1 million to settle allegations of defrauding the United States Army on security contracts. The company allegedly billed the Army for guard hours at U.S. Army installations in Germany that were not actually worked. Under the terms of the settlement agreement, the company also agreed to dismiss its own claims against the Army, totaling about $5.7 million.

Verizon Communications Inc.: (D.D.C. April 5, 2011)

Verizon Communications Inc. agreed to pay the United States $93.5 million to resolve fraud allegations involving General Services Administration (GSA) contracts. Verizon subsidiary MCI Communications Services Inc., dba Verizon Business Services, allegedly overcharged GSA on invoices dealing with government-wide voice and data telecommunications services contracts. This settlement resolves a *qui tam* suit brought by Stephen M. Shea and 2Probe LLC.

Rex Healthcare: (W.D.N.Y. April 4, 2011)

Rex Healthcare agreed to pay the United States $1.9 million, plus interest, to settle allegations that it submitted false claims to Medicare. From 2004 through 2007, the hospital allegedly submitted claims to Medicare for a variety of minimally-invasive procedures that were classified as inpatient admissions, which allowed Rex to improperly increase its reimbursements from Medicare. Most of the claims were for kyphoplasty, a spinal fracture treatment. This settlement was the result of a 2008 False Claims Act *qui tam* action filed by former Kyphon, Inc. employees Craig Patrick and Charles Bates. The relators, who were represented by TAFEF member Mary Louise Cohen of Phillips & Cohen LLP, will receive $80,000 of the federal recovery.

Merck & Co., Schering Corp. and Warrick Pharmaceuticals Corp.: (W.D. Wis. Mar. 28, 2011)

Merck & Co., Schering Corp. and Warrick Pharmaceuticals Corp. agreed to pay the State of Wisconsin $4.2 million to resolve allegations that the companies defrauded the Wisconsin Medicaid program by reporting false prices to inflate sales and alter reimbursement formulas. Under the terms of the settlement agreement, the companies agreed to pay $3.7 million in restitution and $550,000 in costs and fees.

Occidental Petroleum Corporation, Occidental Oil and Gas Corporation, and OXY USA Inc.: (E.D. Tex. Mar. 22, 2011)

Occidental Petroleum Corporation, Occidental Oil and Gas Corporation, and OXY USA Inc. agreed to pay the United States $2.05 million plus interest to settle allegations that the companies violated the False Claims Act by knowingly underpaying royalties owed on natural gas produced from federal leases. This settlement is the result of a *qui tam* action filed by Harold Wright, who is now deceased. Mr. Wright's heirs will receive his relator's share award of $91,000 plus interest.

Kellum Family Medical Practice Associates: (W.D. Tex. Mar. 21, 2011)

Kellum Family Practice Associates, two of its principal physicians, and two employees agreed to pay the United States $1.5 million and agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services Office of the Inspector General to settle a False Claims Act *qui tam* action, in which the company was alleged to have employed unlicensed personnel to treat Medicare, Medicaid and Tricare patients. The *qui tam* action was filed by Julie Hajek Stewart, a former medical assistant at the company. Stewart will receive $250,000 of the recovery.

Medline Industries, Inc. and The Medline Foundation: (N.D. Ill. Mar. 11, 2011)

Medline Industries, Inc. and The Medline Foundation agreed to pay the United States $85 million to settle allegations that they violated the False Claims Act by paying kickbacks to hospitals and other health care providers that purchased company products under Medicare and Medicaid. This settlement resolves a *qui tam* action filed by Sean Mason, a former company employee. Mason, who was represented by attorneys from Milberg LLP, Marek Law Office PC, Williams Montgomery & John Ltd and Clifford Law Offices PC will receive $23,375,000 (27.5%) of the settlement amount as his relator's share.

AstraZeneca Pharmaceuticals LP and AstraZeneca LP: (Mar. 10, 2011)

AstraZeneca agreed to pay $68.5 million as part of a multistate settlement involving allegations that the company promoted its psychiatric drug Seroquel for unapproved uses. While the drug was approved for treating schizophrenia and bipolar disorder, AstraZeneca promoted the drug for non-approved uses, including for dementia, Alzheimer's, post traumatic stress disorder, depression and anxiety. The settlement funds will be shared by 37 states and the District of Columbia.

Avaya Inc. and CIT Group, Inc.: (C.D. Cal. Mar. 2, 2011)

Avaya Inc. and CIT Group, Inc agreed to pay the United States more than $16.5 million to resolve allegations that the companies overcharged federal and state government agencies for the lease and purchase of desktop telephone systems. Between the mid-1990s and 2006, Avaya, a New Jersey telecommunications company, allegedly knowingly billed hundreds of agencies and collected payments for phone systems that did not work and billed its government customers and received payments for phone systems that were no longer in use. CIT Group, Inc., a New York-based financial services company, allegedly later bought some of Avaya's customer accounts and then knowingly continued the improper billing practices. Avaya agreed to pay $13,481,791 and CIT agreed to pay $3,111,400. California, Delaware, Florida, Illinois, Nevada, Tennessee; the Commonwealths of Massachusetts, Virginia; and the District of Columbia will share in the settlement. The settlement resolves a False Claims Act *qui tam* action that was filed in 2004 by two former Avaya employees, Mauro Vosilla and Steven Rossow. Vosilla and Rossow will share the relators' award of $3.3 million.

Blue Cross Blue Shield of Illinois: (N.D. Ill. Feb. 24, 2011)

Blue Cross Blue Shield of Illinois agreed to pay the United States and the State of Illinois $25 million to settle False Claims Act allegations that the company denied nursing care coverage for sick children and fraudulently shifted the cost of such care to the state and federal Medicaid programs. Under the settlement agreement, the company will pay the State of Illinois $14.25 million and the United States $9.5 million. The company also agreed to pay $1.25 million to the State of Illinois to resolve consumer fraud allegations.

Innovative Resources Group, LLC (dba APS Healthcare Midwest): (N.D. Ga. Feb. 22, 2011)

APS Healthcare Midwest agreed to pay the United States and the State of Georgia a total $13 million to settle a False Claims Act *qui tam* action that alleged that APS submitted false claims to Medicaid, through the Georgia Department of Community

Health, for specialty services related to disease management and case management that were not provided. As part of the settlement agreement, APS agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. The relator in this case, Michael Claeys, was represented by TAFEF member Julie Bracker of Bothwell Bracker & Vann.

Alaska DigiTel LLC: (D. Ak. Feb. 22, 2011)

General Communication Inc. (GCI) agreed to pay the United States $1,556,075 to settle a False Claims Act *qui tam* action involving Alaska DigiTel LLC, a former Alaska limited liability company that is now owned by GCI. The *qui tam* suit alleged that, between January 1, 2004 and August 31, 2008, Alaska DigiTel submitted false claims for ineligible subscribers to the Federal Communications Commission's (FCC) Low Income Support Program.

Catholic Healthcare West: (E.D. Cal. Feb. 18, 2011)

Catholic Healthcare West agreed to pay the United States $9.1 million to settle allegations that seven of its hospitals—Community Hospital of San Bernardino, California; St. Bernadine Medical Center in San Bernardino, California; St. Elizabeth Community Hospital in Red Bluff, California; O'Connor Hospital in San Jose, California; Seton Medical Center in Daly City, California; St. Joseph's Hospital and Medical Center in Phoenix, Arizona; and St. John's Regional Medical Center in Oxnard, California—violated the False Claims Act by committing Medicare fraud. Three of the hospitals allegedly received overpayments due to Medicare processing errors, but did not return the funds when the errors were discovered; three other hospitals allegedly submitted inflated costs for their home health agencies and were subsequently overpaid; and one hospital claimed entitlement to additional funds for treating a high percentage of patients with end-stage renal disease for several years, including a period for which it was not eligible.

Pharmacia Corporation: (N.Y. Sup. Ct. Feb. 18, 2011)

Pharmacia Corporation agreed to pay $2.5 million to the New York Medicaid program and to the Elderly Pharmaceutical Insurance Coverage Program (EPIC) to settle allegations related to inflated drug costs. The State of New York alleged that Pharmacia intentionally reported false and inflated prices for its products, causing New York's Medicaid Program and the EPIC program to pay higher prices for Pharmacia's prescription drugs. Pharmacia also agreed to reimburse the state for the $50,000 costs of its investigation.

Cheyenne Vision Clinic, P.C.: (D.S.D. Feb. 14, 2011)

Cheyenne Vision Clinic, P.C. agreed to pay the United States $235,000 to settle False Claims Act allegations that the company improperly billed the federal government and the Wyoming Medicaid program for extended color vision exams for which the company did not have the required equipment.

Senior Care Group Inc.: (W.D.N.C. Feb. 10, 2011)

Senior Care Group Inc. agreed to pay the United States $953,375 and to enter into a five-year corporate integrity agreement to settle allegations that the company defrauded the Medicare program by billing Medicare for unnecessary services provided by the company's rehabilitation contractor, Evergreen Rehabilitation LLC. This settlement follows a multi-year investigation carried out by the U.S. Department of Health and Human Services Office of Inspector General and the Federal Bureau of Investigation.

Actavis Mid-Atlantic LLC and Actavls Elizabeth LLC: (Texas Feb. 1, 2011)

Actavis Mid-Atlantic LLC and Actavis Elizabeth were ordered by a Texas jury to pay the United States and the State of Texas $170.3 million for overcharging the state Medicaid program. This verdict resolves a False Claims Act *qui tam* action filed by Ven-A-Care of the Florida Keys Inc., which was represented by TAFEF members Jim Breen of The Breen Law Firm PA; Jarrett Anderson of Anderson LLC; John Clark of Goode Casseb Jones Riklin Choate & Watson PC; the Law Office of Glenn Grossenbacher; and Prichard Hawkins McFarland & Young.

CareSource, CareSource Management Group Co. and CareSource USA Holding Co.: (S.D. Ohio Feb. 1, 2011)

CareSource, CareSource Management Group Co. and CareSource USA Holding Co. agreed to pay the United States and the state of Ohio $26 million to resolve allegations that they defrauded Medicaid by submitting false data and by receiving reimbursements for health care services that were not provided, including screening, assessment, and case management services for adults and children with special health care needs. This settlement resolves a False Claims Act *qui tam* action filed by Laura Rupert and Robin Herzog, two former CareSource employees. Rupert and Herzog will receive a $3.1 million share of the federal recovery. The relators were represented by TAFEF members Brian Kenney and Pam Brecht of Kenney & McCafferty as well as TAFEF members Rick Morgan and Mary Jones of Morgan Verkamp.

Oracle America Inc.: (E.D. Ark. Jan. 31, 2011)

Oracle America Inc. agreed to pay the United States $46 million to resolve allegations that Sun Microsystems Inc., a corporation that merged with Oracle in 2010, violated the False Claims Act and the Anti-Kickback Act by submitting false claims and causing others to submit false claims to the General Services Administration (GSA) and to other federal agencies, and by paying illegal kickbacks to systems integrator companies. This settlement resolves a False Claims Act *qui tam* action filed in 2004 by Norman Rille and Neal Roberts, who were represented by TAFEF members Ron and Von Packard of Packard, Packard & Johnson.

N.I. Teijin Shoji Co. Ltd.: (Jan. 25, 2011)

N.I. Teijin Shoji Co. Ltd. and American subsidiary N.I. Teijin Shoji (USA) Inc. agreed to pay the United States $1.5 million to resolve potential False Claims Act allegations involving the companies' importation and sale of Zylon fiber—a key ballistic material in bulletproof vests that has been alleged to be defective due to concerns that the fiber degrades quickly over time and that this degradation renders bulletproof vests containing woven Zylon fiber unfit for use.

Lockheed Martin Inc.: (S.D. Miss. Jan. 24, 2011)

Lockheed Martin Inc. agreed to pay the United States $2 million to settle allegations that the company conspired to submit false claims under a contract with the General Services Administration (GSA) in support of the Naval Oceanographic Major Shared Resource Center (NAVO MSRC). This settlement resolves a False Claims Act *qui tam* action filed in 2009 by David Magee, a former employee at the NAVO MSRC. Magee, who was represented by TAFEF members Jim Helmer, Paul Martins and Rob Rice of Helmer, Martins, Rice & Popham, along with co-counsel, Gary Galiher, Rick DeRobertis and Dale Saito of Galiher DeRobertis Ono, will receive a $560,000 share of the federal recovery.

St. Jude Medical Inc.: (D. Mass. Jan. 20, 2011)

St. Jude Medical Inc. agreed to pay the United States $16 million to resolve allegations that the company violated the False Claims Act and the Anti-kickback Act by knowingly and intentionally using post-market studies and a patient registry as means to pay kickbacks to induce participating physicians to implant St. Jude pacemakers and implantable cardioverter defibrillators (ICDs) in their patients. This settlement resolves a False Claims Act *qui tam* action filed by Charles Donigian, a former St. Jude technician. Donigan who was represented by TAFEF members from Nolan & Auerbach; Thomas & Associates; and the Law Office of Suzanne E. Durrell, will receive a $2.64 million share of the total recovery amount.

Young Adult Institute, Inc.: (S.D.N.Y. Jan. 18, 2011)

Young Adult Institute, Inc. agreed to pay the United States and the State of New York $18 million to settle allegations that, from 1999 through 2010, the company submitted false consolidated fiscal reports that inflated the costs of certain residential facilities as a means to receive Medicaid funding to which it was not entitled. Company officials Philip H. Levy and Karen Wegmann, as well as former CEO Joel M. Levy, were also allegedly involved in the fraudulent scheme. Of the settlement amount, the State of New York will receive $10.8 million and the United States will receive the remainder. This settlement was the result of a False Claims Act *qui tam* action filed by Richard Faden, a former budget director for the company. Faden was represented by TAFEF member David Koenigsberg of Menz Bonner & Komar LLP and Bruce Menken of Beranbaum Menken LLP.

Fastenal Company: (W.D. Mo. Jan. 13, 2011)

Fastenal Company, a Minnesota-based national hardware store distributor, agreed to pay the United States $6.25 million to resolve allegations that the company violated the False Claims Act by failing to meet its obligations under a contract with the General Services Administration's Multiple Award Schedule. Specifically, the company allegedly failed to provide complete information about its commercial sales practices, overcharged government customers, and knowingly sold products to the government that were manufactured in countries that do not have trade agreements with the United States, in violation of the Trade Agreements Act. The investigation into Fastenal's activities was prompted by a post-award audit conducted by the GSA Office of Inspector General.

MSO Washington, Inc.: (W.D. Wash. Jan. 7, 2011)

MSO Washington, Inc. and MSO's owner, Charles Plunkett, agreed to pay the United States $565,000 to settle allegations that, between January 1, 2002 and continuing through the present, MSO submitted false claims to Medicare and Medicaid by upcoding for services, and by seeking reimbursement for medically unnecessary services, for services lacking proper documentation, and for services that were never rendered. In addition to the settlement amount, MSO and Plunkett agreed to enter into a five-year Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services.

Seven Hospitals: (W.D. N.Y. Jan. 4, 2011)

Seven hospitals agreed to pay the United States more than $6.3 million to settle allegations that they submitted false claims to Medicare related to kyphoplasty procedures performed between 2000 and 2008, by performing the procedures on an in-patient

basis to increase their Medicare billings. The hospitals involved in the settlement include: Lakeland Regional Medical Center, Lakeland, Fla. ($1,660,134.49); The Health Care Authority of Morgan County—City of Decatur dba Decatur General Hospital, Decatur, Ala. ($537,892.88); St. Dominic-Jackson Memorial Hospital, Jackson, Miss. ($555,949.35); Seton Medical Center, Austin, Texas ($1,232,955.91); Greenville Memorial Hospital, Greenville, S.C. ($1,026,764.01); Presbyterian Orthopaedic Hospital, Charlotte, N.C. ($637,872.57); and The Health Care Authority of Lauderdale County and the City of Florence, Ala., dba the Coffee Health Group, fka Eliza Coffee Memorial Hospital ($676,038.00). This settlement resolves a 2008 False Claims Act *qui tam* action filed in Buffalo, New York by Craig Patrick and Charles Bates, who will receive a $1.1 million share of the federal recovery. The relators were represented by TAFEF member Mary Louise Cohen of Phillips & Cohen.

St. John's Mercy Health Care and St. John's Health System, Inc.: (E.D. Mo. Dec. 30, 2010)

St. John's Mercy Health Care and St. John's Health System, Inc. agreed to pay the United States $2.2 million to settle allegations involving routine podiatry services provided by clinics at six St. John's hospitals in Missouri. St John's allegedly submitted false claims or caused false claims to be submitted to Medicare and to the federal portion of the Missouri Medicaid program. From January 1, 2005 to March 31 2010, St. John's was alleged to have improperly billed the federal health care programs for services that were not covered or medically necessary. This settlement and the related investigation by the Department of Health and Human Services, Office of Inspector General was the result of a state-wide probe of podiatry services involving several hospitals and providers.

Detroit Medical Center: (E.D Mich. Dec. 30, 2010)

Detroit Medical Center agreed to pay the United States $30 million to settle allegations that it violated the False Claims Act, the Anti-Kickback statute and the Stark statute, by engaging in improper financial relationships with referring physicians. The medical center self-reported its violations to the government after discovering them while preparing for its sale to Vanguard Health Systems Inc. This case was handled by the Department of Justice's Civil Division, the US Attorney's Office for the Eastern District of Michigan, the Office of Inspector General of the Department of Health and Human Services, and the Centers for Medicare and Medicaid Services.

John D. Archbold Memorial Hospital Inc.: (N.D Ga. Dec. 22, 2010)

John D. Archbold Memorial Hospital Inc. agreed to pay the United States $13.9 million to settle allegations that it submitted false claims to Georgia's Medicaid program. From November 2002 to July 2008, the hospital was alleged to have made false repre-

sentations to the Georgia Department of Community Health. The hospital received millions of dollars in Medicaid Upper Payment Limit (UPL) program funds and Disproportionate Share Hospital (DSH) funds, to which it was not entitled. The civil settlement resolves a *qui tam* lawsuit filed by Wesley Simms, M.D. Simms will receive $695,151 as his share of the federal government's recovery.

Ray A. Silao, M.D.: (D. Ariz. Dec. 22, 2010)

Ray A. Silao, M.D., a physician practicing in Yuma, Ariz., agreed to pay the United States $92,000 to settle allegations that he submitted false claims to Medicare. Dr. Silao allegedly falsely billed Medicare for Thoracic Electrical Bioimpedance (TEB) tests by falsely representing that the patients receiving the tests met applicable Medicare coverage requirements.

Dey Inc. et al: (D. Mass. Dec. 20, 2010)

Dey Inc., Dey Pharma L.P. (formerly known as Dey, L.P.) and Dey L.P. Inc. agreed to pay $280 million to settle False Claims Act allegations that the companies engaged in a scheme to report false and inflated prices for several pharmaceutical products, including: Albuterol Sulfate, Albuterol MDI, Cromolyn Sodium and Ipratropium Bromide. This settlement was the result of s False Claims Act *qui tam* action filed by Ven-A-Care of the Florida Keys Inc. and its principals. Ven-A-Care was represented by TAFEF member Jim Breen of The Breen Law Firm, P.A. The Ven-A-Care whistleblowers will receive a $67.2 million share of the federal government's recovery.

Elan Corporation, PLC and Eisai Company, Ltd.: (D. Mass. Dec. 15, 2010)

Irish pharmaceutical manufacturer Elan Corporation, PLC and Japanese pharmaceutical company Eisai Company, Ltd. have agreed to pay the United States a combined $214.5 million to settle allegations involving off-label marketing of the anti-seizure medication Zonegran. Elan has also agreed to enter into a Corporate Integrity Agreement with OIG-HHS. The companies allegedly violated Federal and State False Claims statutes, the Federal Food, Drug, and Cosmetic Act, and the Medicare-Medicaid Anti-Kickback Act. The companies were alleged to have illegally promoted Zonegran and to have caused false claims to be submitted to government health care programs for a variety of uses that were not medically accepted and therefore not covered by the programs. This settlement resolves a *qui tam* suit filed by Dr. Lee Chartock, a Massachusetts physician. Chartock was represented by TAFEF members Suzanne E. Durrell and Robert M. Thomas, Jr. He will receive over $10 million from the federal share of the civil recovery.

Northrop Grumman Corporation: (CD. Cal. Dec. 8, 2010)

Northrop Grumman Corporation has agreed to pay the United States $5.21 million to settle allegations that, from 1998 to 2002, it violated the False Claims Act by developing and implementing the Advance Topcoat System for the Air Force's B-2 bomber, but failed to fully disclose cohesion problems with the system to the Air Force.

Johnson & Johnson: (Pennsylvania Dec. 7, 2010)

Johnson & Johnson was ordered to pay over $51 million in damages and penalties after a Pennsylvania judge found that the company falsely reported the prices of its drugs. The company knowingly manipulated the average wholesale prices of its drugs and engaged in misconduct when marketing the drugs to pharmacists. Johnson & Johnson will repay more than $45 million to Medicaid and the Pharmaceutical Assistance Contract for the Elderly (PACE) program, and will also pay more than $6.5 million in civil penalties.

Kos Pharmaceuticals: (M.D. La. Dec. 7, 2010)

Kos Pharmaceuticals, a subsidiary of Abbott Laboratories, agreed to pay the United States $41 million to resolve criminal and civil charges associated with the cholesterol drugs Advicor and Niaspan. In addition to the monetary settlement, Kos agreed to enter into a Deferred Prosecution Agreement. Kos was accused of knowingly causing the submission of false or fraudulent claims for payment to federal healthcare programs, as well as offering to pay medical professionals illegal kickbacks. This settlement resolves two *qui tam* lawsuits filed by former Kos employees—Nanci Johnson, Therese Lalcebrinlc, and Ruth Westover filed a *qui tam* action in March 2004 in the United States District Court for Eastern District of Wisconsin, and Amanda Cashi and Kimberly Scullin filed a separate *qui tam* action in the United States District Court for the Western District of Louisiana. The relators will split a $6.4 million share of the federal recovery. TAFEF member Mary Louise Cohen of Phillips & Cohen, LLP represented relators Cashi and Scullin.

Abbott Laboratories Inc., B. Braun Medical Inc. and Roxane Laboratories: (D. Fla. Dec. 7, 2010)

Abbott Laboratories Inc., B. Braun Medical Inc., Roxane Laboratories Inc. (Boehringer Ingelheim Roxane Inc.) and affiliated entities have agreed to pay the United States $421 million to settle allegations that the companies violated the False Claims Act by knowingly reporting false and inflated prices for numerous pharmaceutical products.

Roxane agreed to pay $280 million to resolve claims against it and related entities: Roxane Laboratories Inc., Boehringer Ingelheim Corp. and Boehringer Ingelheim

Pharmaceuticals Inc. Roxane allegedly reported false prices for the following drugs: Azathioprine, Diclofenac Sodium, Furosemide, Hydromorphone, Ipratropium Bromide, Oramorph SR, Roxanol, Roxicodone and Sodium Polystyrene Sulfonate. Abbott agreed to pay $126.5 million to resolve the claims related to dextrose solutions, sodium chloride solutions, sterile water and vancomycin. B. Braun Medical Inc., an American subsidiary of B. Braun Melsungen AG, agreed to pay $14,744,000 to resolve allegations involving 49 of its pharmaceutical products.

This settlement resolves a *qui tam* suit filed by relator Ven-A-Care of the Florida Keys Inc., which was represented by TAFEF member Jim Breen of The Breen Law Firm, P.A. Ven-A-Care will receive an $88.4 million share of the federal recovery.

Ronald T. Lim: (E.D. Cal. Dec. 3, 2010)

Ronald T. Lim agreed to pay the United States $175,000 to settle allegations that he violated the Controlled Substances Act and the False Claims Act at his three pharmacies: Lim's Family Pharmacy, Susanville Family Pharmacy and Lim's Shasta Lake Pharmacy. Lim allegedly submitted or caused to be submitted false claims for payment to Medicare and the California Medicaid Program for drugs that were not dispensed to beneficiaries.

Matthew Stevens and Michelle Dahlberg: (D. Idaho Dec. 2, 2010)

Speech therapists Matthew Stevens, Michelle Dahlberg, their speech therapy businesses, and three hospitals in Eastern Idaho agreed to pay the United States $2.425 million to settle allegations that they used unqualified aides when delivering speech therapy services to outpatients of Eastern Idaho Regional Medical Center, Madison Memorial Hospital, and Idaho Falls Recovery Center. This settlement resolves a 2007 *qui tam* suit filed by Jennifer Putnam, who will receive a $364,425 share of the federal recovery. Putnam was represented by TAFEF member Michael Hirst of the Hirst Law Group.

Remedi Seniorcare: (D. Md. Dec. 1, 2010)

Woodhaven Pharmacy Services, Inc. (dba Remedi Seniorcare) agreed to pay the United States $1,279,575 to settle allegations that, from January 2006 through December 2007, its drug recycling program violated the False Claims Act, as the company fraudulently billed Medicare Part D, Medicaid, the Federal Employees Health Benefit Plan and TRICARE for prescriptions that were returned by assisted living facilities, but then re-dispensed to other nursing home and assisted living patients. Remedi also was alleged to have illegally distributed misbranded and adulterated drugs. This settlement resolves a 2009 *qui tam* suit brought by Barbara Dianne Thompson, who will receive a $191,000 share of the federal recovery. Thompson was represented by TAFEF members from the Nolan & Auerbach law firm. In addition to the civil settlement, Remedi agreed to enter into a five Corporate Integrity Agreement with the Office of the Inspector General, U.S. Department of Health and Human Services.

Dey, Inc.: (Ky. Nov. 29, 2010)

Dey, Inc. agreed to pay $3.5 million to resolve allegations that it reported inflated average wholesale prices on certain drugs used to treat asthma and chronic obstructive pulmonary disease, thereby causing the Kentucky Medicaid program to pay substantially more for Dey's drugs than Kentucky pharmacists. The drugs involved include various inhalation drugs manufactured and marketed by Dey such as Albuterol, Cromolyn Sodium, and Ipratropium Bromide.

CDI Corporation: (S.D. Ohio Nov. 24, 2010)

CDI Corporation agreed to pay the United States $1.95 million to resolve False Claims Act allegations that from January 15, 2001 to December 31, 2001 the company wrongfully charged employees' labor costs to purchase orders that would be reimbursed by the U.S. military. The *qui tam* suit was filed in the federal district court in Cincinnati by Vicki Lanich, a former CDI employee. Lanich will receive a $360,750 share of the federal recovery.

Dr. Walter Janke, Lalita Janke, and Medical Resources LLC: (S.D. Fla. Nov. 24, 2010)

Dr. Walter Janke, Lalita Janke, and Vero Beach-based primary care provider Medical Resources LLC, have agreed to pay the United States $22.6 million to settle allegations that they defrauded the federal Medicare program by submitting false diagnosis codes that increased the severity of patient diagnoses and resulted in increased Medicare payments.

John Carlo Inc. and Angelo Iafrate Construction Company: (E.D. Mich. Nov. 19, 2010)

Two Michigan construction companies—John Carlo Inc. and Angelo Iafrate Construction Company—agreed to pay the United States $1.407 million to settle allegations that they falsely claimed to have used Disadvantaged Business Enterprises for part of the work on a federally-funded construction project at Detroit Wayne County Metropolitan Airport. In addition to the monetary settlement, Angelo Iafrate Construction agreed to enter into a separate administrative agreement with the Department of Transportation.

American Grocers, Inc.: (S.D. Tex. Nov. 19, 2010)

American Grocers, Inc. and company owner Samir Itani agreed to pay $13.2 million to settle False Claims Act allegations that they changed expiration dates and forged accompanying documentation in order to ship food products that were past or near

their expiration dates to United States troops stationed in the Middle East. The 2005 *qui tam* suit was brought by Debbie Pallares, a former employee of the company. Pallares was represented by TAFEF members Joel Androphy and Sarah Frazier, along with Kathryn Nelson, all of the law firm Berg & Androphy.

Sentient Medical Systems: (D. Conn. Nov. 17, 2010)

Surgical Monitoring Systems, Inc. (dba Sentient Medical Systems) and former CEO, Jeffrey H. Owen, agreed to pay the United States $2,768,795 to resolve allegations that, from 2003 through 2008, they violated the False Claims Act by improperly billing Medicare for an excessive number of monitoring hours and for services provided to multiple patients at the same time.

Four Student Aid Lenders: (E.D Va. Nov. 17, 2010)

Four student aid lenders have agreed to pay the United States a total of $57.75 million to settle allegations that they violated the False Claims Act by improperly inflating their entitlement to certain interest rate subsidies from the U.S. Department of Education. Nelnet Inc. and Nelnet Educational Loan Funding Inc. agreed to pay $47 million. Southwest Student Services Corp. agreed to pay $5 million. Brazos Higher Education Authority and Brazos Higher Education Service Corp. agreed to pay $4 million. Panhandle Plains Higher Education Authority and Panhandle Plains Management and Servicing Corp. agreed to pay $1.75 million. The *qui tam* suit was filed by Dr. Jon H. Oberg, a former employee of the Department of Education. Oberg, who was represented by TAFEF members Scott Oswald, Dave Scher and Jason M. Zuckerman of The Employment Law Group, will receive a reward of $16.65 million.

Ameritox, Ltd.: (M.D. Fla. Nov. 16, 2010)

Ameritox, Ltd., a Texas-based drug-testing company, has agreed to pay the United States $16.3 million to settle allegations that it paid kickbacks to providers to induce them to refer Medicare business. Of the total settlement amount, the federal government will receive $15,486,000, with the remaining amount of $814,000 split among various states. Ameritox also agreed to enter into a 5-year Corporate Integrity Agreement with the Department of Health & Human Services Office of Inspector General. The settlement is the result of a *qui tam* lawsuit filed by Debra Maul, a former Ameritox senior sales representative. Maul will receive a $3.4 million share of the federal recovery.

Johnson & Johnson and Ortho-McNeil Janssen: (La. Nov. 11, 2010)

Johnson & Johnson and Ortho-McNeil Janssen were ordered to pay the State of Louisiana $257.7 million after a jury returned a verdict against the companies for defrauding the state Medicaid system. The companies made misleading claims about the safety of the antipsychotic drug Risperdal and minimized the drug's links to diabetes. The jury found that the company committed 35,542 violations of the state's Medical Assistance Programs Integrity Law and imposed a penalty of $7,250 for each violation.

Bradford Regional Medical Center: (W.D. Pa. Nov. 10, 2010)

A federal judge ruled that Bradford Regional Medical Center faces over $20 million in potential damages and millions more in penalties for violating the False Claims Act and the Anti-Kickback Statute. A jury will determine whether or not they violated the Stark Act. The Medical Center allegedly submitted improper claims to Medicare based upon referrals from physicians that the hospital had a prohibited financial relationship. This prohibited relationship involved Dr. Peter Vaccaro and Dr. Kamran Saleh and their medical practice, V&S Medical Associates, LLC. This case was filed by four relators who worked as members of the Medical Center staff. The relators were represented by TAFEF members G. Mark Simpson of Simpson Law Firm, LLC and Andrew M. Stone of Stone Law Firm LLC.

CFP Group: (Va. Nov. 10, 2010)

Virginia contractor CFP Group and company president Roberto Clark have agreed to pay the United States $150,000 to settle allegations they violated the False Claims Act by making false statements to the Small Business Administration to obtain certification as a Historically Underutilized Business Zone (HUBZone) company, and then using that certification to wrongfully obtain a contract with the Department of Veterans Affairs to install fire alarms systems.

Hewlett-Packard Corporation: (N.D. Tex. and S.D. Tex. Nov. 10, 2010)

The Hewlett-Packard Corporation agreed to pay the United States $16.25 million to settle two *qui tam* lawsuits, alleging that the company violated the competitive bidding rules of the Federal Communications Commission's E-Rate Program. The first lawsuit was filed in Dallas, Texas by Dan Cain and Pamela Tingley, who were represented by TAFEF members Brian Kenney and Brian McCafferty of Kenney & McCafferty. The second lawsuit was filed in Houston, Texas by Dave Richardson and Dave Gillis. Cain and Tingley will receive an award of $1,424,969, while Richardson and Gillis will receive $796,280.

St. Joseph Medical Center: (D. Md. Nov. 9, 2010)

St. Joseph Medical Center in Towson, Md. agreed to pay the United States $22 million to settle allegations that it violated the False Claims Act, the Anti-Kickback Act, and the Stark Law when it entered into a series of professional services contracts with MidAtlantic Cardiovascular Associates (MACVA). From January 1, 1996 to January 1, 2006, St. Joseph's allegedly paid various forms of illegal remuneration to MACVA to induce referrals of patients insured by federal health care programs for cardiac procedures. In addition to the monetary settlement agreement, St. Joseph's agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General. This settlement resolves a *qui tam* suit brought by relators, Stephen D. Lincoln, M.D., Peter Horneffer, M.D., and Garth McDonald, M.D. The relators, who were represented by TAFEF member J. Stephen Simms of Simms Showers LLP and co-counsel Bill Gately and Al Brault, were cardiac surgeons who practiced together as members of Cardiac Surgery Associates in Baltimore.

Mylan Inc.: (D. Mass. Nov. 8, 2010)

Mylan Inc., a Pennsylvania pharmaceutical manufacturer, agreed to pay the Commonwealth of Massachusetts $2.6 million to settle a state False Claims Act case, alleging that Mylan, through its wholly-owned subsidiary, Mylan Pharmaceuticals Inc., reported false and inflated prices to drug industry price reporting services, which caused the Massachusetts Medicaid Program to pay inflated amounts for ingredient costs on prescriptions for Medicaid recipients. The settlement resolves claims associated with certain drugs Mylan manufactured and sold between 1998 and 2003, including Clozapine, Phenytoin Sodium and Lorazapam.

The Louis Berger Group, Inc.: (D. Md. Nov. 5, 2010)

The Louis Berger Group Inc., a New Jersey-based engineering consulting company, agreed to pay the United States $69.3 million to resolve criminal and civil fraud charges. The company agreed to pay $46.5 million to resolve civil claims, $4.1 to settle other contractual disputes and $18.7 million in criminal penalties. In addition to the civil settlement agreement, the company agreed to a Deferred Prosecution Agreement with the US Attorney's Office in the District of New Jersey and an Administrative Agreement with the USAID. From at least 1999 through August 2007, the company was alleged to have knowingly overbilled the U.S. government in connection with international contracts for work on behalf of the United States Agency for International Development (USAID) and the U.S. Department of Defense.

This settlement resolves a 2006 *qui tam* suit brought by Harold Salomon, a former senior financial analyst/auditor for Louis Berger in New Jersey. Salomon was represented by TAFEF members Peter W. Chatfield and Tim McCormack, of the Phillips & Cohen law firm.

Simi Valley Hospital: (C.D. Cal. Nov. 3, 2010)

Simi Valley Hospital agreed to pay the United States $5.15 million to resolve allegations that it filed fraudulent claims with Medicare. This settlement is the result of a 2001 *qui tam* suit filed by Timothy Field, a former hospital director. Field alleged that the hospital's Behavioral Medicine Services unit knowingly submitted false claims to Medicare for chemical dependency and psychiatric patient services performed between 1991 and 1997. The hospital also allegedly paid a medical director $12,000 each month to work on a nonexistent program.

Rocky Mountain Instrument Company: (D. Colo. Oct. 29, 2010)

Rocky Mountain Instrument Company (RMI), a Colorado-based optical components maker, has agreed to pay the United States $1 million to settle False Claims Act allegations that the company caused prime defense contractors to submit false claims for payment to the Pentagon and engaged in the illegal export of sensitive technical data. In a related case, RMI pled guilty to the associated charges and agreed to a forfeiture of $1 million and five years of probation. This case was handled by TAFEF member Claire Sylvia of Phillips & Cohen LLP.

Platinum One Contracting: (Md. Oct. 29, 2010)

Platinum One Contracting, company president Anthony Wright, Capitol Contractors, and its president Vernon J. Smith III, have agreed to pay the United States $200,000 to settle claims that they used false statements to obtain contracts from the Department of Defense. The contracts had been set aside for companies that qualified for the Small Business Administration's 8(a) business development program, and the Historically Underutilized Business Zone (HUBZone) program. Platinum One was alleged to have falsely represented that they were owned and controlled by a socially and economically disadvantaged individual, and falsely represented that their principal office was located in a designated HUBZone.

GlaxoSmithKline, PLC: (D. Mass. Oct. 26, 2010)

GlaxoSmithKline (GSK) agreed to pay the United States a total $750 million to settle a False Claims Act *qui tam* action. In addition, SB Pharmco Puerto Rico Inc., a subsidiary of GSK, agreed to plead guilty to charges related to the manufacture and distribution of certain adulterated drugs made at GSK's manufacturing facility in Cidra, Puerto Rico. Of the $750 million settlement amount, $150 million will resolve a criminal fine and the remaining $600 million will settle civil FCA charges. This settlement involved charges related to product contamination and dosage irregularities affecting the drugs: Paxil, Avandia, Avandament, Coreg, Bactroban, Abreva, Cimeti-

dine, Compazine, Denavir, Dyazide, Thorazine, Stelazine, Ecotrin, Tagamet, Relafen, Kytril, Factive, Dyrenium, and Albenza.

This case arose from a 2004 *qui tam* suit filed in Massachusetts by Cheryl D. Eckard, a former manager of quality assurance for GSK. Eckard will receive a $96 million share (22%) of the federal recovery. Eckard was represented by TAFEF members Neil Getnick, Peggy Finerty and Leslie Ann Skillen of Getnick & Getnick LLP.

The Boeing Company: (C.D. Cal. Oct. 26, 2010)

The Boeing Company agreed to pay the United States $4 million to settle allegations that the company unlawfully inflated the price it charged the Air Force to manufacture the Towed Decoy System for the B-1 bomber. The government alleged that Boeing provided inaccurate and incomplete information to Air Force contract negotiators and failed to disclose that it had previously been able to manufacture the TDS at lower costs by outsourcing much of the work to outside vendors and subcontractors.

State Street Bank: (Cal. Oct. 26, 2010)

State Street Bank agreed to pay the Washington State Investment Board (WSIB) in Olympia $11.7 million to resolve a contract dispute over the pricing of foreign exchange transactions. State Street Bank is WSIB's former master custodian. The settlement was the direct result of an internal investigation by the state prompted by two state false claims act suits filed against State Street in California.

ELA Medical, Inc: (S.D. Fla. Oct. 25, 2010)

Sorin Group subsidiary, ELA Medical, Inc., agreed to pay the United States $10 million to settle two False Claims Act cases involving an alleged massive billing and kickback fraud scheme in which ELA submitted false statements and claims to Medicare from 2002 through 2005, paid kickbacks to medical providers, and submitted false certifications of medical necessity. One of the FCA cases was brought by former ELA employee Tania Lee, a certified cardio-vascular Technical Services Representative, in 2006. Lee was represented by Jon May of May & Cohen, P.A., and TAFEF member Benedict P. Kuehne of Law Office of Benedict P. Kuehne, P.A.

Quicksort, Inc., Quicksort LA Inc., and Quicksort Sacramento Inc.: (E.D Cal. Oct. 20, 2010)

Quicksort, Inc., Quicksort LA Inc., and Quicksort Sacramento Inc. have agreed to pay the United States $4.2 million in damages and penalties to settle False Claims Act allegations. The three mailing companies allegedly misrepresented the pre-sort level of mail submitted to the U.S. Postal Service, allowing the companies to receive

discounted postage rates. These claims were investigated by the U.S. Postal Inspection Service and the settlement was handled by the Commercial Litigation Branch of the Justice Department's Civil Division and the U.S. Attorney's Office for the Eastern District of California.

McKesson Corporation: (D. Mass. Oct. 18, 2010)

Pharmaceutical distributor McKesson Corporation agreed to pay the United States and the state of Connecticut a total of $24 million to settle allegations that it artificially inflated the average wholesale prices for over 400 pharmaceuticals, which created a larger spread between the cost paid by the state Medicaid program and the actual charges to the retailers. The alleged fraud affected the Connecticut Medicaid program, the Connecticut Pharmaceutical Assistance Contract to the Elderly and the Disabled (ConPACE) and the Connecticut AIDS Assistance Program (CADAP). Of the settlement amount, $9 million will reimburse Connecticut's state Medicaid program, $3 million will reimburse ConnPACE, and $700,000 will reimburse CADAP. An additional $9 million will be attributed to the federal share of Connecticut's Medicaid program.

Dr. Howard Goldstein and SSM St. Charles Clinic Medical Group: (E.D. Mo. Oct. 12, 2010)

Dr. Howard Goldstein agreed to pay the United States and the State of Missouri $830,329 to resolve allegations that he falsely billed Missouri's Medicaid program by upcoding his Medicaid reimbursement records. Goldstein's former employer, SSM St. Charles Clinic Medical Group, Inc., and related corporation, SSM Healthcare Corp., agreed to pay the United States an additional $865,812 for Goldstein's false charges to Medicare. In addition, Goldstein agreed to be excluded from participation in the Medicare program for a period of five years and pleaded guilty to federal felony charges involving false statements he made to the Federal Bureau of Investigation during an investigation of his billings.

Northwest Mobile Services, LLC: (D. Or. Oct. 8, 2010)

Northwest Mobile Services, LLC agreed to pay the United States $950,000 to resolve allegations that, from January 1, 2003 to July 31, 2007, the company submitted fraudulent claims for payment to Medicare for services that were provided by x-ray technicians that id not meet the educational and licensing qualifications required by Medicare.

Edward J. Quinn, MD: (D Ariz. Oct. 7, 2010)

Arizona cardiologist Edward J. Quinn has agreed to pay the United States $395,000 to settle allegations that he submitted false claims to Medicare by improperly billing for uncovered thoracic electrical bioimpedance tests. The government alleged that between 2004 and 2008, Quinn falsely billed Medicare for the tests when his patients did not meet any of the applicable Medicare coverage requirements. In addition to the settlement agreement, Quinn agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services.

Forty Pharmaceutical Companies: (D. Haw. Oct. 6, 2010)

Forty pharmaceutical companies have agreed to pay the State of Hawaii more than $82 million to resolve allegations relating to the marketing and sale of prescription drugs and the companies' reporting of average wholesale prices. The companies allegedly published inflated prices for prescription drugs, which caused the overpayment of millions of dollars in drug costs.

The majority of the settlement amount will come from fewer than half of the involved companies. Merck Sharp & Dohme Corp. (formerly known as Merck & Co., Inc.) will pay $28 million. AstraZeneca Pharmaceuticals, LP, AstraZeneca LP, GlaxoSmithKline LLC (formerly known as SmithKline Beecham Corporation, dba GlaxoSmithKline), and Novartis Pharmaceuticals Corporation will collectively pay $10 million. Pfizer, Inc. and Pharmacia Corporation will collectively pay $8.2 million. Teva Pharmaceuticals USA, Inc., Barr Laboratories, Inc., Ivax Corporation, Ivax Pharmaceuticals, Inc., and Sicor Pharmaceuticals, Inc. will collectively pay $6.5 million. Johnson & Johnson, Janssen Pharmaceutical Products, LP, Ortho Biotech Products, LP, McNeil-PPC, Inc., and Centocor, Inc. will collectively pay $5.2 million.

Christus Health Systems: (C.D. Cal. Oct. 6, 2010)

Christus Health Systems, a Texas-based hospital chain, agreed to pay the United States $970,987 to settle a False Claims Act *qui tam* action involving Medicare fraud. From 1988 through 2001, the company allegedly billed Medicare for ineligible costs and expenses and failed to disclose overpayments. This civil settlement resolves a 1998 *qui tam* action filed by Mark Razin, an employee of Healthcare Financial Advisors Inc.—a company that worked with hospitals on their cost reports to maximize Medicare reimbursement. Razin was represented by TAFEF member Mary A. Inman, a San Francisco attorney with Phillips & Cohen LLP.

Dartmouth College: (D. Vt. Oct. 4, 2010)

Dartmouth College agreed to pay the United States $275,000 to settle False Claims Act allegations that employees of the college engaged in improper conduct with respect to six contracts between the College and the Veterans Affairs Medical Center in White River Junction, Vermont. The alleged improper conduct was discovered in late 2004 after the Department of Veterans Affairs Office of Inspector General conducted a routine audit of contracts at the VA Hospital. Prior to the settlement, the College returned $604,000 in contract funds to the government following an investigation associated with the VA audit.

CSI Engineering and CSI Design Build: (Md. Oct. 1, 2010)

CSI Engineering, CSI Design Build, and company president Debdas Ghosal, have agreed to pay the United States $200,000 to settle claims that they used false statements to obtain contracts from several government agencies, including the Army, the Department of Labor, the Department of Homeland Security, and the Smithsonian Institution. These contracts had been set aside for companies that qualified for the Small Business Administration's Historically Underutilized Business Zone (HUBZone) program. In order to receive these contracts, CSI Design Build allegedly falsely represented to the SBA and other government agencies that it maintained its principal office in a designated HUBZone location in Maryland when it actually operated as part of CSI Engineering, which was not located in a HUBZone.

Novartis Pharmaceuticals Corporation: (E.D. Pa. Sept. 30, 2010)

Novartis Pharmaceuticals Corporation (NPC), a subsidiary of Novartis AG, agreed to pay the United States a total of $422.5 million to resolve criminal and civil claims related to the illegal marketing of the anti-seizure medication, Trileptal. Under the settlement agreement, the company agreed to plead guilty to a misdemeanor count and to pay a $185 million fine. The company also agreed to pay $237.5 million to resolve civil allegations over the promotion of Trileptal for uses not approved by the U.S. Food and Drug Administration, and for paying kickbacks to doctors to prescribe that drug and five others: Diovan, Exforge, Sandostatin, Tekturna and Zelnorm. The company also agreed to enter into a five-year Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General.

This settlement resolves four *qui tam* actions filed by former NPC employees in Tampa, Philadelphia and Birmingham in 2004, 2005 and 2008. The realtors, Jim Austin, Darryl Copeland, Jeremy Garrity, Steve McKee, and John Montgomery, will share $25,675,035 of the government's recovery. Relators Austin, Garrity and Montgomery were represented by TAFEF members Marcella Auerbach, Kenneth J. Nolan, and Joseph White of Nolan & Auerbach, P.A. Relators Austin and Montgomery were

also represented by TAFEF members Frederick M. Morgan and Jennifer Verkamp of Morgan Verkamp LLC. Relator Copeland was represented by TAFEF members Don Mckenna and Scott Powell of Hare, Wynn, Newell, & Newton, LLP. And relator McKee was represented by TAFEF member Tracy L. Steckling of the Law Office of Tracy L. Steckling, LLC.

Center for Diagnostic Imaging: (W.D. Wash. Sept. 30, 2010)

The Center for Diagnostic Imaging (CDI) agreed to pay the United States $1.2 million to settle allegations of Medicaid billing fraud. The relators in the *qui tam* case—Dr. Alexander Serra and Patricia West—alleged that CDI provided illegal kickbacks to doctors, defrauded Medicare by not requiring written doctors' orders for some examinations, and engaged in a conspiracy to defraud the health-care system. Dr. Serra is a Seattle radiologist and West was a former company vice president. The relators were represented by TAFEF members Marlan B. Wilbanks of Wilbanks & Bridges, LLP., and Marc Raspanti of Pietragallo, Gordon, Alfano, Bosick and Raspanti, L.L.P. Their local counsel was Thomas Loeser of the Hagens Berman firm in Seattle.

Wright Medical Technology Inc.: (D.N.J. Sept. 29, 2010)

Wright Medical Technology Inc. agreed to pay the United States $7.9 million to resolve civil and criminal investigations related to fraudulent-marketing practices that allegedly caused false claims to be submitted to Medicare. The company also allegedly paid kickbacks to induce orthopedic surgeons to use its artificial hip and knee reconstruction devices. Under the terms of the settlement agreement, the company agreed to enter into a five-year Corporate Integrity Agreement with the U.S. Department of Health and Human Services, Office of Inspector General. The company also entered into a Deferred Prosecution Agreement (DPA) with the United States Attorney's Office for the District of New Jersey.

Sushil Sheth: (N.D. Ill. Sept. 29, 2010)

Between 2002 and 2007, cardiologist Sushil Sheth sought payment from Medicare and Medicaid for services that were not performed. He pled guilty to healthcare fraud and was sentenced to five years in prison for criminal claims. He also agreed to pay the United States $20 million to settle the criminal and civil allegations, as well as an additional payment of $13 million in restitution. Moreover, he agreed to forfeit property and funds totaling more than $11.3 million. Relator Lokesh Chandra, a former colleague of Sheth, was represented by TAFEF members Robin Potter and Denise Quimby of Robin Potter & Associates, PC. Chandra will receive $3.5 million (17.5 %) of the federal government's recovery.

Arthritis and Allergy Associates: (D. Conn. Sept. 21, 2010)

Arthritis and Allergy Associates, agreed to pay the United States $247,036.72 to settle allegations that the company violated the False Claims Act by submitting false claims to Medicare. The government alleged that the company improperly billed Medicare for facet joint blocks/injections and allowed inappropriate staff members to prepare and administer antigens. The *qui tam* case was filed by Chwee Cass, a former employee of Arthritis and Allergy Associates. Cass will receive a $41,996.24 share of the federal government's recovery.

Forest Laboratories Inc. and Forest Pharmaceuticals, Inc.: (D. Mass. Sept. 15, 2010)

Forest Laboratories Inc. and Forest Pharmaceuticals, Inc. agreed to pay the United States over $313 million to resolve criminal charges and False Claims Act allegations. This settlement resolves three FCA *qui tam* actions alleging that the drug-maker marketed the thyroid drug, Levothroid, without FDA approval and unlawfully promoted the two antidepressants, Celexa and Lexapro, for pediatric use.

As part of the civil settlement, $149 million will resolve federal and state civil claims (with more than $88 million to be distributed to the federal government and more than $60 million to be distributed to the states involved), while the remainder will account for a criminal penalty of $150 million and an asset forfeiture of $14 million. In addition to the settlement agreement, the pharmaceutical company agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General, Department of Health and Human Services.

The relators involved in this settlement, Christopher R. Gobble, Joseph Piacentile, Constance Conrad and Jim Conrad, will split a $14 million share of the federal recovery. Gobble was represented by TAFEF members Marlan B. Wilbanks (Wilbanks & Bridges, LLP), Philip S. Marstiller (The Marstiller Law Firm), Suzanne Durrell (Durrell Law Office) and Robert M. Thomas (Thomas & Associates). Piacentile was represented by TAFEF members David Stone and Bob Magnanini of Stone & Magnanini. Constance Conrad and Jim Conrad were represented by TAFEF members Kenneth J. Nolan, Marcella Auerbach and Joseph White of Nolan & Auerbach.

Omnicare Inc.: (N.D. Ill. Sept. 15, 2010)

Omnicare Inc., a company that specializes in providing pharmacy services to long term care facilities, agreed to pay $21.1 million to settle a *qui tam* action alleging the company defrauded the Medicaid programs in Michigan and Massachusetts. The states alleged that Omnicare defrauded the Medicaid programs by knowingly charging the agencies as much as four times the amount charged private healthcare insurers for the same drugs. The company will pay $11.6 million to Michigan and $9.5 million to Massachu-

setts. Of the amounts distributed to the states, the United States will receive $5.48 million of the Michigan settlement and $3.78 million of the Massachusetts settlement.

This civil settlement resolves a *qui tam* suit brought in 2003 by David Kammerer, Omnicare's former director of Medicaid relations. Kammerer was represented by TAFEF member Shelley Slade of the law firm Vogel, Slade and Goldstein.

Khosrow Moghaddam: (S.D.N.Y. Sept. 14, 2010)

Khosrow Moghaddam, the former owner of Sasha Pharmacy and K&S Pharmacy Inc., agreed to pay the United States $700,000 to resolve False Claims Act allegations that he submitted false claims to Medicare. The government alleged that between 2001 and 2004, Moghaddam sought inflated reimbursements from Medicare for medical equipment that was not medically necessary or not provided to Medicare beneficiaries. The case was handled by Assistant U.S. Attorney Pierre G. Armand and the Civil Frauds Unit of the U.S. Attorney's Office in the Southern District of New York.

Cisco Systems, Inc.: (E.D. Ark. Sept. 7, 2010)

Cisco Systems Inc. and one of its distributors, Westcon Group, agreed to pay the United States $48 million to settle allegations that the companies made misrepresentations during contract negotiations with the General Services Administration (GSA) and other federal agencies. The Department of Justice (DOJ) alleged that the companies knowingly provided incomplete information to GSA contracting officers during negotiations regarding Westcon's contract with the agency.

This civil settlement resolves a *qui tam* suit filed in 2005 by relators Norman Rille and Neal Roberts, who were represented by TAFEF members Ron Packard and Von Packard of the law firm Packard, Packard & Johnson, located in Los Altos, California. The investigation and settlement were handled jointly by DOJ's Civil Division and the Office of the U.S. Attorney for the Eastern District of Arkansas, with assistance from the GSA's Office of Inspector General, the Defense Criminal Investigative Service and the Defense Contract Audit Agency the Department of Energy's Office of Inspector General.

Allergan Inc.: (N.D. Ga. Sept. 1, 2010)

Allergan Inc., an American pharmaceutical manufacturer, agreed to pay the United States a total of $600 million to resolve allegations of marketing Botox off-label. The company will pay $225 million to resolve civil allegations, as well as a $375 million criminal fine. The company also agreed to plead guilty to a misdemeanor charge.

This civil settlement resolves three *qui tam* suits filed in federal court in the Northern District of Georgia. The relators: Dr. Amy Lang, Charles Rushin, Cher Beilfuss, Kathleen O'Conner-Masse, and Edward Hallivis, will split a $37.8 million share of the government's recovery. Cher Beilfuss, and Kathleen O'Conner-Masse were rep-

resented by TAFEF members Ken Nolan, Marcella Auerbach, and Joseph White of the law firm of Nolan & Auerbach, P.A. Edward Hallivis was represented by TAFEF members Jay Holland and Brian Markovitz of Joseph Greenwald & Laake.

Hewlett-Packard Co.: (E.D. Ark. Aug. 30, 2010)

Hewlett-Packard Co. (HP) agreed to pay the United States $55 million to resolve claims that the company defrauded the General Services Administration (GSA) and other federal agencies. This settlement resolves allegations that HP knowingly paid kickbacks to systems integrator companies Sun Microsystems and Accenture in exchange for recommendations that the agencies purchase HP products.

The settlement resolves a *qui tam* suit filed in the U.S. District Court for the Eastern District of Arkansas in 2004 by relators Norman Rille and Neal Roberts, who were represented by TAFEF members Ron Packard and Von Packard of the law firm Packard, Packard & Johnson, located in Los Altos, California. The investigation and resulting settlement were handled jointly by the Justice Department's Civil Division and the Office of the U.S. Attorney for the Eastern District of Arkansas, with assistance from the GSA-OIG, the Office of Inspector General of the Department of Energy, and the Defense Criminal Investigative Service.

Stryker Biotech LLC: (D. Mass. Aug. 26, 2010)

Stryker Biotech LLC agreed to pay the Commonwealth of Massachusetts $1.35 million to resolve allegations that the company marketed certain orthopedic products for uses that had not been approved by the U.S. Food & Drug Administration (FDA). The company also allegedly misled healthcare providers about the appropriate uses of its products. According to the terms of the settlement, the company will pay $325,000 in civil penalties, $875,000 to fund efforts to combat unlawful marketing in the health care industry, and $150,000 to cover attorneys' fees and investigative costs.

Saint John's Health Center: (C.D. Cal. Aug. 25, 2010)

Saint John's Health Center in Santa Monica, California agreed to pay the United States $5.25 million to resolve False Claims Act allegations of over-billing Medicare. The hospital had allegedly submitted false, inflated claims to increase Medicare "outlier payments" between 1996 and 2003.

According to the Department of Justice, the case was handled by the Civil Fraud Section of the United States Attorney's Office, which received assistance from the Office of the Inspector General for the U.S. Department of Health and Human Services.

El Centro Regional Medical Center: (S.D. Cal. Aug. 25, 2010)

El Centro Regional Medical Center, a Southern California hospital, agreed to pay the United States $2.2 million to settle False Claims Act allegations that the hospital defrauded Medicare. The hospital was alleged to have fraudulently inflated its charges to Medicare patients in order to obtain larger reimbursements from the Federal healthcare program. The allegations were raised in a *qui tam* case filed by relator Pietro Ingrande, who is a former El Centro employee. Ingrande, who was represented by TAFEF members Vince McKnight and Altomease Kennedy of the law firm McKnight & Kennedy, LLC., will receive a $375,000 share of the government's recovery.

In addition to the settlement agreement, the hospital agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General, Department of Health and Human Services.

Dominion Oklahoma Texas Exploration & Production Inc. and Marathon Oil Company: (E.D. Tex. Aug. 20, 2010)

Dominion Oklahoma Texas Exploration & Production Inc. and Marathon Oil Company agreed to pay the United States $2,219,974.98 and $4,697,476.57 respectively, to settle two False Claims Act cases. The settlement, totaling $6.9 million, will resolve claims that the companies knowingly underpaid royalties owed on natural gas produced from Federal and American Indian lands.

This civil settlement resolves a *qui tam* suit brought by relator Harold Wright. His estate and heirs will receive a $1.822 million (26%) share of the government's recovery. The investigation and settlement were handled jointly by the Department of Justice's Civil Division and the U.S. Attorney for the Eastern District of Texas, with assistance from the Department of the Interior's Office of Inspector General, the Bureau of Ocean Energy Management and Office of the Solicitor.

Significant Education, Inc.: (D. Ariz. Aug. 18, 2010)

Phoenix-based, for-profit institution Grand Canyon Education Inc. (formerly Significant Education, Inc.), agreed to pay $5.2 million to settle a False Claims Act action alleging improper incentive compensation-related conduct. Relator Ronald D Irwin, a former Grand Canyon employee, filed the whistleblower suit in 2007, which alleged that the company violated the FCA by falsely certifying that it was in compliance with the incentive compensation ban placed by the federal government on schools receiving Title IV funds, in order to receive federal grants and student loans. This civil settlement resolves Irwin's suit, and the federal government will receive 73 percent of the settlement amount, while Irwin will receive 27 percent of the recovery.

Nelnet, Inc.: (E.D. Va. Aug. 13, 2010)

Nelnet Inc. agreed to pay the United States $55 million to settle a False Claims Act *qui tam* case that alleged that the company defrauded the federal government's student loan subsidy program by submitting false claims to the Department of Education in order to obtain extra government student-loan subsidies. The *qui tam* suit was brought by former U.S. Education Department specialist Jon Oberg, who was represented by TAFEF member Jason Zuckerman of the Employment Law Group, and co-counsel from Wiley Rein, LLP.

WellCare Health Plans. Inc.: (M.D Fla. Aug. 9, 2010)

WellCare Health Plans Inc. agreed to pay $137.5 million to settle fraud allegations with the U.S. Attorney's Office in Tampa, the U.S. Department of Justice, and the state of Connecticut. The company also agreed to pay $200 million to settle a class-action securities lawsuit. The False Claims Act allegations were brought in a *qui tam* action filed by former WellCare analyst Sean Hellein, who claimed that the company stole $400 million to $600 million from the Medicare and Medicaid programs in several states. Hellein also claimed that the company held a celebratory dinner to honor those who successfully dis-enrolled 425 infants, saving the company $6.9 million. Hellein was represented by Barry Cohen of Cohen, Foster and Romine in Tampa.

Panalpina Inc.: (E.D. Tex. July 30, 2010)

Panalpina Inc., a Swiss-based freight forwarder, agreed to pay the United States $375,000 to settle allegations that the company paid kickbacks to Kellogg, Brown & Root (KBR) employees in exchange for favorable treatment on subcontracts provided for US military operations. The settlement resolves a *qui tam* case brought by relators David Vavra and Jerry Hyatt, who will receive a $78,750 (21%) share of the federal government's recovery.

Quantum Dynamics Inc.: (July 29, 2010)

Quantum Dynamics Inc., and its president, Audrey Price, agreed to pay the United States $750,000 to settle allegations that they used false statements to obtain contracts from the US Army. The Georgia-based defense contractor was alleged to have fraudulently qualified for the Small Business Administration's (SBA) Historically Underutilized Business Zone (HUBZone) program in order to obtain contracts from the U.S. Army that were specifically set aside only for companies that qualified for HUBZone certification. This settlement was the result of coordinated efforts by the Civil Division of the Department of Justice, the SBA Office of General Counsel, and the SBA Office of Inspector General.

The Morganti Group, Inc.: (D. Conn. July 27, 2010)

The Morganti Group, Inc., a Connecticut construction company, agreed to pay the United States $800,000 to settle allegations that the company violated the False Claims Act, the Foreign Assistance Act, and common law. The company allegedly submitted false pre-qualification documents when bidding on construction projects in Jordan that were partially funded by the United States Agency for International Development (USAID).

Teva Pharmaceuticals: (July 26, 2010)

Teva Pharmaceuticals, an Israeli-owned generic drug company, agreed to pay the United States, as well as the States of Texas, Florida, and California a total of $169 million to settle allegations that the company defrauded Medicaid by allegedly setting and reporting inflated prices for medications dispensed by pharmacies and other providers, who were then reimbursed by state Medicaid programs. Texas will receive $51 million and Florida will receive $27 million. The remaining $90 million will be divided between the federal government and the State of California. The settlement was the result of a *qui tam* case filed by Ven-a-Care of the Florida Keys, which was represented by TAFEF member James J. Breen of The Breen Law Firm.

Sodexho, Inc. and Sodexho SA: (July 21, 2010)

Sodexho Inc., an integrated food and facilities management service company, agreed to pay $20 million to settle allegations of overcharging 21 New York school districts and the SUNY system, which had contracted with Sodexo for food services, vending and facilities services. The settlement was the result of a *qui tam* suit was brought by John Carciero and Jay Carciero, former general managers for Sodexo in Massachusetts. The investigation of the relators' allegations found that the company promised to provide goods at cost, but failed to disclose certain rebates awarded by its vendors and suppliers, resulting in illegal overcharges to the schools. New York State and the impacted school districts will provide a $3.6 million (18%) share of the recovery to the relators, who were represented by TAFEF members Colette G. Matzzie and Timothy McCormack of Phillips & Cohen LLP.

William Crittenden, M.D.: (D. Md. July 15, 2010)

William Crittenden, M.D. agreed to pay the United States $225,000 to settle allegations that, between January 1, 2003 and November 30, 2005, he submitted false claims to Medicare, by upcoding billing data for visits made to nursing homes and other assisted living facilities.

Elan Corporation: (D. Mass. July 15, 2010)

The Elan Corporation, PLC agreed to pay over $200 million to settle a False Claims Act case, which alleged improper sales and marketing practices for the antiepileptic drug Zonegran (zonisamide). As part of settlement agreement the company will plead guilty to a misdemeanor violation of the U.S. Federal Food, Drug and Cosmetic Act. The company also agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General of the United States Department of Health and Human Services.

National Cardio Labs LLC: (C.D. Cal. July 8, 2010)

National Cardio Labs LLC, an Orange County company that offered heart monitoring services, agreed to pay $3.6 million to settle allegations that the company, its manager, Adrienne Stanman, and her husband, Robert Parsons (a former manager), defrauded Medicare, Medicaid, and TRICARE, by knowingly submitting false healthcare claims to the federal health insurance programs between January 1998 and February 2004. The False Claims Act *qui tam* suit was originally filed in January 2004 by James Cast and Stanton Crowley, who will receive a $1,115,614 share of the federal government's recovery.

Hines Dermatology Associates, Inc.: (D.R.I. July 7, 2010)

Hines Dermatology Associates, Inc. agreed to pay $275,000 to settle allegations that it billed Medicare for unnecessary pathology services. The company has agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General.

Cardinal Health 110, Inc. and Bindley Western Industries, Inc.: (E.D. Pa. July 6, 2010)

Wholesale pharmaceutical distributors Cardinal Health 110, Inc. and Bindley Western Industries, Inc. agreed to pay the United States $5,500,000 to settle allegations that the companies charged medical treatment facilities more than the Distribution and Pricing Agreement (DAPA) price negotiated by the Department of Defense and drug manufacturers.

The Oaks Diagnostics, Inc.: (C.D. Cal. July 2, 2010)

The Oaks Diagnostics, Inc. (d/b/a Advanced Radiology) agreed to pay the United States $647,000 to settle allegations that it filed false claims with Medicare for unnecessary radiological tests. This settlement resolves a 2003 False Claims Act *qui tam* action filed by a former Advanced Radiology employee. The case was investigated by the Office of Inspector General of the Department of Health and Human Services and the Federal Bureau of Investigation.

Advanced BioNutrition Corporation: (D. Md. July 1, 2010)

Advanced BioNutrition Corporation and its former chief executive officer, David Kyle, agreed to pay the United States $934,000 to settle allegations that they submitted false grant progress reports to the National Science Foundation and was awarded the second phase of a grant based upon misrepresentations in its proposal about results obtained during the first phase of research. This settlement resolves a 2007 *qui tam* suit brought by relator Albert Cunniff, Jr., who will receive a $105,275 share of the government's recovery. Under the settlement agreement, the company also agreed to enter into a five-year Corporate Integrity Agreement.