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Quarterly Review

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

The TAF Education Fund is a nonprofit charitable organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the False Claims Act (FCA). The TAF Education Fund serves to inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions.

The TAF Education Fund is based in Washington, D.C., where it maintains a comprehensive FCA library for public use and a staff of lawyers and other professionals who are available to assist anyone interested in the False Claims Act and *qui tam*.

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New Tools to Combat Whistleblower Retaliation, Jason M. Zuckerman and R. Scott Oswald

FROM THE EDITOR

"It is curious that physical courage should be so common in the world, and moral courage so rare." –Mark Twain, American author and humorist

Whistleblowers who expose fraud against the government exhibit exceptional courage. Aside from the stigma of being seen as a "snitch" or a "rat," whistleblowers often face the possibility of losing their jobs and careers, and sometimes even risk their own safety, simply to do what is right. Although the False Claims Act has been around for nearly 150 years, it has only been in the past 25 years that Congress has begun to fully recognize the obstacles whistleblowers must overcome in order to protect taxpayer dollars from liars, cheats, and thieves. The False Claims Act was overhauled in 1986 and created a framework that has resulted in the recovery of more than $25 billion to the federal government. In the past two years, Congress has continued to improve the False Claims Act, by removing even more of the obstacles that confront whistleblowers. In addition, more than half of the States now have their own false claims act laws, which protect state dollars. Similarly, the IRS has recently strengthened its whistleblower program. And now, the SEC has joined the fight against fraud, by announcing its whistleblower program. The foundation has been laid for whistleblowers to come forward. Taxpayers Against Fraud Education Fund (TAFEF) applauds these efforts.

In late October/early November, TAFEF held its Tenth annual national conference, in Washington, DC. As always, one of the highlights of the event was the annual awards dinner, which gives TAFEF an opportunity to formally recognize the contributions of whistleblowers, private attorneys, and government officials who have joined the fight against fraud. This year, TAFEF awarded its Whistleblower of the Year Award to Harry Markopolos. Harry, of course, was the whistleblower who first alerted the SEC to Bernie Madoff's massive Ponzi scheme, back in 1999. Unfortunately, at that time, the SEC was not prepared to accept Markopolos' information, and nearly ten years passed before Madoff was finally arrested and publicly exposed. By then, tens of billions of investors dollars had been lost. As a sign of the changing times and the government's gradual recognition of the courageous efforts of Harry Markopolos and countless others like him, two days after Markopolos received his award from TAFEF, the SEC announced its proposed rules for implementing the SEC Whistleblower Program, which will reward those who voluntarily alert the SEC of violations of securities laws and assist the government in prosecuting the fraudsters. One of the most important aspects of the SEC's proposed rules are the built-in protections offered to such whistleblowers, as the SEC's program will prohibit em-

ployers from retaliating against employees who expose their securities fraud schemes. Various other new whistleblower provisions offer similar protections, and this issue includes a comprehensive article that provides an overview of several of them. During these tough economic and political times, it is refreshing to see the government take the necessary steps to not only encourage—but to actually protect—the courageous whistleblowers who protect our tax dollars.

Happy holidays,
Cleveland Lawrence III

Recent False Claims Act & *Qui Tam* Decisions

JULY 1–SEPTEMBER 30, 2010

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

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

A relator brought a *qui tam* action against an international biotechnology company, a nephrology company, its corporate affiliate, and a healthcare provider, alleging that the defendants violated the False Claims Act by engaging in a scheme of kickbacks to induce providers to purchase a drug manufactured by one of them. The relator alleged that the fraud scheme included sham consulting agreements, retreats, free services, and pass-through price concessions. In addition, the relator's complaint alleged an additional kickback, in the form of excess overfill—liquid dosages of the drug that exceeded the amount necessary to allow providers to withdraw the labeled dosage. Notably, some overfill is often necessary, as small quantities of the drug sometimes remain in the vial or are ejected prior to the dose being delivered to the patient, but the relator alleged that the defendants knowingly included additional amounts, which essentially amounted to free samples of the drug, designed to induced providers to purchase it, and which created the potential for providers to receive excess reimbursements from the government. The relator alleged that these kickbacks caused providers to falsely certify in their Medicare enrollment forms that they were in compliance with applicable anti-kickback statutes. The relator alleged that the defendants encouraged providers to submit false claims, by advising them that Medicare would reimburse them for overfill, even if doses were never administered or medically necessary. Moreover, the complaint alleged that the defendants directly defrauded the government by reporting an inflated Average Sales Price (ASP) to Medicare and Medicaid, causing the government to overpay for drugs. Finally, the relator also alleged a conspiracy, in violation of the False Claims Act. The defendants moved to dismiss the relator's complaint for failure to state a claim and for failure to plead fraud with particularity. The United States District Court for the District of Massachusetts denied the defendants' motion, finding that that the relator had sufficiently stated a claim with respect to all the allegations in the complaint.

Liability Based on the Overfill Theory

The defendants argued that that there was no violation of the anti-kickback statute when providers accepted free overfill, and thus there was no false certification of compliance. They noted that the FDA requires drug manufacturers to include overfill in their injectable products, for the reasons stated above, and that there is no legal stan-

dard governing the amount of overfill that can be included. The court disagreed and held that the relator adequately pled that the defendants were providing built-in free samples of the drug, since the only legitimate purpose of overfill is to allow providers to withdraw the labeled dosage, and the defendants exceeded the amount necessary to achieve that purpose. The court noted that the relator's claim was not that the amount of overfill was inherently illegal, but rather that it constituted an illegal kickback. This allegation, the court held, was sufficient to state a claim under the FCA.

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

Knowingly False Express Certifications

The defendants also contended that the relator's allegations of false certification could not satisfy Rule 9(b)'s particularity requirements, arguing that the relator did not allege that the providers' certifications of compliance with the anti-kickback statute were "knowingly false when made." The relator countered, providing statistical evidence that demonstrated that after the defendants' alleged kickback scheme began, 70% of Medicare-eligible providers had re-enrolled in the program and had certified future compliance with the anti-kickback statute on their enrollment forms. Thus, the relator reasoned—and the court agreed—the defendants' providers had also likely re-enrolled after the defendants' alleged kickbacks scheme began, and thus, those providers' certifications of compliance with the anti-kickback statute were knowingly false.

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

Liability Based on Overdosing & False Billing Theories

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

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

ASP Inflation by Failing to Report Excess Overfill

The relator also argued that the defendants inflated the drug's Average Sales Price by failing to report overfill. The defendants argued that the applicable regulations do not require them to include overfill in ASP calculations, since the regulations apply to the total number of units sold and overfill does not qualify as a "unit." Therefore, the defendants argued, the relator's theory of liability fails as a matter of law. The relator, on the other hand, argued that overfill qualified as a "free good"—the value of which should be deducted from the total drug sales. Moreover, they argued that that providers could pool together free overfill, thereby reducing the amount they needed to purchase. They noted that the government had previously reached this same conclusion with respect to overfill on one of the defendants' other drugs, and therefore the defendants knew that excess overfill would affect the cost and sales of the drug. The court concluded that the relator adequately pled a violation of the FCA, due to ASP inflation.

Conspiracy to Inflate ASP as to INN and ASD

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

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

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

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

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

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

See Frazer ex rel. U.S. v. Iasis Healthcare Corp., 2010 WL 3190641 (9th Cir. Aug. 12, 2010) at page 38.

B. What Constitutes a False Claim

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

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

Claims Under Section 3729(a)(1)

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

Claims Under Section 3729(a)(2)

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

Claims Under Section 3729(a)(3)

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

JURISDICTIONAL ISSUES

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

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

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

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

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

The relator, an employee with the Pennsylvania Department of Transportation (PennDOT), filed a *qui tam* action against several engineering and consulting firms, alleging that the defendants falsified consultant credentials in order to obtain higher pay rates on federally-funded projects. The defendants moved to dismiss the relator's complaint for failure to state a claim. The United States District Court for the Western District of Pennsylvania granted the motions, holding that the relator failed to allege that the federal government was involved in the alleged false claims. However, on appeal the Third Circuit vacated and remanded the judgment in light of the new FERA amendments to the FCA. The Third Circuit held that if the federal government was involved in the disbursement of funds from a state agency—such as PennDOT—to the defendants, then it was possible that relator's claims were actionable, depending upon the circumstances surrounding the federal government's involvement. The relator was then granted leave to file an amended complaint.

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

The defendants then individually moved for summary judgment and to dismiss the relator's amended complaint. The defendants argued that the relator failed to satisfy numerous statutory and jurisdictional requirements and failed to plead fraud and conspiracy with the required particularity. The defendants also argued that the FCA's public disclosure bar and that the relator was not allowed to maintain his suit. They argued that the relator gained his knowledge through PennDOT's internal investigation, which was publicly disclosed, and that he did not voluntarily provide the information to the federal government before filing his *qui tam* suit. The relator countered the defendants' claims, arguing that his knowl-

edge came, not from publicly disclosed information, but from his own audits. The United States District Court for the Western District of Pennsylvania granted the defendants' motions in part. The court held that the relator qualified as an original source only for those claims against the defendants for whom he had direct knowledge. Hence, the court held the relator did not qualify as an original source for claims against the defendants that were uncovered as part of PennDOT's internal investigation. The relator argued that all of the defendants should be included under a common scheme theory, but the court disagreed and held that the FCA still requires relators to allege direct and independent knowledge of information supporting their allegations in order to meet their burden under the FCA.

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

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

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

Two relators filed a *qui tam* action against a pharmaceutical company, alleging that the defendant gave illegal kickbacks to providers and hospitals to induce them to prescribe its drug. The defendant moved to dismiss the complaint. The district court found that one of the relators' claims was based on publicly disclosed information and that the relator did not qualify as an original source. Thus, that relator

was dismissed from the suit. The other relator was allowed to maintain his claim, but that claim was subsequently dismissed for failure to plead fraud with particularity. The relators then appealed to the First Circuit, which affirmed the dismissal of one relator, but reversed and remanded the court's ruling that the complaint failed to comply with the 9(b) requirements for the remaining relator.

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

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

Three relators filed a *qui tam* action against a group of EPA employees and a group of University of Georgia researchers. The relators alleged that the researchers deliberately made false claims in an EPA grant application to study sewage treatment on farmlands, and that they falsified the results from that study. The relators claimed the study led to the publication of an article that contained false and fabricated data regarding the effects of sewage sludge on health and land. The relators further alleged that the EPA employees encouraged the researchers to apply for the grant and that they misrepresented information in and effort to assist the researchers in receiving the grant. The defendants moved for summary judgment, and contended that the relators' complaint was barred by the FCA's public disclosure provision. The United States District Court for the Middle District of Georgia granted the defendants' motion. The defendants argued that the information relied on in the relators' complaint—including the relevant grant application and

communications between the defendants—were publicly disclosed via requests for public information under the Freedom of Information Act and Georgia Open Records Act. The court noted that information contained in reports generated by such requests to the government constitute public disclosures, as they qualify as government reports. In response, the relators argued that they were an original source of the information on which their allegations were based, as they had direct and independent knowledge of the false information in the grant application. However, the court found that the relators were not involved in any drafting or reviewing of the grant application and only received information from their attorney, which was received from open records act requests (ORAR) during discovery in a prior litigation. The court determined that the relators only suspected fraudulent activity and then were able to confirm the contents of the grant application once they received information from an ORAR. Hence, the court held that relators were not an original source, and that their claims were barred by the FCA's public disclosure provision.

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

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

Public Disclosure

The First Circuit affirmed the district court's decision. It held the relator's allegations had previously been publicly disclosed through prior lawsuits and the news media and that the relator did not claim that she qualified as an original source of the information upon which her allegations were based. The relator had argued that civil complaints filed in state or federal courts do not qualify as a public disclosures, since there is no real audience. The circuit court disagreed and held that the relevant information was

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

Dismissal With Prejudice

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

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

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

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

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

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

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

A relator brought two separate *qui tam* actions against two housing complexes, one of their parent companies, the parent company's management, the city of New

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

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

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

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

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

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

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

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

the non-amended version of the public disclosure bar provision, and declared: "The Supreme Court has now clarified that 'congressional' denotes only the federal legislature and a state legislative report is therefore not an enumerated source under the prior statute."

The Ninth Circuit also took issue with the district court's finding that the relator's allegations had been previously publicly disclosed through an internal report, as well as newspaper articles, which focused on the activities of pharmaceutical companies. The appellate court disagreed and held that those materials did not disclose material elements of the alleged fraud. The Ninth Circuit further reversed the district court's ruling that the relator was not an original source of information, finding that the relator obtained knowledge of the questionable practices in the scope of his employment and acquired the knowledge directly; certainly, the court held, the relator was an original source of allegations he had previously made in a state court proceeding—which did qualify as a public disclosure—wherein he alleged that the defendants wrongfully terminated his employment. As a result, the Ninth Circuit reversed the judgment dismissing the federal claim and remanded for further proceedings. The appeals court left it to the district court to determine whether or not the relator's claims under the California FCA should be treated differently, "in light of the differences between state and federal law as to enumerated sources."

***See U.S. ex rel. Barber v. Paychex Inc.*, 2010 WL 2836333 (S.D. Fla. July 15, 2010) at page 43.**

FALSE CLAIMS ACT RETALIATION CLAIMS

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

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

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

The plaintiff, who had been employed as a director of operations for a security service for the U.S. in Kabul, Afghanistan, brought an action against three private security providers, one of their managers, and an individual, alleging that the defendants violated the False Claims Act's anti-retaliation provision and Virginia state law by constructively discharging him from his job after he engaged in protected activities. The plaintiff's complaint alleged that the defendants engaged in wrongdoing and illegal conduct and attempted to convince him to defraud the U.S. Department of State. He further asserted that after he complained about the defendants' fraudulent conduct, the defendants moved him to a different location, with intolerable working conditions, which made him quit. The defendants moved separately to dismiss the plaintiff's claims or in the alternative, for summary judg-

ment, contending that the plaintiff requested the move, as he no longer wanted to work on the government contract at issue. The United States District Court for the Eastern District of Virginia examined the plaintiff's state law claims and FCA claims separately and granted the defendants' motions in part. The court dismissed the plaintiff's state law claims, finding that under Virginia law, at-will employees cannot be constructively discharged. However, the court allowed the plaintiff to maintain his FCA claims, as it held that under the FCA an at-will plaintiff can predicate a FCA claim on an alleged constructive discharge. Since the court could not determine the pertinent facts regarding the plaintiff's reassignment and alleged subsequent isolation and intolerable working conditions, it held that discovery was required with respect to the plaintiff's FCA claims.

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

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

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

question for the jury to decide, since the plaintiff could provide evidence that her termination was in retaliation for her investigation and that the reason offered by the defendant was pretextual. Thus, the court denied the defendant's summary judgment motion on the plaintiff's FCA retaliation claim.

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

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

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

Three relators brought a *qui tam* action against a juvenile psychiatric facility, its operator company, and their parent corporation, alleging that the defendants submitted false claims in order to obtain Medicaid reimbursement, in violation of the federal False Claims Act and the Virginia Fraud Against Taxpayers Act (VFATA). Further, the relators alleged retaliatory discharge after they refused to comply with fraudulent practices. The U.S. Government and the Commonwealth of Vir-

ginia intervened in the case. After the intervention, the relators filed an amended complaint. The United States District Court for the Western District of Virginia dismissed all claims in the relators' amended complaint that were pled on behalf of the governments, finding that under both the federal FCA and it's Virginia counterpart, once the government intervenes in a *qui tam* action, "the action shall be conducted by the government," and that consequently, the relators could no longer prosecute the government's claims.

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

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

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

The plaintiff filed suit in the United States District Court for the District of Alabama suing the trustees, the president, and the executive vice president of his former employer—a state university—in both the official and individual capacities. The suit alleged that the defendants violated the anti-retaliation provisions of the False Claims Act, and claimed that the plaintiff was directed by the defendants to use federal funding provided by the Department of Education for improper purposes. He alleged that when he refused to do so and threatened to report any misconduct to the agency, the defendants arranged for him to be terminated from his job. After his initial complaint was dismissed, the plaintiff filed an amended complaint that provided more factual information regarding the alleged fraud and retaliation. The defendants moved to dismiss the plaintiff's amended complaint

for failure to state a claim. The court granted the motion in part and denied in part. The court held that the plaintiff's explicit threats to report any unauthorized use of funds, coupled with documentary evidence that suggested that the defendants submitted false claims to the government, were sufficient to state a claim that the plaintiff's efforts were in furtherance of stopping violations of the FCA. The defendants, however, also argued that, as state employees, they were entitled to qualified immunity. The court disagreed and held that qualified immunity does not apply to FCA retaliation claims and is not available as a defense to defendants who have been sued in their individual capacities. Thus, the defendants' motion to dismiss was denied.

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

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

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

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

duct. Third, the court analyzed the causation element, as the defendants argued that the relator failed to show that he was fired in retaliation for his protected conduct. The court held that the relator's complaint sufficiently alleged that he was fired in retaliation for his protected conduct and that the defendants' stated reasons for his termination were pretextual. Consequently, the court denied the defendant's motion to dismiss.

See Riddle v. Dyncorp Intern. Inc., 2010 WL 3304245 (N.D. Tex. Aug. 19, 2010) at page 31.

See U.S. ex rel. Davis v. Lockheed Martin Corp., 2010 WL 3239228 (N.D. Tex. Aug. 16, 2010) at page 30.

See U.S. ex rel. Martinez v. Va. Urology Ctr. P.C., 2010 WL 3023521 (E.D. Va. July 29, 2010) at page 49.

COMMON DEFENSES TO FCA ALLEGATIONS

A. Not a Condition of Payment

See U.S. ex rel. Rost v. Pfizer, Inc., 2010 WL 3554719 (D. Mass. Sept. 14, 2010) at page 6.

B. Not Knowingly False

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

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

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

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

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

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

fore they can receive other forms of federal and/or state benefits. The First Circuit considered each of the appellant's arguments in turn.

Denial of Defendant's Summary Judgment Motion was Proper

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

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

quently, the defendant's scienter argument failed as well, and the district court's denial of the defendant's summary judgment motion was affirmed.

Exclusion of Evidence was Improper

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

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

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

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

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

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

C. Relator Released Defendant from FCA Claims

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

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

D. Sovereign Immunity

See Bell v. Dean, 2010 WL 2976752 (M.D. Ala. July 27, 2010) at page 22.

E. Statute of Limitations

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

The plaintiff brought an action against his former employer, a corporation, and other individuals, alleging that the defendants violated the False Claims Act by retaliating against him and terminating his employment after he raised concerns to his superiors about the defendants' alleged acceptance of unearned payments from the government. The defendants moved to dismiss the complaint for failure to state a claim, contending that the plaintiff's claims were time-barred. The United States District Court for the Northern District of Texas granted the defendants' motion. The court first noted that at the time the plaintiff filed his complaint, the False Claims Act did not specify a statute of limitations period for retaliation claims. The court was then concluded that it was required to apply the most analogous state law statute. The defendants argued that the 90-day statute of limitations under the Texas Whistleblower Act (TWA) was the most analogous state law statute, since the plaintiff wanted protection as a whistleblower. The plaintiff disagreed and argued that the correct limitations period was the two-year catch-all statute of limitations for personal injury claims. Further, the plaintiff argued that the TWA was inapplicable because it only provides a remedy for government employee whistleblowers. Alternatively, the plaintiff argued that a recent amendment to the FCA created a new, universal three-year statute of limitations for all retaliation claims. The court, however, agreed with the defendants and held that the TWA was the most closely analogous state statute to the plaintiff's allegations, regardless of its limited scope and applicability only to claims by government employees. The court also rejected the plaintiff's argument that the FCA's newly enacted three-year limitations period should apply, finding that the amendment took effect after the plaintiff's claim arose and could not be applied retroactively. The court then applied the 90-day statute of limitations and held that the plaintiff's action was untimely, since it was filed 178 days after his termination. The court also denied the plaintiff's request to amend his complaint, finding that any amendment would be futile, since there was nothing the plaintiff could allege that would make his claim timely. Consequently, the defendants' motion to dismiss the plaintiff's complaint was granted.

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

First, the court analyzed the allegations that the defendant's off-label marketing caused physicians and hospitals to submit false claims for treatments that were not "reasonable and necessary" or "medically necessary." The relators argued that the treatments in question could not possibly have been medically necessary, because no element of the defendant's device had ever received approval for those uses. Moreover, the relators argued that the use of the defendant's device for off-label uses was not medically necessary, but rather, experimental within the scientific community. However, the court found the complaint did not allege that the defendant concealed or misstated the limits of the FDA's approval on the use of the device, and noted that Medicare contractors may approve coverage for such devices and that necessity decisions are made by individual physicians. In addition, the court held that each state's Medicare carrier determines the conditions for coverage and reimbursement and found that the relators failed to allege that any state denied coverage for the off-label use of the defendant's device. Further, the court held that alleging that a device is "experimental" does not equate to alleging that it is medically unnecessary for Medicare/Medicaid reimbursement purposes.

The court held that the relators also failed to allege specific false statements made by the defendant, and found that statements made in the defendant's patient education brochures did not support an inference that the defendant caused physicians and hospitals to submit false claims for using its device. Further, the court held that the relators failed to plead fraud with particularity, as they did not iden-

tify any of the defendant's employees who engaged in off-label promotion or specific physicians or hospitals who received the promotions. The court found the relators alleged unlawful promotional tactics, but failed to show how the defendants caused the physicians or hospitals to submit false claims. In short, the complaint did not sufficiently allege that by promoting off-label use, the defendant caused the submission of false claims.

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

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

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

A relator brought a *qui tam* action against his former employer, a medical center, and the center's accounting firm, alleging that the medical center submitted false claims to Medicaid in New York and that the accounting firm knowingly assisted the center in the alleged fraud scheme by falsely certifying that it had audited the center's reports and that those reports were free of misstatements. The relator's suit alleged violations of both the federal False Claims Act and the New York State False Claims Act, as the federal government and the State of New York

each pay 50% of New York's Medicaid reimbursement expenses. The government intervened in the relator's suit and settled the claims against the medical center. However, the government declined to intervene in the remaining claims against the accounting firm, and the firm moved to dismiss the relator's remaining claims for failure to plead fraud with particularity.

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

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

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

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

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

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

Relators brought a *qui tam* action against their former employer, an educational institute, alleging that the defendant knowingly filed false claims by making misrepresentations to the Department of Education when securing student financial aid under Title IV of the Higher Education Act. The relators alleged that the defendant violated the Act's incentive compensation ban and that its implied false cer-

tification of compliance with the Higher Education Act gave rise to liability under the False Claims Act. Specifically, relators alleged defendant knowingly submitted student applications for financial aid which certified that students were eligible for Title IV financial aid, without disclosing that the defendant was not in compliance with the program's governing regulations. The United States District Court for the District of New Jersey dismissed the relators' false certification claim and the relators moved for reconsideration. The court also denied the relators' motion for reconsideration, due to procedural defects of the motion and because the relators' arguments failed to establish a clear error of law deserving reconsideration.

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

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

The government brought an action under the False Claims Act against a civilian employee of the U.S. Army, alleging that the defendant was involved in a fraudulent scheme to have the government pay a contractor and subcontractor for work that was not performed. The government alleged that the contract at issue called for the contractor and subcontractor to install updated computer workstations, but that this work was not performed, even though the government received invoiced signed by the defendant that certified that the work had been completed. The defendant moved to dismiss the FCA allegations for failure to state a claim and for failure to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The United States District Court for the District of New Jersey denied the motion with respect to those fraud allegations, as it found that the government identified specific false claims—in the form of invoices the defendant signed and certified, even though he allegedly knew they were false—which were submitted to the Army for reimbursement. The court held that these allegations were sufficient to plead a viable claim that the defendant expressly falsely certified his compliance with the terms of the government contract. The court also held that the government satisfied Rule 9(b)'s pleading requirements, since it offered evidence showing that the defendant communicated with the contractor and subcontractor involved in the alleged fraud scheme, and that they all agreed that they would bill the government for work that was not performed. The defendant argued that the government faield to allege that he knew that invoices he signed were false, but the court held that the government's allegations made it plausible he knew the invoices were false and that his signature on those invoices was

enough to cause the government to pay false claims. As a result, the court denied the defendant's motion, stating that "[t]he Government's allegations give rise to a reasonable inference that as part of a scheme with [the contractor and subcontractor involved], Albinson knowingly signed ... invoices accepting work on behalf of the Government that [the contractor and subcontractor] did not perform."

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

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

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

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

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

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

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

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

The court then addressed the pleading requirements of Rule 9(b), noting that, in contrast to the district court's determination, Rule 9(b) does not require plaintiffs "to identify representative examples of false claims to support every allegation, although we recognize that this requirement has been adopted by some of our sister circuits." Instead, the Ninth Circuit held that "use of representative examples is simply one means of meeting the pleading obligation," and stated that "it is sufficient to alleged 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" (internal citations omitted) The relator had argued that the pleading requirements should be relaxed, since he was an outsider, the alleged fraud occurred over an extended time period, and the necessary billing information was in the

defendants' possession. The court rejected this argument, noting that "the FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government."

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

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

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

The U.S. District Court for the Eastern District of Louisiana held that, although detailed factual allegations are not required, Federal Rule of Civil Procedure 9(b) still requires FCA plaintiffs to plead with particularity the circumstances constituting fraud, including time, place, content and identity. This standard can be satisfied if a plaintiff alleges "a general scheme to defraud the government, when the scheme occurred, those involved, its mechanics, an explanation of how the claims were false, and a description of the billing system." The court held that the relator failed to meet the Rule 9(b) standard, as her complaint does "little more than to provide a cursory explanation of the [alleged fraud] scheme's design." The relator's conspiracy claim also failed, as the court determined that the relator failed to provide any facts to show an agreement between the doctor and the hospital to defraud the government. Finally, the court also held that the relator's complaint failed to state a fraud claim, since it did not contain allegations showing that the

defendants' alleged misrepresentations were material to the government's decision to pay their Medicare claims.

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

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

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

The court found that the relator filed his complaint after the FCA was amended by the Fraud Enforcement and Recovery Act of 2009 (FERA). The court noted that the amendments were driven, at least in part, by Congress' reaction to the Supreme Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, in which the Supreme Court read a specific intent requirement into the FCA's liability provision covering making and using false statements in support of false claims. Following that decision, Congress enacted FERA, which specifically eliminates any specific intent requirement for liability under the FCA and made that amendment retroactive to June 7, 2008—two days before the Supreme Court issued its decision. However, the district court also noted that FERA's retroactivity provision states that the amendment would apply to "claims" pending on before June 7, 2008, and, as some other courts have done, interpreted the word "claims" to mean claims to the government for payment, rather than legal claims brought in a complaint. Consequently, the court, finding that there were no claims to the government pending at that time, held that the relator was bound by the Supreme Court's decision, which required him to plead specific intent. Since he had not done so, the court dismissed his claims alleging that the defendant made false statements to the government. The court, finding "no convincing reason why state false claims statutes

modeled on the federal FCA would be interpreted any differently by the state Supreme Courts," dismissed the relator's analogous state law claims as well.

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

The court further held that the relator adequately pled the false claims themselves, noting that "for each of the claims alleged to have been presented, [the relator] has provided the redacted identity of the patient, a prior drug history to demonstrate why the prescription would have been off-label, the date of the claim, the Medicare or Medicaid program to which the bill was submitted, the location of the submitting pharmacy, the dosage, the dollar amount billed, the initials of the pharmacist who filled the prescription, and the name of the doctor who wrote it." In addition, the court held that the relator's complaint sufficiently pled that the defendant falsely certified compliance with the law, stating that the relator was not necessarily required to plead evidence of false certifications in order to satisfy Rule 9(b). Moreover, the court held that the relator's complaint sufficiently plead an implied false certification by the defendant, since the complaint alleged that under the applicable Medicare and Medicaid rules, off-label uses of drugs are generally not reimbursable and the drug at issue was being promoted and prescribed for off-label uses. Finally, the court considered the defendant's argument that the relator's complaint did not adequately plead a nationwide fraud scheme, as he only addressed fraud in a single state. The court agreed with First Circuit precedent and held that the relator's complaint could allege a nationwide scheme of fraud, even as the relator's claims were based on conduct alleged in a single representative state. The court, however, stated that it would initially limit discovery to allegations involving that one state, before allowing nationwide discovery.

Thus, the court denied the defendant's motion in part and granted it in part. With respect to the allegations that were dismissed, the court denied the relator leave

to amend his complaint, finding that he had already amended the complaint twice and declaring that "[p]laintiffs do not get a fourth chance to try to get it right."

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

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

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

FCA and Allegations of Tax Fraud

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

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

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

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

FCA's Public Disclosure Bar

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

FCA and Rule 9(b)

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

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

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

Presentment of False Claims and Use of False Records

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

Reverse False Claim

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

State FCA Claims

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

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

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

With respect to the Homeland Security contract, the relators alleged that the defendants intentionally and knowingly submitted false claims, which resulted in the government making improper reimbursement payments each month, by overstating their expenses and inflating their work hours and the number of employees. The relators also alleged that the defendants willfully and intentionally failed to perform material terms of the contract, that the defendants hired felons and issued firearms to them, and that the defendants failed to ensure that their employees abided by the terms governing the deadly use of force. With respect to the Iraq & Afghanistan contract, the relators alleged that the defendants knowingly and intentionally submitted "musters" and "expense reports" on a monthly basis that documented more employees than were actually employed and more expenses than were actually incurred. Furthermore, funds were allegedly transferred from one defendant company to another, but these transfers were improperly reflected as a reimbursable management fee paid to unrelated parties. Moreover, the relators alleged that the defendants submitted improper expenses to the government by using a software program to create the false appearance that they were using the services of a third party travel agent. The relators alleged that the defendants' non-performance of the two contracts was equal to no performance.

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

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

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

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

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

***See U.S. ex rel. Westmoreland v. Amgen, Inc.*, WL 2010 3622033 (D. Mass. Sept. 20, 2010) at page 3.**

***See U.S. ex rel. Poteet, et al. v. Bahler Med., Inc.*, 2010 WL 3491159 (1st Cir. Sept. 08, 2010) at page 13.**

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

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

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

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

With respect to the relator's implied false certification claim, the Tenth Circuit held that she provided enough facts to show that the defendant knowingly submitted legally false requests for payment to the government, that the government paid those claims, and that had the government known that the claims were false, it may not have made the payments. Under this theory, it was unnecessary, as the district court had required, for the relator to tie the alleged fraud to identifiable

certifications of regulatory compliance, since the implied false certification theory does not include any explicit, identifiable certification at all. Thus, the circuit court held that the relator had indeed stated a claim under the FCA under the implied false certification theory, and reversed the district court's dismissal of the relator's complaint on that basis.

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

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

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

A relator brought a *qui tam* action against her former employer, a urology center, claiming that the defendant submitted bills to Medicare and Medicaid without the required certifications, in violation of the FCA and the Virginia Fraud Against Taxpayers Act (VFATA). Specifically, the relator alleged the anesthesiologists improperly certified certain procedures, and that surgeons failed to properly supervise procedures, but that the center nonetheless forwarded bills containing false information to Medicare for reimbursement. The relator contended that she brought the concerns to the attention of the doctors and practice administrator, but they refused to take corrective actions. She alleged that her persistence

in raising these concerns led to retaliation eventually to the termination of her employment, which resulting in a claim against the defendant under the FCA's and VFATA's anti-retaliation provisions. The defendant filed a motion to dismiss and contended that the relator failed to state a claim upon which a relief could be granted. The United States District Court for the Eastern District of Virginia granted the defendant's motion to dismiss. The court held the relator failed to provide specific information regarding her allegations, as she did not provide information regarding the particular procedures which were allegedly not followed, the specific forms which were allegedly left blank, details linking the alleged omissions and misinformation to claims submitted for payment, and the amounts of the alleged improper payments. The court also held that the relator failed to establish that the defendant did not its procedural requirements in some other manner. The court held the relator failed to connect the required certification omissions to claims which would otherwise have gone unpaid by the government. Thus, the relator's fraud claims were dismissed.

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

A. Applicability of FCA to Tax Fraud

***See U.S. ex rel. Barber v. Paychex Inc.*, 2010 WL 2836333 (S.D. Fla. July 15, 2010) at page 43.**

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

***See U.S. ex rel. Carpenter v. Abbott Labs Inc.*, 2010 WL 2802686 (D. Mass. July 16, 2010) at page 41.**

C. Calculating Damages and Civil Penalties

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

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

The second dispute was over the number of claims that should be subjected to civil penalties under the FCA. The relator contended that each of the defendant's miscalculated royalties, from each lease, included in each monthly report constituted a separate false claim. The defendant argued that only the consolidated monthly

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

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

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

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

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

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

D. Costs and Attorney's Fees

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

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

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

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

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

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

A relator brought a *qui tam* action against her previous employer—a corporation that provided mail transport services to the United States Postal Service (USPS), in which the relator alleged a general violation of FCA without identifying any specific provision of the Act. The defendant moved to dismiss and in response the relator filed an amended complaint specifically asserting three claims. The defendant moved to dismiss the amended complaint, on the grounds that it failed to state a claim and failed to plead fraud with particularity. The defendant's motion was granted, but the relator was allowed to file a second amended complaint. The relator's second amended complaint only alleged a reverse false claim, claiming that the defendant used and caused the USPS to use payment certifications as a means to keep and conceal its obligation to repay any overpayments made. The defendant again moved to dismiss on the same grounds. The defendant's third motion to dismiss was granted, this time with prejudice. Subsequently, the defendant filed a motion for attorney's fees and costs. The defendant argued that the relator's action were clearly frivolous, vexatious, and was brought primarily for purposes of harassment. The United States District Court for the Southern District of Florida granted the motion in part, holding that the relator's allegations were not frivolous because the relator attempted to allege more specific facts to support her claim and because the court allowed her amend the complaint twice. The court also found no evidence that the relator brought the litigation for an improper purpose. The court found that the relator had personal knowledge of her claims and that she was proactively litigating all the claims she might have had against the defendant. Thus, the court held that the defendant was not entitled to attorney fees. The defendant, however, had also moved for taxable costs and the court awarded the defendant $288.87 in copying costs, reasoning that such costs were covered by Federal Rule of Civil Procedure 54 as necessary for successfully defending against the relator's claims.

Judgments & Settlements

JULY 1–SEPTEMBER 30, 2010

Novartis Pharmaceuticals Corporation: (E.D. Pa. Sept. 30, 2010)

Novartis Pharmaceuticals Corporation (NPC), a subsidiary of Novartis AG, agreed to pay the United States a total of $422.5 million to resolve criminal and civil claims related to the illegal marketing of the anti-seizure medication, Trileptal. Under the settlement agreement, the company agreed to plead guilty to a misdemeanor count and to pay a $185 million fine. The company also agreed to pay $237.5 million to resolve civil allegations over the promotion of Trileptal for uses not approved by the U.S. Food and Drug Administration, and for paying kickbacks to doctors to prescribe that drug and five others: Diovan, Exforge, Sandostatin, Tekturna and Zelnorm. The company also agreed to enter into a five-year Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General.

This settlement resolves four *qui tam* actions filed by former NPC employees in Tampa, Philadelphia and Birmingham in 2004, 2005 and 2008. The realtors, Jim Austin, Darryl Copeland, Jeremy Garrity, Steve McKee, and John Montgomery, will share $25,675,035 of the government's recovery. Relators Austin, Garrity and Montgomery were represented by TAF members Marcella Auerbach, Kenneth J. Nolan, and Joseph White of Nolan & Auerbach, P.A. Relators Austin and Montgomery were also represented by TAF members Frederick M. Morgan and Jennifer Verkamp of Morgan Verkamp LLC. Relator Copeland was represented by TAF members Don Mckenna and Scott Powell of Hare, Wynn, Newell, & Newton, LLP. And relator McKee was represented by TAF member Tracy L. Steckling of the Law Office of Tracy L. Steckling, LLC.

Center for Diagnostic Imaging: (W.D. Wash. Sept. 30, 2010)

The Center for Diagnostic Imaging (CDI) agreed to pay the United States $1.2 million to settle allegations of Medicaid billing fraud. The relators in the *qui tam* case—Dr. Alexander Serra and Patricia West—alleged that CDI provided illegal kickbacks to doctors, defrauded Medicare by not requiring written doctors' orders for some examinations, and engaged in a conspiracy to defraud the health-care system. Dr. Serra is a Seattle radiologist and West was a former company vice president. The relators were represented by TAF members Marlan B. Wilbanks of Wilbanks & Bridges, LLP., and Marc Raspanti of Pietragallo, Gordon, Alfano, Bosick and Raspanti, L.L.P. Their local counsel was Thomas Loeser of the Hagens Berman firm in Seattle.

Wright Medical Technology Inc.: (D.N.J. Sept. 29, 2010)

Wright Medical Technology Inc. agreed to pay the United States $7.9 million to resolve civil and criminal investigations related to fraudulent-marketing practices that allegedly caused false claims to be submitted to Medicare. The company also allegedly paid kickbacks to induce orthopedic surgeons to use its artificial hip and knee reconstruction devices. Under the terms of the settlement agreement, the company agreed

to enter into a five-year Corporate Integrity Agreement with the U.S. Department of Health and Human Services, Office of Inspector General. The company also entered into a Deferred Prosecution Agreement (DPA) with the United States Attorney's Office for the District of New Jersey.

Sushil Sheth: (N.D. Ill. Sept. 29, 2010)

Between 2002 and 2007, cardiologist Sushil Sheth sought payment from Medicare and Medicaid for services that were not performed. He pled guilty to healthcare fraud and was sentenced to five years in prison for criminal claims. He also agreed to pay the United States $20 million to settle the criminal and civil allegations, as well as an additional payment of $13 million in restitution. Moreover, he agreed to forfeit property and funds totaling more than $11.3 million. Relator Lokesh Chandra, a former colleague of Sheth, was represented by TAF members Robin Potter and Denise Quimby of Robin Potter & Associates, PC. Chandra will receive $3.5 million (17.5 %) of the federal government's recovery.

Arthritis and Allergy Associates: (D. Conn. Sept. 21, 2010)

Arthritis and Allergy Associates, agreed to pay the United States $247,036.72 to settle allegations that the company violated the False Claims Act by submitting false claims to Medicare. The government alleged that the company improperly billed Medicare for facet joint blocks/injections and allowed inappropriate staff members to prepare and administer antigens. The *qui tam* case was filed by Chwee Cass, a former employee of Arthritis and Allergy Associates. Cass will receive a $41,996.24 share of the federal government's recovery.

Forest Laboratories Inc. and Forest Pharmaceuticals, Inc.: (D. Mass. Sept. 15, 2010)

Forest Laboratories Inc. and Forest Pharmaceuticals, Inc. agreed to pay the United States over $313 million to resolve criminal charges and False Claims Act allegations. This settlement resolves three FCA *qui tam* actions alleging that the drug-maker marketed the thyroid drug, Levothroid, without FDA approval and unlawfully promoted the two antidepressants, Celexa and Lexapro, for pediatric use.

As part of the civil settlement, $149 million will resolve federal and state civil claims (with more than $88 million to be distributed to the federal government and more than $60 million to be distributed to the states involved), while the remainder will account for a criminal penalty of $150 million and an asset forfeiture of $14 million. In addition to the settlement agreement, the pharmaceutical company agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General, Department of Health and Human Services.

The relators involved in this settlement, Christopher R. Gobble, Joseph Piacentile, Constance Conrad and Jim Conrad, will split a $14 million share of the federal recovery. Gobble was represented by TAF members Marlan B. Wilbanks (Wilbanks & Bridges, LLP), Philip S. Marstiller (The Marstiller Law Firm), Suzanne Durrell (Durrell Law Office) and Robert M. Thomas (Thomas & Associates). Piacentile was represented by TAF members David Stone and Bob Magnanini of Stone & Magnanini. Constance Conrad and Jim Conrad were represented by TAF members Kenneth J. Nolan, Marcella Auerbach and Joseph White of Nolan & Auerbach.

Omnicare Inc.: (N.D. Ill. Sept. 15, 2010)

Omnicare Inc., a company that specializes in providing pharmacy services to long term care facilities, agreed to pay $21.1 million to settle a *qui tam* action alleging the company defrauded the Medicaid programs in Michigan and Massachusetts. The states alleged that Omnicare defrauded the Medicaid programs by knowingly charging the agencies as much as four times the amount charged private healthcare insurers for the same drugs. The company will pay $11.6 million to Michigan and $9.5 million to Massachusetts. Of the amounts distributed to the states, the United States will receive $5.48 million of the Michigan settlement and $3.78 million of the Massachusetts settlement.

This civil settlement resolves a *qui tam* suit brought in 2003 by David Kammerer, Omnicare's former director of Medicaid relations. Kammerer was represented by TAF member Shelley Slade of the law firm Vogel, Slade and Goldstein.

Khosrow Moghaddam: (S.D.N.Y. Sept. 14, 2010)

Khosrow Moghaddam, the former owner of Sasha Pharmacy and K&S Pharmacy Inc., agreed to pay the United States $700,000 to resolve False Claims Act allegations that he submitted false claims to Medicare. The government alleged that between 2001 and 2004, Moghaddam sought inflated reimbursements from Medicare for medical equipment that was not medically necessary or not provided to Medicare beneficiaries. The case was handled by Assistant U.S. Attorney Pierre G. Armand and the Civil Frauds Unit of the U.S. Attorney's Office in the Southern District of New York.

Cisco Systems, Inc.: (E.D. Ark. Sept. 7, 2010)

Cisco Systems Inc. and one of its distributors, Westcon Group, agreed to pay the United States $48 million to settle allegations that the companies made misrepresentations during contract negotiations with the General Services Administration (GSA) and other federal agencies. The Department of Justice (DOJ) alleged that the companies knowingly provided incomplete information to GSA contracting officers during negotiations regarding Westcon's contract with the agency.

This civil settlement resolves a *qui tam* suit filed in 2005 by relators Norman Rille and Neal Roberts, who were represented by TAF members Ron Packard and Von Packard of the law firm Packard, Packard & Johnson, located in Los Altos, California. The investigation and settlement were handled jointly by DOJ's Civil Division and the Office of the U.S. Attorney for the Eastern District of Arkansas, with assistance from the GSA's Office of Inspector General, the Defense Criminal Investigative Service and the Defense Contract Audit Agency the Department of Energy's Office of Inspector General.

Allergan Inc.: (N.D. Ga. Sept. 1, 2010)

Allergan Inc., an American pharmaceutical manufacturer, agreed to pay the United States a total of $600 million to resolve allegations of marketing Botox off-label. The company will pay $225 million to resolve civil allegations, as well as a $375 million criminal fine. The company also agreed to plead guilty to a misdemeanor charge.

This civil settlement resolves three *qui tam* suits filed in federal court in the Northern District of Georgia. The relators: Dr. Amy Lang, Charles Rushin, Cher Beilfuss, Kathleen O'Conner-Masse, and Edward Hallivis, will split a $37.8 million share of the government's recovery. Cher Beilfuss, and Kathleen O'Conner-Masse were represented by TAF members Ken Nolan, Marcella Auerbach, and Joseph White of the law firm of Nolan & Auerbach, P.A. Edward Hallivis was represented by TAF members Jay Holland and Brian Markovitz of Joseph Greenwald & Laake.

Hewlett-Packard Co.: (E.D. Ark. Aug. 30, 2010)

Hewlett-Packard Co. (HP) agreed to pay the United States $55 million to resolve claims that the company defrauded the General Services Administration (GSA) and other federal agencies. This settlement resolves allegations that HP knowingly paid kickbacks to systems integrator companies Sun Microsystems and Accenture in exchange for recommendations that the agencies purchase HP products.

The settlement resolves a *qui tam* suit filed in the U.S. District Court for the Eastern District of Arkansas in 2004 by relators Norman Rille and Neal Roberts, who were represented by TAF members Ron Packard and Von Packard of the law firm Packard, Packard & Johnson, located in Los Altos, California. The investigation and resulting settlement were handled jointly by the Justice Department's Civil Division and the Office of the U.S. Attorney for the Eastern District of Arkansas, with assistance from the GSA-OIG, the Office of Inspector General of the Department of Energy, and the Defense Criminal Investigative Service.

Stryker Biotech LLC: (D. Mass. Aug. 26, 2010)

Stryker Biotech LLC agreed to pay the Commonwealth of Massachusetts $1.35 million to resolve allegations that the company marketed certain orthopedic products for uses that had not been approved by the U.S. Food & Drug Administration (FDA).

The company also allegedly misled healthcare providers about the appropriate uses of its products. According to the terms of the settlement, the company will pay $325,000 in civil penalties, $875,000 to fund efforts to combat unlawful marketing in the health care industry, and $150,000 to cover attorneys' fees and investigative costs.

Saint John's Health Center: (C.D. Cal. Aug. 25, 2010)

Saint John's Health Center in Santa Monica, California agreed to pay the United States $5.25 million to resolve False Claims Act allegations of over-billing Medicare. The hospital had allegedly submitted false, inflated claims to increase Medicare "outlier payments" between 1996 and 2003.

According to the Department of Justice, the case was handled by the Civil Fraud Section of the United States Attorney's Office, which received assistance from the Office of the Inspector General for the U.S. Department of Health and Human Services.

El Centro Regional Medical Center: (S.D. Cal. Aug. 25, 2010)

El Centro Regional Medical Center, a Southern California hospital, agreed to pay the United States $2.2 million to settle False Claims Act allegations that the hospital defrauded Medicare. The hospital was alleged to have fraudulently inflated its charges to Medicare patients in order to obtain larger reimbursements from the Federal healthcare program. The allegations were raised in a *qui tam* case filed by relator Pietro Ingrande, who is a former El Centro employee. Ingrande, who was represented by TAF members Vince McKnight and Altomease Kennedy of the law firm McKnight & Kennedy, LLC., will receive a $375,000 share of the government's recovery.

In addition to the settlement agreement, the hospital agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General, Department of Health and Human Services.

Dominion Oklahoma Texas Exploration & Production Inc. and Marathon Oil Company: (E.D. Tex. Aug. 20, 2010)

Dominion Oklahoma Texas Exploration & Production Inc. and Marathon Oil Company agreed to pay the United States $2,219,974.98 and $4,697,476.57 respectively, to settle two False Claims Act cases. The settlement, totaling $6.9 million, will resolve claims that the companies knowingly underpaid royalties owed on natural gas produced from Federal and American Indian lands.

This civil settlement resolves a *qui tam* suit brought by relator Harold Wright. His estate and heirs will receive a $1.822 million (26%) share of the government's recovery. The investigation and settlement were handled jointly by the Department of Justice's Civil Division and the U.S. Attorney for the Eastern District of Texas, with assistance from the Department of the Interior's Office of Inspector General, the Bureau of Ocean Energy Management and Office of the Solicitor.

Significant Education, Inc.: (D. Ariz. Aug. 18, 2010)

Phoenix-based, for-profit institution Grand Canyon Education Inc. (formerly Significant Education, Inc.), agreed to pay $5.2 million to settle a False Claims Act action alleging improper incentive compensation-related conduct. Relator Ronald D Irwin, a former Grand Canyon employee, filed the whistleblower suit in 2007, which alleged that the company violated the FCA by falsely certifying that it was in compliance with the incentive compensation ban placed by the federal government on schools receiving Title IV funds, in order to receive federal grants and student loans. This civil settlement resolves Irwin's suit, and the federal government will receive 73 percent of the settlement amount, while Irwin will receive 27 percent of the recovery.

Nelnet, Inc.: (E.D. Va. Aug. 13, 2010)

Nelnet Inc. agreed to pay the United States $55 million to settle a False Claims Act *qui tam* case that alleged that the company defrauded the federal government's student loan subsidy program by submitting false claims to the Department of Education in order to obtain extra government student-loan subsidies. The *qui tam* suit was brought by former U.S. Education Department specialist Jon Oberg, who was represented by TAF member Jason Zuckerman of the Employment Law Group, and co-counsel from Wiley Rein, LLP.

WellCare Health Plans. Inc.: (M.D Fla. Aug. 9, 2010)

WellCare Health Plans Inc. agreed to pay $137.5 million to settle fraud allegations with the U.S. Attorney's Office in Tampa, the U.S. Department of Justice, and the state of Connecticut. The company also agreed to pay $200 million to settle a class-action securities lawsuit. The False Claims Act allegations were brought in a *qui tam* action filed by former WellCare analyst Sean Hellein, who claimed that the company stole $400 million to $600 million from the Medicare and Medicaid programs in several states. Hellein also claimed that the company held a celebratory dinner to honor those who successfully dis-enrolled 425 infants, saving the company $6.9 million. Hellein was represented by Barry Cohen of Cohen, Foster and Romine in Tampa.

Panalpina Inc.: (E.D. Tex. July 30, 2010)

Panalpina Inc., a Swiss-based freight forwarder, agreed to pay the United States $375,000 to settle allegations that the company paid kickbacks to Kellogg, Brown & Root (KBR) employees in exchange for favorable treatment on subcontracts provided for US military operations. The settlement resolves a *qui tam* case brought by relators David Vavra and Jerry Hyatt, who will receive a $78,750 (21%) share of the federal government's recovery.

Quantum Dynamics Inc.: (July 29, 2010)

Quantum Dynamics Inc., and its president, Audrey Price, agreed to pay the United States $750,000 to settle allegations that they used false statements to obtain contracts from the US Army. The Georgia-based defense contractor was alleged to have fraudulently qualified for the Small Business Administration's (SBA) Historically Underutilized Business Zone (HUBZone) program in order to obtain contracts from the U.S. Army that were specifically set aside only for companies that qualified for HUBZone certification. This settlement was the result of coordinated efforts by the Civil Division of the Department of Justice, the SBA Office of General Counsel, and the SBA Office of Inspector General.

The Morganti Group, Inc.: (D. Conn. July 27, 2010)

The Morganti Group, Inc., a Connecticut construction company, agreed to pay the United States $800,000 to settle allegations that the company violated the False Claims Act, the Foreign Assistance Act, and common law. The company allegedly submitted false pre-qualification documents when bidding on construction projects in Jordan that were partially funded by the United States Agency for International Development (USAID).

Teva Pharmaceuticals: (July 26, 2010)

Teva Pharmaceuticals, an Israeli-owned generic drug company, agreed to pay the United States, as well as the States of Texas, Florida, and California a total of $169 million to settle allegations that the company defrauded Medicaid by allegedly setting and reporting inflated prices for medications dispensed by pharmacies and other providers, who were then reimbursed by state Medicaid programs. Texas will receive $51 million and Florida will receive $27 million. The remaining $90 million will be divided between the federal government and the State of California. The settlement was the result of a *qui tam* case filed by Ven-a-Care of the Florida Keys, which was represented by TAF member James J. Breen of The Breen Law Firm.

Sodexho, Inc. and Sodexho SA: (July 21, 2010)

Sodexho Inc., an integrated food and facilities management service company, agreed to pay $20 million to settle allegations of overcharging 21 New York school districts and the SUNY system, which had contracted with Sodexo for food services, vending and facilities services. The settlement was the result of a *qui tam* suit was brought by John Carciero and Jay Carciero, former general managers for Sodexo in Massachusetts. The investigation of the relators' allegations found that the company promised to provide goods at cost, but failed to disclose certain rebates awarded by its vendors and suppliers, resulting in illegal overcharges to the schools. New York State and the impacted

school districts will provide a $3.6 million (18%) share of the recovery to the relators, who were represented by TAF members Colette G. Matzzie and Timothy McCormack of Phillips & Cohen LLP.

William Crittenden, M.D.: (D. Md. July 15, 2010)

William Crittenden, M.D. agreed to pay the United States $225,000 to settle allegations that, between January 1, 2003 and November 30, 2005, he submitted false claims to Medicare, by upcoding billing data for visits made to nursing homes and other assisted living facilities.

Elan Corporation: (D. Mass. July 15, 2010)

The Elan Corporation, PLC agreed to pay over $200 million to settle a False Claims Act case, which alleged improper sales and marketing practices for the antiepileptic drug Zonegran (zonisamide). As part of settlement agreement the company will plead guilty to a misdemeanor violation of the U.S. Federal Food, Drug and Cosmetic Act. The company also agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General of the United States Department of Health and Human Services.

National Cardio Labs LLC: (C.D. Cal. July 8, 2010)

National Cardio Labs LLC, an Orange County company that offered heart monitoring services, agreed to pay $3.6 million to settle allegations that the company, its manager, Adrienne Stanman, and her husband, Robert Parsons (a former manager), defrauded Medicare, Medicaid, and TRICARE, by knowingly submitting false healthcare claims to the federal health insurance programs between January 1998 and February 2004. The False Claims Act *qui tam* suit was originally filed in January 2004 by James Cast and Stanton Crowley, who will receive a $1,115,614 share of the federal government's recovery.

Hines Dermatology Associates, Inc.: (D.R.I. July 7, 2010)

Hines Dermatology Associates, Inc. agreed to pay $275,000 to settle allegations that it billed Medicare for unnecessary pathology services. The company has agreed to enter into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of Inspector General.

Cardinal Health 110, Inc. and Bindley Western Industries, Inc.: (E.D. Pa. July 6, 2010)

Wholesale pharmaceutical distributors Cardinal Health 110, Inc. and Bindley Western Industries, Inc. agreed to pay the United States $5,500,000 to settle allegations

that the companies charged medical treatment facilities more than the Distribution and Pricing Agreement (DAPA) price negotiated by the Department of Defense and drug manufacturers.

The Oaks Diagnostics, Inc.: (C.D. Cal. July 2, 2010)

The Oaks Diagnostics, Inc. (d/b/a Advanced Radiology) agreed to pay the United States $647,000 to settle allegations that it filed false claims with Medicare for unnecessary radiological tests. This settlement resolves a 2003 False Claims Act *qui tam* action filed by a former Advanced Radiology employee. The case was investigated by the Office of Inspector General of the Department of Health and Human Services and the Federal Bureau of Investigation.

Advanced BioNutrition Corporation: (D. Md. July 1, 2010)

Advanced BioNutrition Corporation and its former chief executive officer, David Kyle, agreed to pay the United States $934,000 to settle allegations that they submitted false grant progress reports to the National Science Foundation and was awarded the second phase of a grant based upon misrepresentations in its proposal about results obtained during the first phase of research. This settlement resolves a 2007 *qui tam* suit brought by relator Albert Cunniff, Jr., who will receive a $105,275 share of the government's recovery. Under the settlement agreement, the company also agreed to enter into a five-year Corporate Integrity Agreement.

Spotlight

New Tools to Combat Whistleblower Retaliation

New Tools to Combat Whistleblower Retaliation

Jason M. Zuckerman and R. Scott Oswald[1]

Recognizing the critical role that whistleblowers play in exposing financial fraud, threats to public health and safety, and fraud on the government, Congress has recently enacted numerous robust whistleblower protection laws and strengthened existing whistleblower protection statutes. For example, the Dodd-Frank Act includes three new whistleblower retaliation causes of action and strengthens the whistleblower retaliation provisions of the False Claims Act and the Sarbanes-Oxley Act. In addition to the expansion of whistleblower protection law at the federal level, several states have strengthened their whistleblower protection statutes and the common law wrongful discharge tort continues to expand. The proliferation of whistleblower protections at the federal and state level is an important development for *qui tam* relators' counsel in that prospective clients who seek advice on potential *qui tam* actions may also have strong retaliation claims. This article aims to assist counsel in identifying and evaluating whistleblower retaliation claims and formulating a strategy to maximize the whistleblower's recovery.

The article discusses the following recently enacted and recently enhanced federal whistleblower protections:

Section I Retaliation provision of the False Claims Act

Section II Retaliation provision of the American Recovery and Reinvestment Act

Section III Retaliation provision of the Federal Acquisitions Streamlining Act and a provision specifically protecting Department of Defense employees

Section IV Retaliation provision of the Sarbanes-Oxley Act (SOX)

Section V Retaliation provision of the Consumer Product Safety Reform Act

Section VI Retaliation provisions of the Consumer Financial Protection Act of 2010

Section VII Whistleblower reward and retaliation provisions of the Dodd-Frank Act

Section VIII Retaliation provision of the Patient Protection and Affordable Care Act

In addition, the article discusses the common law wrongful discharge tort and state whistleblower protection statutes (Section IX), and offers tips on claim selection, forum selection, maximizing damages, pleading whistleblower retaliation claims and prosecuting whistleblower claims (Section X).

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FALSE CLAIMS ACT RETALIATION PROVISION, 31 U.S.C. § 3730(H)

The retaliation provision of the FCA provides robust protection to any employee, contractor, or agent who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Section 3730(h) plaintiffs must allege three things: (1) that they engaged in protected conduct, *i.e.*, acted in furtherance of a *qui tam* action; (2) that the defendants knew that the relators were engaged in this protected conduct; and (3) that the defendants were motivated, at least in part, to terminate the relators because of the protected conduct. *See Brandon v. Anesthesia & Pain Management Associates*, 277 F.3d 936, 944 (7th Cir. 2002). Section 3730(h) protects not only individuals who bring *qui tam* actions, but also individuals who take steps to expose fraud, including investigation of a potential *qui tam* action or supplying information that could prompt an investigation. *See Neal v. Honeywell Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994).

In the past year and a half, Congress has twice strengthened the retaliation provision of the FCA. The Fraud Enforcement Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (2009), amended § 3730(h) by expanding the scope of coverage to expressly protect independent contractors, and expanded the scope of protected conduct to cover "efforts to stop 1 or more violations" of the FCA. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079B, 124 Stat. 1376 (2010) ("Dodd-Frank Act"), enacted on July 21, 2010, enhanced § 3730(h) by prohibiting associational discrimination, applying a uniform three-year statute of limitations and broadening the scope of protected conduct.

A. Scope of Coverage

Section 3730(h) protects not only employees of government contractors, but also contractors, agents, and associated others. *See* 31 U.S.C. § 3730(h). Expanding the scope of coverage under § 3730(h) twice in the past two years, Congress has clarified that any individual in the private sector who suffers retaliation for taking any action in furtherance of a potential *qui tam* action has a remedy under § 3730(h).

B. Protected Conduct

Protected conduct under § 3730(h) includes "lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h). Protected conduct includes internal complaints about what an employee, contractor, or agent reasonably believes to be a violation of the FCA. *See, e.g., Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 481 (7th Cir. 2004) (holding that employee's internal complaints about alleged misappropriations of federal funds to government official

can constitute protected conduct under FCA); *Neal v. Honeywell Inc.*, 33 F.3d 860, 865 (7th Cir. 1994) (court specifically rejected argument that plaintiff must raise her concerns directly to government to qualify for protection, noting that it was appropriate for plaintiff to complain through corporate channels).

A "protected activity" is defined as that activity that reasonably could lead to a viable FCA action. *See McKenzie v. Bellsouth Telecomms., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000) (citation omitted). A plaintiff "need not use formal words of 'illegality' or 'fraud,' but must sufficiently allege activity with a nexus to a *qui tam* action, or fraud against the United States government." *Id.* An employee need not have actual knowledge of the FCA for her actions to be considered "protected activity" under § 3730(h). If so, only those with sophisticated legal knowledge would be protected by the statute. *United States ex rel. Yesudian v. Howard Univ.*, 332 U.S. App. D.C. 56, 153 F.3d 731, 741 (D.C. Cir. 1998) (". . . only [lawyers] would know from the outset that what they were investigating could lead to a False Claims Act prosecution.").

There is both a subjective and an objective component for assessing whether an activity is protected conduct under the FCA, *i.e.*, the relevant inquiry is whether "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government." *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002)). Employers have tried to apply an onerous standard of objective reasonableness under which the plaintiff must demonstrate that her disclosures would have resulted in a successful *qui tam* action. *See, e.g., Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 109 (3d Cir. 2002) (plaintiff's disclosure about false information in application to be designated clinical study research center is not protected because application was not claim for payment). Requiring a § 3730(h) plaintiff to prove that she disclosed actual violations of the FCA, however, is contrary to the plain meaning of § 3730(h) and well-established precedent. The Supreme Court has specifically noted that "proving a violation of § 3729 is not an element of a § 3730(h) cause of action." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 416 n.1 (2005) (citing *Yesudian*, 153 F.3d at 740). FCA litigation is a "distinct possibility" if plaintiff had a "good faith" belief, based on information he had "at the time of the retaliation," he could reasonably conclude that "there was a 'distinct possibility' [the plaintiff] would find evidence" showing the defendant had submitted false claims. *See Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999). As the D.C. Circuit held in a leading case construing the scope of § 3730(h) protected conduct, Congress's "inclusion of an 'investigation for . . . an action filed or to be filed' within its protective cover . . . manifests Congress' intent to protect employees while they are collecting information about a possible fraud, *before they have put all the pieces of the puzzle together.*" *Yesudian*, 153 F.3d at 740 (emphasis added). This apt metaphor (putting all the pieces of the puzzle together) should guide discovery, *i.e.*, plaintiff should take discovery not only about the pieces of the puzzle that he gathered at the time he engage in protected conduct, but also the pieces of the puzzle that plaintiff was not aware of or had not put together at the time he blew the whistle. Taking broad discovery about the plaintiff's

protected conduct is important to demonstrate the objective reasonableness of plaintiff's disclosures, and also show the employer's motive to retaliate against plaintiff.

Discovery should be also be guided by the Eleventh Circuit's standard for assessing protected conduct:

> If an employee's actions, as alleged in the complaint, are sufficient to support a reasonable conclusion that *the employer could have feared being reported to the government for fraud* or sued in a qui tam action by the employee, then the complaint states a claim for retaliatory discharge under § 3730(h).

United States v. Lymphatx, Inc., 2010 WL 547499, at *2 (11th Cir. Feb. 18, 2010) (citation omitted) (emphasis added). In *Lymphatx*, the court concluded that the plaintiff has sufficiently alleged an FCA retaliation action by averring that "she complained about the defendants' 'unlawful actions' and warn[ing] them that they were incurring 'significant criminal and civil liability,'" which if proven suffices to show that the defendants were aware of the possibility of *qui tam* litigation. *Id. Lymphatx* underscores the importance of taking broad discovery about the employer's knowledge of and reaction to plaintiff's disclosures, including an investigation of those disclosures.

As employers vigorously try to narrow the scope of protected conduct, it is important to focus on the purpose of § 3730(h). The Senate report accompanying the 1986 amendments to the FCA states that Congress added a retaliation provision to the FCA "to halt companies . . . from using the threat of economic retaliation to silence 'whistleblowers'" and to "assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." S. Rep. No. 99-345, at 34 (1986), U.S. Code Cong. & Admin. News 1986, at 5266, 5299. In addition, the legislative history expressly states that courts should interpret "[p]rotected activity . . . broadly," and protected conduct "includes any 'good faith' exercise of an individual 'on behalf of himself or other of *any option offered by this Act*, including … *an action filed or to be filed under this act*.'" *Id.* at 34-35 (emphasis added).

C. Scope of Actionable Adverse Actions

Section 3730(h) of the FCA prohibits any action which has a negative effect on the terms, conditions, or privileges of employment, including termination, demotion, suspension, harassment and any other act that would dissuade a reasonable person from reporting violations of the FCA. *See, e.g., McKenzie*, 123 F.3d at 943-44 (observing that purpose of § 3730(h) is to prevent any retaliation which would prevent whistleblower from coming forward). Acts which constitute actionable retaliation under Title VII are generally actionable under the FCA. *See Moore*, 275 F.3d at 847. This includes oral or written reprimands, reassignment of duties, as well as other actions that "might well have dissuaded a reasonable person from making or supporting a claim" or otherwise engaging in protected conduct. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). For example, courts have construed § 3730(h) to protect in-

dividuals who are constructively discharged. *See Neal v. Honeywell, Inc.*, 191 F.3d 827, 831 (7th Cir. 1999), *aff'g*, 995 F. Supp. 889 (N.D. Ill. 1998) (concluding that "a drastic diminution of duties might suffice as a 'constructive discharge.'").

D. Burden of Proof to Prevail in an FCA Retaliation Case under 3730(h)

To prevail in an FCA retaliation claim, a plaintiff must show that "the retaliation was motivated at least in part by the employee's engaging in protected activity." S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300. *See also Kakeh v. United Planning Org., Inc.*, 655 F. Supp. 2d 107, 119 (D.D.C. 2009) (holding that "a reasonable juror could easily conclude that the short duration-one day—between the OIG visit to Defendant office and Plaintiff termination demonstrates that Defendant knew of Plaintiff protected activity and that the termination was motivated by a desire to retaliate against him"). A § 3730(h) plaintiff need not prove "but for" causation. *Id.* at 125 n.13 (distinguishing *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009)).

E. Statute of Limitations and Forum

Prior to the passage of the Dodd-Frank Act, the statute of limitations for an FCA retaliation claim was the analogous state statute of limitations for wrongful discharge actions, which can range from as little as three months to three years. *See Graham County Soil,* 545 U.S. at 418. Under the Dodd-Frank Act, the statute of limitations for FCA retaliation claims is now three years from the date on which the retaliation occurred. Dodd-Frank Act § 1079B(c)(2); 31 U.S.C. § 3730(h)(3). FCA retaliation claims can be brought directly in federal court; there is no administrative exhaustion requirement. *See* 31 U.S.C. § 3730(h)(2).

F. Remedies

A prevailing whistleblower is entitled to "all relief necessary to make that employee, contractor, or agent whole," which includes reinstatement, double back pay, interest on the back pay, special damages, and attorney's fees and costs. *See* 31 U.S.C. § 3730(h)(2). Where reinstatement is not feasible, front pay is available. *See Wilkins v. St. Louis Housing Authority*, 314 F.3d 927, 934 (8th Cir. 2002). The term "special damages" has been construed to include damages for emotional distress and other non-economic harm resulting from retaliation. *See Neal*, 191 F.3d at 832 (awarding damages for emotional distress where manager threatened to physically injure whistleblower).

G. State False Claims Acts

Approximately 28 states and the District of Columbia have enacted false claims act statutes containing a *qui tam* provision, 27 of which contain an anti-retaliation provision. There is little case law interpreting state FCA retaliation provisions; therefore, judicial interpretations of § 3730(h) will likely shape construction of the retaliation provision of state false claims act statutes.

THE AMERICAN RECOVERY AND REINVESTMENT ACT, PUB. L. NO. 111-5, § 1553, 123 STAT. 115, 297-302 (2009)

The American Recovery and Reinvestment Act of 2009 ("ARRA"), also known as the "Economic Stimulus Bill," authorized nearly $800 billion in federal spending to stimulate the economy and create jobs. To safeguard these funds, ARRA includes robust whistleblower protections to ensure that employees of private contractors and state and local governments can disclose gross mismanagement, waste, fraud, and abuse of stimulus funds without fear of reprisal. ARRA, Pub. L. No. 111-5, § 1553(a), 123 Stat. 115, 297-302 (2009). In particular, § 1553 of ARRA prohibits any private employer or state or local government that receives stimulus funds from retaliating against an employee who discloses information that the employee reasonably believes constitutes evidence of an improper use of stimulus funds, including gross mismanagement of an agency contract or grant. *Id.* There is no statute of limitations governing this whistleblower provision, which means that an employee may bring a whistleblower retaliation claim against her employer several years after the employer received the stimulus funds. *See* § 1553.

A. Scope of Coverage

Section 1553 applies to "any non-federal employer receiving covered funds," including private contractors, state and local governments and other non-federal employers that receive a contract, grant or other payment appropriated or made available by covered funds. *See* § 1553(a). It covers not only employees of companies that have obtained contracts for stimulus projects, but also to employees of companies that receive any payment made available by stimulus funds.

B. Protected Conduct

Under ARRA, protected conduct includes a disclosure to a person with supervisory authority over the employee, a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a federal agency, or an inspector general about information that the employee reasonably believes evidences:

- Gross mismanagement of an agency contract or grant relating to stimulus funds;
- A gross waste of stimulus funds;
- A substantial and specific danger to public health or safety related to the implementation or use of stimulus funds;
- An abuse of authority related to the implementation or use of stimulus funds; or

- A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

Id. Section 1553 expressly protects "duty speech" whistleblowing, *i.e.*, disclosures made in the ordinary course of performing one's job duties can constitute protected conduct.

C. Burden of Proof

To prevail on a § 1553 whistleblower claim, an employee need only demonstrate that the protected conduct was a contributing factor in the employer's decision to take an adverse action. Under this standard, employees need not prove that their whistleblower complaint was the sole factor or the determinative factor leading to the adverse action. Additionally, § 1553 specifically clarifies that an employee can satisfy the "contributing factor" standard through the use of "circumstantial evidence," *i.e.*, by showing temporal proximity or by demonstrating that the decision-maker knew of the protected disclosure. Once the employee demonstrates by a preponderance of the evidence that her protected conduct was a contributing factor in the retaliatory action, the employer can avoid liability only by proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the employee's protected conduct.

D. Administrative Exhaustion Requirement and Right to Jury Trial

Actions brought under the whistleblower provisions of § 1553 must be filed initially with the appropriate inspector general. Unless the inspector general determines that the action is frivolous, does not relate to covered funds, or has been resolved in another federal or state administrative proceeding, the inspector general must conduct an investigation and make a determination on the merits of the whistleblower retaliation claim no later than 180 days after receipt of the complaint. Within 30 days of receiving an inspector general's investigative findings, the head of the agency must determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, compensatory damages, and attorney fees. Where an agency has denied relief in whole or in part or has failed to issue a decision within 210 days of the filing of a § 1553 complaint, the plaintiff can remove the action to federal court and is entitled to trial by jury. Pre-dispute arbitration agreements do not apply to § 1553 claims.

E. Remedies

Under § 1553, a prevailing employee is entitled to "make whole" relief, which includes reinstatement, back pay, compensatory damages, and attorney's fees and litigation costs. Where an agency files an action in federal court to enforce an order of relief for a prevailing employee, the court may award exemplary damages.

ADDITIONAL CONTRACTOR EMPLOYEE PROTECTIONS

There are two fairly obscure anti-retaliation provisions that prohibit retaliation against employees of government contactors yet provide robust remedies, including reinstatement. *See* 10 U.S.C. § 2409; 41 U.S.C. § 265. Both of these statutes require agency Inspector Generals to investigate claims of retaliation. Provisions protecting employees of Department of Defense ("DoD") contractors authorize employees to pursue a private right of action in federal court and expressly provide for trial by jury.

A. U.S.C. § 2409(a)

1. Scope of Coverage

The term "contractor" is defined broadly within the statute to mean any person who is awarded a contract or a grant with an agency, including the DoD, the Army, the Navy, the Air Force, the Coast Guard and the National Aeronautics and Space Administration. *See* 10 U.S.C. § 2409(e)(4); *see also* 10 U.S.C. § 2303(a).

2. Protected Conduct

Protected conduct includes a disclosure to a Member of Congress, an Inspector General, the Government Accountability Office, a DoD employee, or an authorized official of the Department of Justice that the contractor reasonably believes evidences:

- a gross mismanagement of a DoD contractor grant;
- a gross waste of DoD funds;
- a substantial and specific danger to public health or safety; or
- a violation of law related to a DoD contract or grant.

10 U.S.C. § 2409(a).

3. Procedure and Remedies

A § 2409 Action must be filed with the DoD Inspector General and there is no statute of limitations for filing a complaint. Unless the IG finds that the complaint is frivolous, the IG must conduct an investigation and make a determination on the merits no later than 180 days after receipt of the complaint. Within 30 days of receiving an inspector general's investigative findings, the head of the agency must determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, employment benefits, exemplary damages, and attorney fees and expenses. If the agency denies relief or fails to issue a decision within 210 days of the filing of the complaint, the complainant can remove the complaint to federal court and elect a jury trial.

B. Federal Acquisitions Streamlining Act, 41 U.S.C. § 265

The Federal Acquisitions Streamlining Act, 41 U.S.C. § 265, protects employees of contractors of agencies other than the DoD who suffer reprisal for "disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract)." 41 U.S.C. § 265(a). Unlike 10 U.S.C. § 2409 however, there is no private right of action under 41 U.S.C. § 265. If an Inspector General does not recommend that the agency grant relief (reinstatement, back pay and attorney fees), the contractor cannot further prosecute the action.

THE SARBANES-OXLEY ACT, 18 U.S.C. § 1514(A)

In the wake of several corporate fraud scandals in the early 2000s, including the collapse of Enron, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"), also known as the Corporate and Criminal Fraud Accountability Act.[2] Section 806 provides a robust private right of action for retaliation, including preliminary reinstatement for employees who prevail at the investigative stage of the action. Recently, OSHA has issued some very favorable orders for SOX complainants, including a March 3, 2010 order requiring e-Smart Technologies to reinstate the complainant and pay over $600,000 in damages, and a March 18, 2010 order requiring Tennessee Commerce Bank to pay more than $1,000,000 in damages and reinstate the Bank's former chief financial officer. To prevail in a SOX whistleblower action, an employee must prove by a preponderance of the evidence that: (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 (5th Cir. 2008).

A. Scope of Coverage

Section 806 of SOX applies to any "officer, employee, contractor, subcontractor or agency" of a company that has securities registered under § 12 of the Securities Exchange Act or is required to file reports under section 15(d) of the same Act. *See* 18 U.S.C. § 1514(A). SOX also applies to employees of "any subsidiary whose financial information is included in the consolidated financial statements of such company" and employees of nationally recognized statistical rating organizations. *See* Dodd-Frank §§ 922, 929A.[3]

2. Pub. L. No. 107-204, 116 Stat. 745 (2002).

3. Prior to the enactment of the Dodd-Frank Act, ALJs and federal courts were inconsistent in the application of SOX to privately held subsidiaries of publicly traded companies. See *Johnson v. Siemens Blg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Apr. 15, 2010) (ARB solicited amicus briefs discussing proper scope of SOX and various tests used to determine whether SOX should apply to subsidiaries).

B. Protected Conduct

SOX protects an employee who provides information, causes information to be provided, or otherwise assists in an investigation regarding any conduct which the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, or securities fraud, or a violation of any rule or regulation of the Securities and Exchange Commission ("SEC") or any provision of Federal law relating to fraud against shareholders. Internal reporting is protected, including a disclosure to a supervisor. 18 U.S.C. § 1514(A). Indeed, merely requesting that a company investigate potential shareholder fraud constitutes protected conduct. *Van Asdale v. Int'l Game Tech*, 577 F.3d 989, 997 (9th Cir. 2009).

Protected conduct is not limited to disclosures about shareholder fraud and instead includes a disclosure about a violation of *any* SEC rule or regulation. 18 U.S.C. § 1514(A). For example, a disclosure about deficient internal accounting controls4 or non-compliance with Generally Accepted Accounting Principles is protected. *See* Smith v. Corning Inc., 496 F. Supp. 2d 244 (W.D.N.Y. 2007); *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008). There is, however, an important limitation on SOX protected conduct that both the DOL Administrative Review Board ("ARB")5and federal appeals courts have read into SOX. The complainant's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). *See Platone v. FLYi, Inc.*, ARB No. 04-154, *slip op.* at 17 (Sept. 29, 2006); *Allen*, 514 F.3d at 476. Accordingly, it is critical to plead SOX protected conduct with specificity, including the link between the protected disclosure and one of the six categories of fraud enumerated in Section 806. There are, however, no "magic words" that an employee must utter to trigger the protections of Section 806. *Van Asdale*, 577 F.3d at 997 (employee need not use words "SOX," "fraud," "fraud on shareholders" or "stock fraud" to satisfy the heightened burden widely adopted by federal courts); *Welch*, 536 F.3d at 276 (SOX whistleblower "need not 'cite a code section he believes was violated' in his communications to his employer.").

C. Reasonable Belief Requirement

A SOX retaliation plaintiff need not demonstrate that she disclosed an actual violation of securities law; only that she reasonably believed that her employer was defrauding shareholders or violating an SEC rule. *See Van Asdale*, 577 F.3d at 992. Indeed, a reasonable but mistaken belief is protected under SOX. *See Kalkunte v. DVI Fin. Servs.*, ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009); *see also Halloum v. Intel Corp.*, 2003-SOX-7 at 10 (ALJ Mar. 4, 2004), *aff'd* (ARB Jan. 31, 2006) ("belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong . . . .").

4. See *Klopfenstein*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006).

5. The ARB issues final agency decisions for the Secretary of Labor and its decisions are binding on ALJs.

An employee's reasonable belief must be scrutinized under both a subjective and objective standard. *Welch*, 536 F.3d at 275. The objective reasonableness of a complainant's belief is evaluated based on "the knowledge available to a reasonable person in the same factual circumstances, with the same training and experience as the aggrieved employee." In *Allen*, the court held that a certified public accountant (CPA) did not engage in protected conduct when she complained about her employer overstating gross profits in violation of SEC Staff Accounting Bulletin 101 ("SAB-101"). The *Allen* Court held that this disclosure was not protected because the whistleblower identified improper accounting practices in accounting reports that had not yet been filed with the SEC and a CPA should know that SAB-101 applies only financial reports that have been filed with the SEC. The implication of this flawed decision is that a whistleblower should allow the violation to occur before reporting it, thereby ensuring that the whistleblower is disclosing an actual violation. Adopting this rule would defeat the intent of SOX, which is to prevent the carrying out of the underlying crime. *See Getman v. Southwest Secs., Inc.*, 2003-SOX-8 at 13 n.8 (ALJ Feb. 2, 2004), *reversed on other grounds*, ARB No. 04-059 (ARB July 29, 2005). Judge Levin pointed out in *Morefield v. Exelon Servs., Inc.*, 2004-SOX-2 at 5 (ALJ Jan. 28, 2004):

> The value of the whistleblower resides in his or her insider status. . . . [T]heir reasonable concerns may, for example, address the inadequacy of internal controls promulgated in compliance with Sarbanes-Oxley mandates or SEC rules that impact on procedures throughout the organization, or the application of accounting principles, or the exposure of incipient problems which, if left unattended, could mature into violations of rules or regulations of the type an audit committee would hope to forestall.

Moreover, requiring a SOX complainant to demonstrate that she disclosed an actual violation is contrary to Congressional intent in that the legislative history of § 806 specifically states that the reasonableness test "is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), available at 2002 WL 32054527 (citing *Passaic Valley Sewerage Commissioners v. DOL*, 992 F.2d 474, 478 (3d Cir. 1993) (setting forth broad definition of "good faith" protected disclosures under analogous whistleblower protection statutes)). In sum, limiting protected conduct to disclosures of actual violations of SEC rules is contrary to the plain meaning and intent of SOX. A SOX plaintiff, however, must prepare at the outset of the case to meet a high standard of objective reasonableness. For example, the complaint should plead how the plaintiff's disclosures implicate violations of specific SEC rules or fraud statutes.

D. Scope of Actionable Adverse Actions

Under § 806, the scope of actionable adverse actions is broad and includes discharging, demoting, suspending, threatening, harassing or discriminating against an employee who engages in protected conduct. § 1514A(a). The ARB and federal courts have held that the *Burlington Northern*[6] standard applies to SOX whistleblower claims. *Melton v. Yellow Transp. Inc.*, ARB No. 06-052, 05-140, ALJ No. 2005-STA-002 (ARB Sept. 30, 2008); *Schlicksup v. Caterpillar, Inc.*, No. 09-CV-1208, 2010 WL 2774480 at *3 (C.D. Ill. July 13, 2010). Under this broad standard, an employment action is adverse if it would dissuade a reasonable person from engaging in the protected conduct.

E. Burden of Proof

A SOX complainant need not prove that her protected conduct was the motivating or determining factor in the employer's adverse action but instead need only prove that the protected conduct was a "contributing factor." The DOL's ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). This standard is "intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a "significant," "motivating," substantial." or "predominant" factor in a personnel action in order to overturn that action." *Id.* Once an employee satisfies this minimal causation standard by a preponderance of the evidence, an employer can avoid liability only where it proves by "clear and convincing evidence" that it would have taken the same action absent the employee's protected conduct. *See Kalkunte*, ARB Nos. 05-139, 05-140 at 13.

F. Statute of Limitations and Forum

A SOX whistleblower must file a complaint with Department of Labor ("DOL") within 180 days of the date that she becomes aware of the violation. *See* § 1514A(b)(2)(D) (as amended by the Dodd-Frank Act § 922(c)(1)(A)(i)-(ii)). A SOX plaintiff must exhaust administrative remedies prior to litigating, *i.e.*, a SOX plaintiff must file her complaint with DOL's Occupational Safety and Health Administration ("OSHA"). If while the claim is before OSHA, new adverse actions take place, an employee must amend her complaint to include the subsequent adverse employment actions. *See, e.g., Willis v. Vie Fin. Grp., Inc.*, No. 04-435, 2004 WL 1774575 (E.D. Pa. 2004) (dismissing complaint for termination in violation of SOX because it was never presented to DOL). After OSHA performs an investigation, either party can request a hearing before a DOL ALJ and can appeal an ALJ decision to the DOL's Administrative Review Board. If DOL has not issued a final decision within 180 days of the filing of the complaint, the employee may remove the complaint to federal court for a jury trial.

6. *See supra* note 3 (discussing *Burlington Northern* standard).

See § 1514A(b)(1)(B)-(E) (as amended by the Dodd-Frank Act § 922(c)(1); *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 245 (4th Cir. 2009).

G. Remedies

A prevailing employee under the SOX retaliation provision is entitled to "all relief necessary to make the employee whole," including reinstatement, back pay, attorney's fees and costs. 18 U.S.C. § 1514A(c). An employee can also obtain special damages under SOX, which includes damages for impairment of reputation, personal humiliation, mental anguish and suffering, and other non-economic harm resulting from retaliation. *See Kalkunte,* ARB Nos. 05-139, 05-140 (clarifying that "special damages" under SOX includes compensatory damages; upholding ALJ's award of damages for pain, suffering, mental anguish, humiliation, and effect on complainant's credit). If OSHA finds for the employee and the employer appeals, OSHA's preliminary order of relief is stayed, except reinstatement.

THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT, 15 U.S.C. § 2087

In response to startling instances of consumers being exposed to dangerous products, such as children exposed to toys with lead paint, Congress enacted an overhaul of consumer protections in the Consumer Product Safety Improvement Act ("CPSIA"), 15 U.S.C. § 2087. The CPSIA includes a robust whistleblower anti-retaliation provision that prohibits manufacturers, private labelers, distributors, and retailers from retaliation against an employee because the employee blew the whistle about a perceived violation of the CPSIA. Similar to a SOX complainant, a CPSIA whistleblower retaliation plaintiff must prove that: (1) she engaged in protected conduct; (2) the employer knew that she engaged in protected conduct; (2) the employer took adverse action against her; and (4) the protected conduct contributed to the employer's decision to take an adverse action. § 2087(b).

The whistleblower provision of the CPSIA protects an employee whose employer discharges or discriminates against her because the employee: (1) provides information relating to a violation of the CPSIA or any act enforced by the Consumer Product Safety Commission ("Commission") to their employer, the federal government, or state attorneys general; (2) testifies or assists in a proceeding concerning a violation of the CPSIA or any act enforced by the Commission; or (3) refuses to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSIA or any act enforced by the Commission. § 2087(a)(1)-(4). Specific examples of protected conduct include:

1. Reporting violations of the standard for the flammability of children's sleepwear;

2. Disclosing information about the use of consumer patching compounds containing free-form asbestos;

3. Reporting an employer's violation of a safety standard for creating architectural glazing materials;
4. Reporting choking incidents involving marbles, small balls, latex balloons and other small parts;
5. Reporting the export of banned or misbranded products;
6. Disclosing information about an employer's import or distribution of new all-terrain vehicles in violation of the CPSIA; and
7. Providing information about an employer who manufactures a toy that contains an unsafe amount of lead.

The burden of proof, scope of actionable adverse actions, and procedural rules are similar to those in SOX. *See* § 2087(b)(2)(B)(i)-(iii). The major difference is that an employee bringing a claim under the CPSIA must wait 210 days for DOL to issue a final decision before removing the complaint to federal court for a jury trial. *See* § 2087(b)(4)(A). SOX plaintiffs need only wait 180 days to receive a final decision from DOL before removal.

WHISTLEBLOWER PROTECTION FOR EMPLOYEES IN THE FINANCIAL SERVICES INDUSTRY

The Dodd-Frank Act creates a robust retaliation action for employees in the financial services industry.[7] *See* Dodd-Frank Act § 1057. The scope of coverage is quite broad in that Section 1057 applies to organizations that extend credit or service or broker loans; provide real estate settlement services or perform property appraisals; provide financial advisory services to consumers relating to proprietary financial products, including credit counseling; or collect, analyze, maintain, or provide consumer report information or other account information in connection with any decision regarding the offering or provision of a consumer financial product or service.

Protected conduct includes providing to the Bureau of Consumer Financial Protection ("Bureau") or any other government or law enforcement agency information that the employee reasonably believes relates to any violation of the consumer financial protection provision of the Dodd-Frank Act (Title X), or any rule, order, standard, or prohibition prescribed or enforced by the Bureau. Employees are also protected if they initiate or cause to be initiated any proceeding under federal consumer financial law or if they object to or refuse to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of the Bureau.

7. Employees of credit union and depository institutions may also have claims under the whistleblower provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and Federal Credit Union Act. *See* 12 U.S.C. § 1831j (2001); 12 U.S.C. § 1790b(a)(1) (2001).

The procedures, remedies, and burden of proof are identical to the CPSIA, *i.e.*, the complaint must be filed initially with OSHA. However, if the DOL does not issue a final order within 210 days (or within 90 days of receiving a written determination) the case may be removed to federal court and either party may request a jury trial. *See* Dodd-Frank Act § 1057(c)(1)(A) to (c)(5)(D); 15 U.S.C. § 2087(b)(1) to (c). A complainant can prevail merely by showing by a preponderance of the evidence that her protected activity was a contributing factor in the employer's decision to take an adverse employment action. Remedies include reinstatement, backpay, compensatory damages, and attorney's fees and litigation costs, including expert witness fees.

REWARDS AND PROTECTIONS FOR SECURITIES AND EXCHANGE COMMISSION AND COMMODITY FUTURES TRADING COMMISSION WHISTLEBLOWERS

Under the Dodd-Frank Act, an individual who provides original information to the SEC or Commodity Futures Trading Commission ("CFTC") which results in monetary sanctions exceeding $1 million shall be paid an award of 10 to 30 percent of the amount recouped. *See* Dodd-Frank Act § 748 (applying to CFTC whistleblowers) and § 922(a) (applying to SEC whistleblowers). The amount of the reward is at the discretion of the respective commission and factors to be considered in calculating the amount of the award include the significance of the information provided by the whistleblower, the degree of assistance provided by the whistleblower, the interest of the respective commission in deterring violations by making awards to whistleblowers, and other factors that the each commission may establish by rule or regulation. *Id*. An award shall not be paid to a whistleblower who has been convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information; who gains the information by auditing financial statements as required under the securities laws; who fails to submit information to the SEC as required by an SEC rule; or who is an employee of the DOJ or an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board or a law enforcement organization. *Id*. Sections 748 and 922 of Dodd-Frank are not *qui tam* provisions, *i.e.*, the whistleblower cannot pursue an action if the SEC or CFTC decline to act on the whistleblower's disclosure.

A. SEC Whistleblower Protection Provision

Section 922(a) protects employees who have suffered retaliation "because of any lawful act done by the whistleblower—'(i) in providing information to the Commission in accordance with [the whistleblower reward subsection]; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are

required or protected under the Sarbanes-Oxley Act,'" the Securities Exchange Act of 1934, and "'any other law, rule, or regulation subject to the jurisdiction of the [SEC].'"

The action may be brought directly in federal court and remedies include reinstatement, double back pay with interest, as well as litigation costs, expert witness fees, and reasonable attorney's fees. The claim must be brought within three years from the date when the facts material to the right of action are known or reasonably should have been known to the whistleblower, but no more than six years after the violation occurred. *Id*.

B. CFTC Whistleblower Protection Provision

Section 748 contains a whistleblower protection provision that is substantially similar to § 922(a). Protected conduct includes providing information to the CFTC in accordance with the whistleblower incentive program or assisting "in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information." *Id*. The statute of limitations is two years from the date of the violation. *Id*.

PROTECTION FOR HEALTH CARE WHISTLEBLOWERS

The Patient Protection and Affordable Care Act of 2009 ("PPACA") which became law on March 23, 2010, amended the definition of an "original source" under the FCA and created new protections for employees who blow the whistle about violations of Title I of the PPACA.[8] *See* PPACA §§ 1558, 10104(j)(2). Under § 1558, an employee engages in protected conduct when he provides or is about to provide to an employer, the Federal Government, or a state attorney general, information that the employee reasonably believes to be a violation of Title I of the PPACA. Section 1558 also protects employees who participate in an investigation, or object to or refuse to participate in any activity that the employee reasonably believes to constitute a violation of Title I. Title I covers a broad range of rules governing health insurance including policy and financial reporting requirements and prohibitions against discrimination. Title I also mandates that hospitals establish and publish a list of standard charges, and prescribes rules for insurers to submit reinsurance claims to the Secretary under a program for early retirees. *See* PPACA §§ 1001, 1102(c).

Section 1558 incorporates the procedures, burden-shifting framework, remedies, and statute of limitation set forth in the CPSIA, 15 U.S.C. 2087(b).[9] *See* PPACA § 1558.

COMMON LAW WRONGFUL DISCHARGE

In addition to the relief available under Federal whistleblower laws, employees may have a common law claim for wrongful discharge in violation of public policy. This can

8. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
9. *See supra* Section V - Consumer Product Safety Reform Act, 15 U.S.C. § 2087.

be the best remedy for whistleblowers because employees can seek punitive damages in wrongful discharge cases.[10]

Approximately 46 states have adopted a public policy exception to the employment at will rule. The elements for establishing a whistleblowing-based wrongful discharge claim, however, vary considerably from state to state. For example, some state courts have held that a statutory expression of public policy is required. *See, e.g., Gantt v. Sentry Ins.*, 824 P.2d 680, 688 (Cal. 1992); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1059 (Ind. Ct. App. 1980). Other state courts, however, have held that administrative regulations, federal statutes, and case law can also define the public policy at issue. *See, e.g., Lewis v. Nationwide Mut. Ins. Co.*, No. 3:02CV512 (RNC) 2003 WL 1746050 (D. Conn. 2003) (denying motion to dismiss claim by in-house insurance defense counsel who alleged that he had been discharged in violation of public policy expressed by Connecticut Rules of Professional Conduct relating to duty of loyalty owed to insureds); *see also Hubbard v. Spokane County*, 50 P.3d 602, 606 (Wash. 2002) (en banc) (Washington Supreme Court recognized county zoning code and state statute as source of public policy to support claim by county planning director who alleged that he had been discharged for questioning legality of issuing hotel building permit).

States also differ on the types of legal violations that can support a wrongful discharge claim. In Virginia, for example, only state statutes constitute public policy. An employee discharged in retaliation for reporting wrongdoing that violates federal law cannot make a wrongful discharge claim in Virginia. Other states such as Maryland, take a broader approach and protect employees who report a violation of any state or federal statute. While courts do not uniformly interpret the types of protected activity that give rise to a tort claim for wrongful discharge, most courts have recognized a claim for the following types of protected activity: (1) refusing to engage in illegal activity, (2) performing a duty required by law, or (3) exercising a statutory right.

A. Refusing to Engage in Illegal Activity

The tort for wrongful discharge protects employees from being terminated because they refuse to engage in illegal activity. For example, courts will likely recognize a wrongful discharge claim where an employee is terminated for refusing to participate in an employer's irregular accounting practices, including the recording of an asset purchased by one entity and placing it on the books of another entity. *See Rocky Mountain Hosp. & Medi. Serv. v. Mariani*, 916 P.2d 519, 527 (Colo. 1996) (recognizing wrong-

10. Three recent verdicts reveal that punitive damages can be a significant component of damages in a common law wrongful discharge action. In *Carpenter v. Sandia Nat'l Laboratories*, a jury awarded Mr. Carpenter approximately $4.4 million in a common law wrongful termination action, which consisted of $36,000 for lost wages, benefits and other costs, $350,000 for emotional distress and $4 million in punitive damages. *See Carpenter v. Sandia Natl. Laboratories*, #D-202-CV-200506347, Bernalillo Co. NM Dist. Court (verdict 2/13/2007). Mr. Carpenter alleged that he was terminated in retaliation for cooperating with federal authorities that were investigating Chinese cyber intelligence efforts. In *Feliciano v. Parexel International*, No. 04-CV-3798 (E.D. Pa. verdict 9/15/2008), a jury awarded $1.8 million in punitive damages for wrongful termination, plus nearly $100,000 in compensatory damages, plus attorneys' fees. Mr. Feliciano alleged that he was terminated in retaliation for complaining to his supervisors that a company marketing database contained email addresses and other information that was illegally obtained.

ful discharge claim where company recorded assets purchased by one entity under books of another entity). Cases construing this form of protected conduct include:

- Recognizing a wrongful discharge claim where an employee was terminated for refusing to participate in employer-directed activities that he claimed violated both state and federal criminal statutes. *See, e.g., Isbell v. Stewart & Stevenson, Ltd.*, 9 F. Supp. 2d 731, 732 (S.D. Tex. 1998).
- Recognizing a wrongful discharge claim where an employee was discharged for refusing to violate federal and state tax laws regarding deductions for employees' wages and bonuses. *See, e.g., Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 459 (Wis. 2000).
- Recognizing a wrongful discharge claim where an employee refused to commit perjury on behalf of his supervisor. *See, e.g., Ne. Health Mgmt., Inc. v. Cotton*, 56 S.W.3d 440, 447 (Ky. Ct. App. 2001).

B. Fulfilling a Statutory Obligation

An at-will employee who is terminated for fulfilling a statutory obligation or reporting suspected criminal behavior to law enforcement is protected under public policy. Under this form of protected conduct, the employee must demonstrate that she had a legal obligation or duty to report the employer's unlawful conduct. Thus, an employee terminated for blowing the whistle on her co-worker who distributed prescription medication to patients without authorization from a physician, but who had no statutory duty to report the misconduct, will likely have her claim dismissed. *See Austin v. HealthTrust, Inc.*, 967 S.W. 2d 400 (Tex. 1998) (declining to extend public policy tort doctrine to protect private whistleblower who reported another nurse for working while under the influence and distributing prescription medication to patients without authorization from a physician because the employee was under no duty to oppose such illegal conduct).

C. Exercising a Statutory Right or Privilege

Terminating an employee for exercising her statutory rights can give rise to a wrongful discharge claim. *Uylaki v. Town of Griffith*, 878 N.E. 2d 412, 414 (Ind. Ct. App. 2007) (holding that employee who has been fired for exercising statutory right or refusing to violate law has claim for wrongful discharge). In *Jackson v. Morris Commc'ns Corp.*, for example, a Nebraska court recognized a cause of action for wrongful discharge where a co-circulation manager for the York News-Times alleged that "she was discharged in retaliation for filing a [workers' compensation] claim." *Jackson*, 657 N.W.2d 634, 641 (Neb. 2003). In reaching its decision, the court reasoned that the "failure to recognize the cause of action for retaliatory discharge for filing a workmen's compensation claim would only undermine [the] Act and the strong public policy behind its enactment."

Id. at 641 (citing *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984)). A California court reiterated this principle in *Grant-Burton v. Covenant Care, Inc.*, when it recognized a wrongful discharge claim for an employee who was terminated for participating in a group discussion with other employees about the fairness of the employer's bonus system, a statutory right available to employees under section 232 the California Labor Code. *See Grant-Burton*, 99 Cal. App. 4th 1361, 1371 (2002). Covenant Care argued that section 232 was not triggered because the marketing directors did not disclose the amount of their bonuses. The court, however, rejected Covenant's argument, stating that the amount of wages can be disclosed without mentioning dollars and cents and concluded that the company wrongfully discharged the marketing director for exercising her statutory right to discuss compensation with her co-workers. Other examples of rights that have been recognized as the basis of a violation include:

- Terminating a barmaid for exercising her right to participate in benefits of the Unemployment Compensation Fund. *See, e.g., Smith v. Troy Moose Lodge No. 1044*, 645 N.E. 2d 1352, 1353 (Ohio 1994).
- Terminating an employee because he protested his employer's unauthorized use of his name in its lobbying efforts. *See, e.g., Chavez v. Manville Prods. Corp.*, 777 P. 2d 371, 376 (N.M. 1989).
- Discharging an employee for refusing to submit to a drug test in violation of Cal. Const. Art. 1, § 1. *See, e.g., Semore v. Pool,* 217 Cal. App. 3d 1087, 1098 (1990).
- Discharging an employee for exercising his statutory right to overtime pay. *See, e.g., Meyers v. Meyers,* 846 N.E.2d 280, 706 (Ind. Ct. App. 2006).

In sum, "[an] employee must be able to exercise his [statutory] right in an unfettered fashion without being subject to reprisal." *Jackson*, 657 N.W.2d at 639.

D. Potential Sources of Public Policy

Sources of public policy for a common law wrongful discharge claim may include clear and particularized pronouncements of public policy in the United States Constitution, the State Constitution, and federal and state statutes and regulations. *See, e.g., Island v. Buena Vista Resort*, 103 S.W.3d 671,679 (Ark. 2003) (sexual harassment statute established public policy against sexual harassment); *Ballinger v. Delaware River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002) (sources of public policy include legislation, administrative rules, regulations or decisions, and judicial decisions, as well as professional codes of ethics under certain circumstances); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 575 S.E.2d 618, 622 (W. Va. 2002) (Code of State Regulations sets forth specific statement of substantial public policy, ensuring that hospital unit is properly staffed to accommodate regulation's directive, that patients are protected from inade-

quate staffing practices, and that medical care is provided to hospital patients); *Wholey v. Sears Roebuck*, 803 A.2d 482, 490 (Md. 2002) (constitutional provisions and principles provide clear public policy mandates under which a termination may be grounds for wrongful discharge claim); *Mitchem v. Counts*, 523 S.E.2d 246, 250 (Va. 2000) (common law cause of action for wrongful termination could be based on public policies expressed in statutes prohibiting fornication and lewd and lascivious behavior); *Faulkner v. United Tech. Corp.*, 693 A.2d 293, 295 (Conn. 1997) (wrongful discharge claim may be predicated solely on violation of federal as opposed to state statute); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985) (public policy can be found in expressions of state's founders and state's constitution and statutes that embody the public conscience of people within that state). Specific examples of federal statutes that may serve as sources of public policy include:

- 18 U.S.C. § 1001, which prohibits knowing and willful falsification, concealment or covering up of "a material fact, or mak[ing] any false, fictitious, or fraudulent statement or entry . . . ;"
- 18 U.S.C. § 1002, which prohibits knowingly defrauding the government;
- 18 U.S.C. § 1031, which criminalizes the knowing execution of a scheme or artifice to defraud the federal government;
- 18 U.S.C. § 208, which prohibits employees from participating in government contracts in which they hold a financial interest;
- 41 U.S.C. §§ 51-54, which makes it a criminal offense for any subcontractor to knowingly influence the award of a subcontract;
- 18 U.S.C. § 1516, which prohibits an intentional effort to influence, obstruct or impede a federal auditor;
- 18 U.S.C. §§ 1341 and 1343, which prohibit mail fraud and wire fraud, *i.e.*, using wire communications, the U.S. Postal Service or other interstate delivery services to accomplish an illegal act; and
- 18 U.S.C. § 287, which criminalizes the knowing submission of any false claim to the government.

The FCA itself can be a source of public policy in a wrongful discharge action. For example, a district judge recently denied a motion to dismiss a Missouri common law wrongful discharge action in which the plaintiff alleged he was terminated for disclosing to his supervisor a billing scheme in which his employer was spreading the cost of certain projects to other unrelated projects, thereby causing certain projects to be falsely over billed. *See McNerney v. Lockheed Martin Ops. Support, Inc.*, No. 4:10-cv-00704 (W.D.Mo. 10/22/10) (order denying motion to dismiss). Concluding that the

billing scheme about which plaintiff complained was a fraudulent attempt to get the Government to pay out money it was not obligated to pay, the scheme violated the public policy embodied in the FCA and therefore terminating the plaintiff for complaining about the scheme violated Missouri law.

D. Pleading Requirements and Burden of Proof

While there is no heightened pleading requirement for a wrongful discharge claim, it is critical to plead with specificity the public policy that the employer violated by discharging the plaintiff. *See, e.g., Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 808 (Va. 1996) (no cause of action was stated where employee failed to specify statutory basis for claim that he was wrongfully discharged for refusing to perform auto repairs using method that he believed unsafe). Moreover, an employee should ensure that the specified public policy applies not only to him but also to the particular employer. *See, e.g., Edmondson v. Shearer Lumber Prod.*, 75 P.3d 733 (Idaho 2003) (employee cannot base wrongful discharge claim against private sector employer on exercise of constitutional right of free speech, because this right is protected only against government action).

To establish a *prima facie* case in most jurisdictions, an employee must establish the following:

1. That plaintiff was an at-will employee terminated by the defendant;
2. That the termination of the plaintiff's employment violates a specific public policy; and
3. That there is a causal nexus between the public policy violation and the employer's decision to terminate the plaintiff.

In attempting to establish that the employee's termination violates public policy, the employee's counsel should always try to emphasize the public and social importance of the rights or interests that the employee is attempting to defend. Courts are more apt to recognize a wrongful discharge claim of an employee discharged for supplying law enforcement with information about a co-worker's involvement in a crime than for an employee discharged for asserting his right to take a rest break. *Compare Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 846 (Ill. 1981) (employee stated cause of action for retaliatory discharge where employee alleged that he was discharged for supplying law enforcement agency with information that fellow employee might be involved in violation of criminal code) *and Miller v. SEVAMP, Inc.*, 362 S.E.2d 915 (Va. 1987) (court characterized employee-shareholder's statutory right to vote free from employer's coercion, right conferred by policy benefiting public rather than merely benefiting shareholder's private interest) *with Crawford Rehab. Serv's, Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (plaintiff's right to take rest breaks clearly did not implicate substantial public policy); *and City of Virginia Beach v. Harris*, 523 S.E.2d 239 (Va. 2000)

(police officer terminated for obtaining warrants against his supervisor did not have claim against city for wrongful discharge in violation of public policy based on statute describing powers and duties of police officer; statute did not state any public policy and was not designed to protect any public rights pertaining to property, personal freedoms, health, safety, or welfare).

Additionally, an employee must identify a public policy that is expressed in a source acceptable and actionable within the state governing the action. For example, as discussed above, some states require that the public policy be expressed in a state statute, rather than a federal source. *See, e.g., Clinton v. State ex rel. Logan County Election Bd.*, 29 P.3d 543 (Okla. 2001) (plaintiff must identify Oklahoma public policy goal that is clear and compelling and is articulated in existing Oklahoma constitutional, statutory, or jurisprudential law); *Torrez v. City of Scottsdale*, 13 IER 316 (Ariz. Super. Ct. 1997) (holding that neither federal statutes nor municipal ordinances are cognizable sources of public policy). Once the public policy has been established, the employee must demonstrate that her conduct furthered that particular public policy. This may require a showing that the employee took affirmative steps that required the employer to conform to the stated public policy.

There are challenges, however, in proving the causal relationship between the employee's conduct and the stated public policy violation. Some issues that arise in the context of wrongful discharge litigation include: (1) whether an employee must prove that the employer's conduct actually violated public policy or whether it is sufficient that the employee had a good faith belief that the employer's conduct violated public policy; and (2) whether the employee must demonstrate that she disclosed information about the employer's violations of public policy to regulatory or prosecutorial agencies or if it is sufficient to make complaints internally. While most courts have held that employees need not voice their concerns about their employer's public policy violations externally, and that a reasonable belief that the employer's conduct violated public policy is sufficient to make a claim for wrongful discharge, employees should try to identify evidence that would show a colorable case of illegality, *i.e.*, information about a regulatory action taken against the employer for malfeasance can provide a basis for the employee's belief that the employer was engaging in conduct that violated public policy.

E. Remedies

A prevailing plaintiff can recover backpay, front pay, damages for emotional distress, and punitive damages. In certain jurisdictions, punitive damages can be awarded only upon a showing of malice, which can be inferred from circumstantial evidence. *See Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144, 1151 (Md. Ct. Spec. App. 1990). Other jurisdictions have awarded punitive damages where an employer formally requires an employee's adherence to the law but simultaneously requests that the employee engage in unlawful conduct. *See Smith v. Brown-Forman Distillers Corp.*, 196 Cal. App. 3d 503 (1987) (awarding punitive damages where liquor distiller consciously disregarded rights of employees by requiring that they engage in illegal activities).

F. An Alternative Statutory Remedy May Bar a Common Law Wrongful Discharge Action

In many states, where the source of public policy is expressed in a statute with its own remedy to vindicate the public policy objectives, the employee can pursue a retaliation action only through the statute. For example, in *Scott v. Topeka Performing Arts Ctr., Inc.*, the court granted the employer's motion to dismiss, concluding that the employee's state-law claim for retaliatory discharge was precluded by the alternative statutory remedies available under the Fair Labor Standards Act ("FLSA"). *Scott v. Topeka Performing Arts Ctr., Inc.*, 69 F. Supp. 2d 1325, 1330 (D. Kan. 1999). In *Scott*, the employee alleged that she was wrongfully discharged for asserting her rights under the FLSA. In her complaint, the employee argued that it was unclear whether relief on her FLSA retaliation claim would include all the remedies available under her state-law claim and that the remedies under the FLSA were not adequate. The court rejected this argument, barring the employee from pursuing a wrongful discharge claim against her employer. Similarly in *Korslund v. Dyncorp Tri-Cities Serv., Inc.*, a group of employees was precluded from pursuing wrongful discharge claims where the employees alleged that their employer retaliated against them for reporting safety violations, mismanagement, and fraud at a nuclear facility. *Korslund* 125 P.3d 119 (Wash. 2005) (en banc). According to the Washington court, the administrative process for whistleblower complaints in the federal Energy Reorganization Act ("ERA") adequately protected the public policy of protecting against waste and fraud in the nuclear industry. Thus, when attempting to bring a retaliation claim under the wrongful discharge tort, an employee should not rely on a statute with its own whistleblowing remedy as the source of public policy. The employee should, if possible, identify and cite another statue that lacks its own remedy.

G. Failure to Exhaust Internal Remedies May Lead to Early Dismissal

An employee's claim for wrongful discharge can be dismissed at the early stages of litigation if the state or jurisdiction where the tort is being adjudicated requires that the employee exhaust internal remedies prior to reporting the employer's alleged malfeasance to outside authorities and the employee fails to comply with the company's remedial corporate procedures and policies. For example, a California court affirmed summary judgment, dismissing an employee's wrongful discharge claim where the employee failed to exhaust a university's internal grievance procedures. *See Palmer v. Regents of the Univ. of Ca.*, 132 Cal. Rptr. 567, 571 (2003). According to the court, when a private association or public entity establishes an internal grievance mechanism, an employee must exhaust those internal remedies before pursuing a civil action for wrongful termination. *See id.*

H. State Statutory Whistleblower Protections

Nearly all states and the District of Columbia have adopted statutory whistleblower protections, some of which protect only public sector employees.[11] The scope of protected conduct varies widely. Some state whistleblower statutes protect only disclosures concerning violation of law, while some also protect disclosures concerning violations of rules and regulations. Unlike nearly all of the federal whistleblower protection statutes, many state whistleblower protection laws do not protect internal disclosures. And some afford protection to a whistleblower only where the whistleblower disclosed the matter internally prior to reporting it to the Government. The strongest state whistleblower protection statute for employees in the private sector is New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. § 34:19-5, which protects both private and public sector employees who disclose or threaten to disclose internally or to a public body an activity, policy, or practice that the employee reasonably believes is in violation of a law, rule, or regulation. Remedies for a prevailing CEPA plaintiff include economic damages, emotional distress damages, attorney's fees and punitive damages.

In sum, counsel should assess whether a whistleblower who has suffered retaliation has a remedy under state law, including a retaliation action under a state FCA, an action under a state whistleblower protection statute, and a common law wrongful discharge action. Trying the case in state court may offer the opportunity to recover higher damages, and minimizes the risk of dismissal on a motion summary judgment.

GENERAL TIPS FOR LITIGATING WHISTLEBLOWER RETALIATION CLAIMS

The proliferation and strengthening of whistleblower retaliation statutes and the expansion of the common law wrongful discharge tort have dramatically altered the options for whistleblowers who have suffered retaliation. Whereas just a few years ago a whistleblower may have just one remedy, if any, whistleblowers now may have several potential claims. Therefore, it is critical during the intake process to thoroughly analyze those options. The remainder of the article provides general tips for maximizing damages, claim selection, forum selection, pleading whistleblower retaliation claims, and litigating whistleblower retaliation claims.

A. Claim Selection

1. Maximizing Damages

In choosing claims, consider options to maximize damages. For example, including a claim with a fee-shifting provision is critical. The statutory whistleblower retaliation

11. Public Employees for Environmental Responsibility has compiled a detailed survey of state whistleblower protection statutes, which is posted at http://www.peer.org/state/index.php.

claims discussed in this article all authorize attorney fees and costs for a prevailing plaintiff. Additionally, statutory whistleblower retaliation claims generally do not authorize punitive damages. Consider bringing a common law claim under state law for wrongful discharge in violation of public policy or other tort claims that offer the opportunity to obtain punitive damages. Potential common law claims include defamation, promissory estoppel, breach of the covenant of good faith and fair dealing, intentional interference with contract, and breach of contract. Where an employer's conduct is outrageous, a jury may be motivated to award significant punitive damages.

Another advantage of adding a statutory whistleblower retaliation claim is the opportunity to obtain reinstatement. Most of the recently enacted DOL whistleblower retaliation statutes authorize preliminary reinstatement, *i.e.*, if OSHA finds for the complainant at the investigative stage (before the parties have litigated the case), the employer must reinstate the employee immediately. Preliminary reinstatement gives a complainant significant leverage in litigation (the whistleblower is back at the worksite while prosecuting his claim) and can lead to a favorable settlement. Under the leadership of Secretary Chao, OSHA was criticized for failing to enforce whistleblower protection statutes and for finding in favor of employers in most whistleblower retaliation investigations. Plaintiff's counsel typically viewed the OSHA investigative stage as a waste of time for the whistleblower because OSHA merely adopted the employer's justification for the adverse action. The current leadership of OSHA is undertaking concrete steps to invigorate OSHA's Whistleblower Protection Program and OSHA has recently issued several favorable orders in whistleblower retaliation cases. Accordingly, plaintiff's counsel should not assume that it is best to forego pursuing a whistleblower retaliation claim with an administrative exhaustion requirement. To the contrary, pursuing a strong whistleblower retaliation claim before OSHA can provide an opportunity to obtain preliminary reinstatement. The OSHA investigative process also enables plaintiff to discover the employer's defenses and possibly obtain critical admissions prior to prosecuting related claims. Furthermore, since many of the whistleblower retaliation claims that must be initially filed with DOL contain a removal provision, the whistleblower can initially pursue the claim before DOL and later remove it to federal court.

2. Choosing a Remedy with a Favorable Causation Standard

As discussed *supra*, the whistleblower retaliation statutes enacted in the past decade all employ a very favorable causation standard for plaintiffs. To prevail, the plaintiff must demonstrate merely that protected conduct was a "contributing factor" in the employer's decision to take an adverse action. The ARB defines a contributing factor as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). Close temporal proximity alone can support an inference of causation under the "contributing factor" standard. *See, e.g., Kalkunte*, 2004-SOX-

56, *supra*. Some state common law wrongful discharge actions, however, require a plaintiff to meet a "sole cause" standard, a far more onerous causation standard. Accordingly, in selecting claims, it is important to consider adding a claim that employs the favorable "contributing factor" standard.

3. Naming Individual Defendants

An important consideration in choosing among retaliation claims is whether the claim authorizes individual liability. The retaliation provision of SOX expressly authorizes claims against individuals, and the FERA amendments to § 3730(h) authorize claims against individuals. *See Laborde v. Rivera-Dueno*, 2010 WL 1416010 (D. P.R. Mar. 31, 2010) (post-FERA, liability is not limited to employers). Asserting a claim against an individual can be especially important where the corporation might not have sufficient assets to pay a judgment and the individual responsible for the retaliation is covered under a Director & Officers insurance policy. Before naming an individual as a defendant, consider the potential impact on diversity jurisdiction and consider whether naming an individual defendant will often make them personally invested in the case and could pose an obstacle to settlement. An individual defendant might be strongly disinclined to settle and instead prefer to litigate the claim.

B. Forum Selection

As a general rule, state courts are the preferred forum to try whistleblower retaliation claims because jury verdicts tends to be higher and summary judgment is less of an obstacle when litigating in state court. While jurors can readily relate to being the subject of an abusive working environment, it is important to carefully evaluate whether the plaintiff will be likeable to a jury in the forum in which the claim would be brought. Where the plaintiff is not likely to be viewed favorably by a jury but the facts are strong, litigating before a DOL ALJ might be a better option than a jury trial because DOL ALJs are less inclined to make emotional decisions in reaction to the employer's efforts to undermine the plaintiff's motive for engaging in protected activities or the employer's efforts to portray the plaintiff as a disgruntled former employee and instead focus on the evidence. Litigating a retaliation claim before a DOL ALJ can also be advantageous in that ALJs typically permit the plaintiff to take broad discovery,[12] and a plaintiff can get a hearing on the merits before an ALJ far more expeditiously than in federal court. In addition, DOL ALJs usually address discovery disputes promptly, and will permit nearly all relevant evidence to come in at trial. Formal rules of evidence generally do not apply in whistleblower retaliation cases tried before DOL ALJs.

Several of the recently enacted federal whistleblower protection statutes contain a removal provision under which the plaintiff may elect to bring the retaliation claim

12. *See, e.g., Leznik v. Nektar Therapeutics, Inc.*, 2006-SOX-93 (ALJ Feb. 9, 2007) (Order Granting Motion to Compel) ("Unless it is clear that the information sought can have no possible bearing on a party's claims or defenses, requests for discovery should be permitted.").

de novo in federal court once the claim has been pending before DOL for a certain period of time—180 days for a SOX claim. That option provides the complainant an opportunity to initially litigate the claim at DOL and then remove it to federal court and add other deferral claims and pendent state claims. Employers have tried to argue that although these statutes provide for *de novo* review in federal court, the decisions of the presiding ALJ, such as an order granting a motion to dismiss or a motion for summary decision, should be accorded preclusive effect when the claim is removed to federal court. The Fourth Circuit, however, has flatly rejected this argument, holding that a SOX whistleblower may seek *de novo* review in federal court so long as the complaint has been pending for 180 days and DOL has not issued a final decision. *See* Stone *v. Instrumentation Lab. Co.*, 591 F.3d 239, 245 (4th Cir. 2009) (deferring to administrative agency, "even if more efficient, is in direct conflict with the unambiguous language of [SOX]").

In devising a strategy to litigate whistleblower retaliation claims, avoiding arbitration is an important factor to consider. Whistleblower retaliation claims bought under the American Recovery and Reinvestment Act, Sarbanes-Oxley Act, Patient Protection and Affordable Care Act, and Dodd-Frank Act are exempt from mandatory arbitration. Accordingly, when choosing among multiple claims, it is preferable to bring a claim that will not be subject to arbitration. Even if a whistleblower retaliation claim is subject to arbitration, the plaintiff may be able initially to pursue the claim before DOL or an Agency IG if the claim has an administrative exhaustion provision. The DOL or an Agency IG could award relief to the whistleblower before the claim is submitted to arbitration, and OSHA's orders of preliminary reinstatement are effective immediately.

C. Claim Preemption

Federal whistleblower protection statutes do not preempt state remedies, including a common law claim of wrongful discharge in violation of public policy. In the leading case addressing this issue, the Supreme Court held that a whistleblower retaliation action under the Energy Reorganization Act did not preempt a common law emotional distress claim arising from the plaintiff's termination. *English v. General Electric Co.*, 496 U.S. 72 (1990). The Court found "no basis for [the] contention that all state-law claims arising from conduct covered by the [statute] are necessarily [preempted]." 496 U.S. at 83. Accordingly, a whistleblower can pursue remedies under both federal and state law. Bringing a state tort action offers a plaintiff the opportunity to obtain punitive damages in a jury trial. Where a federal whistleblower protection statute has an administrative exhaustion requirement, the whistleblower may be able to initially litigate the claim before DOL or an IG and subsequently remove the claim to federal court and add pendent state claims.

D. Claim Preclusion

While the Fourth Circuit's recent *Stone* decision clarifies that a SOX retaliation plaintiff is entitled to a *de novo* hearing in federal court after litigating the case before a DOL ALJ (so long as DOL has not yet issued a final order), formulating a strategy to maximize a whistleblower's recovery requires careful analysis of claim preclusion. Courts seek to avoid "claim splitting" and are reluctant to give a plaintiff more than one bite at the apple.

For example, in *Tice v. Bristol-Myers Squibb*, the Third Circuit affirmed summary judgment for the employer, holding that a DOL ALJ's determination that the employer had a legitimate reason for terminating SOX plaintiff Carol Tice's employment should be accorded preclusive effect in related employment actions. *Tice*, 325 F. App'x 114 (3d Cir. 2009). Tice had initially filed a SOX retaliation claim with OSHA, alleging that her employment was terminated because she opposed management's direction to employees to falsify sales call reports in violation of SOX. A SOX ALJ dismissed Tice's claim, concluding that the employer demonstrated that it would have terminated Tice absent her disclosure because Tice falsified sales call reports. Tice did not appeal the ALJ's order and subsequently brought an action in federal court alleging age discrimination and gender discrimination. The summary judgment dismissal of Tice's discrimination claims likely could have been avoided if Tice had appealed the DOL ALJ's order.

Similarly, in *Thanedar v. Time Warner, Inc.*, the Fifth Circuit held that an unsuccessful Title VII discrimination claim can preclude a SOX claim arising from the same adverse action. *Thanedar*, 352 F App'x 891 (5th Cir. 2009). Five months after Thanedar's Title VII and 42 U.S.C. § 1981 claims were dismissed, Thanedar removed a SOX complaint pending before OSHA to federal district court. Time Warner moved for judgment as a matter of law on the basis that Thanedar's SOX and state law claims are barred by the doctrine of *res judicata*, because the claims should have been asserted in his prior Title VII lawsuit. Thanedar appealed to the Fifth Circuit, which found that "all three of Thanedar's claims arise from the same core set of facts and therefore the preclusive effect of the Title VII judgment "extends to all rights the original plaintiff had 'with respect to all or any part of the transaction, or series of connected transactions out of which the [original] action arose.'" *Id*.

In general, the findings of an agency investigation do not have preclusive effect on related claims. *See, e.g., Hanna v. WCI Cmtys., Inc.*, 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 2004) (holding that OSHA's preliminary findings in a SOX do not have preclusive effect). But the California Supreme Court recently issued a surprising decision holing that OSHA's findings in an AIR21 retaliation action barred the plaintiff from pursuing related claims under state law because the plaintiff had the option of a formal adjudicatory hearing at DOL to determine the contested issues and failed to request a hearing before DOL, thereby rendering OSHA's notice of determination a final order). *Murray v. Alaska Airlines Inc.*, 237 P.3d 565 (CA 2010). The *Murray*

decision will not likely be followed by other courts, but it underscores the importance of timely appealing agency decisions before they become final orders.

Resolving a whistleblower retaliation action will not preclude the whistleblower from bringing a *qui tam* action. *See U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 852 (7th Cir. 2009). But if the government is aware of the facts underlying a *qui tam* action before the action is filed, a general release signed by the relator may, in certain jurisdictions, waive the whistleblower's relator share. *U.S. ex rel. Radcliffe, et al. v. Purdue Pharma L.P.*, 600 F.2d 319 (4th Cir. 2010), *cert. denied*, 10-254, 2010 WL 3302027 (U.S. Oct. 12, 2010) ("When the government is unaware of potential FCA claims the public interest favoring the use of *qui tam* suits to supplement federal enforcement weighs against enforcing prefiling releases. But when the government is aware of the claims, prior to suit having been filed, public policies supporting the private settlement of suits heavily favor enforcement of a pre-filing release."). *C.f. United States ex rel Green v. Northrop* 59 F.3d 953, 963-967 (9th Cir. 1995) (a general release entered into without the knowledge or consent of the United States, could not be enforced to bar a later qui tam claim where the government did not know have knowledge of the fraud prior to the filing of the *qui tam* action).

E. Preserving Ability to Recover Relator Share

Where a client is both eligible for a whistleblower reward under the False Claims Act and also has a strong retaliation claim, counsel should carefully analyze whether prosecuting the retaliation claim could limit the client's ability to obtain a whistleblower reward. A *qui tam* relator can prosecute a retaliation claim without violating the seal, but this requires planning, including a strategy for responding to questions during the plaintiff's deposition about the plaintiff's disclosures to the government. The following are some issues counsel should consider in prosecuting a retaliation claim while a *qui tam* action is under seal:

- Before filing a retaliation claim on behalf of a whistleblower who may have a *qui tam* action, the whistleblower should disclose the fraud to the Government to ensure that the whistleblower will qualify as an original source.
- Consider filing the retaliation claims with the *qui tam* action (under seal).
- Be prepared to justify the plaintiff's damages with specificity to avoid the appearance that the employer is settling more than just an employment claim. As most whistleblower retaliation claims authorize both compensatory damages and front pay in lieu of reinstatement, potential damages can be very substantial, especially where the employer's retaliation damages the whistleblower's career. A vocational rehabilitation expert can evaluate the extent to which the whistleblower's career prospects have been diminished and the time it will take for the whistleblower to regain a comparable employer. Relying on the opinion of the vocational rehabilitation expert, an economist can estimate frontpay.

F. Pleading Whistleblower Retaliation Claims

While Rule 9(b) does not apply to 3730(h) or any other retaliation cause of action, counsel for whistleblowers are well-advised in the wake of *Iqbal*[13] and *Twombly*[14] to plead whistleblower retaliation complaints in detail. In a § 3730(h) action, plaintiff should plead how plaintiff's disclosures or plaintiff's investigation reasonably could lead to a viable FCA action. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996). In a SOX retaliation action, plaintiff should plead how plaintiff's disclosure "definitively and specifically" relates to the SOX subject matter (such as shareholder fraud or a violation of an SEC rule). Pleading protected conduct in detail will also be useful in discovery disputes in that plaintiff will be able to point to specific allegations in the complaint as a basis to take broad discovery on plaintiff's disclosures.

Additionally, plaintiff should plead adverse actions in detail, as context matters, *i.e.*, "the significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington N.*, 548 U.S. at 57. For example, changing an employee's work hours may be materially adverse where the change in hours would effectively force the employee to resign. In a SOX retaliation case, the ALJ found that the plaintiff suffered an adverse action when he was given one day to either resign or accept a transfer to a different department that would significantly decrease his workload. *McClendon v. Hewlett Packard*, Inc, 2006-SOX-29 (ALJ Oct. 5, 2006).

Plaintiff should also plead retaliatory actions (any act that would dissuade a reasonable employee from whistleblowing) that occured outside of the statute of limitations. While such adverse actions are not actionable, they can constitute important circumstantial evidence of retaliation, and including them in the complaint is important to ensure that they are discoverable. Finally, it is critical to exhaust administrative remedies where plaintiff is subjected to additional adverse actions after filing a complaint.

G. Prosecuting Whistleblower Retaliation Claims

Although whistleblower retaliation statutes generally do not require that plaintiff disclose an actual violation of law,[15] some courts are erroneously applying a heightened standard of objective reasonableness that comes close to requiring plaintiff to prove that she disclosed an actual violation of law, *e.g.*, requiring a § 3730(h) plaintiff to demonstrate that her disclosures would have resulted in a successful *qui tam* action. Therefore, to survive summary judgment, it is critical to develop evidence proving the objective reasonableness of plaintiff's disclosures.

Whistleblower retaliation plaintiffs are entitled to take broad discovery about their protected disclosures, but of course should expect defendants vigorously to resist disclosing documents and information about the plaintiff's disclosures. Counsel should promptly move to compel such evidence, and there are several strong legal arguments

13. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

14. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

15. *See, e.g., Graham County, supra* (proving a violation of the FCA is not element of a § 3730(h) cause of action).

to support a motion to compel. As discussed *supra*, plaintiff will have to prove the objective reasonableness of her disclosures, so therefore she must take broad discovery about her disclosures. In addition, courts have held that information about the plaintiff's disclosures is relevant to the employer's motive for retaliating against plaintiff. *See, e.g., Dilback v. General Electric Company*, 2008 WL 4372901 (W.D. Ky. Sept, 22, 2008) ("If Plaintiff can show that the documents he was attempting to retrieve reveal the existence of false claims on the part of the Defendant, then such evidence may be probative of the Defendant's motivation.").

Plaintiff should also vigorously pursue discovery about investigations of her disclosures. For example, in a SOX case, the employer refused to produce in discovery the report of an internal investigation related to plaintiff's disclosures which the employer had submitted to the SEC prior the plaintiff filing suit. Plaintiff moved to compel, and the ALJ ordered production of the report, concluding that the employer's disclosure of the report to the SEC waived attorney-client privilege and work product protection, despite the presence of a confidentiality agreement with the SEC. *See Fernandez v. Navistar Int'l Corp.*, 2009-SOX-43 (ALJ Oct. 16, 2009). It is also important not to accept broad assertions of privilege at face value and instead require employers to produce privilege logs. A privilege log may reveal that the employer retained outside counsel to investigate plaintiff's disclosures, which may be critical evidence to prove that the employer had knowledge of the whistleblower's protected conduct. For example, it is not credible for an employer to claim at trial that it was never aware that plaintiff was disclosing violations of securities laws where the employer promptly retained a securities lawyer to investigate the whistleblower's disclosures.

Third-party discovery can also be very useful to obtaining the evidence necessary to prove the objective reasonableness of plaintiff's disclosures. For example, a SOX retaliation plaintiff alleging that she disclosed inadequate internal accounting controls should consider deposing the company's independent auditors to discover the extent to which the internal control deficiencies she disclosed adversely impacted the accuracy of the company's financial reporting. Retaliation plaintiffs should also consider obtaining information through the Freedom of Information Act that may corroborate the objective reasonableness of their disclosures.

In addition to taking broad discovery on the objective reasonableness of plaintiff's disclosures, plaintiff's counsel should focus discovery on eliciting evidence of causation, including the following types of direct and circumstantial evidence:

- Direct evidence of retaliatory motive, *i.e.*, "statements or acts that point toward a discriminatory motive for the adverse employment action." William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. Nat'l Ass'n Admin. L. Judiciary 43, 66 (Spring 2006) (citing *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004)). As the Eighth Circuit has pointed out, direct evidence is not the converse of circumstantial evidence, but instead "is evidence 'showing a specific link between

the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action." *Griffith*, 387 F.3d at 736. "'[D]irect' refers to the causal strength of the proof, not whether it is 'circumstantial' evidence." *Id*.

- Deviation from company policy or practice, such as failing to apply a progressive discipline policy to the whistleblower. During the employer's Rule 30(b)(6) deposition or the deposition of a Human Resources official, plaintiff should explore relevant company policies in detail to lay a foundation for proving that the employer deviated from its policies. For example, a whistleblower who is terminated for committing a minor violation of policy, such as sending a personal email using a work computer, should establish that the company has a progressive disciplinary policy and that the employer typically metes out an oral warning or no disciplinary action to an employee who sends a personal email from work. Similarly, explore whether the company investigated plaintiff's disclosures in accordance with its policies or protocols concerning investigation of employee concerns. A sham or biased investigation is strong evidence of retaliation. Failure to investigate can also be circumstantial evidence of retaliation. In *Howard v. Urban Inv. Trust, Inc.*, 2010 WL 832294 at *4 (N.D. Ill. 2010), the court held that the employer's failure to investigate or stop the harassment of the whistleblower constitutes discrimination in the terms and conditions of employment.

- Animus or anger towards the employee for engaging in a protected activity. *See Pillow* v. *Bechtel Constructions, Inc.,* Case No. 1987-ERA-00035 (Sec'y July 19, 1993).

- Singling out the whistleblower for extraordinary or unusually harsh disciplinary action. *See Overall* v. *TVA,* ARB Nos. 98-111 and 128, ALJ No. 1997-ERA-000S3, slip op. at 16-17 (Apr. 30, 2001), *aff'd TVA* v. *DOL,* 2003 WL 932433 (6th Cir. 2003). Obtain all relevant policies and procedures, including the employer's progressive discipline policy, and determine whether the employer failed to follow its procedures. Where your client was subject to an adverse action for violating a particular policy or work rule, ascertain whether the employer meted out similar discipline against other employees who violated the same policy or work rule.

- Proof that employees who are situated similarly to the plaintiff, but who did not engage in protected conduct, received better treatment. Dorsey, *supra*, at 71.

- Temporal proximity between the employee's protected conduct and the decision to take an actionable adverse employment action. *See Stone* & *Webster Eng'g Corp.* v. *Herman,* 115 F.3d 1568, 1573 (11th Cir 1997).

- The cost of taking corrective action necessary to address the whistleblower's disclosures and the decision-maker's incentive to suppress or conceal the whistleblower's concerns.

- Evidence that the employer conducted a biased or inadequate investigation of the whistleblower's disclosures, including evidence that the person accused of misconduct controlled or heavily influenced the investigation.

- Shifting or contradictory explanations for the adverse employment action. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, at 9, ALJ No. 2004-AIR-11 (ARB May 26, 2010) (footnotes omitted). Focus on the evolution of an employer's justification for an adverse action from the inception of the litigation through discovery. For example, an employer's justification at an unemployment compensation hearing or in a position statement submitted to an agency soon after the complaint is filed may differ significantly from the reasons asserted at the deposition of a witness well prepared by counsel.

- Evidence of after-the-fact explanations for the adverse employment action. In *Clemmons*, the ARB pointed out that "the credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision." *Id.* at 9-10 (footnotes omitted).

- Corporate culture and evidence of a pattern or practice of retaliating against whistleblowers.

In addition to eliciting evidence of causation, plaintiff should seek evidence in discovery that would justify an award of punitive damages, including reckless indifference to the federally protected rights of the aggrieved individual or malice, which can be inferred from outrageous conduct. The employer's reaction to the whistleblowing may provide evidence of malice, such as an employer conducting a sham investigation of plaintiff's disclosures or an employer leveling false accusations of misconduct against the whistleblower and not providing the whistleblower an opportunity to respond to such accusations. Additional conduct warranting punitive damages includes efforts by the employer to injure the employee post-termination, including negative references to prospective employers or disparagement of the plaintiff.

H. Playing Defense

While whistleblower retaliation plaintiffs often have significant leverage in litigation, including the prospect of far-reaching discovery about the unlawful conduct that the whistleblower disclosed, a straightforward retaliation case can turn into years of expensive and hard-fought litigation. Upper management's animosity toward the whistleblower, an inclination to avoid the appearance of conceding that the whistleblower's disclosures were legitimate, and other factors sometimes cause employers to commit an irrational level of resources towards defending a whistleblower retaliation claim,

including legal costs that are several times the value of the claim. During the intake stage and throughout the litigation, it is critical to anticipate scorched earth tactics and to develop a strategy to avoid permitting such tactics to derail the litigation. The following are some tips for playing defense:

- Advise clients early on to avoid posting anything about their claims on social media and from commenting about their claims in emails or text messages. Indeed, a retaliation plaintiff should strongly consider curtailing the use of social media while the litigation is pending.
- With some exceptions, such as cooperation with the DOJ or other law enforcement, it is best for a retaliation plaintiff to obtain documents to support a retaliation claim through the discovery process or from public records.[16] To avoid defending a strong retaliation case on the merits, defense counsel might use a plaintiff's retention of company documents as a basis to derail the litigation. For example, the employer may file and aggressively prosecute retaliatory counterclaims with no value except to force a settlement or intimidate the plaintiff. The employer may also move for sanctions.
- Where the defendant files retaliatory counterclaims, amend the complaint to bring a separate cause of action. *See, e.g., Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) ("filing a lawsuit alleging fraud with a retaliatory motive and without a reasonable basis in fact or law" constitutes an adverse employment action).
- Do not let the case focus on plaintiff's motive. Indeed, the ARB has repeatedly held that plaintiff's motive for blowing the whistle is irrelevant.[17]
- React promptly and pro-actively to defense tactics designed to harass plaintiff. For example, where defendant insists on subjecting the plaintiff to a gratuitous defense medical examination (defense counsel will refer to it as an "independent medical examination") in a case where plaintiff is alleging only garden variety emotional distress damages, consider moving for a protective order before the defendant moves to compel the examination.[18] Similarly, consider moving for a protective order where the defense counsel takes extensive discovery from plaintiff's current or prior employers as a means to harm plaintiff's reputation.

16. The Sixth Circuit has articulated a six-factor test to determine whether employee's delivery of confidential documents to his counsel in support of a discrimination claim was protected conduct. *See Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 725-26 (6th Cir. 2008); *see also Kempcke v. Monsanto Co.*, 132 F.3d 442, 446–47 (8th Cir. 1998) (reversing district court's grant of summary judgment for employer because reasonable jury could find that employee who obtained and disseminated confidential information engaged in protected activity under Title VII).

17. *See Carter v. Electrical Dist. No. 2*, Case No. 1992-TSC-00011, slip op. at 11 (Sec'y July 26, 1995); *Oliver v. Hydro-Vac Services, Inc.*, Case No. 1991-SWD-00001, slip op. at 8 (Sec'y Nov. 1, 1995).

18. *See, e.g., Flanagan v. Keller Products, Inc.*, (2001 DNH 2001) (plaintiff did not place her mental condition in controversy where plaintiff renounced any claim for damages for unusually severe emotional distress).

- Plaintiff should be cautious in discussing the litigation with current employees, as the employer might use current employees to conduct informal discovery.
- During the intake process, counsel should investigate potential pitfalls, such as untrue statements on a job application or resume (harmful to plaintiff's credibility and a possible ground for an after-acquired evidence defense), or plaintiff's negative postings about the employer on blogs, social media, or listservs.
- Ensure that plaintiff preserves all evidence relevant to the claim. The idea of a "litigation hold" and the consequences of failing to preserve electronic evidence are foreign to most plaintiffs pursuing retaliation claims. Therefore, counsel should explain in detail the steps necessary to preserve evidence. Aggressive defense counsel will question plaintiff at a deposition in detail to establish that plaintiff did not take adequate measures to preserve evidence and then bring a spoliation motion in an effort to obtain dismissal or an adverse inference.
- Plaintiff should maintain a detailed log of job search efforts in order to prove mitigation of damages.
- Limit aggressive employer discovery concerning the after-acquired evidence defense, which is often used as a means to harass the plaintiff and put the plaintiff on trial. The after-acquired evidence defense gives employers a strong incentive to undertake extensive discovery into a discrimination plaintiff's character, conduct, background and job performance to find some misconduct that would potentially warrant cutting off certain damages at the time the employer learned of new information. Indeed, as suggested by Professor Hart, a frivolous assertion of the after-acquired evidence defense to dissuade a plaintiff from pursuing her case may give rise to an independent retaliation claim.[19]

CONCLUSION

The whistleblower protection statutes enacted by Congress in recent years has created a patchwork of many potential claims for whistleblowers who have suffered retaliation, with significant differences in the scope of protected conduct, burden of proof, remedies, and procedural requirements. The authors hope that this article is helpful to practitioners in identifying potential whistleblower retaliation claims and formulating a strategy to maximize a whistleblower's recovery. The following table summarizes the primary features of the whistleblower protection statutes discussed in this article:

19. Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After- Acquired Evidence"*, 40 Ariz. St. L.J. 401 (2008).

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297-302 (2009).	Disclosures about: » gross mismanagement of an agency contract or grant relating to stimulus funds; » gross waste of stimulus funds; » a substantial and specific danger to public health or safety related to the implementation or use of stimulus funds; » an abuse of authority related to the implementation or use of stimulus funds; or » a violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.	None, but 4 year catchall SOL may apply	Yes, employee must file with Inspector General. If no decision within 210 days of filing the complaint, employee may file a complaint in federal district court.	» Reinstatement » Double back pay » Interest on back pay » Special damages » Attorney's fees and costs	Yes
Consumer Product Safety Improvement Act, 15 U.S.C. § 2087.	(1) providing information relating to a violation of the CPSC Reform Act or any act enforced by the Commission to the employer, the Federal Government, or the State Attorney general; (2) testifying or assisting in a proceeding concerning a violation of the CPSC Reform Act or any act enforced by the Commission; or (3) refusing to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSC Reform Act or any act enforced by the Commission.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	» Reinstatement » Back pay » Special damages » Attorney's fees and costs	Yes
Department of Defense Authorization Act, 10 U.S.C. § 2409.	Disclosure about: » gross mismanagement of DoD contract or grant; » gross waste of DoD funds; » substantial and specific danger to public health or safety; or » violation of law related to a DoD contract or grant.	None	Yes, employee must file with Inspector General. If no decision within 210 days of filing the complaint, employee may file a complaint in federal district court.	» Reinstatement » Back pay » Restoration of employment benefits » Exemplary damages » Attorney's fees and costs	Yes

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Federal Acquisitions Streamlining Act, 41 U.S.C. § 265.	Disclosures about a substantial violation of law related to a contract.	None	No private right of action. Employee receives only an investigation by the Inspector General.	» Reinstatement » Back pay » Attorney's fees and costs	No
False Claims Act, 31 U.S.C. § 3730(h).	» Any efforts to stop a violation of the FCA. » Being associated with someone who engaged in protected conduct.	3 years	No, employee can bring claim in any federal district court.	» Reinstatement » Double back pay » Interest on back pay » Special damages » Attorney's fees and costs	Yes
Sarbanes-Oxley Act, 18 U.S.C. § 1514(A).	Disclosures about alleged violations of the federal mail, wire, radio, TV, bank, securities fraud statutes or any rule or regulation of the SEC.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	» Reinstatement » Back pay with interest » Special damages » Attorney's fees and costs	Yes
Wrongful Discharge	Varies by state. Examples include: (1) exercising a statutory right, (2) refusing to engage in illegal activity, or (3) performing a duty required by law.	State statute of limitations for tort actions.	No, employee can file in federal or state court.	» Back pay » Front pay » Special damages » Punitive damages » Lacks statutory fee-shifting	Yes
Patient Protection and Affordable Care Act § 1558.	» Disclosures about suspected violations of Title I of the Act. » Participating in investigations. » Objecting or refusing to participate in an activity reasonably believed to violate Title I.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	» Reinstatement » Back pay » Special damages » Attorney's fees and costs	Yes
Dodd-Frank Wall Street Reform and Consumer Protection Act § 748.	» Disclosing information to the CFTC in accordance with the whistleblower incentive program. » Assisting in any investigation or action of the CFTC based upon or related to disclosed information.	2 years	No, employee can bring claim in any federal district court.	» Reinstatement » Back pay with interest » Special damages » Attorney's fees and costs	Likely yes[20]

20. While § 748 of the Dodd-Frank Act does not explicitly grant the right to a jury trial, the ARB's decision in *Kalkunte*—affirming the ALJ's award of damages for "pain, suffering, mental anguish, the effect on her credit [due to losing her job], and the humiliation she suffered"—shows that special damages can include compensatory damages. *Kalkunte*, 2004-SOX-056 (2009). If compensatory damages are sought, likely the plaintiff would be entitled to a jury trial.

Statute	Protected Conduct	SOL	Administrative Exhaustion	Remedies	Jury Trial
Dodd-Frank Wall Street Reform an Consumer Protection Act § 922.	» Disclosing information to the SEC in accordance with the whistleblower incentive program » Initiating, testifying in, or assisting in any investigation or action based on or related to previously disclosed information » Making disclosures that are required or protected under SOX. » Making disclosures that are protected or required under any law, rule, or regulation subject to the jurisdiction of the SEC.	3 years from the date when the facts material to the right of action are known or reasonably should have been known by the employee; no more than 6 years from the date of the violation.	No, employee can bring claim in any federal district court.	» Reinstatement » Double back pay with interest » Attorney's fees and costs	No
Dodd-Frank Wall Street Reform an Consumer Protection Act § 1057.	(1) providing information relating to a violation of the Consumer Finance Protection Act or any law enforced by the Bureau of Consumer Financial Protection to the employer, Bureau, or any state, federal, or local government or law enforcement agency; (2) testifying or assisting in a proceeding concerning a violation of the CFPA or any rule, order, standard, or prohibition prescribed by the Bureau; (3) filing, instituting, or causing to be filed any proceeding under any Federal consumer finance law; or (4) refusing to participate in an activity, policy, practice, or assigned task that the employee reasonably (or other such person) reasonably believes violates any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the Bureau.	180 days	Yes, employee must file with DOL's OSHA. If no decision within 210 days of filing complaint, may file a complaint in federal district court.	» Reinstatement » Back pay with interest » Special damages » Attorney's fees and costs	Yes