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Quarterly Review

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Edited by Cleveland Lawrence III
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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.

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TABLE OF CONTENTS

FROM THE EDITOR xi

Recent False Claims Act & *Qui Tam* Decisions 1

I. FALSE CLAIMS ACT LIABILITY 3

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

U.S. ex rel. King v. Solvay S.A., 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011)

U.S. ex rel. Wilkins v. United Health Group, Inc., WL 6719139 (D.N.J. Dec. 20, 2011)

B. What Constitutes a False Claim?

U.S. ex rel. Wright v. Comstock Resources, Inc., WL 6259893 (5th Cir. Dec. 15, 2011)

U.S. v. Mays, 2011 WL 4807750 (D. Me. Oct. 11, 2011)

U.S. v. Carell, WL 6339839 (M.D. Tenn. Dec. 19, 2011)

II. JURISDICTIONAL ISSUES 15

A. Section 3730(b)(5) First-to-File Bar 15

U.S. ex rel. Carter v. Halliburton Co., WL 6178878 (E.D. Va. Dec. 12, 2011)

U.S. ex rel. Batiste v. SLM Corp., 2011 WL 5299637 (D.C. Cir. Nov. 4, 2011)

B. Section 3730(e)(4) Public Disclosure Bar and Original Source Exception 19

U.S. ex. rel. McNulty v. Reddy Ice Holdings, Inc., WL 6102046 (E.D. Mich. Dec. 7, 2011)

U.S. ex rel. Purcell v. MWI Corporation, 2011 WL 5517352 (D.D.C. Nov. 14, 2011)

U.S. ex rel. Cervantes v. Deere & Co., 2011 WL 5325466 (E.D. Wash. Nov. 3, 2011)

U.S. ex rel. McLean v. County of Santa Clara, 2011 WL 5223076 (N.D. Cal. Oct. 31, 2011)

III. FALSE CLAIMS ACT RETALIATION CLAIMS **25**

Tolman v. Am. Red Cross,
WL 6333700 (D. Idaho Dec. 19, 2011)

Huang v. Rector and Visitors of the Univ. of Va., et al.,
WL 6329755 (W.D. Va. Dec. 19, 2011)

U.S. ex rel. Berglund v. The Boeing Company,
WL 6182109 (D. Or. Dec. 13, 2011)

Hill v. Booz Allen Hamilton, Inc.,
WL 6000501 (D. Guam Nov. 16, 2011)

U.S. ex rel. Glynn v. Compass Medical, P.C.,
WL 5508916 (D. Mass., Nov. 10, 2011)

U.S. ex rel. Davis v. Point Park Univ.,
2011 WL 4916190 (W.D. Pa. Oct. 17, 2011)

U.S. ex rel. Knapp v. Calibre Sys., Inc.,
2011 WL 4914711 (C.D. Cal. Oct. 17, 2011)

IV. COMMON DEFENSES TO FCA ALLEGATIONS **33**

A. Not Knowingly False 33
U.S. v. Houston, 2011 WL 4899983 (M.D. Tenn. Oct. 14, 2011)

B. Relator Released Defendant from FCA Claims 35
U.S. ex rel. Scott v. Cancio, WL 5975782 (M.D. Fla. Nov. 28, 2011)

U.S. ex. rel. McNulty v. Reddy Ice Holdings, Inc.,
WL 6102046 (E.D. Mich. Dec. 7, 2011)

C. Sovereign Immunity 36
Myers v. Simpson, WL 6140864 (E.D. Va. Dec. 9, 2011)

D. Statute of Limitations 37
U.S. v. Carell, WL 6339839 (M.D. Tenn. Dec. 19, 2011)

Tolman v. Am. Red Cross, WL 6333700 (D. Idaho Dec. 19, 2011)

U.S. ex rel. Berglund v. The Boeing Company,
WL 6182109 (D. Or. Dec. 13, 2011)

U.S. ex rel. Carter v. Halliburton Co.,
WL 6178878 (E.D. Va. Dec. 12, 2011)

V. FEDERAL RULES OF CIVIL PROCEDURE 39

A. Rule 9(b) Failure to Plead Fraud with Particularity 39

U.S. ex rel. Westlund v. Lab. Corp. of Am. Holdings, 2011 WL 6846748 (M.D. Fla. Dec. 29, 2011)

U.S. ex rel. Wilkins v. United Health Group, Inc., WL 6719139 (D.N.J. Dec. 20, 2011)

U.S. ex rel. Baltazar v. Warden, WL 6400351 (N.D. Ill. Dec. 15, 2011)

U.S. ex rel. Hudalla v. Walsh Const. Co., WL 6028315 (N.D. Ill. Dec. 3, 2011)

U.S. ex rel. Glynn v. Compass Medical, P.C., WL 5508916 (D. Mass., Nov. 10, 2011)

U.S. ex rel. King v. Solvay S.A., 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011)

B. Rule 12(b)(6) Failure to State a Claim upon which Relief Can Be Granted 46

U.S. ex rel. Wildhirt v. AARS Forever Inc., WL 5373985 (N.D. Ill., Nov. 4, 2011)

U.S. ex rel. McLean v. County of Santa Clara, 2011 WL 5223076 (N.D. Cal. Oct. 31, 2011)

U.S. ex rel. Hill v. Univ. of Med. & Dentistry of N.J., 2011 WL 5008427 (3rd Cir. Oct. 20, 2011)

U.S. v. Bedi, 2011 WL 4974861 (S.D. Ill. Oct. 18, 2011)

U.S. ex rel. Davis v. Point Park Univ., 2011 WL 4916190 (W.D. Pa. Oct. 17, 2011)

U.S. ex rel. Knapp v. Calibre Sys., Inc., 2011 WL 4914711 (C.D. Cal. Oct. 17, 2011)

U.S. ex rel. King v. Solvay S.A., 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011)

VI. LITIGATION DEVELOPMENTS 55

A. Calculating Damages and Civil Penalties 55

U.S. ex rel. Hobbs v. MedQuest Assocs., Inc., 2011 WL 5027504 (M.D. Tenn. Oct. 21, 2011)

U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co., WL 5005313 (E.D. Va. Oct. 19, 2011)

B. Costs and Attorneys' Fees 59

U.S. ex rel. Rille v. Hewlett Packard Co., 2011 WL 4625646 (E.D. Ark. Oct. 5, 2011)

C. False Certification of Compliance 61

U.S. v. Villaspring Health Care Center, Inc.,
WL 6337455 (E.D. Ky. Dec. 19, 2011)

U.S. ex rel. Foglia v. Renal Ventures Management, LLC,
WL 5882020 (D.N.J. Nov. 23, 2011)

U.S. ex rel. Purcell v. MWI Corporation,
2011 WL 5517352 (D.D.C. Nov. 14, 2011)

D. Seal/Service Issues 65

U.S. ex. rel. Bernat v. The Boeing Company, Inc., et al.,
WL 6152303 (E.D. Mo. Dec. 12, 2011)

U.S. ex rel. Ruble v. Skidmore,
2011 WL 5389325 (S.D. Ohio Nov. 8, 2011)

U.S. ex rel. Danner v. Quality Health Care Inc.,
2011 WL 4971453 (D. Kan. Oct. 18, 2011)

E. Vicarious Liability 68

U.S. ex rel. King v. Solvay S.A.,
2011 WL 4834030 (S.D. Tex. Oct. 12, 2011)

JUDGMENTS & SETTLEMENTS 69

GE Healthcare Inc.

Ranbaxy Laboratories, Ltd.

Kaman Precision Products Inc.

CVS Caremark Corporation

Medtronic Inc.

Russell Hawley and Hawley Insurance, Inc.

KV Pharmaceutical Company

Diakon Lutheran Social Ministries

Genentech Inc.

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FROM THE EDITOR

"The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing." –Albert Einstein, Physicist & Nobel Prize Recipient

The world is indeed a dangerous place, fraught with greed, corruption, and fraud. Every day, we are bombarded with headlines about the machinations of liars, cheats, and thieves—including unscrupulous defense contractors that put our troops in danger, greedy healthcare providers that steal from Medicare and Medicaid, deceitful pharmaceuticals companies whose schemes affect our health and our wallets, banks and other financial institutions that caused the housing crisis, and architects of Ponzi schemes who cripple the economy. And as we enter this election year, allegations of election frauds and abuses are sure to follow. It often seems that honesty and hard work are lost arts.

History instructs us that those at the root of these problems often don't change their behavior. Unfortunately, we can point to numerous examples of repeat players who constantly and consistently engage in fraud and corruption, even after being exposed and punished. These fraudsters do not appear to care about the effect of their behavior on the honest, law-abiding citizenry.

So how do we change this culture of fraud? I offer two suggestions. First, we should take full advantage of the useful information that whistleblowers and other insiders can provide to help expose wrongdoing. At a recent event celebrating the 25th anniversary of the modern False Claims Act, the Department of Justice underscored the integral role whistleblowers play in the government's fight against fraud. Whistleblowers make the world a less "dangerous" place because they get personally involved to make a positive difference instead of looking the other way. Their efforts should be applauded. It certainly comes as no surprise that corporate wrongdoers often lead the charge against whistleblowing and the systems created to incentivize and reward whistleblowers. Second, we should reflect on the words of philosopher Friedrich Nietzsche: "It is easier to cope with a bad conscience than with a bad reputation." This observation rings true in the case of repeat players, who seem to view monetary penalties as simply part of the cost of doing business. Instead of merely recovering our money from fraudsters, why not consider simply not doing business with them? Too often, we have allowed cheats to "cope with their bad consciences" by continuing to bestow government contracts on them. And when we contract with known liars, cheats, and thieves, we probably shouldn't be overly surprised when they steal from us.

I hope you enjoy the January 2012 issue. As always, feel free to contact me with your comments, suggestions, and article ideas. I look forward to hearing from you.

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Recent False Claims Act & *Qui Tam* Decisions

OCTOBER 1, 2011–DECEMBER 31, 2011

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

U.S. ex rel. King v. Solvay S.A., 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011)

Two relators brought a *qui tam* action against their former employer—a pharmaceuticals manufacturer (SPI)—and its affiliates (SAI and SNA), alleging that the defendants violated the federal False Claims Act and twenty-nine state FCAs. Specifically, the relators alleged that the defendants caused physicians to submit false claims to the government, made false statements in support of those false claims, and conspired to defraud the government by influencing with physicians to promote unapproved off-label uses of the drugs Luvox, Aceon, and AndroGel; by providing illegal kickbacks to those physicians in violation of the Anti-Kickback Statute (AKS); and by encouraging physicians to manipulate the Medicare/Medicaid codes the physicians used when prescribing those drugs in order to conceal the fact that the drugs were being prescribed for off-label uses. Further, the relators—both of whom had been employed as managers at SPI—alleged that they were wrongfully terminated from their jobs, in violation of the federal FCA, after they questioned the ethics and legality of the defendants' practices. Defendant SPI moved to dismiss the relators' federal and state fraud claims for failure to plead with particularity, for failure to state a claim, and for "state-specific pleading deficiencies." Further, it moved to dismiss the relators' retaliation claim as time-barred. Defendants SAI and SNA also moved to dismiss the fraud claims for failure to plead with particularity and for failure to state a claim.

Holding: In a 138-page opinion, the United States District Court for the Southern District of Texas granted the defendants' motions in part and denied them in part.

The court first considered defendant SPI's motion to dismiss.

Failure to Plead Fraud with Particularity—Causing False Claims to be Presented

The court began by analyzing SPI's motion to dismiss the relators' claims alleging that SPI caused physicians to present false claims to the government. The court began its analysis by considering SPI's argument that the relators' off-label promotion claims were not pled with particularity, as required by Federal Rule of Civil Procedure 9(b), and for failure to state a claim, pursuant to Rule 12(b)(6). SPI argued that the relators' off-label promotion claims did not identify any instance in which a physician wrote a prescription for a patient in a federal healthcare program as a result of an

alleged off-label promotion scheme *and* in which a pharmacy submitted a claim to the government for any such off-label prescription. The relators countered that their complaint—which alleged a nationwide off-label promotion scheme involving multiple drugs—provided reliable indicia that false claims were submitted to the government healthcare programs. They asserted that they were not required to plead the who, what, when, where, how of those false claims, and that by pleading the who, what, when, where, how of the alleged scheme, their complaint satisfied Rule 9(b)'s pleading standard.

The court found that the relators alleged that physicians wrote off-label prescriptions for the drugs for federal healthcare program patients, after receiving off-label promotion from SPI, and accordingly held that the relators's complaint provided reliable indicia that false claims were submitted to the government, and provided sufficient examples to lead to an inference that the off-label promotion scheme caused at least some physicians to write off-label prescriptions for the drugs. **Thus, SPI's motion to dismiss the fraud claims based on off-label drug promotion, pursuant to Rule 9(b) was denied.**

Next, the court analyzed SPI's motion to dismiss the relators' kickback claims—which alleged that the defendant "bribed doctors to use its drugs"—for failure to plead the alleged fraud scheme with particularity. SPI argued that the relators failed to provide any details about false claims resulting from the alleged kickback scheme. Additionally, SPI argued that all of the relators' examples of alleged kickbacks occurred in Texas and therefore, the alleged fraud was not nationwide. The court held that although the allegations used to link specific physicians who allegedly received kickbacks to Medicaid prescriptions for the drugs at issue were all from Texas, the relators alleged enough details of a geographically diverse kickback scheme to reliably indicate that there was a nationwide kickback scheme, as the relators alleged personal knowledge and provided details of specific types of kickbacks provided in different parts of the country. The court held the complaint reliably indicated that SPI's alleged kickback practices were crafted with the intent that physicians would write prescriptions and that these prescriptions would be reimbursed by the government. Further, it held the allegations that physicians received kickbacks from SPI and later wrote prescriptions for two of the drugs at issue were reliable indicia that the alleged kickbacks caused the submission of false claims to the government. However, it held that the relators' examples of kickbacks with respect to the third drug were not sufficiently linked to Medicaid prescriptions (because they were too distant in time) to reliably indicate that the alleged kickbacks caused false claims to be submitted. **Therefore, the court denied SPI's motion to dismiss the relators' kickback claims for Aceon and AndroGel for failure to plead fraud with particularity, but granted the motion and dismissed the relators' claim based on alleged kickbacks to doctors for prescribing Luvox.**

The court then analyzed the relators' allegation that SPI encouraged doctors to improperly use certain Medicare/Medicaid codes "for the sole purposes of evading formulary controls and sometimes concealing actual uses in order to obtain reimbursement for [the three drugs at issue]." In essence, the relators asserted that the codes use

did not truly represent the patient's diagnoses, so as to conceal the off-label uses of the drugs at issue and ensure that the physicians' allegedly false Medicare/Medicaid claims for prescriptions would be approved by the government for reimbursement. While the court noted that the relators provided examples of physicians using the allegedly improper codes when writing prescriptions for Medicare/Medicaid patients, it observed that the relators failed to indicate why the codes used did not match the patients' respective diagnoses, which is the only way the relators' could establish that claims containing those codes were false. **Consequently, the court granted SPI's motion to dismiss the federal FCA claims relating to code manipulation, for failure to plead the alleged fraud with particularity.**

Failure to Plead Fraud with Particularity—Making False Records/ Statements

The court then turned to the relators' allegations that SPI caused physicians to make false statements to the government. As an initial matter, the court observed that SPI failed to differentiate between the FCA's liability provision regarding the presentment of false claims and its liability provision prohibiting false records and false statements. The court found that the false records/statements provision was amended in 2009 as part of the Fraud Enforcement and Recovery Act (FERA), which retroactively applied to the case at issue. As a result of the amendments, the court was not required to determine whether or not the defendants made false statements with the intention of getting false claims paid by the government. Instead, the court held, the amended liability provision merely required the court to determine whether or not any false statements were material—*i.e.* had the potential to influence the government's decision with respect to—false claims. The court concluded that the relators' complaint adequately pled an FCA violation for making false statements material to false claims, as the complaint set forth details of the alleged off-label promotion, the scienter element of liability was not in dispute, and the relators' allegations were sufficient to show that the defendants' alleged false statements were materials to the government's payment decisions. **Accordingly, the court denied SPI's Rule 9(b) motion to dismiss the relators' allegations regarding the defendants' allegedly false statements.**

Failure to Plead Fraud with Particularity—Conspiracy

The court then analyzed the relators' conspiracy claim. The court first held that conspiracy claims under the FCA must be pled with particularity. As the court held that the relators' off-label marketing claims were pled with sufficient particularity, while the code manipulation and AKS claims were not, it denied SPI's Rule 9(b) motion to dismiss the relators' conspiracy claims regarding off-label promotion on the basis that those claims, but granted its Rule 9(b) motion with respect to the relators' conspiracy claims regarding code manipulation and kickbacks.

Failure to State a Claim—Making False Records/Statements

Next, the court examined SPI's argument that the relators's kickback allegations failed to state a claim under the FCA, because the relators failed to allege that the defendants made any express certification of compliance with the Anti-Kickback Statute. Further, SPI argued that the relators' off-label and Medicare/Medicaid code manipulation allegations failed to state a claim under the FCA because they did not demonstrate that any alleged statements were false or material to the government. In response, the relators argued that their kickback allegations properly stated a claim, as they alleged that compliance with the AKS and other applicable laws and regulations was a condition of payment under the healthcare programs; thus, they argued, pleading that false certifications of compliance with these laws and regulations was not necessary to state a claim. Having made that argument, the relators also claimed that they did in fact plead that physicians, pharmacists and third-party payers falsely certified compliance with the AKS. In addition, the relators argued that, pursuant to applicable regulations, claims for prescriptions for off-label drug uses and claims containing improper Medicare/Medicaid codes claims were not reimbursable under any circumstances, and thus, their allegations in those respects were viable.

With respect to the kickbacks allegation, the court observed that even though the government declined to intervene in the relators' case, it filed a statement of interest on this issue. In its brief, the government agreed with the relators and argued that claims resulting from violations of the AKS are *per se* false claims under the FCA, even in the absence of any false certification of compliance with that statute. Both the relators and the government also argued that Congress made clear that AKS violations render corresponding Medicare/Medicaid claims false, pursuant to the recently-enacted Patient Protection and Affordable Care Act (PPACA). SPI, however, argued that PPACA was not a clarification of existing law, but rather a change in the law, and therefore, had no bearing on whether any kickback-tainted claims submitted by physicians were automatically false, absent some certification of compliance. The court, finding no support for the government's and relators' position in either caselaw or PPACA's legislative history, 'decline[d] to hold . . . that an allegation of express certification is unnecessary" in order to establish FCA liability based on alleged AKS violations. Thus, in order for the relators to maintain their AKS claims, they would have to show a false statement based on a false certification of compliance with the AKS. The court ultimately held that the relators' complaint did not plead that false certifications of compliance with the AKS were made, as the relators did not plead any details regarding any such false certifications of compliance. **As a result, the court granted SPI's motion and dismissed the relators' kickback allegations for failure to state a claim under the FCA.**

The court then examined the relators' off-label promotion claims, which SPI contended failed to satisfy the FCA's falsity and materiality elements. SPI contended that the relators' allegation that claims for off-label uses were not reimbursable under any circumstances was erroneous and conclusory, and that the government's decision regarding payment of such claims was not conditioned on whether or not the drugs were

prescribed for off-label uses, but rather on whether or not the drugs were used for medically accepted uses; SPI argued that most off-label uses are medically accepted. The court found some support for SPI's position under federal law, and decided to separately evaluate the relators' claims regarding each of the drugs at issue.

With regard to Luvox, the court found that the relators' complaint included allegations that the drug was prescribed to Medicare/Medicaid patients for off-label uses that were not deemed medically accepted, and thus, the relators provided reliable indicia that at least some false claims were submitted to the government for Luvox. However, with respect to AndroGel and Aceon, the court found that although the relators' complaint alleged that the drugs were prescribed for various off-label uses and provided reliable indicia that claims for such prescriptions were presented to the government, they failed to allege that any of the off-label uses was not deemed medically accepted, such that the corresponding claims to the government would be reimbursable under applicable Medicare/Medicaid regulations. Without such allegations, the court held that the relators failed to provide reliable indicia that claims regarding AndroGel and Aceon were materially false. The relators then contended that the defendants improperly influenced the medical community by ghost-writing articles and engaging in other wrongful conduct that led to the off-label uses of AndroGel and Aceon at issue becoming medically accepted. The court agreed that these allegations could plausibly lead to the conclusion that claims resulting from the defendants' off-label promotion of the drugs were materially false. **As a result, the court denied SPI's motion to dismiss the relators' off-label promotion allegations for failure to state a claim under the FCA.**

Failure to State a Claim—Conspiracy

The court then analyzed the relators' conspiracy claim to determine whether the relators properly stated a claim under the FCA. The court first noted that FERA also amended the FCA's conspiracy provision, but that this amendment was not retroactive. Thus, the court concluded, the FCA's former conspiracy provision applied, which prohibited conspiring to "defraud the Government by getting a false or fraudulent claim allowed or paid." The court held that in order to be held liable for conspiracy, the defendants must have reached an agreement with physicians to make false statements for the purpose of having the government pay false claims. The court held that the relators failed to meet that standard, since the agreements between the defendants and any doctors relied on by the relators pertained to off-label promotion of drugs, but did not involve defrauding the government; the court stated that the relators failed to demonstrate that the defendants entered into any agreements with physicians in which Medicare or other federal healthcare programs was discussed. As a result, the court granted SPI's motion to dismiss the relators' conspiracy claims for off-label promotion on the basis that the relators failed to state a claim under the FCA.

Retaliation

SPI argued that the relators' retaliation claims under the FCA were time barred. SPI contended that the applicable statute of limitations for the relators' retaliation claim was 180 days, but that the relators waited eight months and a year, respectively, to file their retaliation claims. The relators argued that the limitations period was not 180 days, but two years. The court noted that, for retaliation claims, the FCA's general six year statute of limitations period does not apply. Instead, courts are directed to apply the limitations period of the most closely analogous state law. First, the court determined that the law of Texas, the forum state, would apply, rather than the law of Georgia, the state where the alleged retaliation occurred. Tthe court noted that since the FCA is a federal statute, Georgia substantive law would not apply. Next, the court held that Texas' healthcare whistleblower statute—which includes a 180-day limitations period—was the most closely analogous state law, rejecting the relators' argument that the court should apply the two-year statute of limitations under Texas personal injury law. Since both relators' retaliation claims were brought outside the 180-day limitations period, the court held that those claims were time-barred and they were dismissed with prejudice.

State FCA Claims

SPI also moved to dismiss the relators' claims brought under state False Claims Acts, arguing that, for a variety of reasons, those claims were deficient. The court examined the relators' claims under each of the twenty-nine state FCA statutes in turn. **The court determined that some of the relators' state FCA claims should be dismissed with prejudice for a variety of procedural reasons, including: (1) the state FCA limited *qui tam* suits to "affected persons," and the relators did not meet the definition of "affected persons," since they did not live in that state; (2) the state statute only allowed relators to litigate actions that the state intervened in, and the state declined to intervene in the relators' action; (3) the relators alleged conduct that occurred before the state FCA was enacted and the state either made explicit that retroactive application was not allowed, or the state was silent on the retroactivity issue but there was a presumption of prospective application under state law under those circumstances; (4) the relators' claims were time-barred; and (5) the relators failed to file state law claims under seal, in accordance with state FCA requirements. The relators were allowed to maintain the subset of their state FCA claims that did not fall within any of those categories.**

Next, the court considered SPI's motion to dismiss the relators' request to receive a percentage of any damages from the "common fund" shared by states that do not allow relators to sue on their behalf. The relators argued that, should their case succeed, states without *qui tam* provisions will receive a windfall due to the relators' efforts. The parties agreed that this request was not a "claim." The court stated that it was not inclined to dismiss the relators' request, but noted that "it appears at this point that

Relators will not be entitled to common fund relief from the non-*qui tam* states, as these states are not parties to this litigation," and presumably, the court believed that it might not have subject matter jurisdiction over claims purportedly brought on behalf of those states.

Leave to Amend Complaint

The court then analyzed SPI's argument that the relators should not be allowed to once again amend the complaint—their fourth amended complaint—because they had several opportunities in the past to cure any deficiencies. The court, though, noted that the relators' first and second amended complaints were filed while the case was under seal and before the defendants were served, that the relators were granted leave to file a third amended complaint once the defendants moved to dismiss the relators' claims, and that the fourth amended complaint merely redacted names that were included in the prior complaint. Further, the court noted that the issues involved were complex and in some instances unsettled, and that dismissal of the relators' remaining claims with prejudice would be inappropriate, given the liberal nature of Rule 15(a). The court granted the relators leave to amend their complaint.

Alter Ego Liability

After fully considering SPI's motion to dismiss, the court turned its attention to SAI and SNA's motion to dismiss. SAI and SNA argued that the relators failed to state with particularity that they engaged in any misconduct, and if so, what their roles were; or that they exhibited the requisite total control and domination of SPI to be held responsible for SPI's alleged misconduct. They also joined SPI's motion to dismiss. Although the relators argued that issues regarding parent-subsidiary relationships are fact-specific inquiries that are inappropriate for resolution on a motion to dismiss, they also argued that did in fact adequately plead that SPI was the alter ego of SAI and SNA. Further, they argued the court should not dismiss their alter ego claims without first giving them an opportunity to conduct discovery on the issue.

As an initial matter, the court held that any of the relators' claims that were dismissed with respect to SPI would also be dismissed with regard to SAI and SNA. The court then held that since the relators pled a nationwide fraudulent scheme rather than specific individualized fraudulent statements, they were not required to link each corporate entity to each individual aspect of the alleged fraud scheme, and could properly plead the "who" element of the fraud scheme by plausibly alleging an alter ego relationship. The court determined that the relators did not link SAI and SNA to the fraud scheme, as their allegations regarding the specific involvement of the individual corporate defendants were scarce. The court also held that the relators failed to establish an alter ego relationship between SPI and SNA, since they failed to show that SNA totally dominated and controlled SPI, but instead merely established that the two companies were siblings. The court, though, found that the relators did plausibly allege that SPI was SAI's alter ego, as they alleged that SPI had been a wholly-owned

subsidiary of SAI, that SAI's CEO and Finance Vice President served on SPI's board, that SAI provided insurance coverage to and was in charge of savings and pension plans for SPI employees, and that SAI set various policies for SPI's employees. As a result of these findings, the court dismissed the relators' claims against SNA, but refused to dismiss the claims against SAI. In a separate ruling, the court dismissed all state FCA claims against both SNA and SAI, holding that Georgia law applied to the state law claims, since SPI was a Georgia corporation, and since Georgia law requires insolvency as a prerequisite for corporate veil piercing, and there were no allegations that the defendants were insolvent.

SNA and SAI also opposed any request by the relators for leave to file an amended complaint with respect to any claims that were not dismissed with prejudice. SNA and SAI cited the same reasons as SPI, but in this instance, the court held that the alter ego issues were not complex and that the relators should not be allowed to use discovery as a means to cure pleading deficiencies regarding the defendants' alleged alter ego relationship. Consequently, the court dismissed all federal and state FCA claims asserted against SNA, and dismissed the state FCA claims against SAI—the court had previously held that the relators could maintain their federal FCA claims against SAI.

See *U.S. ex rel. Wilkins v. United Health Group, Inc.*, WL 6719139 (D.N.J. Dec. 20, 2011) at page 40.

B. What Constitutes a False Claim

U.S. ex rel. Wright v. Comstock Resources, Inc., WL 6259893 (5th Cir. Dec. 15, 2011)

Three relators brought a *qui tam* action against an energy company, alleging that the defendant violated the False Claims Act by claiming royalties on mineral production on federal and tribal property, under multiple leases that were allegedly invalid for various reasons. The relators alleged that the defendant was required to submit MMS-2014 forms, which were used to determine the proper royalty amounts due to the defendant, but that these forms were improperly premised on ineffective leases, which led to FCA violations. The defendant denied the legal validity of the relators' arguments, and moved for summary judgment. The District Court for the Eastern District of Texas granted defendant's motion. The relators appealed to the United States Court of Appeals for the Fifth Circuit.

Holding: The Fifth Circuit affirmed the district court's decision and upheld the grant of summary judgment in favor of the defendant.

What Constitutes a False Claim?

The circuit court first considered the relators' arguments that, pursuant to several statutes, the leases in question were invalid. The relators had argued that the Indian Mineral Development Act (IMDA), which governs how government consent is obtained, required the government's compliance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) before the leases in question could be validated. As the relators alleged that the government failed to strictly comply with these statutes, they argued that the government's alleged consent regarding the lease agreements was ineffective, as required by the Indian Non-Intercourse Act (INIA). The appeals court disagreed with the relators' arguments and found that there was no case law which directly supported the contention that the apparent statutory violations amounted to fraud under the FCA—the court held that no reasonable jury could conclude, on the basis of relator's arguments, that the defendant knowingly defrauded the government. Moreover, the court determined that, although the INIA and IMDA do require consent of the government in dealing with Indian Tribes, it would be unwise to declare such consent ineffective when it did not comport with the strictures of the NEPA and ESA—instead of invalidating the leases due to alleged non-compliance with the NEPA and ESA, the court noted that these requirements could be enforced through an injunction. Thus, the Fifth Circuit held that the leases were valid, with respect to the relators' arguments regarding statutory non-compliance.

The court then turned to the leases that the relators argued were invalidated by the defendant's alleged violation of surface drilling operations. The relators argued that the defendant violated an agreement not to conduct surface operations, which amounted to a trespass that invalidated the defendant's mineral rights. Since, accord-

ing to the relators, the defendant's purported mineral rights were invalid, the defendant's claims to the government for royalty payments were false. The appellate court again disagreed with the relators, relying on a provision within the lease agreements that stated that no material breach of obligations would amount to a forfeiture or termination of the defendant's rights under the agreement. Thus, the court held that even if the defendant's actions technically constituted a trespass, those actions did not affect the defendant's mineral rights, and consequently, the defendant's claims to the government based on those mineral rights were not false.

Lastly, the circuit court turned to the leases that the relators argued had expired. The relators contended that the government improperly approved certain leases for property for which the government was still acting as a trust supervisor but had not yet gained legal title—and the relators argued that the government needed legal title to the property to approve the leases or any extensions of the leases. The defendant argued that the existence of a trust relationship was sufficient, and the Fifth Circuit agreed, finding that the government's authority to regulate Indian lands was not dependent on whether or not the government held legal title. Thus, the court held this group of leases was properly approved and also valid. Once again, the court noted that relators did not establish the defendant's scienter, concluding that no reasonable jury could infer that the defendant knowingly claimed invalid royalties from the federal government while simultaneously seeking and complying with the federal government's approval of the lease.

As a result of these findings, the Fifth Circuit affirmed the district court's grant of summary judgment in favor of the defendant.

U.S. v. Mays, 2011 WL 4807750 (D. Me. Oct. 11, 2011)

The government brought an action under the False Claims Act against two individuals (Mays and Chisholm), alleging that the defendants invoiced and accepted federal grant payments for services not actually rendered in a town camera surveillance system installation. The government alleged Chisholm—the chief of the town's fire department—prepared a detailed grant application to the state, requesting funding for the purchase and installation of a camera surveillance system. The government asserted that Chisolm's grant application included a budgetary cost description that equaled the maximum possible grant amount, but did not include any budgeted costs for labor, as the application stated that town residents would donate the labor required to install the cameras. The state approved Chisolm's grant application, which was funded by the federal government. The government further alleged that Chisholm submitted two invoices for reimbursement under the grant—one for equipment and one for labor, which was purportedly performed by Mays. The government alleged that the invoice for the labor was false, since Mays did not install the cameras. Furthermore, the government alleged that the town's actual expenses were less than the amount of the grant and that

Chisholm attempted to ensure that the town would receive all of the remaining grant money for which it was eligible by submitting false invoices. The defendants moved for summary judgment, arguing that the government did not present any evidence that they knowingly committed fraud—they argued that Mays did begin installing the cameras and that he would also provide training, maintenance, and repair of the system as needed, until the grant funds were exhausted. The government countered that, by submitting the invoices, the defendants falsely affirmed that Mays had completed the work detailed on each invoice, since the invoices said nothing about future work to be performed. The United States District Court for the District of Maine determined that a genuine issue of material fact existed as to whether the defendants' conduct constituted fraud. As a result, the court denied the defendants' summary judgment motion.

See *U.S. v. Carell*, WL 6339839 (M.D. Tenn. Dec. 19, 2011) at page 37.

JURISDICTIONAL ISSUES

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

U.S. ex rel. Carter v. Halliburton Co., WL 6178878 (E.D. Va. Dec. 12, 2011)

A relator brought a *qui tam* action against his former employer and its subsidiaries, alleging that the defendants falsely billed the United States for water purification services during the war in Iraq that were never actually provided. The relator had been employed as a water purification operator during the Iraq war and he alleged that the defendants required their employees to submit time cards totaling 12 hours each day, even when they did little or no actual work. The relator had previously brought these same claims twice before, but the United States District Court for the Eastern District of Virginia dismissed his first two attempts without prejudice, pursuant to the False Claims Act's first-to-file bar. However, once the other related actions were dismissed, the relator filed his claims for the third time. The defendants then moved to dismiss the relator's action, arguing that, under the first-to-file rule, the case was still barred by the first related case that had been filed and was precluded by another related action as well. The defendants also argued that the relator's case should be dismissed for failure to state a claim under the False Claims Act and because it was filed outside the FCA's six-year statute of limitations.

Holding: The United States District Court for the Eastern District of Virginia granted the defendants' motion and dismissed the complaint with prejudice.

First-to-File Bar

The defendants argued that the relator's case should be barred by other previously-filed *qui tam* cases—including yet another *qui tam* action the defendants discovered that was pending when the relator's third case was filed. The court focused its attention on the case that was still pending when the relator's present case was filed. First, the court addressed whether the claims in that case were related to the relator's claims for purposes of the first-to-file rule. The court found that, although the related action alleged fraud by the defendants at a different camp in Iraq, it still alleged that the defendants' fraudulent timekeeping and billing practices were common throughout the defendants' operations in Iraq and that such frauds were an "institutionalized" practice throughout defendant's corporate structure in Iraq and other countries. Thus, the court found that the claims alleged in the earlier-filed case were sufficient to put the government on notice of the essential allegations of a fraudulent scheme, which would allow the government to discover related fraud. Next, the court analyzed whether the earlier-filed case was still pending, for purposes of barring the relator's case under the first-to-file. It found that the earlier action was pending when the relator's complaint

was filed, but was no longer pending, as it had been voluntarily dismissed. The court held that when determining whether a *qui tam* action is barred under the first-to-file rule it is necessary to look at the facts as they existed when the second related action was brought. Therefore, the court held that the relator's suit was barred by the earlier-filed case, which was both "related" and "pending" when the relator's suit was filed.

Statute of Limitations

The court then addressed the defendants' argument that most of the relator's claims were barred by the FCA's six-year statute of limitations because the relator chose to re-file new actions rather than amend his prior complaints. The relator argued that the Wartime Suspension of Limitations Act (WSLA)—which, the relator contended, expressly applied to civil offenses against the government—tolled the statute of limitations on his claims. The court examined the issue and held that the WSLA does not apply to non-intervened civil FCA actions, as application of the WSLA would allow relators to sit on their claims in excess of ten years, which would undermine the FCA's purpose of combatting fraud efficiently and quickly.

Thus, the court granted the defendants' motion and dismissed the relator's action with prejudice.

U.S. ex rel. Batiste v. SLM Corp., 2011 WL 5299637 (D.C. Cir. Nov. 4, 2011)

A relator brought a *qui tam* action against his former employer—a student loan administrator—alleging that the defendant presented false claims to the government, based on false certifications of compliance with the Higher Education Act. Specifically, the relator alleged that the defendant unlawfully put student loans into forbearance, so as to allow interest to continue accruing on the loans and to allow the Department of Education to continue paying special allowances to the defendant, thereby increasing the defendant's return on such loans. In addition, the relator alleged that the defendant would continue to postpone default on loans in forbearance, thereby artificially keeping its default ratio low and maintaining the defendant's status as an eligible lender under Department of Education guidelines. Moreover, the relator alleged that the defendant paid bonuses to employees who reduced delinquencies on loan payments by granting unlawful forbearances; the relator alleged that the defendant advised its employees to disregard their training and to grant forbearances to any student whose loan payments were delinquent, regardless of whether or not the borrower intended to repay the loan.

The defendant moved to dismiss the relator's complaint for lack of subject matter jurisdiction, citing the False Claims Act's first-to-file bar, which precludes relators from filing *qui tam* actions whenever related actions have already been filed and are still pending. The United States District Court for the District of Co-

lumbia granted the defendant's motion and dismissed the relator's complaint with prejudice, based on its finding that an earlier-filed *qui tam* complaint against the defendant barred the relator's complaint. The relator appealed the district court's ruling to the U.S. Court of Appeals for the District of Columbia Circuit, arguing that the district court improperly dismissed his action because his complaint alleged a different fraudulent scheme from the earlier-filed complaint. Further, he argued that the district court erred in holding that the first-to-file bar does not require first-filed complaints to satisfy Rule 9(b)'s heightened pleading standards, and thus improperly dismissed his complaint with prejudice.

Holding: The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the district court and upheld the dismissal of the *qui tam* complaint for lack of subject matter jurisdiction, pursuant to the FCA's first-to-file rule.

First-to-File Bar

The circuit court began by analyzing whether the relator's complaint alleged the same material elements of fraud as the earlier-filed complaint, and therefore, was a "related action." The court found that the relator failed to explain how his complaint was unrelated to the earlier-filed complaint, noting that both complaints served to put the government on notice of the same alleged fraud. Specifically, the court observed that the two complaints named the parent company as the lead defendant, both alleged a nationwide fraud scheme, both alleged nearly identical relevant dates, and both alleged the same corporate-wide scheme of fraudulently increasing the defendant's profits and promoting its standing with the Department of Education by misusing forbearances. Further, the appeals court found that both complaints alleged that the defendant's corporate culture promoted increasing the dispensation of forbearances through quotas and a team bonus system. Although the circuit court observed that the relator's complaint alleged some additional details that were not included in the earlier-filed complaint, it concluded that these additional facts did not give rise to a different government investigation or would lead to a great government recovery. Accordingly, the D.C. Circuit Court held that the district court properly dismissed the relator's complaint under the FCA's first-to-file bar.

The court then considered the relator's argument that first-filed *qui tam* complaints must satisfy Rule 9(b)'s pleading standard in order to bar later-filed complaints under the FCA's first-to-file rule. The relator, supported by the government as *amicus curiae*, contended that the circuit court should impose a heightened pleading requirement on complaints for first-to-file purposes, arguing that such a requirement would ensure that first-filed *qui tam* complaints provide the government with sufficient information to pursue an investigation and prevent overly-broad complaints from barring more detailed, later-filed complaints. The circuit court, though, found that the heightened pleading standard is designed to protect defendants in fraud cases from frivo-

lous accusations and to allow them to prepare an appropriate response—the pleading requirement is not designed to serve the interests of relators. Further, the appellate court agreed with the district court that a *qui tam* complaint may give the government sufficient information to launch an investigation, even if the complaint does not satisfy Rule 9(b)'s particularity standard. Accordingly, the court of appeals rejected the relator's argument that prior *qui tam* complaint must meet the heightened pleading standard in order to bar later complaints.

The relator also argued that the district court should not have dismissed his complaint with prejudice, since the earlier-field complaint had been dismissed before his complaint was dismissed—essentially, the relator argued that once the earlier-filed complaint was dismissed, it was no longer "pending" and he should have been allowed to amend his complaint and re-file. The circuit court, though, found that the earlier-filed complaint was had been dismissed 18 months before the present relator's case was dismissed, and that during that entire time, the present relator had never requested leave to amend his complaint. The circuit court held that by waiting so long to raise this issue, the present relator waived any argument for leave to amend his complaint. Thus, the court upheld the district court's dismissal of the complaint with prejudice.

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

U.S. ex. rel. McNulty v. Reddy Ice Holdings, Inc., WL 6102046 (E.D. Mich. Dec. 7, 2011)

A relator filed a *qui tam* action against his former employer—an ice company—as well as two other ice companies. The relator alleged that the defendants conspired to increase the price of packaged ice above competitive levels by secretly agreeing to: (1) sell and distribute packaged ice at artificially inflated prices; (2) rig bids for ice purchase and distribution contracts, and (3) allocate customers and markets territories among themselves. He alleged that this conspiracy increased the prices of packaged ice to all purchasers, including the federal government, as the defendants allegedly had hundreds of contracts with various government agencies for the purchase of ice from the defendants, including a contract with FEMA during the Hurricane Katrina relief effort. The defendants each moved to dismiss the relator's action, arguing that the court lacked subject matter jurisdiction over his claims and that he failed to plead those claims with the requisite particularity. Additionally, the relator's former employer filed a counterclaim against him for breach of a settlement agreement between the parties, in which the relator received six months of severance pay in exchange for waiving any and all claims against that defendant—the defendant argued that, based on his *qui tam* filing, the relator had knowledge of the alleged conspiracy prior to signing the agreement, and therefore committed a breach. The relator moved to dismiss that counterclaim.

Holding: The United States District Court for Eastern Michigan granted the defendants' motions to dismiss the relator's complaint, and also granted the relator's motion to dismiss the counterclaim.

Public Disclosure Bar

The court began by examining the defendants' motions to dismiss. The defendants argued that the court lacked subject matter jurisdiction over the relator's complaint because his claims were based on previous public disclosures and the relator was not an original source of that information. The court agreed with the defendants, finding that similar alleged activity had been publicly disclosed in other proceedings against the defendants, months before the relator filed his *qui tam* complaint. The court then held the relator did not qualify as an original source because he took inconsistent positions with respect to his knowledge of the alleged conspiracy. The court observed that, on one hand, the relator argued that he had direct and independent knowledge of the alleged conspiracy to defraud the government, in order to qualify as an original source, but on the other hand, he claimed that he did not have advance knowledge of the alleged conspiracy, in order to escape liability for a breach of the settlement agreement with his former employer. In addition, the court held that even if the relator had direct

and independent knowledge of the defendants' alleged conspiracy, he did not qualify as an original source of information on which his allegations of fraud against the government was based, since he only "learned" that the defendants were price-gouging the government from a rumor he heard from a former co-worker. Thus, the court held that it lacked subject matter jurisdiction over the relator's *qui tam* claims, and those claims were dismissed on that basis.

Pleading Fraud with Particularity

The court also held the relator failed to plead the alleged fraud scheme with particularity, since the relator failed to present a single allegation regarding fraud on the government and failed to describe any false claim presented to the government. The court found the relator simply alleged that all contracts between the defendants and the government were fraudulent because of the alleged conspiracy, and held that this type of generalized approach to pleading the presentment requirement of FCA liability failed, noting that contracts with the government are not the same as claims for payment. Therefore, the court granted the defendants' motions to dismiss on that basis as well.

Waiver/Release of FCA Claims

Finally, the court examined the defendant former employer's counterclaim, in which that defendant alleged that the relator breached a settlement agreement, which barred his *qui tam* action. In moving to dismiss that counterclaim, the relator argued he did not know of the alleged conspiracy when he signed the agreement and that he only received key knowledge of the defendants' agreement after the settlement agreement and release was signed. The court agreed with the relator and dismissed the counterclaim. The court held that such agreements releasing former employers of FCA liability only preclude subsequent *qui tam* actions if: (1) the release can be fairly interpreted to encompass *qui tam* claims; and (2) public policy does not otherwise outweigh enforcement of the release. Upon considering the public policy implications of enforcing the release, the court stated: "Where the government had no knowledge of the claims that form the basis for a *qui tam* complaint prior to the time that the relator signs the release, enforcement of the release interferes with and frustrates the FCA's goals of incentivizing individuals to reveal fraudulent conduct to the government." Since there was no dispute that the relator only brought his allegations to the government after he had already signed the release agreement, the court held that enforcement of that agreement was outweighed by public policy considerations. As a result, the court granted the relator's motion to dismiss the counterclaim.

U.S. ex rel. Purcell v. MWI Corporation, 2011 WL 5517352 (D.D.C. Nov. 14, 2011)

A relator brought a *qui tam* action against his former employer, alleging that the defendant submitted false claims to the Export-Import Bank of the United States—a federal agency. The government intervened in the relator's suit and added common law claims to the relator's False Claims Act claims. The plaintiffs alleged that the defendant had arranged to sell irrigation pumps and other equipment throughout Nigeria and that, to facilitate the sales, the defendant and Nigeria received a series of loans from the Export-Import Bank, totaling $74.3 million. Each of these loans was conditioned on a "supplier's certificate" that the defendant was required to submit, which certified that the defendant had not paid any "irregular commissions" in connection with its equipment sales. The plaintiffs alleged that these certificates were necessary to ensure that any U.S. exports financed by the Export-Import Bank were not tainted by the stigma of bribes or other illegal activity. The plaintiffs contended that the defendant's certificates were false, since the defendant had paid its Nigerian sales representative $28 million in excessive and irregular commissions, which, the plaintiffs contended, amounted to bribes. The plaintiffs alleged that the defendant usually paid commissions of about 10% of the standard discounted sales price, and 50% of any amount received over that price. The Nigerian sales representative in question, however, was alleged to have received far greater commissions, which represented 34% of the sales price.

Both parties moved for summary judgment on the FCA claims and the defendant also moved to dismiss the relator's claims for lack of subject matter jurisdiction, arguing that those claims were precluded by the FCA's public disclosure bar provision.

Holding: The United States District Court for the District of Columbia denied all motions.

Public Disclosure Bar

The court first determined that it had subject matter jurisdiction over the relator's claims and thus denied defendant's motion to dismiss the relator's complaint for lack of jurisdiction. The defendant had argued that the relator's allegations were based on information that was publicly available at the time he filed suit, citing several news articles and documentary evidence that purportedly showed that the government had received Freedom of Information Act requests related to the case. The court, though, found that that the defendant failed to provide copies of the majority of the news articles and did not furnish any copies of relevant FOIA requests or responses. The relator countered that the news articles in question did not publicly disclose the central allegations of his complaint, as they did not disclose the allegedly fraudulent loan documents or the underlying allegations concerning the defendant's alleged bribes. Rather, the relator claimed, he used his insider position with the defendant to obtain the information

upon which his *qui tam* complaint was filed and he provided that information to the government before filing suit. While the relator acknowledged gathering some information through FOIA requests to the Export-Import Bank, he stated that he only received background documents and other general information, and thus, the FOIA responses did not result in a public disclosure that would bar his *qui tam* action.

The court first observed that only half of the news articles in question were published before the relator's *qui tam* action was filed—the other half of the news articles could not possibly bar the relator's suit and as a result, the court held that those articles were irrelevant to the subject matter jurisdiction question. With respect to the articles that were published before the *qui tam* action was filed, the court agreed with the relator that "[n]one of these articles contain any information regarding the critical elements underlying the relator's complaint," since the articles did not "suggest that [the defendant] concealed irregular sales commissions in an effort to secure loan money from the Ex-Im Bank, the central allegation at issue here." Consequently, the court held that the news articles in question did not trigger the FCA's public disclosure bar.

Next, the court examined the relator's FOIA requests and the responses he received, and again concluded that the public disclosure bar had not been triggered. The court first considered the defendant's argument that at least one major newspaper, the Wall Street Journal, had filed FOIA requests to receive information about the defendant's business activities in Nigeria. However, since the defendant failed to provide any evidence regarding what information the newspaper requested or received, the court held that the defendant failed to show that the relator's allegations had been publicly disclosed. Thus, the court held that the Wall Street Journal's FOIA request did not trigger the public disclosure bar. Similarly, the court held that the relator's own FOIA requests did not bar him from filing suit. The court determined that the defendant failed to show that the relator's FOIA requests were for anything more than the "background information" the relator admitted to receiving. Since the defendant could not contradict the relator's claim that he did not receive any documents related to the defendant's alleged false certifications through FOIA—the relator claimed that he received such documentation from a co-worker—the court denied the defendant's motion to dismiss the relator's claims for lack of subject matter jurisdiction.

Motions for Summary Judgment

The court denied both parties' summary judgment motions, holding that genuine issues of disputed material fact existed regarding key elements of FCA liability and damages. First the court concluded that there was a genuine dispute as to whether or not the defendant knowingly made a false statement regarding the payment of any "irregular commissions." The court noted that "both parties have marshaled inconsistent facts to support their arguments." The plaintiffs claimed that the defendant paid significantly higher commissions to the Nigerian sale agent at issue than it had paid, on average, to other sales agents. The defendant, though, claimed that the plaintiffs failed to consider the "relevant industry framework"—which encompasses relevant geo-

graphic and other factors—and that any analysis of the meaning of the term should be left to a jury. The court agreed with the defendant and denied both parties motions for summary judgment with respect to the issue of falsity.

In addition, the court determined that a genuine issue of disputed material fact existed as to whether or not any alleged false certification was material to the Ex-Im Bank. Both parties submitted evidence to the court regarding this element of FCA liability. The plaintiffs relied on the testimony of Ex-Im Bank employees, but the defendant attacked that testimony and argued that the witnesses lacked supervisory authority to approve the loans in question and thus could not establish that the disclosure of the commissions in question would have affected the government's decision to provide the loans. The court made clear that it was not swayed by the defendant's argument, but ultimately held that the matter was not appropriate for summary judgment. Thus, the court denied both parties summary judgment motions on the materiality issue.

Finally, the court considered the parties summary judgment motions on the issue of damages. Once again, the court concluded that issues of disputed material facts existed. The court relied in part on its analysis of the materiality issue and determined that "the parties dispute a relevant factual question—whether or not the evidence shows that Ex-Im Bank's employees would have approved the loans if they had known" about the commission in question. As a result, the court denied the parties' motions for summary judgment with respect to the government's alleged damages.

U.S. ex rel. Cervantes v. Deere & Co., 2011 WL 5325466 (E.D. Wash. Nov. 3, 2011)

Three relators brought an action against a finance company and its affiliates, alleging fraud claims under the False Claims Act, as well as other claims. The relators alleged that the defendants defrauded the government by misrepresenting their eligibility to participate in a federal government program that allowed financial institutions to issue billions of dollars in FDIC-guaranteed debt. The United States declined to intervene in the action and the defendants moved to dismiss the relators' claims, arguing that the FCA's public disclosure bar deprived the court of subject matter jurisdiction, and that the relators failed to state a claim.

Holding: The United States District Court for the Eastern District of Washington granted the defendants' motion to dismiss, finding that the relators' *qui tam* complaint was precluded by the public disclosure bar. The court did not reach the question of whether or not the relators stated a claim for relief under the FCA.

The court began by analyzing whether information underlying the relators' fraud allegations had been previously publicly disclosed. It found that the relators relied on numerous documents that were downloaded from the Internet, as well as deposition testimony from two of the defendants' employees, which were taken during an earlier bankruptcy proceeding. The court determined that all of these disclosures had entered

the public domain before the relators became aware of them, and thus, the information underlying the *qui tam* complaint had been publicly disclosed. The court did not address the question of whether or not the relators' allegations were "based upon" publicly disclosed information, and instead turned its attention to the issue of whether or not the relators qualified as original sources of that information, and could overcome the public disclosure bar. It concluded that they did not, as they failed to allege that they voluntarily provided information regarding the alleged fraud to the government before filing their complaint, and since they failed to allege that they uncovered any information that was not already available in the earlier public disclosures and thus had no direct or independent knowledge of the alleged fraud. Accordingly, the court held that the relators' complaint was barred by the FCA's public disclosure provision and would be dismissed. As the court determined that the relators' complaint should be dismissed for lack of subject matter jurisdiction, it declined to address the defendants' argument that the relators also failed to state a claim for relief under the FCA.

See *U.S. ex rel. McLean v. County of Santa Clara*, 2011 WL 5223076 (N.D. Cal. Oct. 31, 2011) at page 47.

FALSE CLAIMS ACT RETALIATION CLAIMS

Tolman v. Am. Red Cross, WL 6333700 (D. Idaho Dec. 19, 2011)

A plaintiff brought an action against his former employer—a chapter of the American Red Cross—and its national parent organization. He alleged that he complained about the misuse of public money and, in response, was terminated from his job. He alleged a claim under the False Claims Act for retaliation, along with several other causes of action. The defendants moved to dismiss all of his claims. With respect to the False Claims Act allegation, the defendants argued that the plaintiff failed to state a claim for relief under the FCA, and that, if he did, then his claim was filed after the statute of limitations expired.

Holding: The United States District Court for the District of Idaho granted the defendants' motion in part. The court held that the plaintiff's retaliation claim was timely filed, but concluded that the plaintiff did not adequately plead the elements of an FCA retaliation claim, as he failed to demonstrate that he had engaged in protected activity under the FCA and was fired for doing so.

Statute of Limitations for FCA Retaliation Claims

The court first considered the defendants' assertion that the plaintiff's retaliation claim was untimely. The plaintiff argued that he was fired in retaliation for complaining about the defendants' alleged misuse of public funds. The defendants countered that the statute of limitations for that claim was only 180 days, but that his complaint was filed nearly two years after the alleged retaliation occurred. The court noted that at the time the alleged retaliation occurred, the FCA did not include a specific statute of limitations for retaliation claims. The court further observed the U.S. Supreme Court's holding that the applicable statute of limitations for FCA retaliation claims must be borrowed from the most analogous state law. Since the parties' dispute arose in Idaho—the relator had been employed by the Idaho Chapter of the American Red Cross—the court looked to Idaho state law for the most analogous state law provision and found two possible statutes: one with a 4-year limitations period and another with a 180-day limitations period. Before adopting one of those limitations periods, the court noted that the False Claims Act was amended in 2010, to add a standard 3-year limitations period for retaliation claims. Although the amendment is silent as to whether or not it should be applied retroactively, the court reasoned that it should be applied retroactively in this instance, since the proper limitations period had not been settled and there was no evidence that applying the amended 3-year period would frustrate federal law or result in inequity against the employees for whom it was adopted. Consequently, the court denied the defendants' motion to dismiss on the basis of untimeliness, since the plaintiff's claim was filed within 3 years.

Failure to State Retaliation Claim

Next, the court considered the defendants' argument that the retaliation claim was deficient. The court noted that plaintiff's complaint only made vague references to the defendants' alleged misuse of public funds, and found that, "[a]t times, the complaint seems to allege nothing more than that the Red Cross officials were inept fundraisers." Since the court could not determine from the complaint the nature of any fraud against the government about which the plaintiff allegedly complained to his employer, the court granted the defendants' motion to dismiss the retaliation claim without prejudice. The court granted the plaintiff leave to amend his complaint "to more precisely describe the fraud against the government, being committed by National Red Cross and Idaho Chapter employees, that he was complaining about that caused him to lose his job."

Huang v. Rector and Visitors of the Univ. of Va., et al., WL 6329755 (W.D. Va. Dec. 19, 2011)

A plaintiff brought an action under the False Claims Act, state law and common law, against two employees of a state university that had previously employed him—the two university employees were sued in both their individual and official capacities. He alleged that the defendants retaliated against him after he exposed a fraud scheme against the National Institutes of Health (NIH). Specifically, the plaintiff alleged that after he was promoted to an assistant professor position in the university, he applied for and received an NIH grant, for which he proposed to allocate 50% of his time. He stated that his immediate supervisor, Dr. Li, would allocate 5% of his time to the project, in a supervisory role. He alleged that, without authorization, Dr. Li changed the level of effort charged to the project and misrepresented the amount of time spent on an NIH-funded project, so as to improperly divert money from the project to pay unrelated salaries and expenses. He claimed that when he discovered and reported these misrepresentations to the chairman of his department within the university, he was retaliated against; he alleged that his employment contract was not renewed because of his strained relationship with his supervisor, and that restrictions were placed on the conditions of his employment—the locks were changed on the laboratory he was working in, which prevented him from conducting research on the project.

In response to these actions, the plaintiff alleged that he filed a grievance with the university, but soon after, Dr. Johnson, an associate dean, informed him that he was being placed on administrative leave, amid allegations that he had taken laboratory equipment without permission and had tried to pass off his supervisor's work as his own. The plaintiff denied those allegations and filed a formal complaint with the university. Dr. Johnson recommended that the university terminate the plaintiff's employment. The university, however, concluded that it was

possible that the plaintiff's employment contract was not renewed for retaliatory reasons and that the university had not met its burden of justifying any effort to terminate his employment. Eventually, the university determined that the alleged misuse of NIH funds was "a serious breach of University policy," and offered to extend the plaintiff's employment contract by one year. Fearing further retaliation, the plaintiff declined the university's offer. Subsequently, he filed his lawsuit against the university, Dr. Li, and Dr. Johnson. The defendants moved to dismiss the plaintiff's FCA claims—with the individual defendants only moving for the dismissal of FCA claims filed against them in their official capacities—for failure to state a claim for relief.

Holding: The United States District Court for the Western District of Virginia granted the defendants' motion in part. The court dismissed the plaintiff's individual-capacity and official-capacity claims for damages against both individual defendants, but allowed the plaintiff to maintain his individual-capacity and official-capacity claims for prospective relief against those defendants.

Retaliation Claims Against State Officials

The court first considered the plaintiff's FCA claims for damages against the individual defendants in their official capacities. The court found that such suits, when filed against state officials, are actually filed against the officials' respective offices, not against the officials themselves. Therefore, it found that both individual defendants were, in their official capacities, synonymous with the public university, which was an instrumentality of a state. The court then considered the question of whether an FCA retaliation claim for damages can be brought against a state entity, and found that the FCA's anti-retaliation provision should not be read to allow suits against states unless it clearly expresses such an intent. After examining the plain language of that provision, as well as its legislative history, the court concluded that the FCA's anti-retaliation provision does not include an express Congressional intent to subject states to liability. The court held that the plaintiff "has not demonstrated that Congress intended to waive sovereign immunity in [the FCA's anti-retaliation provision]." As a result, the plaintiff's FCA claims for damages against the individual defendants in their official capacities were dismissed.

The court, though, noted that the plaintiff also sought equitable relief against the individual defendants in the official capacities—up to and including reinstatement of his job. The court noted that the FCA's anti-retaliation provision specifically allows for injunctive relief, and that, unlike with claims for damages, states are not exempt from actions for prospective relief. The court observed that the university offered to reinstate the plaintiff's job for a year, presumably to make up for the year he "lost" while pursuing grievances against the university and being placed on administrative leave. The court shared the defendants' concern that reinstatement of the plaintiff's job would be circular and futile, given the long history of poor relations between the par-

ties. However, the court decided that the plaintiff presented sufficient facts to pursue the claim, and would not, at the motion to dismiss stage, decide whether or not the plaintiff forfeited his right to request equitable relief when he rejected the university's job offer, or whether—in the event that reinstatement would be futile—the plaintiff might be entitled to front pay as a means to make him whole, even though the FCA does not specifically list front pay as a remedy. Since the plaintiff's claims for prospective relief against the individual defendants in their official capacities could not be resolved at the motion to dismiss stage, the court denied the defendants' motion with respect to those claims.

The individual defendants did not move to dismiss the plaintiff's claims against them in their individual capacities. Therefore, those claims remained.

U.S. ex rel. Berglund v. The Boeing Company, WL 6182109 (D. Or. Dec. 13, 2011)

A relator brought a *qui tam* action against his former employer, an aerospace company, alleging that the defendant submitted false claims by knowingly delivering nonconforming parts to the government. He also alleged that the defendant engaged in retaliatory conduct after learning that he had reported the alleged fraud to the government. The government declined to intervene in the relator's suit. The case started in 2001 when the relator and another employee filed a FCA claim (the First Action) against the defendant and others in another court within the district. The First Action included a claim for retaliation by the other employee, but not by the present relator. The First Action was mistakenly posted on the court's website and the defendant first learned of the *qui tam* by viewing the complaint there. Fifteen months later, the two relators filed an amended complaint in which both alleged retaliation. The present relator then filed the present *qui tam* action in 2002, alleging fraud, but not retaliation. In 2004, the relators voluntarily dismissed the First Action and soon after, the present relator amended his complaint in the present action by dropping his fraud claim and adding a retaliation claim. As a result, the only pending claim brought by the present relator against the defendant is a retaliation claim under the False Claims Act. The defendant moved for summary judgment on that claim, arguing that a majority of the instances of alleged retaliation occurred outside the statute of limitations and thus, were time-barred, and that any remaining claims failed to present a disputed issue of fact, warranting summary judgment in favor of the defendant.

Holding: The United States District Court for the District of Oregon denied the defendant's motion for summary judgment, but granted its request for sanctions.

Statute of Limitations on FCA Retaliation Claims

The court first analyzed the statute of limitations for the retaliation claims. The defendant argued that the FCA did not include a statute of limitations when the alleged retaliation took place, and that the court should look to the most analogous state law provision to determine the applicable limitations period. Using that reasoning, the defendant argued that either the one-year limitations period under Oregon's whistleblower statute applied or, alternatively, that the two-year limitations period for wrongful discharge claims under Oregon law should apply. The relator countered that the FCA had been amended in 2009, and now includes a standard three-year limitations period for retaliation actions, and that this three-year statute of limitation should apply to his pending retaliation claim. The court first determined that the one-year limitations period should not apply after finding that it was explicitly limited by the Oregon legislature to actions commenced after 2009. The court also declined to retroactively apply the amended three-year limitations period for retaliation actions under the FCA, noting that even though the three-year limitations period would not have forced the defendant to defend a previously time-barred claim, there existed no controlling authority regarding retroactive application of the amendment. Therefore, the court held that Oregon's two-year limitations period for wrongful discharge claims would apply, as that was the most closely analogous limitations provision under applicable state law.

As the relator's present retaliation claim was brought outside the two-year limitations period, the court considered when the limitations period for relator's claims was tolled. The relator first argued that his claims were not time-barred because they related back to the First Action—which was commenced in 2002, and within the two-year limitations period. The relator argued that since the present action was filed while the First Action was still pending, he could not add the retaliation claim, as it had already been brought in a separate proceeding in a different court. He argued that he did not add the retaliation claim to the current action until after the government declined to intervene in the First action and that case was voluntarily dismissed. Therefore, he argued, his retaliation claim should be incorporated into the First Action, for statute of limitations purposes. The defendant argued the statute of limitations tolled when the relator filed the present case in 2004, not in 2002 when the First Action was filed and agreed that if the retaliation claim related back to 2002, then the claim would not be time barred. The court observed that when the relator voluntarily dismissed the First Action, he specifically and explicitly sought to preserve his retaliation claim and to have that claim consolidated with the present action. However, the court noted that when the First Action was dismissed, the court did not order that the retaliation claim was to be consolidated with the present action, but simply dismissed the entire matter without prejudice. Consequently, the court in the present action was compelled to hold that the date for tolling the retaliation claim shifted from 2002 to 2004.

But before the court dismissed the relator's claims as time-barred, it considered the relator's argument that his allegations of his retaliation claim were timely under the continuing violation doctrine, stating that the defendant engaged in a continuous pattern of retaliation. However, the court declined to apply the continuing violation doctrine to the retaliation claim, as the relator failed to provide any authority in which the doctrine had been applied to FCA retaliation actions. The court, however, did accept the relator's argument that the Oregon Savings Statute preserved the original filing date of the First Action. Under that statute, if an action is involuntarily dismissed without prejudice, then the plaintiff may commence a new action based on the same claim within 180 days, as long as the defendant had notice of the original action. The defendant argued that the statute was inapplicable because relator admitted that he voluntarily dismissed the complaint in the First Action. The court disagreed and found that the voluntarily dismissed the fraud claims in the First Action, but did not voluntarily dismiss the retaliation claim. The court stated that "[t]he fact the [retaliation] claim was ultimately dismissed without prejudice does not alter [the relator]'s clearly stated intent to preserve prosecution of that claim, and thus, dismissal of [the relator's retaliation claim] should be viewed as *involuntary*" (emphasis in original). Since the relator's filed the present action within 180 of the dismissal of the First Action, the court held that the Oregon Savings Statute preserved his claim for statute of limitations purposes.

Failure to State a Retaliation Claim

The court then analyzed the sufficiency of the retaliation claim. The defendant argued that the relator failed to establish that the defendant took actions against him because of any whistleblowing FCA activities, arguing that there was ample evidence that the alleged retaliatory activities would have occurred independent any protected activity by the relator. The court, though, found that the relator showed that he was engaged in protected conduct under the False Claims Act and he presented ample evidence that the defendant was aware of such protected conduct. The relator pointed to three instances of retaliatory conduct: (1) a downgrade of job status; (2) unanswered complaints to human resources; and (3) a scathing performance review by the relator's manager allegedly designed to lower the his retention rating within the company. The defendant was unable to provide non-retaliatory explanations for these allegedly retaliatory actions, and the court determined that the defendant's decision to lower his retention rating, coupled with his inexplicably bad performance review, when viewed in light of the defendant's knowledge of the relator's pending *qui tam* action, provided a sufficient basis to overcome the defendant's motion for summary judgment. Thus, the court denied the defendant's motion.

Hill v. Booz Allen Hamilton, Inc., WL 6000501 (D. Guam Nov. 16, 2011)

A plaintiff brought a claim under the False Claims Act, alleging that her former employer retaliated against her and wrongfully terminated her employment in response to her protected whistleblowing activity. She alleged that the defendant—a management and technology service provider—oversaw U.S. Air Force government contracts related to environmental risk studies on military dump sites. She claimed that her job was to provide quality assurance oversight and progress reviews for the work, and that she discovered that a government contractor was double-billing the government. She alleged that she reported the overbillings to the Air Force and to her boss. She stated that her boss had previously worked with the government contractor involved in the alleged overbilling, and consequently told her to show some lenience to the contractor—threatening that if she continued finding flaws with the contractor's billing, then she would be fired. She further alleged that she provided the Air Force with a detailed spreadsheet regarding the contractor's fraudulent billing, which was eventually forwarded to her boss. She alleged that she was then placed on probation and later terminated from her job. The defendant moved for summary judgment on the plaintiff's claims, arguing that she did not engage in protected conduct under the False Claims Act, that the defendant had no notice of any protected conduct she may have engaged in, and that she was fired for non-retaliatory reasons.

Holding: The United States District Court for the District of Guam denied the defendant's motion, holding that a reasonable jury could find that the plaintiff's allegations amounted to a violation of the False Claims Act's anti-retaliation provision.

Retaliation

The court first rejected the defendant's argument that the plaintiff did not engage in protected conduct under the FCA, since the plaintiff claimed that she investigated the contractor's alleged improper billings, prepared spreadsheets to the Air Force in which those instances of alleged overbilling were itemized, and reported her findings to her boss on several occasions. The defendant argued that these activities should not be considered protected conduct because they were within the scope of the plaintiff's job duties. The court disagreed with the defendant and found that the plaintiff's job did not require her to investigate and report fraudulent billing. Thus, the court held that the plaintiff's allegations provided a basis for a reasonable jury to conclude that she had engaged in protected conduct under the False Claims Act.

Next, the court determined that the defendant was on notice of plaintiff's protected activity, as the plaintiff discussed the contractor's alleged improper billing with both the defendant and Air Force employees. Additionally, the court found that the spreadsheets the plaintiff prepared for the Air Force—and which were eventually sent to the plain-

tiff's boss—was sufficient evidence for a reasonable jury to conclude that the defendant had been put on notice that the plaintiff was engaging in protected conduct.

Finally, the court held that a reasonable jury could conclude that there was a causal nexus between the plaintiff's protected conduct and the termination of her job. The court found that the plaintiff's allegations of protected conduct almost perfectly mirrored the defendant's acts of placing her on probation and her eventual termination. The court rejected the defendant's argument that the plaintiff's termination was not retaliatory and was solely based on poor performance, since the court found that the plaintiff presented adequate evidence showing that the defendant's stated reasons for her termination were pre-textual. The court noted that the plaintiff provided evidence of her satisfactory performance reviews shortly before she presented her concerns to the defendant, but also offered evidence showing that after she began her investigation, she started receiving negative reviews. Furthermore, she provided evidence demonstrating that the timeline of her probation, poor reviews and termination almost perfectly mirrored her investigation. Therefore, the court held the defendant did not articulate non-discriminatory reasons for terminating the plaintiff. The court also rejected the defendant's argument that the plaintiff's termination could not have been retaliatory, since the defendant's vice president fired the plaintiff, and he had no knowledge of her investigations of alleged fraudulent overbillings to the government. Instead, the court held that, under the "cat's paw theory," an employer may be held liable for retaliation even if the ultimate decision-maker did not act with retaliatory intent. Therefore, the court held that a reasonable jury could find that the plaintiff's boss, who did have notice, set in motion the decision to terminate her, which was sufficient for FCA liability.

The defendant's motion for summary judgment was denied.

See *U.S. ex rel. Glynn v. Compass Medical, P.C.*, WL 5508916 (D. Mass., Nov. 10, 2011) at page 43.

See *U.S. ex rel. Davis v. Point Park Univ.*, 2011 WL 4916190 (W.D. Pa. Oct. 17, 2011) at page 51.

See *U.S. ex rel. Knapp v. Calibre Sys., Inc.*, 2011 WL 4914711 (C.D. Cal. Oct. 17, 2011) at page 53.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not Knowingly False

U.S. v. Houston, 2011 WL 4899983 (M.D. Tenn. Oct. 14, 2011)

The United States brought an action against an individual, alleging violations of the False Claims Act and common law. Specifically, the government alleged that the defendant held a power of attorney in relation to her terminally ill mother's affairs and that her mother was entitled to surviving spouse benefits under the Energy Employees Occupational Illness Compensation Program—a program designed to compensate employees and contractors who became ill while working at Department of Energy during the Cold War. The government further alleged that the defendant completed the required surviving spouse benefit form (Form EN-20) on her mother's behalf, but that the form was completed incorrectly and was rejected. Subsequently, the defendant completed the form a second time and backdated it to match the date of her original submission. However, before the second form was submitted, the defendant's mother passed away. Since the defendant failed to provide proper notice of her mother's death to the government, the surviving spouse funds were improperly deposited into an account the defendant had shared with her mother—but which became solely the defendant's account upon her mother's death. Once the funds were deposited, the defendant divided them between herself and her siblings. The government alleged that since the applicable statute mandates that surviving benefit funds only be paid if the "covered spouse is alive at the time of payment," the defendant committed fraud because she withheld information regarding her mother's death. Consequently, the government sued. Following discovery, the government moved for summary judgment.

Holding: The United States District Court for the Middle District of Tennessee denied the motion with respect to the government's FCA claims, finding that there was a dispute of fact regarding whether or not the defendant knowingly submitted a false claim or knowing made a false statement in order to receive her mother's benefits.

Not Knowingly False

The court denied the government's motion as it determined that the defendant could have had reason to believe that her claims and statements to the government were not false. The court found that: (1) prior to her mother's death, the defendant received notice from the U.S. Department of Labor (DOL) that her EEOICPA claim had been accepted; (2) that she had waived any right to object to the amount of the benefit, so as

to receive prompt payment; (3) that the payment would be made upon completion of the EN-20 form; (4) that the defendant informed a DOL official that her mother was on her death bed, but was never advised that the payment would not be made if her mother died before the funds were actually transferred; and (5) that after her mother died, the defendant consulted with her mother's attorney, who advised her to resubmit Form EN-20 using the same date that was on the original form. Thus, the court reasoned, a jury might find that the defendant reasonably believed that her mother was fully entitled to receive the benefit, which would become part of her estate upon her death. Since the False Claims Act does not punish innocent mistakes, but only knowing frauds, the court held that the government was not entitled to summary judgment on its fraud claims, since the issue of whether or not the defendant knowingly violated the FCA was still in dispute. Thus, the government's motion with respect to its FCA claims—claims that, if successful, could have resulted in treble damages and civil penalties—was denied.

Ultimately, though, the government prevailed on its common law theories of conversion, payment by mistake and unjust enrichment, and consequently, the defendant was ordered to repay to the government the $125,000 in benefits she erroneously received.

B. Relator Released Defendant from FCA Claims

U.S. ex rel. Scott v. Cancio, WL 5975782 (M.D. Fla. Nov. 28, 2011)

A relator filed an employment action her former employer, alleging discrimination and retaliation. While the employment action was still pending, the relator filed a *qui tam* action against the defendant, alleging violations of the False Claims Act. Subsequently, the relator and the defendant settled the employment case. The parties' settlement agreement included a representation that the relator had not filed any complaint or claim against the defendant in any state or federal agency or court; the agreement also included a provision in which the relator released the defendant from any and all claims she may have had against the defendant. Subsequently, the relator amended her *qui tam* action to include a claim for declaratory relief, seeking a declaration from the court that the settlement agreement was unenforceable to bar her *qui tam* action. The defendant moved to dismiss the *qui tam* complaint, arguing that the complaint was barred by the settlement agreement, and the government declined to intervene in the case.

Holding: The United States District Court for the Middle Division of Florida denied the defendant's motion.

Release/Waiver of FCA Claims

The court found that the relator executed the settlement agreement with the defendant after filing her *qui tam* action and noted that since the plain language of the False Claims Act requires the consent of the government and the court before a relator can dismiss a *qui tam* action, the relator did not have unilateral authority to dismiss a *qui tam* action that had already been filed. The court noted, however, that the defendant might have recourse in the separate employment action and might be able to set aside the settlement agreement, if that agreement was based on any misrepresentations or fraud by the relator.

See *U.S. ex. rel. McNulty v. Reddy Ice Holdings, Inc.*, WL 6102046 (E.D. Mich. Dec. 7, 2011) at page 19.

C. Sovereign Immunity

Myers v. Simpson, WL 6140864 (E.D. Va. Dec. 9, 2011)

A *pro se* relator brought an action against a sheriff, a deputy, and a county sheriff employee, alleging, among other things, that the defendants violated the False Claims Act by falsely certifying that they implemented non-discriminatory policies, in order to receive federal funds. Specifically, the relator alleged that the defendants engaged in discrimination by denying him access to free self-defense and sexual assault prevention workshops and classes that were only open to female county residents over age 14. The defendants moved to dismiss the relator's claims.

Holding: The United States District Court for the Eastern Division of Virginia granted the defendants' motion.

The court determined that the relator could not maintain his FCA claim for several reasons: (1) the defendants were state officers, and the Supreme Court has held that states and state agencies are not subject to FCA *qui tam* liability; (2) the relator failed to comply with the FCA's filing and seal requirements; (3) the relator was a *pro se* plaintiff, and as such, was not permitted to represent the United States—the real party in interest in the case; and (4) the FCA claims satisfy Rule 9(b)'s heightened pleading requirements. Therefore, the court granted the defendants' motion to dismiss the FCA claim.

D. Statute of Limitations

U.S. v. Carell, WL 6339839 (M.D. Tenn. Dec. 19, 2011)

The United States brought an action alleging that several Medicare service providers violated the False Claims Act and common law by engaging in a fraudulent scheme to receive reimbursements in violation of Medicare laws. Specifically, the government alleged that the defendants' respective cost reports to Medicare were false, because they failed to disclose the related party status of their home health agencies and the management company that provided services to those agencies. The government alleged that Medicare reimburses unrelated parties for the total amount of their charges—including profits—but does not reimburse related parties for profits. Thus, the government argued, the defendants' failure to disclose related party status resulted in false, inflated Medicare claims. After the defendants unsuccessfully moved to dismiss the government's claims, they moved for summary judgment, arguing that the government's claims were time barred. The government moved for summary judgment as well.

Holding: The United States District Court for the Middle District of Tennessee denied both motions, finding that material issues of facts existed.

Statute of Limitations

The defendants argued the government's FCA claims—which were filed in 2009—were barred by the applicable statute of limitations. The defendants argued that the government alleged that false Medicare claims were submitted in 1999, 2000, and 2002, but that the government was aware of the alleged improper related party relationships as far back as 1989—in fact, the defendants contended that the government repeatedly investigated and pursued the alleged violation over a number of years thereafter. Consequently, the defendants asserted, the government's fraud claims were filed: "(1) more than six years after the date on which the violation [was] committed; or (2) more than three years after the date when facts material to the right of action [were] known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, whichever [occurred] last." However, the court found that, for purposes of the FCA's statute of limitations, when the government became aware of the defendants' alleged related party relationships was irrelevant, since related party relationships do not violate the Medicare laws. The court reasoned that submitting false and fraudulent claims is against the law, and so the government's right of action did not arise until the defendants allegedly submitted fraudulent Medicare cost reports, which the government claimed occurred from 1999 to 2002. Since the government's FCA claims were not filed until 2009, the court's analysis continued.

The court further held that a cause of action for Medicare overpayment generally does not accrue until the government's fiscal intermediary charged with administering the Medicare benefits at issue conducts a comprehensive final audit of the cost report and issues a written Notice of Program Reimbursement ("NPR"). In this case, NPRs were issued for two of the cost reports at issue in 2004 and 2005; the government alleged that no other NPRs were issued for the cost reports because, in 2005, the United States Department of Health and Human Services placed a suspension on the relevant cost report files. As the court found that there were genuine issues of material fact as to when the government reasonably should have known that the defendants' cost reports were fraudulent, it concluded that summary judgment in favor of the defendants was not warranted. The defendants' summary judgment motion was denied.

What Constitutes a False Claim?

The court then examined the government's summary judgment motion, in which the government alleged that the defendants' cost reports were false and fraudulent because they failed to disclose the existence of a "related party" relationship. The court found that, under applicable Medicare regulations, providers are required to identify any costs attributable to a related party on their annual cost reports and elsewhere, to permit the government's fiscal intermediary to determine whether any related party cost adjustments were required. In addition, each provider must identify any related organization associated with the provider or its management personnel in cost reports. However, the court recognized the parties' dispute over whether or not the parties at issue were, in fact, "related," for purposes of the Medicare laws. The court found that determining whether the home health agencies at issue were controlled by the management company or any of the defendants involved genuine issues of material fact on several levels. Thus, the court denied the government's summary judgment motion as well.

See *Tolman v. Am. Red Cross*, WL 6333700 (D. Idaho Dec. 19, 2011) at page 25.

See *U.S. ex rel. Berglund v. The Boeing Company*, WL 6182109 (D. Or. Dec. 13, 2011) at page 28.

See *U.S. ex rel. Carter v. Halliburton Co.*, WL 6178878 (E.D. Va. Dec. 12, 2011) at page 15.

FEDERAL RULES OF CIVIL PROCEDURE

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

U.S. ex rel. Westlund v. Lab. Corp. of Am. Holdings, 2011 WL 6846748 (M.D. Fla. Dec. 29, 2011)

A relator brought a *qui tam* action against a clinical laboratory company she formerly worked for, and one of its affiliates. The relator alleged that, in order to obtain referrals, the defendants falsely represented to physicians that Blue Cross and Blue Shield of Florida (BCBSF) would reimburse insured patients for their services. She alleged that after BCBSF rejected the patients' claims, Medicare and Medicaid would sometimes pay the claims, which she alleged constituted violations of the federal False Claims Act and the Florida False Claims Act. The relator also filed a retaliation claim against her former employer under the FCA. The defendants moved to dismiss the relator's claims for failure to state a claim and for failure to plead with particularity. Further, in response to the retaliation claim, the employer-defendant argued that the claim was barred by judicial estoppel.

Holding: In a three-page opinion, the United States District Court for the Middle District of Florida granted the defendants' motion to dismiss all of the fraud claims, finding that the relator failed to plead the alleged fraud with particularity, by not identifying any false claims submitted to the government and by not demonstrating that the defendants' alleged false statements were material to the government's decision to pay Medicare/Medicaid claims. The court stated that the relator "must show that [the defendants'] lie and the government's payment for a valid service amounts to fraud actionable under the False Claims Act."

In addition, the court rejected the defendant's argument that the relator's retaliation claim was barred by judicial estoppel. While the court recognized the fact that the retaliation claim shared operative facts that were pled in a separate civil rights action the relator filed against her former employer, the court held that judicial estoppel did not preclude her retaliation claims, since no substantive order had yet been issued in the other action. However, the court ultimately dismissed the retaliation claim, without explanation, stating that the defendant's "motion to dismiss explains why the retaliation claim fails." The relator's claims were dismissed without prejudice, with the court cautioning that "[t]he next complaint is [the relator]'s final opportunity."

U.S. ex rel. Wilkins v. United Health Group, Inc., WL 6719139 (D.N.J. Dec. 20, 2011)

Two relators, who were both previously employed by a health group and its parent corporation, filed a *qui tam* action against their former employers, alleging that the defendants violated the Anti-Kickback Statute ("AKS"), and thereby violated the False Claims Act. Specifically, the relators alleged that the defendants provided illegal monetary kickbacks to healthcare service providers, in exchange for those providers changing certain beneficiaries to their Medicare Advantage plans—plans that allow for claims to be submitted to the United States government for reimbursement. The defendants moved to dismiss the relators' claims, arguing that the relators failed to state a claim for relief under the FCA, since the relators did not allege that the defendants knowingly violated the AKS or that Medicare reimbursements were conditioned on an express certification of compliance with the AKS. The United States District Court for the District of New Jersey originally dismissed the relators' action for failure to state a claim. The relators appealed that ruling to the U.S. Court Appeals for the Third Circuit, which reversed the district court's decision and remanded the matter. The appellate court held that the relators properly pled that the defendants knowingly violated the AKS while submitting Medicare claims to the government, and that these allegations were sufficient to overcome the defendants' motion to dismiss. The court, however, remanded the matter to the district court for a determination of whether or not the relators' claims were pled with the requisite particularity.

Holding: The U.S. District Court for the District of New Jersey held that the relators did not plead their fraud allegations with particularity and as a result, granted the defendants' motion to dismiss. The court found that the relators failed to adequately plead the date, place, and time of the alleged fraud, and failed to inject any precision or substantiation to their assertion that the defendants provided illegal kickback payments. The relators' complaint was dismissed without prejudice.

U.S. ex rel. Baltazar v. Warden, WL 6400351 (N.D. Ill. Dec. 15, 2011)

A relator and chiropractor brought a *qui tam* action on behalf of the United States and the State of Illinois against the healthcare company he previously worked for, as well as her former supervisor, alleging that the defendants committed Medicare/Medicaid fraud by upcoding fee slips to reflect services that were not provided. The federal and state governments both declined to intervene in the relator's case, and the defendants filed separate motions to dismiss and for summary judgment. The United States District Court for the Northern District of Illinois granted the defendants' summary judgment motion, holding that the relator's claims failed as a matter of law, because they were precluded by the False Claims Act's public disclosure bar provision; the defendants' motion to dismiss was denied as moot.

The relator appealed the district court's decision to the U.S. Court of Appeals for the Seventh Circuit, arguing that her suit should not be barred by the public disclosure rule because it was based upon her personal knowledge. The appeals court agreed and remanded the case. The defendants then moved to dismiss, arguing that the relator failed to plead the alleged fraud with particularity.

Holding: The United States District Court for the Northern District of Illinois denied the defendants' motion.

Pleading Fraud with Particularity

The defendants argued that the relator did not meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) because she failed to identify a single false bill that was allegedly submitted to a government entity for reimbursement. The relator countered that the issue raised by the defendants had already been litigated, arguing that the public disclosure bar and the particularity requirements are "inextricably intertwined," and therefore the circuit court's ruling on the public disclosure bar amounted to a conclusive decision with respect to the sufficiency of her complaint. The court found the relator's argument to be without merit.

The relator then argued that she was not required to provide specific false invoices, but only had to allege facts which created a plausible inference that the defendants submitted false claims. This time, the court agreed with the relator, and found that the relator's complaint described the allegedly fraudulent scheme in detail; alleged that the relator's own fee slips had been altered by her supervisor on two separate occasions, to reflect services that were never performed or to upcode services that had been performed; and included an assertion that the defendants' billing clerk told the relator that the defendants' alleged fraudulent Medicare/Medicaid billing was routine. The court held that the relator's allegations were not vague and satisfied the particularity requirement, as they were "sufficient to support an inference that false claims were submitted to the federal and state government." The defendants' motion to dismiss was denied.

U.S. ex rel. Hudalla v. Walsh Const. Co., WL 6028315 (N.D. Ill. Dec. 3, 2011)

A relator brought a *qui tam* action against his former employer, a construction management and general contracting firm. He alleged that the defendant utilized fraudulent billing practices while working as general contractor on several federally-funded housing projects. Specifically, he alleged the defendant purposefully billed general work under the wrong category in order to fraudulently receive amounts over and above the billing categories' maximum and in order to double-bill the government for amounts that had already been included in the total construction costs as work performed by a subcontractor. The defendant denied all of

the relator's allegations and argued that the relator could not prove that the defendant's billing practices constituted actual claims to the government or that any claims were knowingly false when they were submitted. The defendant moved for summary judgment, and the relator cross-moved for partial summary judgment.

Holding: The United States District Court for the Northern District of Illinois denied the defendant's motion and granted the relator's motion in part.

Relator's Knowledge of FCA Violations

The court observed that the relator had only personally worked on half the projects for which he alleged fraudulent billing. The court decided to first focus its attention on the relator's claims regarding those projects that he did not work on. With respect to those projects, the relator argued that he could maintain his claims, as he was told by the defendant's supervisory panel that the defendant regularly and routinely collected additional funds in the alleged fraudulent manner. The defendant, however, argued that the relator could not maintain claims regarding alleged fraud on projects that he did not work on, since his allegations did not provide sufficient detail to meet Rule 9(b)'s heightened pleading standard. However, the court found that the relator did not have access to the defendant's records regarding those projects and therefore, Rule 9(b)'s pleading standard should be relaxed. As a result, the court held that the relator's allegations were pled with sufficient particularity.

The defendant then argued that, with respect alleged fraudulent billing on projects that the relator did not work on, the relator failed to comply with FCA's filing requirements—which require relators to serve on the government a copy of the *qui tam* complaint and a written disclosure of substantially all material evidence and information the relator has. The defendant argued that the relator's disclosures regarding those projects were inadequate and deprived the government of an adequate opportunity to decide whether or not to intervene in the relator's case. The court disagreed, and found that the relator complied with the FCA's literal requirements, since there was no question that the relator provided all the material evidence he possessed to the government. The court also held that the relator's disclosures to the government served the FCA's two purposes: (1) "protecting the government's interests;" and (2) "protecting the defendant from having to prepare a defense without knowing whether its opposing litigant is the relator or the government." Accordingly, the court rejected the defendant's motion to limit the relator's *qui tam* action to projects that the relator had worked on directly.

The court then examined the defendant's two affirmative defenses. First, the defendant argued that the court lacked jurisdiction over some of the relator's claims because the relator was not the original source of information regarding those claims. The court noted that the relator rebutted the defendant's argument in his opposition papers, and that the defendant failed to counter the relator's argument. The court, though, did not discuss the relator's arguments in its opinion, so it is unclear from the opinion whether or not the defendant raised a public disclosure issue or merely

argued that all relators must demonstrate that they qualify as original sources. The court simply held that the defendant forfeited the point, and granted summary judgment in favor of the relator on the defendant's purported original source affirmative defense. Second, the defendant argued that the FCA's statute of limitations barred the action. The court again rejected the defendant's argument and found that the statute of limitations expires either six years after the violation occurs or three years after the appropriate government official knows or should reasonably have known about material facts regarding the alleged fraud. The court clarified that when the government does not intervene in a *qui tam* action—as was the case here—then the three-year limitations period begins to run from the date the *qui tam* relator knows or should know about material facts giving rise to his/her allegations. The court determined that the relator filed his action within three years of learning about the defendant's alleged fraudulent billing, and accordingly, the court granted the relator's cross-motion for summary judgment on the defendant's affirmative defenses.

Pleading Elements of FCA Liability

Finally, the court examined the substance of the relator's fraudulent billing allegations. The defendant argued that the relator could neither prove that its billing practices resulted in actual claims to the government, nor that any claims that did exist were knowingly false when presented to the government—with respect to the latter point, the defendant argued that the relator provided no evidence that its billing process was contrary to any statue, regulation, or specific written policy. The court, though, found that the relator presented enough evidence to show that the government disbursed funds for construction costs based on the defendant's allegedly false submissions. Therefore, the court concluded that a reasonable jury could find that the defendant either submitted false claims to the government or caused false claims to be submitted to the government. The court then turned to the question of whether or not the relator presented sufficient evidence to show the defendant's claims were knowingly false or fraudulent, and noted that both parties provided expert opinions about standard practice in the industry. Consequently, the court held that a reasonable jury could go either way on the issue, since a jury could find from the evidence that the defendant did not believe it was doing anything deceptive, or that the defendant acted fraudulently because it exceeded caps in various billing categories. Therefore, the court denied both parties' motions for summary judgment with respect to those issues.

U.S. ex rel. Glynn v. Compass Medical, P.C., WL 5508916 (D. Mass., Nov. 10, 2011)

A relator brought a *qui tam* action against her former employer—a healthcare provider—as well as one of the company's private insurance provider affiliates and one of its doctors, alleging that the defendants violated the federal False Claims Act and the Massachusetts False Claims Act by fraudulently billing Medicare and Medicaid.

Specifically, the relator alleged that the defendant doctor fraudulently completed Medicare and Medicaid billing sheets for fictional nursing home visits and for unnecessary or inappropriate medical care, among other abuses. The relator further alleged that the corporate defendants used those false billing sheets to prepare false claims that were submitted to the federal government and to the Commonwealth of Massachusetts for reimbursement; the relator alleged that the corporate defendants knew that the doctor had been engaging in fraudulent billing because she reported the fraud to employees of both companies and was told that the companies shared her concerns. The relator also alleged that her former employer violated both FCA statutes when it fired her from her nursing job in retaliation for reporting her suspicions about the allegedly fraudulent billing. The defendants moved to dismiss the relator's claims, arguing that the relator's fraud allegations were not pled with sufficient particularity, and her retaliation claim failed to demonstrate a causal connection between her termination and any protected whistleblowing activity.

Holding: The United States District Court of Massachusetts granted the defendants' motion to dismiss all of the relator's claims.

Pleading Fraud With Particularity

The defendants argued that the plaintiff did not allege her fraud claims with particularity, as required by Federal Rule of Civil Procedure 9(b). The court noted that the relator's fraud allegations included two claims: a claim that the defendants presented false claims to the government or caused false claims to be presented to the government, and a claim that the defendants made and used false records in support of false claims. The court determined that in order to plead the first claim with particularity, the relator must plead the particulars of false claims that were actually presented to the government. The court held that the relator failed to meet this standard, as her complaint did not "allege specific billing codes, dates, claim numbers, or patients associated with such false claims, or even the name of the government agency to which the claims were allegedly submitted." Consequently, the court held that the relator's claims alleging that false claims were presented to the government were not pled with sufficient particularity. Those claims were dismissed.

The court similarly dismissed the relator's second claim, finding that the relator pled conclusory allegations that the doctor defendant falsified billing sheets, without offering any details about any those billing sheets forming the basis for any false claims to the government. Notably, the court found that the relator failed to allege when the allegedly false records were created, and she did not "connect any given billing sheet to a specific patient, nursing home, date, billing code, or the treatment claimed." Without these details, the court held that the relator's fraud allegations were deficient. The relator stated that since she was a nurse practitioner and did not have access to billing records, she should be given an opportunity to take discovery in order to access the necessary records and then plead her fraud allegations with sufficient particularity.

The court denied the relator's request, stating that the FCA does not offer special leniency to relators who wish to "allege it now" and "prove it later." The court also held that Rule 9(b)'s heightened pleading standard would not be relaxed, since the relator had not pled a far-reaching, complicated fraud scheme.

As a result of the court's analysis, the relator's fraud claims under both the federal FCA and the Massachusetts FCA were dismissed.

Retaliation

Finally, the court considered the relator's retaliation claims, in which she alleged that her former employer defendant terminated her from her job after she attempted to investigate and report the defendant's allegedly fraudulent behavior. The court first observed that Rule 9(b)'s heightened pleading requirements do not apply to retaliation claims under the FCA, since those claims do not allege fraud. The employer defendant still sought to dismiss the retaliation claim, contending that the relator did not sufficiently allege that she engaged in any protected conduct under the FCA laws, because the focus of her investigative efforts was on the doctor defendant's alleged misbehavior, not the government's monetary losses. The relator, though, alleged that she did engage in protected conduct, as she informed the company's billing clerk of her suspicions about the doctor's billing practices and the billing clerk admitted that she'd processed claims for the doctor that she knew contained false information. Moreover, the court noted that the relator alleged that when she confronted the doctor directly, he told her that he needed the additional revenues to help pay for a trip to Italy. These allegations, the court held, were sufficient to support an inference that the relator was, at least potentially, motivated by a desire to protect the government entities from fraud. The court, however, ultimately dismissed the relator's retaliation claims, as it held that she could not show that the defendant company was aware that the conduct was protected because the relator never reported her concerns to any management level employees. Further, the court held that the relator only reported the doctor's inaccurate and illegible billing to the defendant company—and not concerns about fraud against the government—which was not enough to create a causal connection between any protected activity and the termination. Hence, the court granted the employer defendant's motion to dismiss the federal and state retaliation claims. The court also held that the relator's retaliation claim under the Massachusetts FCA would be dismissed because that law only allows plaintiffs to sue if they have been harassed, threatened or otherwise coerced by their employer into engaging into fraudulent activity **and** they voluntary disclosed information regarding the alleged fraud to the government prior to being dismissed or acted in furtherance of state FCA action. As the court concluded that the relator satisfied neither of these elements, it held that her retaliation claim under the Massachusetts FCA failed.

See *U.S. ex rel. King v. Solvay S.A.*, 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011) at page 3.

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

U.S. ex rel. Wildhirt v. AARS Forever Inc., WL 5373985 (N.D. Ill., Nov. 4, 2011)

Two relators filed a *qui tam* action against two home health care corporations, alleging that the companies violated the federal False Claims Act (FCA) and the Illinois Whistleblower Reward and Protection Act (IWRPA). The relators—who formerly worked as respiratory therapists for the defendants—alleged a fraud-in-the-inducement theory of liability, claiming that the defendants solicited and secured government contracts to provide respiratory therapy equipment, services, and supplies under false pretenses, with no ability or intention to fulfill the contractual requirements. The defendants moved to dismiss the relators' complaint for failure to state a claim.

Holding: The United States Distinct Court for the Northern District of Illinois denied the defendants' motion to dismiss the relator's complaint for failure to plead a fraud-in-the-inducement theory of FCA liability.

The court first determined that a fraud-in-the-inducement theory can be maintained under the FCA and the IWRPA. The court, relying on decisions from various circuit courts, concluded that simple breaches of contract do not give rise to FCA liability, but making promises with no intention of keeping them constitutes fraud—and thus gives rise to FCA liability. The court recognized that fraudulent inducements do not involve the submission of any claims to the government. The court also acknowledged that when the government is fraudulently induced to enter into a contract, claims submitted for payment under that contract may not actually be false. However, the court still held that FCA liability can attach to such claims, due to the fraud associated with the efforts to obtain the contract.

The court then determined that the relators' complaint properly alleged FCA claims under a fraud-in-the-inducement theory, since the relators not only alleged that the defendants entered into a contract with the government with no intention of performing, but they also alleged several instances of blatant nonperformance, some directly on the heels of the defendants entering into the contract. The court held that these allegations raised a permissible inference the Defendants indeed entered into the contract while planning not to fulfill their contractual obligations, which was sufficient to overcome the defendants' motion to dismiss. Hence, the court held that the relators' complaint satisfactorily pleaded *qui tam* claims founded under a fraud-in-the-inducement theory. The defendants' motion to dismiss was denied.

U.S. ex rel. McLean v. County of Santa Clara, 2011 WL 5223076 (N.D. Cal. Oct. 31, 2011)

A relator brought a *qui tam* action against the County of Santa Clara (county), the County Department of Family and Children's Services and several individuals, alleging violations of the False Claims Act. Specifically, the relator alleged that the defendants created fictional children in order to obtain increased government funding for welfare services, and conspired with local doctors to bill the government for services not rendered. The parties filed cross-motions for summary judgment. The defendants argued that the FCA's public disclosure bar precluded the relator's suit because the information that her complaint was based on had been previously publicly disclosed in two federal government audit reports and in various internet and other publicly-available materials. The defendants also argued that the relator had no evidence to substantiate her allegations.

Holding: The United States District Court for the Northern District of California rejected the defendants' public disclosure bar argument, but still granted their summary judgment motion. The relator's summary judgment motion was denied.

Public Disclosure Bar

The court first considered whether the relator's suit was precluded by the public disclosure bar. The defendants argued that the relator's claims were based on essential information that was already in public domain. The court disagreed, though, and held that the defendants failed to point to anything in the public documents showing that any of the relator's allegations had been previously publicly disclosed, since the information relied on by the defendants did not discuss any conduct specific to the defendants and since the relator's action alleged conduct that post-dated the public disclosures. Accordingly, on the record presented, it held there was no public disclosure.

Stating an FCA Claim

The court then analyzed the relators' fraud claims, beginning with the allegation that the defendants conspired with local doctors to bill the government for services not rendered. The defendants argued that this allegation was not supported by any evidence, and the court agreed, finding that the relator testified that she did not know whether the county submitted any false claims for services to the federal government or the amount of any such claims. Moreover, the court found that the relator failed to allege the sources of funding allegedly used to pay the doctors for any false claims, noting that the county produced evidence indicating that the doctors in question were paid with county—not federal government—funds. Therefore, as to this claim, the court granted the defendants' summary judgment motion.

Next, the court considered the relator's allegation that the county was inflating the number of children in families in order to wrongfully obtain additional federal

funding. The court observed that the relator based this allegation on two notes in her own case file, which showed that five children were removed from her household even though she only had two children. The defendants countered that the notes were written by a social worker as reminders that the relator's case was complex and should be treated as though there were five kids in the family. The defendants also produced evidence showing that the statewide computer system showed that the relator's household as including only two children. Additionally, the defendants argued that there would be no incentive to report more children because the county regularly exceeded the amount of money available for reimbursement. The court held the relator did not present sufficient evidence to raise an issue of material fact that the defendants created fictional children in order to overbill the government. Therefore, as to this claim, the court also granted the defendants' summary judgment motion.

Third, the court considered the relator's allegation that the defendants submitted false claims for children who were not physically present at emergency shelters and that the county obtained duplicate reimbursements for shelter costs from both the government and from the children's respective parents. She also alleged that although her children were at the shelter for five days, the county reported her children as being in the shelter for a year and she was sent a bill for a year-long stay. The court found that the evidence did not corroborate her allegations, as no evidence was presented which showed that the shelter counted children who were not physically present. Further, the court found that the documentation the relator relied on as proof that the county falsely stated that her children were at the shelter for a year contained ambiguous writing for which the relator could provide no explanation. The court also found the relator failed to produce the alleged bill she received for her children's year-long stay. Accordingly, the court held that the relator failed to present evidence giving rise to a triable issue of fact and granted the defendants' motion for summary judgment with respect to this claim.

Next, the court examined the relator's claim that the defendants falsely inflated federal eligibility ratios for reimbursement of foster care administrative costs. The relator had argued that the county unnecessarily removed children from their homes in order to claim increased federal reimbursement of foster care administrative costs. The defendants countered that the relator was raising this theory of liability for the first time on summary judgment, and asked the court to reject this claim as impermissible. The court found this new allegation was not included in the relator's original complaint or subsequent amended complaint and that the allegations in her complaint were very broad, with an inconsistent focus. The court ultimately held that, after reviewing the record, the relator did not present evidence that the defendants submitted any false claims for government funds by inflating eligibility ratios. The relator, based on her attorney's analysis, argued that the defendants' reimbursement claims were false because they exceeded the national or state average. The court, however, determined that the attorney's analysis was flawed and held that, even if that analysis had not been flawed, it was of no consequence because the attorney did not qualify as an expert in the field. The court also found the relator's testimony with respect to this

claim was either hearsay or lacked foundation, and even if was considered, it did not raise an issue of material fact. Accordingly, the court granted the defendants' motion for summary judgment with respect to this claim.

Finally, the court analyzed the relator's claim that the county had no documentation to establish that it made reasonable efforts not to remove children from their homes. The relator referred to an audit report of the county's fiscal procedures which purportedly showed that the county had not maintained proper documentation as to its eligibility determinations for about 20% of the cases audited. The court, though, found the relator failed to point to anything in the study that concerned her allegation that the county fraudulently inflated numbers and submitted false claims to the federal government. Since the audit report failed to raise a genuine issue of material fact as to relator's fraud allegation, the court held that summary judgment in favor of the defendants was appropriate.

The court denied the relator's cross-motion for summary judgment and denied her requests to re-open discovery or to designate additional experts, holding that she had already been given ample time to do so, over the course of several years, with several different counsel and with multiple amended complaints.

U.S. ex rel. Hill v. Univ. of Med. & Dentistry of N.J., 2011 WL 5008427 (3rd Cir. Oct. 20, 2011)

A relator brought an action under the False Claims Act, alleging that her former employer—a university—and two individuals (Bishayee and Howell) defrauded the federal government. The relator and the two individual defendants were all doctors in the universtity's radiology department, where they all collaborated on preliminary research to support a grant application to the National Institutes of Health (NIH). The relator alleged that the defendants fabricated research data used in support of the initial grant application, in a subsequent progress report, and in a renewal application, claiming that defendant Bishayee failed to follow the proper scientific protocols when performing experiments and that, as a result, his test results contradicted her own and were incorrect. She further alleged that she raised her concerns to defendant Howell, who dismissed her suspicions and then used the allegedly fabricated data in the defendants' grant application. In addition, she stated that she brought her concerns to the chair of the university's "committee on research integrity," which investigated but concluded that there was a lack of evidence of misconduct. The relator then contacted the Office of Research Integrity (ORI), which oversees research projects on behalf of NIH. ORI also concluded that there was insufficient evidence of wrongdoing. The relator then again filed a complaint with the school's research integrity committee, which determined that the disputed test results alone were insufficient to warrant further investigation. The relator then filed a *qui tam* lawsuit. The defendants moved for summary judgment on the relator's claims. The United States District Court for the District of

New Jersey granted the defendants' motion, holding that the relator failed to establish the materiality and scienter elements of her fraud claim. The plaintiff appealed the district court's ruling to the U.S. Court of Appeals for the Third Circuit.

Holding: The circuit court affirmed the district court's rulings.

Materiality and Scienter Under the FCA

The circuit court, relyingon the conclusions of the relevant scientific bodies—ORI, and the school's committee on research integrity—determined that the relator failed to show that the defendant's claims to NIH were actually false, affirming the district court's ruling that there was no evidence of scientific misconduct. Of course, if the relator could not establish that the defendant's claims were actually false, she could not establish that they were materially false either. Thus, the appeal court held that she failed to show the materiality element of FCA liability.

The Third Circuit also agreed with the district court that the relator failed to establish the scienter element of FCA liability. The court rejected the relator's argument that the defendants must have known that their research data was false, because others could not replicate them. Both the district and circuit courts agreed that this allegation was not sufficient to establish scienter. The Third Circuit noted that defendants' conclusions twice survived scrutinized by the university and by ORI. The court also concluded that that the relator's allegations only demonstrated a scientific disagreement over the reliability of the test data at issue, but not the defendants' knowledge that the information was false. The appeals court held that such expressions of opinion, scientific judgments or statements as to conclusions which reasonable minds may differ cannot be false—and thus, could not be "knowingly" false. Accordingly, the court affirmed the district court's ruling and the grant of summary judgment in favor of the defendants.

U.S. v. Bedi, 2011 WL 4974861 (S.D. Ill. Oct. 18, 2011)

The United States brought an action against three health care centers and their owner, alleging violations of the False Claims Act, the Controlled Substances Act (CSA), and common law. Specifically, the government alleged that the defendants knowingly presented false claims to Medicaid for payment of prescriptions issued in violation of the CSA. In addition, the government brought a separate fraud claim alleging that defendant Bedi—the owner of the corporate entities—established a behavioral health unit, which he staffed with physician's assistants who treated mental health patients outside the scope of their professional licenses. In a prior criminal case, the defendants were charged with knowingly dispensing controlled substances without authorization and with healthcare fraud against the Medicaid program—the healthcare fraud claims against Bedi were dismissed and he was only charged with illegally dispensing controlled substances. The defendants pled guilty to the repsective charges against them and agreed to pay criminal

restitution to Medicaid. Subsequently, the government moved for summary judgment in its civil action. The United States District Court for the Southern District of Illinois granted the government's motion in part.

The government argued that the corporate defendants knowingly presented about 400 false claims to Medicaid in violation of the CSA, claiming that these defendants' employees were prescribing and dispensing drugs without authorization under state and federal law. The court found that the corporate defendants did not respond to the government's motion, although defendant Bedi did respond. The court deemed the corporate entities' failure to respond to the government's motion for summary judgment as an admission of the merits of the government's motion. Since the corporate defendants had also pled guilty to Medicaid fraud arising from the same conduct, the court granted the government's motion against the corporate defendants. The court, however, noted that the government did not offer any specific facts regarding defendant Bedi's alleged involvement in the fraud scheme, observing that the government dismissed its healthcare fraud charges against him. Consequently, the court denied the government's motion for summary judgment regarding its claims that Bedi knowingly submitted false Medicaid claims.

The court then examined the government's claims that the defendant's were liable under the FCA for treatment of mental health issues outside the scope of their professional licenses. With respect to this claim, the government presented an exhibit which showed over 1000 patient visits for psychiatric health services in support of its allegation that neither Bedi, nor the physician's assistants in question were qualified to provide these types of services. The government again contended that the corporate defendants had previously admitted in their guilty plea that they submitted false claims to Medicaid for non-covered services, including medically unreasonable and unnecessary visits. The court again held that these prior guilty pleas were evidence that the corporate defendants knowingly submitting false claims to the government for treatment of mental health issues, but once again held that the government failed to allege any facts showing that defendant Bedi was liable for such conduct. As a result, the government's summary judgment motion with respect to these claims was granted against the corporate defendants, but denied as to Bedi.

U.S. ex rel. Davis v. Point Park Univ., 2011 WL 4916190 (W.D. Pa. Oct. 17, 2011)

A relator brought a *qui tam* action against her former employer—a university—as well as the university's Senior Vice President of Finance and Operations and its Director of Financial Aid, alleging that the defendants violated the False Claims Act and the Pennsylvania Whistleblower Law. With respect to the FCA allegations, the relator alleged that the defendants falsely certified their compliance with relevant regulations regarding its financial aid awarding practices. Specifically, the relator al-

leged that the defendants improperly denied financial aid to needy part-time, non-resident students, while submitting claims to the government for federal financial aid funding. As a result, the relator alleged, the defendants' claims to the government were false. The relator further alleged that she reported these alleged improper practices to her superior—the school's Senior VP—who dismissed her claims without ever consulting with the school's Director of Financial Aid, the school's auditors, the U.S. Department of Education, or any other outside authority. Instead, she alleged that she was instructed by the defendants to "keep quiet" and that when she refused to do so, she was terminated from her job on two days' notice and without cause.

The defendants moved for summary judgment on the relator's claims. With respect to the relator's fraud allegations, the defendants argued that the relator failed the scienter element of FCA liability, as there was no evidence that the defendants knew of, or showed indifference or reckless disregard for, any legal requirements with respect to their financial aid awarding practices. With respect to the relator's retaliation claim, the defendants argued that the relator was merely doing her job when she reported concerns about possibly improper financial aid awarding practices, and thus, the defendants were not aware that she was engaging in any "protected conduct," for FCA purposes.

Holding: The United States District Court for the Western District of Pennsylvania denied the defendants' summary judgment motion with respect to both the relator's fraud allegations and her retaliation claim.

Pleading FCA Fraud Claims

The court first noted that it had previously rejected the defendants' argument that the relator's fraud allegations did not properly plead scienter, as these same arguments were raised and dismissed in the defendants' prior motion to dismiss the relator's fraud claim. The court denied that motion and held that the relator sufficiently pled a cause of action under an implied false certification theory of FCA liability. The court further noted that the defendants had requested reconsideration on that earlier ruling, but the court declined to grant that request. The court again concluded that the relator set forth sufficient facts to demonstrate that the university improperly denied financial aid to students, in violation of applicable regulations. The court found that the relator provided evidence that she reported the violations to the university's Senior VP, and that her (the VP's) alleged failure to investigate the matter further was sufficient for a reasonable fact-finder to conclude that the defendants knew, were deliberately indifferent to, or at a minimum, showed reckless disregard for the university's compliance with the applicable regulations, and in turn, for whether or not its claims for federal financial aid funds were false. The court also found that material issues of fact existed regarding whether or not the defendants instructed the relator not to speak to anyone else about her allegations or otherwise concealed information from its auditors and the Department of Education. Material issues of fact also existed regarding whether

or not the defendants based their financial aid awarding practices on their own "reasonable" interpretation of the applicable regulations, which would negate the relator's fraud claim. The court held that these issues of fact made a grant of summary judgment inappropriate, and ruled that the relator's fraud claims should proceed to a jury. The defendants' motion for summary judgment was denied.

Pleading FCA Retaliation Claims

The court then examined the relator's retaliation claims under the FCA and the Pennsylvania Whistleblower Law. The defendants argued that the relator was acting within the duties of her job when she discovered and reported their allegedly improper activities and thus, she was not engaged in protected conduct. However, the court found that the relator presented facts showing that her investigation was outside the scope of her job duties, as she not only report the alleged fraud up the chain of command, but also expressed to the defendants her intention to contact the National Association of Student Financial Aid Administrators; added the issue to the university's audit; raised the issue with the Pittsburgh counsel of Higher Education; and instructed the school's finance director to make changes she felt were necessary. The court further found that the relator supported her retaliation claim by stating that, despite receiving favorable performance reviews, she was terminated from her job with only two days notice, at a $100,000 cost to the university, and conditioned upon a general release and confidentiality clause. The court noted that the defendant claimed that the relator was terminated due to "position elimination" and held that the reason for the termination was another genuine issue of disputed material fact, which should be resolved by a jury. Consequently, the court denied the defendants' summary judgment motion with respect to the retaliation claims as well.

U.S. ex rel. Knapp v. Calibre Sys., Inc., 2011 WL 4914711 (C.D. Cal. Oct. 17, 2011)

A relator brought a *qui tam* action against her former employer—a corporation that provides environmental and archaeological services. The relator alleged that the defendant was contracted by the government to identify and evaluate archeological sites to include in the National Registry. The relator claimed that the defendant violated the False Claims Act by falsely certifying compliance with applicable regulations under the National Historic Preservation Act; according to the relator, the defendant ignored those regulations in an attempt to secure future contracts with the government. The relator also alleged a claim for retaliation under the FCA, stating that the defendant terminated her from her employment position about two months after she raised concerns regarding the defendant's alleged actions to government agencies. In addition, the relator brought claims for wrongful termination and for negligent infliction of emotional distress. The defendant moved to dismiss the relator's fraud claims, arguing that the relator failed

to allege that the defendant knowingly submitted a false claim to the government with the specific intent to deceive or that any allegedly false claim was material to the government. The defendant further moved to dismiss the retaliation claim, arguing that the relator failed to allege that the defendant knew that she was investigating its allegedly fraudulent conduct.

Holding: The United States District Court for the Central District of California granted the defendant's motion in part, dismissing the relator's retaliation claim without prejudice, but allowing the relator's fraud claim to proceed.

Pleading FCA Fraud Claims

The court first considered the defendant's motion to dismiss the relator's fraud claims. The court first observed that the FCA does not include any specific intent to deceive element; rather, the FCA's scienter requirement only requires a showing that the defendant had actual knowledge, or acted in deliberate ignorance of, or in reckless disregard of the truth or falsity of its claims to the government. The court determined that the relator sufficiently pled scienter, as she alleged that, pursuant to applicable regulations, the defendant was required to have a valid Programmatic Agreement (PA) in order to conduct excavations, that her supervisor assured the relator and other employees that the defendant had a valid PA, but that the defendant had not, in fact, secured a valid PA and should not have been allowed to begin its excavation work. The court found the relator's allegations, at a minimum, stated that the defendant acted in deliberate ignorance of, or reckless disregard of, the truth or falsity of its certification to the government that it had a valid PA. As a result, the court held that the relator sufficiently pled the scienter requirement. The court further found that the relator sufficiently alleged the FCA's materiality element, as she pled that compliance with the federal regulations at issue was a prerequisite to receiving payment under the government contract. Therefore, the court denied the defendant's motion to dismiss the relator's fraud allegations.

Pleading FCA Retaliation Claims

The court then examined the relator's retaliation claim under the FCA. The court agreed with the defendant that the relator failed to allege one of the elements of FCA retaliation—namely, that the defendant knew that she engaged in any protected activity. Specifically, the court found that although the relator reported the defendant's alleged conduct to governmental authorities, she never alleged that she notified the defendant directly or that her reports to the government somehow notified the defendant of her protected activity. As a result, the court granted the defendant's motion to dismiss the relator's FCA retaliation claim.

See *U.S. ex rel. King v. Solvay S.A.*, 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011) at page 3.

LITIGATION DEVELOPMENTS

A. Calculating Damages and Civil Penalties

U.S. ex rel. Hobbs v. MedQuest Assocs., Inc., 2011 WL 5027504 (M.D. Tenn. Oct. 21, 2011)

A relator brought a *qui tam* action against her former employer, MedQuest, and a group of MedQuest's affiliates, alleging that the defendants—all of whom operated independent diagnostic testing facilities (IDTF)—submitted false Medicare claims because they conducted testing without the appropriate supervision of Medicre-approved physicians. On summary judgment, the United States District Court for the Middle District of Tennessee held that the defendants violated the FCA after concluding that the defendants' use of non-Medicare approved physicians for testing represented a reckless disregard for Medicare's regulations. The court awarded the government treble damages and civil penalties. The defendants moved for reconsideration, arguing that the award of civil penalties far exceeded the amount of the government's actual damages and resulted in an excessive fine, which is prohibited by the Excessive Fines Clause of the Eighth Amendment.

Holding: The district court denied the defendants' motion and upheld the award of damages and civil penalties.

Calculating Damages and Civil Penalties

The court began by analyzing its award of civil penalties, which included the maximum civil penalty of $11,000 per false claim for the defendants' most egregious false claims, and the minimum civil penalty of $5,500 per false claim for the defendants' remaining false claims. The court acknowledged that these two sets of false claims resulted in actual damages to the United States amounting to about $700,000, which, when trebled, amounted to a recovery to the government of slightly more than $2 million in damages. The court also noted that amount of civil penalties assessed for the defendants' nearly 1300 false claims totaled about $9 million. The court first observed that the False Claims requires an award of both treble damages and civil penalties and then examined its award to the government for a determination of whether the award violated the Excessive Fines Clause.

The court began its analysis by applying the principle of proportionality. First, it held that one half of the total mandatory treble damages award served as compensatory damages to assess the proportionality to the civil penalties. Second, it examined the nature of the harm caused. While the defendants referred to their violations as "technical reporting violations," the court found the defendants' widespread use of non-approved physicians established their reckless disregard for Medicare regulations. As to

the statistical disparity between actual damages and statutory penalties, the court held the single-digit ratio of treble damages to civil penalties was within the range of FCA awards approved by other courts. Third, it examined the maximum penalty available and found that although the statutory maximum civil penalty was imposed for some of the defendants' false claims, it was not imposed on all of them—and in fact, the minimum penalty was imposed on a substantial number of the defendants' false claims. Therefore, the court held that its award of civil penalties was well below the statutory maximum. Finally, the court noted that the Medicare regulations at issue were designed to serve the interests of the government and Medicare beneficiaries and that both were injured by the defendants' FCA violations. Accordingly, the court held that its award of treble damages and civil penalties did not violate the Excessive Fines Clause of the Eighth Amendment and denied the defendants' motion for reconsideration.

U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co., WL 5005313 (E.D. Va. Oct. 19, 2011)

Two relators brought a *qui tam* action against a group of companies that were contracted to provide packing, unpacking, and moving services for U.S. military household goods within Germany. The relators alleged that the companies violated the False Claims Act by manipulating the International Through Government Bill of Lading (ITGBL) program and engaging in a single, overarching bid-rigging and price-fixing conspiracy to raise the rates on subcontracts with local German moving companies. Further, one of the relators alleged that the defendants also defrauded the government with respect to a separate contract in which the defendant companies were directly hired for similar services within Europe. With respect to this second contract, the relator alleged that the defendants engaged in a bid-rigging and price-fixing scheme, while falsely certifying that their prices had been arrived at independently. The government intervened in the relators' ITGBL claims, which were settled as to all but one a small group of defendants. All of the claims against those remaining defendants went to trial and the jury finding in favor of the defendants with respect to some intervened claims, and against the defendants with respect to other intervened claims and with respect to the non-intervened claims. The parties filed several post-trial motions, with: (1) the defendants moving for judgment as a matter of law or for a partial new trial on the claims for which they were found liable, as well as a set-off against damages otherwise assessable based on payments already received by the government as part of a prior criminal proceeding against the defendants; (2) the plaintiffs moving for judgment for civil penalties and treble damages with respect to the claims for which the defendants were found liable; and (3) the relators seeking a determination of civil penalties as to the non-intervened claims. The United States District Court for the Eastern District of Virginia considered each motion in turn.

The defendants argued that the plaintiffs failed to provide sufficient evidence from which the jury could determine the number of false claims the defendants allegedly caused German carrier to submit for moving services. While the defendants acknowledged that, as a result of the prior criminal proceedings, the government suffered actual damages in the amount of $865,000 with respect to some subset of false claims that carriers submitted, they argued that the government's request for civil penalties for more than 4000 allegedly false claims was unsupported, as the government failed to satisfy certain requirements under the Federal Rules of Evidence for admitting certain summary exhibits that purported showed the number of false claims; the government was estopped from claiming the false claims caused loss to the government as result of the FCA conspiracy; even with the admitted exhibits, the jury was forced to speculate as to the number of claims filed; and finally, the evidence was insufficient to identify specific carriers that allegedly submitted false claims to the government.

The plaintiffs countered that the evidence was sufficient for the jury to determine the number of false claims submitted because the jury could have reasonably determined that every carrier the government used was a co-conspirator with the defendants. The court, though, found that the government failed to identify specific carriers that filed claims as part of the alleged conspiracy and failed to present sufficient evidence for a reasonable jury to conclude that because of the defendants' conduct, any particular carrier submitted an inflated claim to the government. Thus, the court agreed with the defendants and held that the plaintiffs did not offer sufficient evidence for the jury to determine the number of false claims that the defendants caused carriers to present to the government. The court, however, held that, as a result of the prior criminal proceeding, the defendants were liable for causing at least one false claim to be submitted to the government. The court stated that it would determine the amount of that penalty after a hearing. Consequently, the defendants' motion for judgment as a matter of law was granted. In addition, the court held that should its decision be vacated or reversed, then the defendants should be granted a new trial on those claims.

With respect to the non-intervened claims regarding the second contract, the defendants argued that the relators failed to produce sufficient evidence to prove the defendants intended to restrict competition on the second contract. Further, they argued that the jury was mischarged on all key knowledge issues and was not charged on various relevant antitrust issues. The court, though, found that the relators' evidence was sufficient for a jury to conclude the defendants made false certifications to the government regarding independent pricing. It held that the jury could have reasonably inferred from the defendants' liability for causing $865,000 in damages to the government with respect to the first contract that they also intended to restrict competition with respect to the second contract. Further, it held the defendants' FCA liability contract claim was not based on violations of the antitrust laws and that there was no reason that the defendants' allegedly false claims should be infused with the complex concepts applicable to antitrust liability. Accordingly, the court denied the defendants' motions for judgment as a matter of law and for a new trial with respect to the second

contract for direct services. Once again, the court held that the proper amount of civil penalties on the non-intervened claims would be determined following a hearing.

Finally, the court evaluated the relators' motion for a determination of the amount of damages and set-offs. The court first determined that all of the defendants (including those that had already settled with the government) were jointly and severally liable for treble damages for any loss suffered by the government, since the government alleged a single, overarching conspiracy against all the defendants and asserted the same claims and causes of action against all of the defendants, and since the settling defendants were alleged to be co-conspirators with the remaining defendants. Accordingly, the court held that the remaining defendants were entitled to a credit against their liability for the amount the government had already collected with respect to those common claims and common damages. Then, relying on its earlier rulings, the court held that the government could only show that the remaining defendants were liable for $865,000 in actual damages. The court tripled that amount and capped the defendants' liability at $2,595,000. As the court determined that the defendants had already paid $865,000 in restitution as part of the criminal proceeding and that those defendants that had previously settled with the government had already paid more than $14 million to the government, the court held that the United States had fully recovered on all the claims and that no amount was due and owing from the defendants as damages.

B. Costs and Attorney's Fees

U.S. ex rel. Rille v. Hewlett Packard Co., 2011 WL 4625646 (E.D. Ark. Oct. 5, 2011)

After two relators prevailed in a *qui tam* action against a technology company, following the defendant's settlement of the relators' allegations with the government, the relators moved for the defendant to pay their attorneys' fees, costs, and expenses for the work by their lead counsel, pursuant to the False Claims Act's fee-shifting provision. As the relators' case involved eight defendants, their fees were divided into two categories: general fees and defendant-specific fees. The defendant in the dispute at issue opposed the relators' motion, arguing that certain of the relators' claimed fees and costs were improper.

Holding: The United States District Court for the Eastern District of Arkansas granted the relators' motion.

Calculating Relator's Attorneys' Fees and Costs

First, the court analyzed the relators' claim for 10,856 hours of billable general time against all defendants. The relators—taking the view that because the cases against all the defendants were based on the same set of core facts and the same general allegations, the full amount of work could be attributed to any single defendant—developed a formula for determining the amount of billable general time to attribute to each defendant, even taking into account defendants who were parties in related actions. The court ultimately held that each defendant should be billed for 1/8 of the total general hours billed, multiplied by a reasonable rate. Furthermore, the court observed that this approach apportions fees between the cases in which the relators were successful, as well as prevents recovery in cases in which the relators were not successful.

Second, the court analyzed the relators' defendant-specific fees. It found that the relators' counsel claimed fees for hours their counsel spent on the relators' conflict with the government over their share of the settlement. The court held that the defendant would not be required to pay for hours billed in the relators' collateral dispute with the government. The defendant also argued that an estimated 21% of the relators' claimed defendant-specific fee was in connection with the fee petition itself, and that this amount was excessive. The court agreed. The court also rejected several claimed hours for entries that were vague, block billed, improperly billed, or inapplicable to the defendant. As a result of these findings, the court reduced the number of defendant-specific hours by 15%.

Third, the court analyzed the claimed attorneys' hourly rates, which ranged from $650 per hour for partners, to $200 per hour for associate attorneys. The defendant argued that the hourly rates were far in excess of local counsel rates, which ranged from $225 to $300 per hour. The relators responded that they could not exclusively use local counsel because of the nuances of FCA litigation and the massive costs and

expenses connected with the case. The court concluded that the relators' counsel did not make adequate attempts to find local counsel, and thus, applied local rates of $375 for partners and $200 for associates. The court also held that considering the complexity of the case, along with the hourly rates and number of hours worked, no lodestar enhancement was necessary.

Finally, the court analyzed whether the relators' claimed costs were reasonable. Again, the relators contended that the general costs apply equally to the various defendants. The court observed that the relators sought reimbursement for costs associated with mailing charges, IT expenses, travel, photocopies, and legal database services. The court concluded that some of these charges seemed excessive, and others seemed to be for office-type expenses that are not properly included in petitions for costs. The court decided to reduce the total amount of claimed costs slightly. The court then divided the amount of total costs by eight, to calculate the portion the defendant was to pay.

C. False Certification of Compliance

U.S. v. Villaspring Health Care Center, Inc., WL 6337455 (E.D. Ky. Dec. 19, 2011)

The United States brought an action against a nursing home (Villaspring) and its CEO (Bortz). The case arose from a state attorney general's investigation of allegations of neglect at Villaspring. The state decided not to pursue criminal charges and turned over the case to the U.S. Attorney for consideration. The United States conducted its own investigation and filed suit under the False Claims Act and common law, alleging that the defendants defrauded both the state and the federal government, by fraudulently seeking and receiving Medicare and Medicaid payments for services the defendants knew were either never provided or were worthless. The defendants jointly moved to dismiss the FCA claims, arguing that the government lacked standing to pursue the claim; that the government was estopped from arguing that the defendants violated the FCA, because the government allowed them to submit the claims at issue and to receive payment; that the government failed to plead the alleged fraud with particularity; and that the government's complaint did not state an FCA claim under an "implied false certification theory." Additionally, defendant Bortz separately moved to dismiss the government's claim, arguing that he was not a proper defendant.

Holding: The United States District Court for the Eastern District of Kentucky denied the defendants' joint motion to dismiss, but granted Bortz's individual motion to dismiss.

Standing Under the FCA

The court first evaluated the defendants' joint argument that the government lacked standing to pursue its FCA claim. The court disagreed, finding that the government pled all the elements for standing, namely: an injury in fact; a causal connection between the injury alleged and the conduct complained of; and a likelihood that the injury would be redressed by a favorable decision.

Estoppel Defense Against the Government's FCA Claims

Next, the court considered the defendants' argument that the government was estopped from bringing its FCA claims because CMS—the federal government agency that administers Medicare and Medicaid—allowed Villaspring to participate in the Medicare and Medicaid programs, even though CMS had knowledge of Villaspring's deficient care, and CMS did not declare the defendants' services to be worthless. In addition, the defendants argued that it would violate due process to allow CMS, representing the government, to authorize the payment of Medicare and Medicaid claims, and then allow the Department of Justice to allege that those same claims violated the FCA. The court disagreed with each of the defendants' arguments. First, the court

found that the FCA's basis for liability is the defendants' knowledge of the falsity of the claim, which is not automatically exonerated by any overlapping government knowledge. Second, the court found that allowing defendants to rely on the government's payment of claims as evidence of compliance with payment conditions would have the effect of shielding defendants who engaged in intentional fraud from FCA liability, simply because the government did not inform them that their claims were false before bringing an action. Third, notwithstanding the fact that the FCA prohibits submitting false claims—even claims that are not actually paid—the court stressed that every case brought by the government under the FCA involves money paid by some federal government agency, and held that allowing a wrongdoer to rely on the initial payment of a false claim as a basis to believe that it is permitted to continue to submit false claims would undermine the entire purpose of the FCA. Therefore, the court held the government was not estopped from bringing its action.

Pleading Fraud with Particularity

The defendants then argued that the government did not adequately plead the alleged fraud with particularity. Once again, the court disagreed, finding that the government alleged specific details regarding five patients who were given insufficient care; that the defendants knowingly directed and approved Medicare/Medicaid billings for these patients in spite of their knowledge of the inadequate services; the dates of these services; and the facilities that submitted claims. The court concluded that the government's complaint included sufficient particularity.

Implied False Certification

The defendants then argued that government's allegation that the defendants submitted claims for worthless services and impliedly certified their compliance with Medicare and Medicaid regulations were inapplicable to the context of a nursing home, because the services were billed on a *per diem* basis—the defendants argued that for either of these theories of liability to survive a motion to dismiss, the government must allege that the patients in question received no services at all. The court disagreed, holding that it was sufficient for the government to allege that patients were not provided the quality of care sufficient to meet the statutory standard, and concluded that the question of whether patients received the necessary standard of care was a factual determination that could not be decided on a motion to dismiss. In addition, the court held that the government could maintain its theory of implied false certification, as the government alleged that the defendants signed an agreement with CMS in which they agreed that payments of claims were conditioned on compliance with the laws, regulations, program instructions, and applicable conditions of participation in any federal health care program. The court again held that the question of whether the defendants' alleged violations of those conditions would have been material to CMS's decision to pay claims was a factual question that could not be resolved at the motion

to dismiss stage. Thus, the court denied the defendants' motion to dismiss the government's FCA claims on that basis.

Individual Defendant's Motion to Dismiss

Finally, the court considered defendant Bortz's individual motion to dismiss, in which he argued that the government did not allege that he personally violated the FCA. The court agreed, noting that Bortz was rarely mentioned in the government's complaint. Further, even in the instances where an allegation against Bortz could be implied, the court found that the government's complaint only contained recitals of the elements of FCA liability and conclusory statements. Thus, the court held that government's complaint was factually insufficient with respect to its allegations against defendant Bortz, and granted his individual motion to dismiss.

U.S. ex rel. Foglia v. Renal Ventures Management, LLC, WL 5882020 (D.N.J. Nov. 23, 2011)

A relator brought a *qui tam* action against her former employer, alleging that the dialysis care services company violated the False Claims Act and state law by falsely certifying its compliance with various state regulations governing nurse-to-patient ratios, and various standards regarding drug administering—the relator alleged that the defendant improperly administered drugs that were intended for one-time by retaining unused amounts of the drugs and medicating other patients with those unused portions, while falsely certifying to the government that it had complied with the applicable rules. The relator also alleged that the defendant overbilled the government for drugs and engaged in other misconduct. The federal and state governments involved declined to intervene in the relator's suit. The defendant moved for partial judgment, arguing that the relator's allegations of false certification failed to state a claim and, alternatively, that the relator failed to plead the alleged false certification claims with the required specificity.

Holding: The United States District Court for the District of New Jersey granted the defendant's motion to dismiss the false certification claims.

False Certification

The court began by determining whether the relator sufficiently pled a false certification claim regarding applicable state nurse staffing regulations. The relator argued that he personally observed the defendant violate the applicable regulations and provided dates of the alleged activity. However, the court held that the relator failed to allege that the alleged violations were conditions of payment that were material to the government, since the relator did not cite to any regulation or otherwise allege that the government would have refused to make reimbursement payments to the defendant if

it had been aware of the alleged nurse staffing violations. Therefore, the court granted the defendant's motion to dismiss the nurse staffing claim.

Next, the court analyzed the relator's claim alleging that the defendant falsely certified its compliance with regulations requiring the defendant to discard unused portions of drugs and not to administer those unused portions to other patients. The court first determined that the relator failed to plead this alleged fraud with specificity, as he failed to plead specific instances in which the defendant improperly administered leftover portions of drugs to patients. The court noted, though, that even if the relator had pled such facts, his complaint still failed to state a claim, since he again failed to cite to any rule or regulation prohibiting the defendant from reusing the drug in this way. Moreover, the court noted that the relator failed to allege that one-time use of the drug was a condition of payment, and thus, he failed to allege that any false certification of compliance with any such rule was material to the government. Therefore, the court granted the defendant's motion with respect to this claim as well.

However, the court declined to dismiss these claims with prejudice and granted the relator leave to amend his complaint.

See *U.S. ex rel. Purcell v. MWI Corporation*, 2011 WL 5517352 (D.D.C. Nov. 14, 2011) at page 21.

D. Seal/Service Issues

U.S. ex. rel. Bernat v. The Boeing Company, Inc., et al., WL 6152303 (E.D. Mo. Dec. 12, 2011)

A relator brought a *qui tam* action against an airplane manufacturer and its subcontractor, alleging that the defendants defrauded the government in connection with the production of certain military aircraft. The defendants moved to dismiss the relator's complaint for lack of subject matter jurisdiction and failure to state a claim, arguing that the relator failed to comply with the FCA's filing requirements. The government declined to intervene in the relator's suit, but filed a statement of interest opposing the defendants' motion.

Holding: The United States District Court for the Eastern District of Missouri denied the defendants' motion.

FCA's Filing/Sealing Requirements

The defendants' motion to dismiss argued that the relator failed to comply with the FCA's filing requirements, which mandate that *qui tam* complaints be filed under seal. The court found that the relator publicly filed a motion to file his *qui tam* complaint *in camera* and under seal, and that the relator's motion—which included the case caption—was publicly-available on PACER for at least 12 hours. In fact, one of the defendants allegedly learned of the case by viewing this publicly-available information. The court determined that the relator's complaint was electronically filed under seal the next day. Since the relator's complaint was ultimately filed under seal, the court held that the defendants failed to establish the relator violated the FCA's filing requirements. The court stated that it was not necessary to reach the questions of whether the FCA's filing requirements are jurisdictional or whether a relator's failure to comply with those requirements warrants dismissal of the *qui tam* action.

The defendants then argued that the relator's complaint should be dismissed because the relator failed to initiate the case pursuant to district court's administrative rules, which require all *qui tam* complaints to be filed in paper format via mail or in person. However, the court found that the district court's filing procedures indicated that the court may deviate from its rules where appropriate, in consideration for the need for the just, speedy, and inexpensive determination of pending matters. The court found that although at least one of the defendants became aware of the relator's case due to the relator's publicly-filed motion to seal, they failed to establish any resulting prejudice—and significantly, the government indicated that it had not been prejudiced either. Consequently, the court granted relators leave to deviate from its filing procedures and denied defendants' motion to dismiss.

***U.S. ex rel. Ruble v. Skidmore*, 2011 WL 5389325 (S.D. Ohio Nov. 8, 2011)**

A relator brought a *qui tam* action against her former employer—an orthopedic center—and the company's owner, alleging that the defendants submitted fraudulent reimbursement claims to federal healthcare programs. Specifically, the relator alleged that the defendants regularly billed for office appointments without proper documentation, employed unqualified personnel to perform services for which they received payment, and fraudulently manipulated billing codes. The government declined to intervene in the relator's case, and with the government's consent, the relator moved to voluntarily dismiss her *qui tam* complaint without prejudice. The relator also moved to keep the complaint under seal or alternatively, to only unseal documents that had been redacted to remove any information identifying her, arguing that lifting the seal could compromise her ability to earn an income within her field, lead to potential physical retaliation against her, and cause harm to her family. The government opposed the relator's request to maintain the seal.

Holding: The United States District Court for the Southern District of Ohio granted the relator's motion dismiss her *qui tam* complaint without prejudice by denied her motion to maintain the seal over the complaint.

FCA Seal

The court immediately granted the relator's request to voluntarily dismiss her *qui tam* complaint without prejudice, noting that the government consented to this request.

The court then turned to the relator's request to keep the complaint under seal. As an initial matter, the court found that the FCA contemplates that *qui tam* complaints will be unsealed at some point, and does not provide for permanent sealing of such complaints. The purpose of the seal, the court noted, is to allow the government sufficient time to investigate and determine if it will intervene in a relator's case—not to protect the relator. The court also noted that there is a presumption in favor of public disclosure of court records and held that the presumption can only be overcome by a significant countervailing interest. While the court recognized that the relator has a legitimate interest in being able to practice her profession within her local community and that her ability to do so is, at least in part, based on her reputation in the local professional community, the court ultimately concluded that this interest was not sufficient to overcome the strong presumption in favor of public access to court documents and proceedings. In response to the relator's concerns about potential retaliation against her, the court concluded that "if the plaintiff-relator were to suffer retaliation for filing the qui tam action, the FCA would provide a cause of action." The court, though, did not discuss the fact that the relator had already resigned from her employment position and therefore, was no longer an "employee, contractor or agent"

of the defendant—the categories of individuals covered by the FCA's anti-retaliation provision. As a result of the court's findings, it denied the relator's motion to maintain the seal.

The court also denied the relator's alternative request to redact all identifying information from her *qui tam* complain. Not only did the court hold that such a wholesale redaction would be tantamount to a permanent seal, it also noted that even if the relator's name and other identifying information were redacted, the defendants may still be able to deduce her identity. As a result, the court denied the relator's alternative request for redaction.

U.S. ex rel. Danner v. Quality Health Care Inc., 2011 WL 4971453 (D. Kan. Oct. 18, 2011)

A relator brought a *qui tam* action against a group of companies that provide medical services reimbursable by Medicare. The relator alleged that the defendants submitted claims for medically unnecessary services and for services not actually provided, and engaged in upcoding. The government declined to intervene in the relator's case and the court unsealed the relator's *qui tam* complaint and other documents, so that the relator could proceed with the suit without the government. The relator then moved for voluntary dismissal without prejudice of her complaint, and for restoration of the seal. The relator argued that the documents should be resealed because if the documents were made publicly available, she would be impaired in her ability to continue investigating and developing facts to support the allegations. Furthermore, the relator argued that public availability of the documents could impair her ability to obtain employment and negatively impact her health.

Holding: The United States District Court for the District of Kansas granted the relator's motion in part.

The court first examined the relator's motion to voluntarily dismiss her complaint. The relator argued that dismissal was appropriate because no responsive pleading had been filed and the government had consented to the motion so long as the dismissal was also without prejudice to the government. As a result, the court granted dismissal without prejudice to the relator or the government.

Next, the court examined the relator's request to reseal the pertinent documents. The court found that the relator's concerns about continuing her private investigation misconstrued the seal provision's purpose—which the court determined was to allow the government—not relators—an adequate opportunity to fully evaluate *qui tam* allegations. The court then examined the relator's employment argument and held that the relator knew, or should have known, when she filed her *qui tam* claim that her identity would eventually be revealed and that her vague and hypothetical concerns about possible impairment of employment and negative health effects were not suf-

ficient to justify resealing the complaint. As a result, the court held that the relator's concerns were insufficient to overcome the established presumption in favor of public access to court documents. The relator's request for resealing was denied.

E. Vicarious Liability

See *U.S. ex rel. King v. Solvay S.A.*, 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011) at page 3.

Judgments & Settlements

OCTOBER 1, 2011–DECEMBER 31, 2011

GE Healthcare Inc. (E.D. Mich. Dec. 29, 2011)

GE Healthcare Inc. agreed to pay the United States $30 million to settle allegations that a company GE Healthcare acquired in 2004, Amersham Health Inc., violated the False Claims Act. Amersham Health Inc. was accused of providing false or misleading information to Medicare regarding Myoview, a radiopharmaceutical used in certain cardiac diagnostic imaging procedures, thereby causing Medicare to reimburse for the drug at inflated rates. In addition, the company alleged improperly diluted Myoview in order to maximize the number of doses available per vial, which led to an increased number of patient-ready doses, thereby inflating Medicare reimbursements. This settlement resolves a False Claims Act *qui tam* suit filed by James Wagel, a pharmaceutical representative for Bristol-Myers Squibb. Wagel, who was represented by TAFEF members Monica Navarro of Frank Haron Weiner PLC and J. Marc Vezina of Vezina & Gattuso, LLC, will receive a $5.1 million share of the federal government's recovery.

Ranbaxy Laboratories Ltd. (D. Md. Dec. 21, 2011)

Ranbaxy Laboratories, Ltd. signed a consent decree with the U.S. Food and Drug Administration (FDA) to lift a ban on the import of drugs from certain manufacturing plants in India. In 2008, the FDA banned the import of more than thirty of Ranbaxy's generic drugs in two of the company's manufacturing facilities in Paonta Sahib (Himachal Pradesh) and Dewas (Madhya Pradesh), due to improper manufacturing practices. In addition to the consent decree, the company set aside $500 million to cover potential criminal and civil liability stemming from an investigation by the U.S. Department of Justice.

Kaman Precision Products Inc. (M.D. Fla. Dec. 21, 2011)

Kaman Precision Products Inc., a Florida-based government contractor, agreed to pay the United States $4.75 million to resolve allegations that the company submitted false claims to the U.S. Army, by knowingly substituting a non-conforming component in four lots of FMU-143 bomb fuzes—parts that could have caused the fuzes to fire prematurely, making them unsafe for use in military operations. This settlement resolved claims involving the fuzes as well as other administrative claims that the Army brought after it terminated Kaman's contract.

CVS Caremark Corporation (Dec. 16, 2011)

CVS Caremark Corporation agreed to pay $19.9 million to Illinois, California, and Florida to settle three separate *qui tam* suits. The suits alleged that CVS Caremark defrauded the states' prescription drug plans by reselling returned drugs, altering prescription orders to make them more expensive, and submitting false reports about prescription filling time. Of the $19.9 million settlement, almost $7 million will go to

the State of California, with $4 million being paid to the State of Illinois, and $3 million going to the State of Florida. Attorneys Michael Leonard and TAFEF member Jonathan D. Lichterman of Meckler Bulger Tilson Marick & Pearson represented the relators. Walter Lack and Paul Traina of Engstrom, Lipscomb & Lack served as their co-counsel.

Medtronic, Inc. (D. Minn. & E.D. Cal. Dec. 12, 2011)

Medtronic Inc., a Minnesota based medical technology company, agreed to pay the United States $23.5 million to resolve allegations that the company violated the False Claims Act and caused false claims to be submitted to Medicare and Medicaid by using two post-market studies and two device registries as vehicles to pay illegal kickbacks to doctors who implanted the company's pacemakers and defibrillators in patients. This settlement resolves allegations arising in two False Claims Act *qui tam* suits filed in Minnesota and California. The relators in those lawsuits will receive more than $3.96 million from the federal recovery.

Russell Hawley and Hawley Insurance Inc. (N.D. Iowa Dec. 9, 2011)

Russell Hawley and his insurance company, Hawley Insurance, Inc., agreed to pay the United States $834,897.50 to settle allegations that they caused false claims to be submitted to the Federal Crop Insurance Corporation (FCIC) by submitting forged crop insurance applications and other false documents to a private insurance company designated by the United States to sell federally-reinsured crop insurance policies. The allegedly fraudulent claims were reinsured by the government, and the government was required to pay out on those policies when the insured crops failed. As a result, the FCIC paid $330,000 in damage losses and premium subsidies for the policies.

KV Pharmaceutical Company (D. Mass. Dec. 6, 2011)

KV Pharmaceutical Company agreed to pay $17 million to resolve federal and state allegations that its now-defunct subsidiary, Ethex Corporation, submitted false quarterly reports to the government regarding two of its drugs: Nitroglycerin Extended Release Capsules (Nitroglycerin ER) and Hyoscyamine Sulfate Extended Release Capsules (Hyoscyamine ER). Ethex also allegedly failed to advise the Centers for Medicare and Medicaid Services (CMS) that the two products did not qualify for coverage. This settlement resolves a False Claims Act *qui tam* matter filed by Constance Conrad, who will receive $1,523,804 of the federal government's $10,158,695 recovery.

Diakon Lutheran Social Ministries (M.D. Pa. December 1, 2011)

Diakon Lutheran Social Ministries (doing business as Diakon Hospice Saint John) agreed to pay the United States $10.56 million to resolve False Claims Act allegations. From October 1, 2004 through October 1, 2010, Diakon submitted improper claims to Medicare for hospice care provided to Medicare beneficiaries who were not eligible for hospice benefits under the Medicare regulations. Diakon voluntarily disclosed to federal authorities that it had received improper payments.

Genentech Inc. (E.D. Pa. Nov. 30, 2011)

Genentech Inc. agreed to pay the United States $20 million to settle False Claims Act allegations that the company pressured its sales representatives to improperly market Rituxan, a non-Hodgkin's lymphoma drug, for off-label uses, including treating chronic lymphocytic leukemia, autoimmune hemolytic anemia, and rheumatoid arthritis. These allegations were brought in a *qui tam* suit filed by former Genentech employee John Underwood. Underwood will receive a $5.7 million share of the government's recovery.

Cliffside Rehabilitation & Residential Health Center, Forest View Center for Nursing & Rehabilitation, and Woodcrest Rehabilitation & Residential Center (Nov. 21, 2011)

Cliffside Rehabilitation & Residential Health Center, Forest View Center for Nursing & Rehabilitation, and Woodcrest Rehabilitation & Residential Center agreed to pay $745,000 to resolve Medicaid fraud claims under the New York State False Claims Act. The three New York nursing homes allegedly defrauded Medicaid by double-billing for patient beds, overbilling for patients' rooms, and holding beds for patients who were either deceased or absent from the facilities. The allegations were brought by *qui tam* relator, Steven Simon, who received a $111,000 share of the recovery. Simon was represented by Alan J. Konigsberg and Theresa A. Vitello of Levy Phillips & Konigsberg, LLP. Konigsberg is a TAFEF member.

Sandoz Inc. (D. Mass. Nov. 16, 2011)

Sandoz Inc. agreed to pay the United States, the State of California, and the State of Florida a combined $150 million to settle claims that it caused these government entities to overpay for drugs by manipulating average wholesale prices. Under the agreement, the United States will recover $86.5 million, California will collect $40 million and Florida will receive $15.2 million. The relator, Ven-a-Care of the Florida Keys, will receive an $8.275 million reward. TAFEF member James Breen of The Breen Law Firm, PA represented the relator.

Dr. Millicent Francis-Lane (W.D.N.C. Nov. 15, 2011)

Gynecologist Millicent Francis-Lane, MD, agreed to pay the North Carolina Medicaid Program $950,000 to resolve allegations related to upcoding. The settlement was reached following a multi-year investigation by state agents and investigators into Dr. Francis-Lane's billing practices, inc which investigators found that Dr. Francis-Lane knowingly billed Medicaid for more extensive services than she actually provided and regularly billed Medicaid for unnecessary tests, which caused the North Carolina Medicaid Program to reimburse her for significantly more than she would otherwise have received for her services. In addition to the settlement payment, Dr. Francis-Lane agreed to enter into a Corporate Integrity Agreement with the U.S. Department of Health and Human Services.

Vanguard Healthcare LLC, Vanguard Health Care Ancillary Services, LLC, and Vanguard Healthcare Services, LLC (M.D. Tenn. Nov. 8, 2011)

Vanguard Health Care, LLC and its subsidiaries, Vanguard Health Care Ancillary Services, LLC, and Vanguard Healthcare Services, LLC (collectively, Vanguard), agreed to pay the United States and the State of Tennessee $2 million and to enter into a Corporate Integrity Agreement with the U.S. Department of Health and Human Services to settle False Claims Act allegations. The United States will receive $1,880,619.02 and the State of Tennessee will receive $119,380.98. This settlement resolves claims by the United States and Tennessee that Vanguard defrauded Medicare and Medicaid by double-billing for enteral feeding services and for supplies provided to patients in skilled nursing facilities, as well as a *qui tam* suit filed by William Bradley Caldwell, a former director of operations at one of Vanguard's skilled nursing facilities. Caldwell, who was represented by TAFEF member Peter Chatfield of Phillips & Cohen LLP, will receive a $400,000 share of the federal recovery.

Point Blank Solutions Inc. Point Blank Body Armor Inc., and Protective Apparel Corporation of America Inc. (Nov. 7, 2011)

Point Blank Solutions Inc. (formerly DHB Industries Inc.), Point Blank Body Armor Inc. and Protective Apparel Corporation of America Inc. agreed to pay the United States $1 million to resolve allegations that they violated the False Claims Act by knowingly manufacturing and selling defective bulletproof vests containing Zylon fiber. The companies allegedly manufactured and sold bulletproof vests containing despite possessing information showing that the Zylon fiber degraded quickly over time and was not suitable for ballistics uses. These vests were purchased by the federal government and by various state, local, and tribal law enforcement agencies. This settlement is part of a larger investigation into the use of Zylon in the body armor

industry, in which the United States has settled with nine other participants in the Zylon body armor industry for more than $61 million.

New Milford Hospital (D. Conn. Nov. 7, 2011)

New Milford Hospital agreed to pay the United States $471,933 to resolve allegations that the hospital violated the False Claims Act by improperly billing Medicare for injections of leuprolide acetate, which is known by the brand names Lupron and Lupron Depot. Lupron is used to treat prostate cancer in men, and endometriosis and fibroids in women and different dosages of Lupron are used to treat male patients and female patients, with the billing code for the female-related dosage of Lupron being reimbursed at a higher rate than that of the male-related dosage. New Milford Hospital allegedly regularly billed Medicare at the higher-paying, female-related Lupron billing code for its male patients, which caused the hospital improperly to receive substantially higher reimbursements from Medicare.

Point Park University (W.D. Pa. Nov. 7, 2011)

Point Park University agreed to pay the United States $1.4 million to settle allegations that the institution excluded commuter and part-time students from receiving federal student aid grants and submitted false claims to the Department of Education. This settlement resolves a *qui tam* lawsuit filed by Betty L. Davis, the university's former senior director of student financial services. Davis will receive a $420,000 share of the government's recovery. She was represented by Paul Tershel of Terhsel & Associates.

Jewish Hospital & St. Mary's HealthCare, Inc. (W.D. Ky. Nov. 3, 2011)

Jewish Hospital & St. Mary's HealthCare, Inc. (JHSMH) agreed to pay the United States $435,502 to settle allegations that it violated the False Claims Act by submitting inappropriate charges to Medicare for outpatient wound care services. The United States alleged that, between January 1, 2006 and February 26, 2010, JHSMH submitted charges for separate evaluation and management services that were never performed.

New York City (S.D.N.Y Oct. 31, 2011)

The City of New York agreed to pay the United States $70 million to settle a False Claims Act lawsuit alleging that the city overbilled Medicaid and improperly administered the Medicaid personal care services program by authorizing personal care services for elderly and disabled Medicaid beneficiaries without the legally required assessments and approvals. This settlement resolves a *qui tam* suit filed by Dr. Gabriel Feldman, an independent medical reviewer from a private agency that was under

contract to the city. Dr. Feldman will receive a $14.7 million share of the settlement payment. TAFEF member Alan Konigsberg of Levy Phillips & Konigsberg, LLP represented Dr. Feldman.

DFine Inc. (W.D. Tenn. Oct. 26, 2011)

DFine Inc. agreed to pay the United States $2.39 million to resolve allegations that the company violated the False Claims Act and the Anti-Kickback Statute by paying kickbacks to induce physicians to use the company's vertebral augmentation devices for treating spinal fractures. DFine allegedly used customer surveys, known as User Preference Evaluations (UPE), as vehicles to pay participating physicians illegal kickbacks and paid physicians up to $500 for each patient recruited to participate in the survey. DFine also allegedly provided improper remuneration to physicians in the form of travel expenses, lavish dinners, entertainment and promotional speaker fees. As part of the settlement, DFine agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services. This settlement resolves a *qui tam* suit filed by Brian Eberhard. Eberhard will receive an award of approximately $250,000 from the government's recovery.

Pfizer Inc. (D. Mass. Oct. 21, 2011)

Pfizer Inc. agreed to pay the $14.5 million to resolve allegations involving the improper marketing of the prescription drugs Detrol and Detrol LA. The drugs were approved by the FDA for the treatment of overactive bladder, but Pfizer allegedly marketed the drugs for treatment of men who were suffering from benign prostate hyperplasia. Under the settlement terms, the federal government will receive $11,878,846 and various State Medicaid programs will receive $2,621,154. This settlement resolves a False Claims Act *qui tam* suit brought by two former Pfizer employees: relators David Wetherholt and Marci Drimer. The relators, who were represented by TAFEF member Thomas M. Greene and his team at Greene LLP, will receive a $3,282,019 share of the recovery.

MedQuest Associates, Inc., BioImaging at Charlotte, Inc., BioImaging of CoolSprings, Inc., and BioImaging at Harding, Inc. (M.D. Tenn. Oct. 21, 2011)

MedQuest Associates, Inc., BioImaging at Charlotte, Inc., BioImaging of CoolSprings, Inc., and BioImaging at Harding, Inc. were ordered to pay $11.1 million after the U.S. District Court for the Middle District of Tennessee granted summary judgment to the United States in a False Claims Act *qui tam* action. The companies submitted claims for payment to Medicare for diagnostic testing conducted without the required physician supervision, and caused the submission of false Medicare claims in which another

Medicare provider's billing number was improperly used. The *qui tam* suit was filed by Karen Hobbs, a former employee of MedQuest Associates. TAFEF member Marlan Wilbanks of Wilbanks & Bridges, LLP represented the relator.

Gibson General Hospital (S.D. Ind. Oct. 12, 2011)

Gibson General Hospital agreed to pay the United States $1,069,840.36 to resolve False Claims Act allegations that the hospital billed Medicare and Medicaid for patients that received out-patient surgical services at a freestanding ambulatory surgery center that was not owned by Gibson. The hospital allegedly billed the government as though the services were provided at the hospital, even though the services were actually performed at the surgery center. This settlement resolves a 2009 *qui tam* suit filed by Gregory Schulten, former CFO of Gibson General Hospital.

Oracle Corp. and Oracle America Inc. (E.D. Va. Oct. 6, 2011)

Oracle Corp. and Oracle America Inc. (collectively, Oracle) agreed to pay the United States $199.5 million for failing to meet contractual obligations with the General Services Administration (GSA). In 1998, Oracle entered into a contract to sell software licenses and technical support to government entities through GSA's Multiple Award Schedule (MAS) program. The MAS program provides the government and other GSA-authorized purchasers with a streamlined process for procurement of certain commercial goods and services. Under the program, contractors must agree to disclose commercial pricing policies and practices, and to abide by the contract terms. This settlement resolves allegations that Oracle knowingly failed to meet its contractual obligations to provide GSA with current, accurate, and complete information about its commercial sales practices and knowingly made false statements to GSA about its sales practices and discounts. The settlement further resolves allegations that Oracle knowingly failed to comply with the price reduction clause of its GSA contract by not disclosing discounts given to its commercial customers. Oracle's allegedly fraudulent behavior caused the United States to overpay for Oracle products. The settlement is a result of a False Claims Act *qui tam* suit filed by former Oracle employee Paul Frascella, who will receive a $40 million share of the government's recovery.

Select Medical Corporation and Select Specialty Hospital-Columbus, Inc. (S.D. Ohio Oct. 4, 2011)

Select Medical Corporation and its subsidiary, Select Specialty Hospital-Columbus, Inc., agreed to pay the United States $7.5 million to resolve a False Claims Act suit alleging that Select entered into Medical Director Agreements in which it made unlawful referral arrangements and excessive fee arrangements with area physicians in Columbus, Ohio, in violation of the federal Anti-Kickback Statute and the Stark Law. In addition, the entire Select Specialty Hospital System agreed to enter into a Corpo-

rate Integrity Agreement with the U.S. Department of Health and Human Services. This settlement resolves a qui tam suit filed by relator Beatrice Maitland. Maitland, who was represented by TAFEF members from Nolan & Auerbach, P.A. and Morgan Verkamp LLC, will receive a $1.35 million share of the government's recovery.

The Trustees of Columbia University, New York Presbyterian Hospital, and Dr. Erik Goluboff (S.D.N.Y Oct. 5, 2011)

The Trustees of Columbia University, New York Presbyterian Hospital, and Dr. Erik Goluboff agreed to pay the United States $995,000 to settle allegations of Medicare fraud. The settlement resolves claims that the parties over-billed Medicare for urological procedures and billed for urological tests that were medically unnecessary. In addition, the settlement resolves allegations that Dr. Goluboff billed Medicare for more procedures than he could actually perform in a single day and that Columbia and New York Presbyterian were aware of Dr. Goluboff's practices and failed to stop them.

Howmet Aluminum Castings, Inc. (E.D. Pa. Oct. 3, 2011)

Howmet Aluminum Castings, Inc. agreed to pay the United States $536,492.57 to resolve an investigation into the company's manufacturing and billing practices. The investigation was the result of a voluntary disclosure made by Howmet in 2005, under the Department of Defense Voluntary Disclosure Program. Howmet disclosed that it had billed customers for certain parts that its employees had not inspected or had inspected using improper techniques. In addition, certain of Howmet's radiographers inspected parts even when their visual acuity testing did not meet proper standards. The improper billing and manufacturing practices occurred from January 1, 2004 through July 1, 2005.